

Governing Animals

Animal Welfare and the
Liberal State

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of industrial exploitation and commodification in an attempt to preserve a traditional ethic of animal stewardship, but also, in part, inventing new forms of meaningful association with animals. Under that theory, the movement is fighting both old, outmoded ways of thinking *and* new, innovative ways of exploiting animals and the natural world. To make sense of our relationships with animals in this changing landscape, we do need a deeper, richer ethic for our treatment of animals—an ethic appropriate to their biological, ecological, and social natures. But we 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. The next chapter begins the project of articulating such a public philosophy.

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Contracts

CAN A LIBERAL government legitimately protect animal welfare? Despite the ubiquity of animal welfare laws and a broad social consensus in their favor, it is not all that easy to justify them in liberal political theory. For hundreds of years liberal theorists have insisted that the purpose of government is to protect *human* welfare, and extending that principle to animals—including animals in the liberal “social contract”—poses some challenges.

Those challenges were starkly on display when Hurricane Katrina hit the Gulf Coast near New Orleans on August 29, 2005. The resulting flood, along with the government’s inadequate response, led to the deaths of thousands and the displacement of hundreds of thousands of residents. One near-victim was Molly, a Labrador retriever belonging to Denise Okojo. Okojo was blind and suffering from cancer, and Molly had been her guide dog and companion for six years. But when Okojo was airlifted to Lake Charles Memorial Hospital, the coast guard officers told her that no animals were allowed on board. “I screamed and yelled,” she said. But they pulled Molly away from her and left the dog to fend for herself in the rising floodwaters.

Okojo, however, refused to abandon her dog. She told her story to a nurse at the hospital, who contacted the Louisiana Society for the Prevention of Cruelty to Animals (LSPCA). The LSPCA saved over 8,500 pets during the first two weeks of the flood and helped other organizations save 7,000 more. After hearing about Molly, four volunteers from the LSPCA and ASPCA took a flatboat to Okojo’s New Orleans East neighborhood and started searching. One of the volunteers smashed a window to gain access to the

apartment complex and swam through the building, calling for Molly. They found her on the second floor, cold, hungry, and frightened—but alive.¹

Many pets and pet owners weren't so fortunate. Thousands were forced to abandon their pets by the coast guard, national guard, and other government officials involved in the rescue effort. Others reportedly stayed behind, risking their lives to protect their pets.² The risks borne and resources spent by volunteers to rescue animals affected by Hurricane Katrina contrast strikingly with the refusal of government actors to do anything to help rescue pet animals or livestock. Private citizens acted as though they had a duty to their animals that justified risks to their own welfare. But government officials, particularly the military and paramilitary officers charged with conducting the rescue, put humans first.

The officers were of course just following orders. What passed for a rescue plan in the weeks following the storm made no provisions for pets. The Red Cross did not allow animals (except service animals) in their shelters, and the Federal Emergency Management Administration (FEMA) had no plan or even authority to rescue pets. This lack of attention to animal welfare should not be surprising. Government actors are reluctant to spend taxpayer resources protecting animals when human lives are at stake. People are supposed to take care of their own pets.

But clearly there are circumstances in which citizens can't fulfill that responsibility without public assistance. Recognizing this reality, one of the first major legislative responses to Hurricane Katrina was the Pet Evacuation and Transportation Standards (PETS) Act. Enacted by Congress in September 2006, the Act mandates that emergency preparedness plans include provisions for pet rescue. It also authorizes the use of federal funds to create pet-friendly emergency shelters and allows FEMA to assist pet owners and the animals themselves after a major disaster.³ Supporters of the Act cited the health and safety problems attendant on leaving pets behind during disasters, but the most common argument for the Act was the sheer inhumanity of forcing pet owners to abandon their animals. Congressman Tom Lantos (D-CA), the bill's chief sponsor, explained that the purpose of the bill was to ensure that people "would never be forced to choose between being rescued or remaining with their pets." A representative of the Humane Society of the United States supported the bill with the claim that "the bond between people and their pets is so great that it becomes nearly impossible to separate the human rescue and relief effort and the animal rescue effort."⁴ Moreover, while legislators expressed concern about the pet owners' suffering, they also seemed concerned about the pets themselves. Representative Christopher

Shays (R-CT) argued that "the plight of the animals left behind was truly tragic." Dennis Kucinich (D-OH) insisted that this bill was an expression of compassion not only for our fellow human beings but also for "our gracious household pets and service animals."⁵ Indeed, the experience of Katrina suggests that drawing a sharp distinction between human and animal welfare may be misguided. Humans and their pets are often too integrally connected to make such a distinction. In some cases, the government must treat humans and the animals in their care as a single unit.

But the bill did have critics. Representative Lynn Westmoreland (R-GA), for example, declared himself a dog lover but nevertheless called the bill "silly." He worried that it would distract the federal agencies from their primary mission of saving human lives.⁶ He raises a reasonable point: Is it fair to other citizens for the government to rescue pet animals? What if making room on the rescue chopper for Molly means that a human being doesn't get rescued as quickly, or that there isn't as much money to help humans needing food and shelter? Sentimental appeals aside, is the PETS Act a legitimate exercise of government power?

Certainly it doesn't seem right to spend more public resources on Denise Okojo than on other citizens simply because she has a dog, as opposed to some other sort of special possession, like family photos or a prize orchid. What makes Okojo's bond with her pet more important than her bond with other things to which she is integrally connected? Of course, Molly isn't just an ordinary possession; she's an animal. Maybe government officials see Molly as a creature with welfare interests they are bound to protect, quite apart from the dog's contribution to Okojo's welfare. That would make sense of the policy, but Westmoreland would still have a valid objection: It is not clear that liberal governments have the right to use public resources to promote the welfare of nonhumans for their own sake. Under traditional liberal theory, the government's job is limited to promoting *human* welfare.

There is a third possibility, however. Perhaps the government has no direct duty to Molly, but it does have a duty to protect Okojo's relationship with Molly. Okojo's duty to her pet may be a purely private matter, like her duty to God, but a liberal state can and should accommodate such private duties. Under this reasoning, giving pet owners a right to have their pets rescued is comparable to giving workers the right to take a day off each week to honor the Sabbath. The state can create policies that support citizens' private duties to their animals, acknowledging as a matter of public policy that such duties are important to many people *without* acknowledging that the state has any direct duty to the animals themselves.

That logic would go some way toward justifying public rescue of animals during a disaster. But it doesn't explain why the government can use its coercive powers to protect animals *from their owners*. It is one thing to accommodate private relationships with pets; it is quite another to punish a citizen for failing to satisfy the government's view of how pets should be treated.

This was the problem faced by Henry Bergh, the founder of the American Society for the Prevention of Cruelty to Animals (ASPCA) and the principal force behind New York's controversial anticruelty statute. The law, passed in 1867, defined as a misdemeanor several offenses, including cockfighting, bear-baiting, impounding an animal without food and water, and mistreating draft animals. The first section runs, "If any person shall over-drive, over-load, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill . . . any living creature, every such offender shall . . . be guilty of a misdemeanor."⁷ Violators could be arrested, held in custody, and fined.

Bergh's law had considerable public support, but it ran into fierce resistance from the stagecoach drivers of New York City. To them, Bergh was the very embodiment of intrusive governmental meddling. He would walk the streets of New York, stopping drivers in order to inspect their horses and pointing out their poor condition and overloaded carts. Even worse, the new law gave him and his ASPCA friends the authority to arrest drivers and drag them into court. Poor Dennis Christie, for example, was driving his coach along his usual route when Bergh called a policeman over to arrest him. Bergh insisted that the horse was lame and Christie was overdriving him. Christie was taken away from his coach and committed to the local police court, where he was eventually acquitted—but not compensated for his loss of time and income.

The stagecoach companies weren't accustomed to this sort of interference. In 1873 they brought several lawsuits against Bergh (including an action by Christie for false arrest). They lost all of them. The Stage Horse Cases offer the first judicial interpretations of the 1867 anticruelty law, and some of the first judicial reflections on using the government's coercive power to protect animals from their owners.

In considering the stagecoach companies' complaints, the court (in the person of Judge Daly) first established that the statute did authorize officers of the ASPCA to arrest people for violating the law. But Daly went on to consider why the government had the power to pass such a law in the first place. He noted that cruelty to animals was a common law offense long before the legislature enacted the criminal statute, explaining that such legislation is

not merely governmental meddling in private property rights but has a clear public purpose: "It truly has its origins in the intent to save a just standard of humane feeling from being debased by pernicious effects of bad example, the human heart being hardened by public and frequent exhibitions of cruelty to dumb creatures, committed to the care and which were created for the beneficial use of man."⁸ The court classified anticruelty laws as morals legislation, like laws against "lewd prints," public drunkenness, and prizefighting.

Improving the citizens' "humane feelings" isn't widely accepted as a legitimate public purpose today (as I will discuss below), and it wasn't particularly strong grounds for the anticruelty statute even in the nineteenth century. But this moral purpose was not the only rationale for the law. Although the court didn't mention it, stagecoach owners eventually realized that supporting animal welfare laws and the SPCAs was good business. As historian Clay McShane has noted, stagecoach companies actually benefited from the work of SPCAs. These organizations helped to monitor drivers to make sure the companies' horses were well treated, and they also served as disinterested parties who could determine whether a sick or lame horse should be destroyed. "In order to collect insurance for their destroyed property," McShane writes, "owners [had] to cooperate with SPCAs and acknowledge their authority."⁹ More generally, in a community heavily dependent on animals, there was a good economic case for protecting their welfare, as Bergh himself insisted. In an 1881 article in the *North American Review*, he estimated that the mistreatment of cattle in rail transit caused losses of 10 to 15 percent, resulting in millions of dollars wasted. "That lesson of humanity to the lower animals," he notes, "should be enforced in the counting-house, as well as in the nursery."¹⁰

Subsequent animal welfare statutes have followed Bergh's practice, routinely proclaiming some sort of public purpose related to *human* welfare, and particularly human health and prosperity: The federal Humane Slaughter Act is supposed to protect workers and consumers as well as the animals themselves; the federal Animal Welfare Act aims to "prevent burdens on [interstate] commerce"; the Endangered Species Act cites the "esthetic, ecological, educational, historical, recreational, and scientific value" of the protected species to the nation.¹¹ Similarly, contemporary animal welfare advocates often argue that cruelty to animals is an indicator of a personality disorder that can culminate in violence toward humans and that domestic abuse often involves abuse of pets.¹² Criminalizing animal abuse is supposed to help law enforcement officers address these patterns of violence toward humans.

It is tempting to conclude from all this evidence that human interests constitute the primary political justification for punishing animal cruelty. But we

should note that these stated purposes are not necessarily the aims of the animal welfare groups and even the legislators who sponsor the statutes. Supporters of the Humane Slaughter Act declared in congressional debates that it was aimed principally at preventing “needless cruelty” to animals; they made few references to human welfare benefits. Similarly, proponents of the Animal Welfare Act focused on our moral duty to protect laboratory animals from unnecessary pain and suffering.¹³ Tom Lantos, sponsor of the PETS Act, is a longtime animal welfare advocate, and Bergh himself was clearly more concerned about the animals themselves than with their owners. Why, then, do government actors insist on citing *human* interests in animal welfare?

The difficulty faced by legislators and judges confronting animal cruelty is this: Cruelty toward animals may be morally repugnant, but it doesn’t follow that the state has authority to prevent it. This is one reason an individual animal welfare ethic—an ethic that tells us it is morally wrong to inflict wanton harm on animals—isn’t an adequate basis for animal welfare protections in a liberal state. There are all sorts of moral wrongs (adultery, lying, failing to forgive trespasses, foisting bad movies on an unsuspecting public) that are beyond the proper scope of state power. 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. In American constitutional law, this principle has served as the limit of state governments’ “police power,” their general power to protect the health and safety of their citizens. Federal power is even more constrained. The federal Constitution grants Congress only a limited set of specific powers, which do *not* include the police power. Most of its regulations concerning animals derive from its power to regulate interstate commerce.

Animal welfare laws therefore raise a fundamental problem for American constitutional law and for liberal government in general: 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? Why does anyone have the right to tell stagecoach drivers how to treat their horses, or require us to pay taxes in order to help other people take care of their animals? Emphasizing broad human interests in animal welfare is one way to answer that question. But that response, I think, does not go far enough. Many forms of animal cruelty (like private instances of neglect) don’t seriously threaten the welfare of other humans, and protecting animals from cruelty will inevitably burden human welfare from time to time. Some scientific experiments on animals will be disallowed; taxpayer money will occasionally be spent on animals instead of humans; activities that some humans enjoy

(like dogfighting, bearbaiting, and cockfighting) may be prohibited altogether. Why should the government *ever* be allowed to protect animals at the expense of human interests? To answer that question, we need to go beyond the moral arguments for protecting animal welfare and draw on political theory about the proper scope of state power. My answer—the only answer, I suggest, that makes sense in light of the liberal tradition and the practices of modern liberal communities—is that some animals are in fact members of the community that the government is bound to protect. In other words, they are members of the liberal “social contract.”¹⁴

To defend that proposition, I will begin with a brief overview of the liberal arguments concerning political obligation and the limits of state power, which will lead us into social contract theory. It is important to note that I am using 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. That is, I claim that the social contract device is useful in defining and justifying our *political* (as opposed to our private moral) duties to animals. I will then explain my somewhat idiosyncratic interpretation of social contract theory and make the case that animals can be considered members of the social contract. The second half of the chapter turns to what I think are the more interesting questions: *Which* animals are members of the social contract, and how do we decide?

I. Are Anticruelty Laws Justified in Liberal Political Theory?

To be clear, the problem we are addressing is not whether we should continue to protect animal welfare. As chapter 1 argues, anticruelty laws have broad public support, and our legislative scheme for protecting animal welfare is growing ever more comprehensive. I don’t expect that trend to reverse anytime soon. If animal welfare laws aren’t justified in liberal theory, that is not a problem for the animals; it is a problem for liberal theory. I follow John Rawls in understanding the theorist’s project as bringing into harmony our principles of justice and our *considered judgments* about justice (that is, judgments about particular practices, rendered under conditions favorable to the exercise of the sense of justice). If our principles and considered judgments conflict, we must work from both ends, examining our judgment in light of our principles and vice versa, making such changes as are necessary to yield a coherent view (or a “reflective equilibrium,” as Rawls puts it).¹⁵ That the state should protect animal welfare is a well-considered, stable, and long-standing

judgment, endorsed by most Americans and, indeed, most contemporary liberal societies. If liberal principles of justice don't allow for this sort of state action, we need to reexamine those principles.

So what sort of state action does liberal theory allow? The best way to approach that question is to examine on what grounds, in liberal theory, we can justify *any* government regulation. Or, to put it another way, why are citizens obligated to obey the law? Traditionally, liberal theories of political obligation focus either on consent (we must obey the law because we agreed to do so) or rationality (we must obey the law because it is a reasonable rule for this community). But according to the most influential contemporary liberal theorists, neither approach permits the state to infringe human freedom to protect animal welfare.

Joseph Raz, for example, offers a nicely intuitive nonconsensual theory of political obligation. He argues that there are certain actions that are simply morally wrong, and we have no right to perform those actions in the first place. Normally we rely on our individual judgment to decide which actions are morally justified. But in some cases, it makes sense to accept the authority of laws that are designed to help us act in morally justifiable ways. Raz points in particular to cases in which the difficulties of coordinating collective behavior may require some central decision maker. Other possibilities come to mind: We may learn from experience that individuals routinely miscalculate when faced with certain kinds of decisions, or lack the time to research complex issues. This reasoning might justify requiring drivers to wear seat belts, or prohibiting them from driving while intoxicated, or specifying how much income citizens must contribute to government (mistrusting our ability to figure out our fair share on our own). Laws are justified, then, if they (normally) help citizens act on morally correct reasons.¹⁶

But that is not the whole story. Raz, like all liberals, is concerned about limiting state action to those areas where it is really necessary. After all, there is always a cost to human welfare and happiness when an individual is prohibited from doing something she wants to do, even if the rest of us think it is for her own good.¹⁷ Liberals (naturally) put a very high value on individual liberty and are willing to tolerate a lot of bad individual decision making in the name of preserving autonomy. On the other hand, Raz recognizes that individual autonomy can flourish only in a public culture that supports it and offers many opportunities for individuals to develop their capacities. He argues further that the government has a role to play in promoting such opportunities. Thus the government may legitimately promote the conditions for autonomy by making sure people have plenty of choices. But it should refrain

from forcing people to make morally correct choices, except to prevent harm to other autonomous beings (namely, humans).¹⁸

Under this view, government efforts to rescue animals during a disaster are probably justified, but animal cruelty laws are not. It should be acceptable for the government to use noncoercive measures (subsidies, rewards, and educational and rescue programs, for example) to promote animal welfare. These efforts may be supported by involuntary taxation, because citizens, and therefore the government, have "an obligation to create an environment providing individuals with an adequate range of options and the opportunities to choose them."¹⁹ Supporting good practices of animal husbandry, one could argue, creates a richer public culture that expands the options for living a valuable life in community with animals. This is particularly important in a society struggling with class and racial inequalities that limit opportunities for some groups to enjoy animal fellowship. In New Orleans, for example, the people least able to rescue their animals were the poor, the elderly, and the infirm. A general animal rescue program has redistributive effects, shifting government resources to people with fewer resources of their own, thus making it easier for them to enjoy animal companionship. However, nothing in Raz's theory allows the state to take coercive measures that substantially interfere with human autonomy in order to prevent harm to animals. While Raz recognizes that animals do suffer morally relevant harm when we mistreat them, and even concedes that *some* people believe that we can have moral duties to animals,²⁰ he would not extend the state's protection to animals.

Why not? Although Raz doesn't explain his conclusion, I suspect it has to do with his concern about protecting individual human autonomy. While apportioning a small amount of taxes to support animal welfare doesn't substantially interfere with—and in fact tends to promote—individual human autonomy, anticruelty statutes are a different story. Minnesota's animal welfare statute, to take just one example, carries a penalty of \$3,000 or one year in jail for anyone who intentionally causes great bodily harm to a pet. Harming a service animal can earn one a \$5,000 fine or two years in jail, and killing a service animal can result in a four-year prison sentence.²¹ As Raz notes, putting someone in prison punishes particular instances of immoral behavior by means of a global and indiscriminate invasion of autonomy. "Imprisoning a person prevents him from almost all autonomous pursuits" rather than simply restricting the perpetrator from abusing an animal in the future.²² Moreover, these laws punish neglect as well, so they can involve the state in fairly close supervision of how one takes care of one's pets. This supervision necessarily will involve, in some cases, entering a person's private home, perhaps on several occasions,

to determine the animal's condition. These are the sort of intrusive, coercive state actions that normally require fairly strong justifications in liberal theory. Raz's theory doesn't provide such a justification.

But perhaps I have misread Raz. Perhaps he's assuming that protecting animal welfare and human welfare are perfectly consistent goals. We have already noted several ways in which animal welfare laws can serve human economic, health, social, and recreational interests. We have also noted that those laws can conflict with human interests (restricting medical research and some uses of animals for entertainment, for example), but perhaps those are minor conflicts that distract us from the larger goal of animal welfare laws: As Immanuel Kant famously argued, promoting good relationships with animals can teach us important social virtues and therefore support the conditions for human freedom and happiness.²³ The *Stage Horse* court, for example, argued that animal welfare laws promote humane sentiments, thus making us better citizens—more rational, more humane, and therefore more likely to respect others' rights. Alisdair MacIntyre has made a similar case with respect to severely disabled humans, arguing that caring for these people can teach us how to care for others, what we owe to those who care for us, how to avoid judging a person's capacity from his or her appearance, and similar lessons valuable to good citizenship.²⁴ Surely caring for animals can also teach such lessons. Conversely, failing to care for animals might undermine human freedom and welfare. People who claim that violent sociopathic tendencies can be identified by a history of cruelty to animals are making a more limited version of this argument.²⁵ Perhaps creating a culture of kindness to animals supports human welfare generally, even though human and animal interests might conflict in particular cases.

But Raz does not actually make this argument, and for good reason. It is certainly correct that animal and human welfare can and normally should be mutually supportive. However, the claim that the state can enforce kindness to animals in order to make us better citizens is problematic. Although the state may legitimately promote some citizenship virtues (like tolerance and respect for rights), liberal theorists rightly consider it dangerous to embrace "improving moral character" *generally* as a legitimate public purpose. Such purposes have been cited to justify a host of intrusive, illiberal regulations, including criminalizing homosexuality, banning the marketing of contraception, forbidding interracial socializing, and even restricting bad language. Americans have notoriously poor footing on this slippery slope. To be sure, where we can identify a specific harm to human welfare (like domestic violence) and establish a concrete link to animal welfare, we are certainly justified

in developing regulatory schemes that protect both. So nothing in traditional liberal theory prevents the state from creating better systems for detecting and reporting animal abuse as part of a larger effort to address domestic violence. But simply granting the state a broad, ill-defined power to shape citizens' moral character threatens the very concept of limited government. Anticruelty statutes will need a different justification.

Will a consensual theory of political obligation better support animal welfare laws? Such theories have several points to recommend them. First, consent is, intuitively, one important element of legitimacy: That you consented can sometimes be a reason for obeying a law. For example, that I joined the army voluntarily can be a reason for obeying army regulations, over and above the normal justification that such regulations are necessary and reasonable. Respecting a person's ability to create obligations like this through consent acknowledges the value of allowing a person to "fashion the shape of his moral world," to choose his or her relationships and duties.²⁶ Second, consent theory complements our concern with the rationality of law. After all, if no reasonable person would consent to a law, it is pretty good evidence the law isn't supported by good reasons. Paradoxically, this point is particularly relevant when the people (or beings) affected by the law can't actually give their consent. Consent theory tells us that in evaluating the rationality of a law, we must pay special attention to the point of view of those affected by the law. When they cannot speak for themselves in a public forum, consent theory tells us to make an effort to discover (or imaginatively reconstruct) their point of view. Finally, consent theories address the need to gain and keep public support for laws. Laws to which the public consented are more likely to be obeyed voluntarily, thus reducing the need for government coercion.

Consent theory may not fully explain political obligation. We tend to think that irrational and unjust laws aren't legitimate even if people do consent to them (a point I'll return to below). Moreover, as Raz argues, we have morally compelling reasons to obey many laws even if we never actually consented to them. Nevertheless, the idea of consent does offer a useful heuristic to help us come up with well-justified and acceptable laws.

Social contract theory is the principal liberal consensual theory of political obligation and the dominant one in the United States.²⁷ Since we're looking for a public philosophy that is suitable for American society, social contract theory is an obvious choice. Social contract theory holds that governments are created by the consent of the people as part of a (usually implicit) social contract among citizens. The terms of that contract are those that one would normally expect other rational citizens to accept. In other words,

we (through the government) can impose obligations on other citizens that we would reasonably expect them to consent to, as members of a community seeking to live together in relations of mutual respect and cooperation.

The social contract specifies the legitimate ends of government authority. Surely (one would imagine) under this theory, the people could consent to a government that cared for the welfare of animals and therefore make animal welfare laws legitimate. We can even point to contemporary instances of such consent. The German people, for example, amended their constitution in 2002 to specify that the government “has responsibility for protecting the natural foundations of life and animals in the interest of future generations.”²⁸ Granted, the wording is bit ambiguous—it could mean that the government can protect animals only to the extent they serve human interests—but some supporters of the amendment read it as authorizing the government to protect animal rights even at the expense of human interests (by restricting the use of animals in medical research, for example).²⁹ If that is the common understanding, then isn’t it fair to say that the German people have agreed to a social contract that allows the government to restrict human liberty in order to protect animal welfare?

Not necessarily. In the first place, the amendment was adopted by the German legislature, not by a popular referendum, and it wasn’t unanimous. So we can’t say that all of the citizens actually consented. Of course, it may be that they agreed at some point to be bound by the decisions of the majority. But even so, the majority should still assure themselves that imposing obligations on people who didn’t consent to them is reasonable—that they *should have* consented, or at least that they had good reasons to consent. Similarly, the German people must assure themselves that those who did vote for the amendment really understood what they were doing. Did they understand that this provision might seriously compromise medical research that could relieve human suffering and save human lives?

So consent really means *rational* consent, and “rational consent” is interpreted against a background understanding of what constitutes a reasonable restriction on one’s freedom. In classic social contract theory (as represented, for example, by Locke’s *Second Treatise of Government*, and the dominant ideology of the American founders), the only kind of restrictions that seem reasonable are those that promote individual humans’ opportunities to enjoy their natural freedom and autonomy, conceptualized (usually) as their natural rights. This natural rights background is problematic for animal welfare, because none of the classic social contract theorists recognize animals as having rights in the same sense that humans do. Animals appear in these theories

merely as resources for humans, and government has an interest in their welfare only to the extent that their welfare is related to human welfare and freedom.

Obviously, much of the ethical literature on animals—most notably, Tom Regan’s defense of animal rights³⁰—challenges this exclusion of animals from the social contract. If animals do have something like natural rights, and protecting natural rights is the chief end of government, that would seem to give us reason to support animal welfare laws. But even if we recognize that animals may have natural rights, we still must grapple with the fact that the social contract is usually considered to protect only the rights of its members—of those capable of entering into such a contract. That would seem to exclude even rights-bearing animals.

I am going to argue against that conclusion; I think some animals are members of the social contract, properly understood. However, I am not going to say much in the following section about animal rights. There are several ways of thinking about moral rights, political rights, and the relation between them. But rights are not the whole of political morality, and I think it is possible to separate social contract theory from its natural rights background. In short, even if we don’t want to grant that animals have something like natural rights, we may still want to recognize duties toward them and design our institutions and practices to satisfy those obligations. The question here is whether our obligations toward animals are *public* duties, responsibilities carried not only by private individuals but also by the government and ourselves in our role as citizens. I believe we can answer that question without resolving the issue of natural rights.

II. Some Animals Are Members of the Social Contract

Theories of political obligation are useful for two purposes: to explain to citizens why and to what extent they should obey the law, and to tell governors what sorts of laws deserve to be obeyed. Obviously we’re not concerned about explaining to animals why they should obey the law. We are interested mostly in the second purpose, thinking through what sort of laws we humans, in our role as governors of animals, should enact. We will of course also feel obligated to obey those laws. But I want to focus in particular on social contract theory as a kind of rule of thumb for lawmakers, a useful way to capture principles of political obligation that should guide us in using government power. As Rosemary Rodd suggests, social contract theory is most helpful as a method for making justifiable, impartial moral decisions (rather than serving

as a comprehensive theory of moral obligation).³¹ Social contract theory is helpful to us because it focuses our attention on critical questions with regard to animals: Which animals are members of the social and political community? How do the rules and institutions we use to govern them affect their welfare? And, most important, what do our rules and institutions look like from the animal's point of view?

In other words, I am using social contract theory here as a normative "midrange" theory,³² a guide to thinking about political phenomena as we attempt to govern at the practical level. A midrange theory offers some general rules that have proven useful for certain kinds of question. It doesn't attempt to answer deep metaphysical questions about the nature of humans or the foundations of justice and is in fact compatible with many different answers to those questions. As I explained in the introduction, John Rawls calls this sort of theory a public philosophy, a public basis of justification that can be supported by an "overlapping consensus of reasonable comprehensive moral doctrines."³³ This simply means that although we may hold differing understandings of the deep basis of political obligation—some of us may believe that obeying the law is a religious duty; others may see it as a matter of rational self-interest or a Kantian moral imperative—for practical purposes, we can all think of that obligation in terms of a social contract.

My rationale for including animals in the social contract is this: 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.³⁴ I will argue below that many other animals also fall into this category.

At this point, some readers may object that I'm assuming too much consensus on this point. *Many* Americans may think of some animals as part of the social community, but surely there are others (perhaps, for example, some of the dogfighting aficionados we will meet in chapter 5) who do not. But the existence of some disagreement on the precise social status of animals does

not necessarily defeat my argument. Of course, if such disagreement were deep and pervasive, then the government could not legitimately treat animals as members of the social contract. But, as mentioned above, all we're looking for is a public philosophy, a practical guide to governing that is supported by an overlapping consensus. That is, treating (some) animals as members of the social contract must seem reasonable (not necessarily true in an absolute, metaphysical sense, but a reasonable approach for the government to adopt), when evaluated by most of the diverse moral perspectives in American society. To be sure, minority groups with radically different views on and practices concerning animals may find this position odd or alien and may wish to see their own views reflected more prominently in our public philosophy. Fashioning our laws to reflect the shifting universe of "reasonable moral comprehensive doctrines" found in the United States is an important and continuing task, and one that I will take up in chapter 5. I claim here only that there is sufficient consensus to claim the existence of a public philosophy concerning animals: Viewing (some) animals as members of the social contract is consistent with and makes sense of most of our laws, our widespread social practices, our typical ways of talking about animals in public discourse, and well-documented measures of public opinion.³⁵

Of course, not every consensus is a well-justified consensus appropriate for governing a liberal community. But I believe this one is appropriate and fully consistent with liberal principles. Including some animals in the social contract makes philosophical sense if we conceive of the end of social contract as not protecting natural rights or human autonomy, but as promoting the welfare of all members of the community. As Martha Nussbaum has argued, we can understand the proper end of government as promoting the "characteristic flourishing of beings," which includes promoting the conditions for autonomy for most of us but also caring for the welfare of those who cannot achieve rational self-governance.³⁶ The contract, according to this understanding, must include all the members whose welfare normally affects other members. Importantly, framing the end of the social contract this way need not expand the reach of the state as far as (for example) "improving citizens' moral character" would. Welfare, and particularly the welfare of animals, can be understood fairly narrowly: taking care of animals' health, preventing undue suffering, and attending to their needs for sociality. (Nussbaum offers a more extensive but still limited definition of human welfare.)³⁷ Nor does this end diminish the importance of autonomy very much; after all, a proper degree of autonomy is critical to the welfare of most humans. But rational autonomy simply is not a proper goal for most animals (nor for some humans).

This understanding of the social contract is supported by the broad social contract tradition and is consistent with the liberal political tradition generally. For Locke, for example, the end of the social contract was the protection of natural rights, but he recognized that one can exercise those rights most effectively in a stable and flourishing society. He acknowledged that children could not come to enjoy their full autonomy without proper nurture and education, which suggests that supporting education and stable families is a public concern. Similarly, his *Letter concerning Toleration* acknowledges the role that religious communities play in allowing one to exercise one's right to religious freedom. Humans can achieve autonomy only in a supportive social context. Indeed, this is the basic justification for forming the social contract in the first place. So while Locke was careful to protect individual and communal freedom from intrusive government interference, he also accorded government broad powers to legislate for the welfare of the community as a whole. The legislative power, in his words, is aimed at "the preservation of the Society, and (as far as will consist with the publick good) of every person in it."³⁸

Admittedly, contemporary social contract theorists usually define the social contract more narrowly than this, to ensure that few people have any reason to object to its terms. For example, in *A Theory of Justice* Rawls attempts to derive a purely procedural theory of justice from the most minimal assumptions about the contracting parties, namely that they are rationally self-interested and not bound by prior, independent principles of right or justice.³⁹ He wants a contract that any rational person (in the contemporary United States) would have trouble objecting to. So his contractors act solely on rational self-interest behind a veil of ignorance (which prevents them from knowing, for example, whether they are pet lovers or stagecoach drivers). These people would have little reason to consent to a contract that might limit their rights in favor of animal welfare. Thomas Scanlon's version of social contract theory starts from less strict assumptions—he allows his contractors to be motivated by a fairly robust sense of justice and not simply their self-interest. But he also limits the social contract to respecting other humans' rational autonomy rather than promoting their general welfare. And Scanlon, too, would exclude animals from the contract.⁴⁰

These theories are rich and insightful, but unfortunately neither Rawls nor Scanlon can provide a compelling rationale for animal welfare laws. Rawls says virtually nothing about duties to nonhumans, beyond noting that we have them and acknowledging that his theory does not accommodate them. Scanlon also recognizes that we have duties toward animals, but he denies that these duties are part of the social contract (although he is tempted to

make an exception for pets, because we tend to treat them as persons).⁴¹ Their failure to explain why the state can criminalize animal abuse requires us to rethink their assumptions. The problematic assumption here is that the sole purpose of the social contract is to protect individual human autonomy.⁴²

If we reject that assumption and instead understand the end of the social contract to be the welfare of what Mary Midgley calls the "mixed human/animal community," then we have a good justification in social contract theory for animal welfare laws. Our principles will cohere better with our considered judgments, not only with respect to animals but also with respect to humans who are incapable of achieving rational autonomy. Nevertheless, including any animals in the social contract does raise some theoretical difficulties. The chief of these are that (1) social contract theory centers on the value of freedom, and animals do not have anything like natural freedom; (2) animals cannot consent to a social contract; and (3) even if they could consent, we can't discover what animals would consent to. I will address these in turn and then consider a few more global objections to social contract theory.

III. Objections

Rational Liberty

For many philosophers, the chief reason for excluding animals from the social contract is that they lack freedom. Admittedly, for nonphilosophers, this objection must be puzzling. We've been focusing on whether the government is justified in restricting the liberty of humans to protect animals; whether animals have freedom seems beside the point. But the relevance of animal freedom is clearer when we think about the issue from a different angle—when we use social contract theory to justify restricting the liberty of animals to protect the welfare of humans. For example, may a dog be tied up for several hours a day to suit the owner's convenience? Social contract theory asks us to consider whether this restriction is justified from the animal's point of view. It asks, in essence, would the dog agree to the social contract if the contract permitted this restriction? Using social contract reasoning this way, however, raises an important theoretical objection: If animals are not free in any meaningful sense of the term, it is hard to see why we should worry about justifying such restrictions to them. And the idea of consent also seems inappropriate if animals do not have the liberty necessary to make consent meaningful.

But the philosophers' objection is still puzzling: Surely (we may insist) animals *do* have natural liberty. After all, isn't a wild animal—a lion running

on the African savannah, a dolphin leaping in waves—the very image of freedom? Tying a dog up may or may not be cruel, but surely no one would deny that it restricts the dog's freedom. How could anyone dispute this point? The answer to that is found in centuries of philosophical tradition: Western philosophy teaches that animals are not free because they lack the rationality essential to our conception of moral and political freedom. Animals, under this view, lack the higher-order reasoning abilities that would make freedom meaningful to them or that would make their subordination to humans problematic. Liberal theorists emphasize that we value human freedom because it allows us to create and follow a life plan, an experience that seems to be essential to our happiness. It is possible that all animals can be happy without that sort of autonomy, that they are capable of being true “happy slaves.” Even vigorous champions of animal rights usually concede that nonhuman animals do not have rationally chosen life plans in the same sense that humans do.⁴³

Nevertheless, I think we should trust the intuition that animals *do* have a valuable form of natural liberty. After all, we twenty-first-century Americans do not view animals as Locke did. Twentieth-century developments in our understanding of animal cognition and behavior, and in our own moral sensibilities, challenge the conception of animals as mere unthinking machines.⁴⁴ There are both philosophical and scientific reasons for affirming the commonsense view that animals have minds—that they can have beliefs, desires, and intentions.⁴⁵ Their minds, to be sure, are different from human minds in important ways, but these ways of knowing may have value precisely *because* they are different from our own. Moreover, we may be overemphasizing the importance of reason to the value of human freedom. Actions motivated by Kantian disinterested rationality are not the only sort of actions that carry moral value. We sometimes value instinctual behaviors, not to mention many forms of nonrational human behavior, precisely because they are disengaged from the realm of reason and the limitations thereof. Such behaviors represent other intrinsically valuable ways of dwelling meaningfully, even intelligently, in the world.⁴⁶ Interference with such behavior can sensibly be called control or domination. So we can understand animal freedom as nondomination, in the same way that some theorists define human liberty as, principally, freedom from domination by others.⁴⁷ In short, even though animals may have very different ways of reasoning or interacting with the world, this does not mean they do not enjoy something comparable in moral worth to human freedom. They may even have something analogous to a life plan: a way of life that, although partly instinctual, is distinctively their own. That is why tying up a dog for several hours is not the same as leaving a toy in the yard for several

hours. The dog, unlike the toy, has a mind, feelings, and intentions that may be frustrated; it has a kind of freedom that is being denied.

In any case, wherever we stand on the philosophical concept of animal freedom, we certainly can recognize that at least some animals—sentient animals, especially those with higher-order cognitive capacity—have welfare interests that deserve respect, and one way to protect animal welfare is to resist treating them as mere means to our ends. All that social contract theory requires is that the contracting parties recognize that other beings—humans and at least some animals—must be treated as though they are not subordinate to one another by nature. Importantly, because we are using social contract theory as a middle-range theory or Rawlsian public philosophy, we do not need to agree on a set of religious or metaphysical principles to undergird this recognition of animal interests in their own liberty. For our purposes, we only need an overlapping consensus on this point. Thus those animals that the human parties to the social contract⁴⁸ recognize as having welfare or liberty interests (for the limited political purpose of designing a just regime) may properly be included in the social contract.

This category, we should note, includes domesticated animals, even though they would seem to be closest to a creature “naturally” under human dominion. Many domesticated animals exist in their current form only because humans bred them and maintain them for human use. But domestication does not make animals “naturally” subject to humans. If it did, the same logic would have to apply to humans themselves, for what animal is more thoroughly domesticated than the human being? Rousseau is instructive on this point: He describes humans as domesticated animals but clearly did not believe this meant that any individual is naturally under the dominion of any other individual. Domestication renders us *interdependent*, not inherently unequal. This interdependence creates the *risk* of political subordination, which is precisely why we need the social contract: to authorize political relationships where no natural dominion exists.⁴⁹

Consent

Martha Nussbaum succinctly objects to including animals in the social contract by noting that animals do not make contracts. “In a very basic way,” she insists,

the whole idea of a contract involving both humans and nonhuman animals is fantastic, suggesting no clear scenario that would assist

our thinking. . . . Because animals do not make contracts, we are blocked . . . from imagining plausibly what a social compact would look like. The type of intelligence that animals possess is not the sort that we need to postulate to imagine a contractual process.⁵⁰

Of course, even for humans the social contract is at best implicit, and usually purely hypothetical, so the problem here is not that animals cannot in fact consent. Rather, I take her point to be that the contract device is not useful as a heuristic because we can't imagine what it would mean for an animal to consent.

But that claim may be overstated. Mary Midgley argues that if consent is taken to mean acceptance of a state of affairs, it seems that some animals are capable of consenting. For example, animals that live in hierarchical groups (such as dogs) may either accept or challenge the leadership of the alpha male. Midgley suggests that popular consent may amount to little more than this sort of tacit trust in one's leader, although admittedly most liberal theorists require a more robust form of consent. But as Rosemary Rodd points out, many animals do seem to have the capacity for choice. "We can often find out what animals prefer, given a choice of several alternatives."⁵¹ We are in the same position with regard to animals as we are with regard to young children or temporarily mentally disturbed persons: We simply have to engage in some imaginative reconstruction to determine what they would prefer if they had the capacity to reason. Of course, Rodd is referring here to narrow choices about food or conditions of confinement, not broad schemes of social cooperation. But if the logic of social contract can be used for narrow policy choices, it is not deeply counterintuitive to apply it to broader principles. Indeed, as J. Baird Callicott (among others) has pointed out, relations of reciprocity between humans and nonhuman animals are virtually universal, and the idea of the "domesticated animal contract" is a commonplace in animal husbandry.⁵² This suggests that many people have found the contract idea to be a useful way to think through our duties toward animals.

Not everyone is convinced, though. Clare Palmer argues that applying social contract theory to domesticated animals is particularly misguided. The question with regard to domesticated animals, she notes, is not whether they would choose to become domesticated (that is already an accomplished fact). Rather, the question is whether these animals are better off living among humans than they would be in the wild—and this question, she asserts, is meaningless. She does not deny that domesticated animals benefit from the care they receive from humans. Rather, she suggests that since many

domesticated animals couldn't survive in the wild, there is no real choice for them, and therefore the social contract theory does not properly apply to them.⁵³ Palmer's point, of course, does not apply to those domesticated animals, like horses, goats, and pigs, that can survive in the wild. True, life in the wild may be nasty, brutish, and short for these animals, but this does not mean that social contract theory is inapposite. On the contrary, the main point of social contract theorists is that life in the wild isn't desirable for humans, either. That's why the social contract emerges as (usually) our best option.

Palmer may be thinking of domesticated animals that have completely lost the ability to survive in the wild. For them, life in the wild is not a viable option. But comparing life in the "state of nature" to life in society is not the proper way to justify the social contract. Under this reasoning, almost any social arrangement would be justified; humans and animals might agree to quite oppressive institutions, if the only alternative were no protection at all. It is better, I think, to set up the question as Rawls does: Given that one must live in some sort of society, how would a group of free and equal contractors set up that society? Social contract theory asks us to choose not between society or the state of nature but between societies governed by different conceptions of justice.⁵⁴ For domesticated animals, the question is what system of animal husbandry they would choose. That question is neither meaningless nor counterintuitive.⁵⁵

Still, these concerns about consent lead us to a final objection from social contract theory: How can we ever know what an animal would choose or consent to? As I suggested in the introduction, I believe the difficulty of answering this question has been overstated. We can assume that animals would wish to flourish in their characteristic ways, free of unnecessary suffering. Moreover, I will argue below that membership in the social contract is limited to animals with whom we have social relationships, like pets and livestock. These are precisely the animals whose needs we understand the best and have proven able to meet. Granted, determining what promotes flourishing in particular cases can pose challenges. But that project is not necessarily any easier when we're making laws concerning humans. Humans can tell us what they want, but they can also lie or be mistaken. And, in general, human needs are more complex and extensive than those of nonhuman animals.

There is of course more to say about how we determine animals' interests, but we must postpone deeper discussion of the topic until the chapter on representation. I want to turn now to general objections to social contract theory *per se*, beginning with the charge that it is too individualistic. In governing

animals, some would argue, we must attend to groups and ecosystems rather than focusing on individuals as the principal objects of our moral concern. This is quite true; many laws and regulations are aimed at managing whole populations of animals in order to preserve healthy ecosystems. As discussed below, not all of those animals are actually members of the social contract, so the state may not have an obligation to attend to the individual welfare of all the animals it manages. However, fulfilling our duties to members of the social contract requires us to attend to both individual *and* group welfare. Animals, both human and nonhuman, need a healthy species group in order to flourish. But it is important not to let the group perspective dominate animal welfare regulation. Humans do not relate only to species; they also have important and meaningful relationships with individual animals, and animals' welfare often depends on these relationships. Indeed, these individual human/animal relationships are the basis for animals' inclusion in the social contract. So social contract theory, as used here, is not quite as individualistic as it seems. It is aimed at protecting the welfare interests of individual animals, but it does so by protecting valuable human/animal *relationships*.

Second, some people point out that social contract theory has been used to justify illiberal practices, like race slavery and the subordination of women, by mischaracterizing the point of view of the subordinate group. We need only assume that these persons are radically different from those in the ruling class in order to convince ourselves that they would consent to their position of inequality.⁵⁶ This is a danger with respect to animals as well. Moreover, with animals we might easily make the opposite mistake: using social contract reasoning to overemphasize the similarities between humans and animals, which could also lead to inappropriate policies.

But the contract device, I think, actually makes both kinds of mistakes less likely. Social contract reasoning instructs us to look at the situation from the animal's point of view. That is a valuable piece of advice in any pluralistic society, which constantly demands that we adopt unfamiliar perspectives. Social contract theory should lead us to pursue further research into animal minds and behavior, not to show that they are exactly like us but to understand and give due respect to their differences. Social contract reasoning, at its best, promotes active, critical empathy as a political practice. Without this practice, any theory of justice is likely to be misused. So social contract theory should cultivate a habit of recognizing difference appropriately. It should promote a higher comfort level with differences among humans while at the same time making us sensitive to important moral differences between humans and animals.

A more worrisome concern is that if animals are members of the social contract, they will necessarily be second-class members. Even the more radical theories of animal rights seldom suggest that animals be given exactly the same rights as humans. Any legal rights accorded to animals must be shaped to reflect animals' capacities and characteristic modes of being. Because humans' capacities so far exceed those of nonhuman animals, human rights will generally be more extensive and weighty than animals' rights. But doesn't this make animals second-class citizens, thus working against a chief purpose of rights and social contract theory, that is, to create a more egalitarian state? In our zeal to protect animals, we may end up creating a subordinate political status—a status to which it would be all too easy to confine some humans.

This objection, however, misunderstands the nature and purpose of legal rights. The idea is not to grant legal rights to animals as a way to express a commitment to universal, equal natural rights. As discussed above, I don't think we need to link social contract theory with natural rights for animals at all. Our commitment is to the welfare of the human/animal community. Of course, in the case of humans this normally involves commitment to a set of natural rights, because the autonomy those rights protect is central to human welfare. But our aim with respect to animals is to use legal rights to support their welfare in the context of morally valuable relationships between humans and animals. So we're not creating a subordinate class of citizens by affording animals a lesser set of rights; rather, we're using legal rights and other legal devices to recognize and protect the human/animal bond. We use legal rights the same way when we care for human welfare, especially that of vulnerable and dependent humans such as children, people with disabilities, and the elderly.

IV. Members and Nonmembers

Which animals, then, are members of the social contract? This is a difficult question, because becoming a member is less a matter of philosophy than of history. It is part of the messy complexity of organic social relations on which philosophers try, but usually fail, to impose some order.

Consider the story of the iconic American pet, the dog. Dogs were not always considered proper subjects for governmental protection. Despite their usefulness, dogs during the nineteenth century were often viewed (by the non-dog-loving public) the same way wolves were—that is, as pests that could be destroyed if they became a problem.⁵⁷ But precisely because they were a nuisance to livestock breeders, they increasingly absorbed the attention of

lawmakers. Complaints about dogs harassing livestock led to the widespread adoption of “dog laws” in the 1850s and 1860s.⁵⁸ By the 1860s, seventeen states had such laws.

The dog laws were aimed at controlling stray dogs and reducing their numbers, but, ironically, they also ended up giving greater legal protection to dog owners’ property rights. The common law rule, still being followed by many judges in the late nineteenth century, was that dogs were not domestic animals; they were essentially wild animals and could be killed with impunity. But the dog laws overrode that rule. To be sure, these laws defined dogs as nuisances and therefore liable to be killed when they were not on their masters’ land. But they also protected dogs that were under their masters’ control, and they created procedures that recognized the owners’ property rights. Maryland, for example, set up a summary judicial procedure for putting down marauding dogs, which including providing notice to the owner and allowing the owner to pay a fine in lieu of killing the dog. Moreover, the debates over these laws provided a forum for dog lovers to assert the value of dogs to the community. For example, one member of the Maine Board of Agriculture argued to his colleagues that “[the dog] was of great benefit in Aroostock county, in protecting the sheep from bears . . . [and the] property saved [by dogs] was greater than the value of all the sheep killed.”⁵⁹ Such defenses contributed to the growing belief that dogs deserved some sort of legal protection.

Similarly, many states imposed taxes on dogs, with the aim of making it more expensive to keep dogs (and therefore reducing their numbers). But taxing dogs implied that they were property. Indeed, an 1863 US Department of Agriculture report insisted in defiance of the common law that “dogs are property, and therefore taxable.”⁶⁰ Moreover, dog taxes required local officials to take a census of dogs and determine who owned them. This regulatory system further enhanced dogs’ legal status. Historian Katherine Kete recounts how this process worked in France, which had a similar experience with the dog tax. Imposed in order to reduce the numbers of dogs, the tax had the unexpected effect of conferring on dogs a kind of civic personality. Dogs with licenses were, in a sense, official. They were practically citizens.⁶¹

In the United States, too, the civic status of dogs improved dramatically during the nineteenth and twentieth centuries. True, the law has not always kept up. Dog owners today might be surprised to learn that their property rights in their dogs are still imperfect. Tort law makes it difficult to recover damages when your dog is negligently harmed, because in most jurisdictions recovery is still limited to its market value. Compensation for loss of

companionship is not generally permitted. It can also be quite difficult to create a trust to take care of one’s dog after one’s death.⁶² On the other hand, the Animal Welfare Act was passed in large part to protect dogs—to shut down puppy mills and prohibit the sale or use of dogs stolen from their owners. The PETS Act offers dog owners some reassurance that, in the event of a natural disaster, they won’t be forcibly separated from their pets. Military working dogs now have the right (if we may put it that way) to be adopted by their handlers when their service is done. Today dogs are treated, in many respects, like members of the social contract.

But the status of other animals is not so clear. Certainly our political practices do not follow the logic of Roderick Nash’s moral extensionism (discussed in chapter 1). Our moral sensibilities do not gradually extend from the human community to animals as a whole, nor do they track any obvious philosophical principle. We protect the welfare of some animals more than others, just as we protect the welfare of some humans more than others. The Animal Welfare Act and other anticruelty statutes usually protect (if not in their language, in their actual enforcement) only animals with whom we have social relationships: notably, pets, livestock, and some research animals. We usually exempt wild animals from these welfare regimes. (They are protected as members of species under a different legal regime.) And we typically do not protect pests at all. Mosquitoes are notably lacking in advocates.

How, then, do we decide which animals to include in the social contract? It is difficult to adduce a set of principles from liberal theory to guide us, since liberal theory is notoriously unhelpful on the question of membership. It focuses on specifying political duties toward members of the social contract rather than specifying who should be included in the social contract. Indeed, the liberal principle of human equality tends to lead liberals to conclude that all humans should be members of the political community, and this conclusion seems to lead us toward a universal state or world government. A thoroughgoing animal rights ethic might lead us to include all animals, or at least all sentient animals, as well. Environmental theorists, taking this logic even further, sometimes argue that all beings that might be harmed by our policies (including, potentially, animals, ecosystems, and future generations) should be considered members of the political community.⁶³

However, these theorists usually do not go so far as to suggest we dissolve the nation-state altogether. That hesitation to take the principle of equality to its logical conclusion is, I think, quite sound. In the first place, we must recall that political duties are not the same as moral duties, and such an extension of the political community to all beings with moral status seems entirely at odds

with liberalism's commitment to limited government. Private individuals may recognize boundless obligations to all manner of creatures, but they don't have an obvious claim on other citizens' resources to satisfy those obligations. In the second place, although we do value equality, we also value community—the shared history, social ties, and sense of membership that are reflected in how we draw political boundaries. Indeed, I argue throughout this book that supporting community is very important to protecting humans *and* nonhumans, since strong communities are vital to individual flourishing. The political community is not more important than individual welfare. But in order to protect individual welfare, the political community must have some meaning. It should be something capable of informing one's identity, something to which one can feel loyal even when one disagrees with its actions. That means it should be rooted in the social ties that shape our day-to-day lives.

Equality (of humans or of all beings with moral status) is not a useful principle for defining the boundaries of the political community, because it gives us no boundaries. Probably no philosophical principle is going to do better.⁶⁴ In practice, the boundaries of the political community must be supported by a widespread consensus and deep commitment, and philosophical arguments (despite their famous analytical rigor) seldom achieve that consensus and commitment. This is why arguments about membership typically rely less on deductive logic and more on “contextual justification.” As described by Don Herzog, contextual justification proceeds not by deducing conclusions from basic philosophical principles but by showing that a policy or institution is better than the alternatives, all things considered. Such justifications can draw on historical considerations, our moral and political ideals, and social theory, but they rely principally on rich descriptions of what the world might look like if we chose one course of action over another.⁶⁵ Thus a contextual argument for including the pigeons in the city park in the social contract might involve giving an account of our history with these pigeons, an explanation of how we might attend to their needs, and a glowing description of how they would benefit and our lives would be enriched by caring for them. Arguments against would no doubt make reference to the pigeon droppings all over the park benches.

Granted, some readers may find this resort to contextual justification worrisome. It suggests that determining membership in the political community is an unprincipled affair. What if we get it wrong? Surely we need some philosophically sound, metaphysically grounded criteria for deciding to whom we owe political obligations. It is a valid concern; we're looking for justifications for government regulation, and it is important in a liberal regime that such

regulations have strong justifications. Of course, contextual justification does not reject principled argument altogether; moral and even metaphysical principles are among the tools people can use to critique the existing social consensus and make the case for expanding membership. But I agree with Don Herzog's response to that concern: Arguments that proceed from abstract philosophical principles may seem compelling in the classroom, but they aren't politically effective. They have a terrible track record of persuading ordinary members of the political community, and there's a good reason for that. Our political commitments—for example, our commitment to including dogs but not raccoons in the political community—have evolved over time in many vivid and concrete contexts, so we have a good sense of what they mean and require. Contextual justifications recognize that; they rely on those contexts and experiences. By contrast, our commitment to an abstract principle (like the moral equality of dogs and raccoons) is new, tentative, and untested. We have little sense of what it really means in practice and what it would require of us.⁶⁶ It also carries little emotional weight, compared to a good contextual argument. So abstract principles are not in fact a very strong basis for public policy. By comparison, contextual arguments provide much better—compelling, vivid, concrete—reasons for government regulation, and for including (or excluding) beings from the political community.

Of course, because contextual argument appeals to empirical descriptions of the way the world is and the way it could be, it is always conditional; it doesn't offer conclusions that hold for all times and places. So it doesn't promise to end political debate for good. Indeed, our ongoing debates about membership make the consensus about animal welfare I asserted above seem pretty fragile. Some subcultures, for example, practice animal sacrifice; others set great value on hunting; in some regions of the United States, dogs may still be considered little more than nuisances. These differences can lead to intense disputes over which animals are members of the social contract and deserving of state protection. But we shouldn't treat these disagreements as a problem for our liberal democracy. On the contrary, debates about which animals should be treated as members of the social contract are prime opportunities for minority views to be aired and to influence our public philosophy—a point I shall explore in more depth in chapter 5. The very openness of such debates, unconstrained by a rigid set of principles, is part of their political value. Talking about membership is an invitation to reimagine the political community and our own ethical and political selves.

Nevertheless, despite our ongoing disagreements, I think we can identify some “rules of thumb” that may properly serve as a starting point for thinking

about membership. Keeping in mind that our goal is to fashion a public philosophy suitable for a liberal community like the contemporary United States, certainly one important criterion of membership is that the animal must be recognized by humans as a subject of moral duties and as enjoying something we can call natural freedom. If an animal does not summon up in humans some sense of moral obligation—some sense that it isn't merely a resource for humans and is capable of being wronged—then it isn't a fit candidate for the social contract. The social contract, as we are using the concept here, must have a basis in humans' moral sentiments, or the idea will have no purchase on our deliberations and behavior. Many nonsentient animals, for example, do not inspire a sense of justice or moral duty, even among animal rights advocates. (Again, consider the poor mosquito.) There's little chance that we will be persuaded to recognize those animals as members of the social contract.

Still, humans do have great capacity for imagination and empathy, so this criterion might result in a very large group of potential members of our social contract. However, contract theory addresses the duties that arise out of a community's *political* relationship with the animals under its jurisdiction, so we only need to include animals with whom we have or want to have a political relationship. A political relationship may be established when the state governs animals directly (when government officials use animals to perform official functions or directly manages the animal population) and indirectly (by specifying what private individuals may do to animals). In the United States, we regulate everything from the treatment of elephants in captivity to the importation of butterflies, and similar regulatory regimes are found in most industrialized nations. Like the dog laws, these laws can confer on the affected animals a kind of civic personality that demands recognition from other civic persons. At the very least, they constitute exercises of government power that need to be legitimated.

Nevertheless, the line between member and nonmember of the political community doesn't track perfectly the line between regulated and unregulated. Some regulated animals may be pests, or may not be sufficiently sentient and aware for us to relate to them as community members. And some animals may be members of the political community even though the laws do not yet reach them; perhaps they don't need legal protection, or we haven't yet extended it to them. Animals become members of the social and political community when they become entangled in certain kinds of relationships—such as relationships of care and dependence, or family relationships—with community members, who come to realize that these animals have a good of their own that our laws and practices should respect. They become involved

with our scheme of social cooperation. So we may add that animals who enjoy a generally recognized and valued social relationship with a community member are candidates for membership.

Under these guidelines, we can conclude that some animals are currently members of the social contract (understanding that the boundaries of the community are always in flux). Pets like dogs and cats are prime examples. Commensal animals, such as the birds who visit our birdfeeders, might also qualify for membership. Pests, by contrast, are not members: 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.⁶⁷ Politically speaking, pests are our enemies, so our laws do not have to take their interests into account. (Of course, as individuals, we might still have moral duties toward them: not to cause them undue suffering, for example.)

Wild animals within our territory might also be members of the community, if we establish meaningful *individual* relationships with them and if their interests can reasonably be accommodated with ours. For example, wild animals in zoos and aquariums become public pets of a sort; unconfined wild animals may also achieve a special reputation and status in the community, becoming a kind of community mascot.⁶⁸ However, most wild animals are properly treated as outside the social contract. We may still be obligated to manage these populations as resources or parts of functioning ecosystems, in the interests of present or future generations of humans. But our political obligations do not extend to protecting the welfare of individual animals in the wild. (Again, as private individuals we may recognize more extensive moral duties to those animals.)

Between pets and wild animals fall two hard cases: livestock and feral animals. I have already claimed that livestock are members of the social contract. They live with us in close relations of interdependence and mutuality, and (as discussed in chapter 1) livestock have historically received the highest level of government protection. But many will find this position counterintuitive. After all, we often keep livestock in crowded, unhealthy conditions where they cannot develop physically or socially in their characteristic way. And then we slaughter them and eat them.⁶⁹ It seems inapt to call them members of the social contract, in the same way that it seemed inapt, to nineteenth-century Americans, to consider slaves members of the social contract.

The analogy between livestock and slavery isn't entirely misguided. Both groups have had deep, intimate relations of interdependence with citizens but have been treated by citizens as outside the social contract. In both cases, this contradiction has prompted calls for reform. Beyond this point, however, the

analogy breaks down. For human beings held in slavery, reform meant political autonomy and legal equality. Humans, in a modern liberal polity, need civil and political rights to flourish as human beings: to form families, create homes, and pursue the manifold projects appropriate to humans. Cows and chickens do not need the same sort of autonomy to flourish; indeed, they *can't* flourish without our care. I don't deny that domesticated animals enjoy something like natural liberty, a way of life that is distinctively their own. But that way of life is not incompatible with the practices of animal husbandry. On the contrary, it *assumes* animal husbandry. If we "freed" livestock, most of them would simply die off. And if we didn't eat them, we would have no reason to raise cattle, hogs, poultry, and other livestock. Some feral populations might survive emancipation, but most domesticated species would disappear altogether.⁷⁰

So I think it is a mistake to say that farmers who scrupulously attend to their livestock's physical and social needs are treating these animals as slaves or mere resources. Bad farmers, and particularly those involved in large-scale industrial livestock production, treat their animals as mere things or commodities.⁷¹ But good farmers treat their livestock as *livestock*. They engage in well-developed social practices of animal husbandry, practices integral to our development as humans and to livestock's development as domesticated animals. Nevertheless, we may still worry that the notion of a domesticated animal contract is incoherent if the point of the contract is to serve the human desire for meat. Is killing an animal for food a violation of the relations of mutual justification that are the point of the social contract?

Farmers usually argue that it isn't. As noted above, many of them do understand their relations with their livestock as governed by a "domesticated animal contract." They insist that they have meaningful and morally valuable relations with their livestock, giving them a comfortable and happy life until they are slaughtered. Death itself, they argue, is not a harm; it is the inevitable price of living. What matters is the quality of one's life, which for livestock can be quite good. Consider, for example, Wendell Berry's description of a model dairy farmer, Elmer Lapp. Lapp's farm includes a variety of animals: cats, dogs, chickens, cows, horses, wild ducks, bees, barn swallows, and goldfish who live in the drinking trough and keep the water clean. Each animal plays a role in the economy of the farm; together they form a complex web of interdependencies. But according to Berry, Lapp doesn't just need his animals; he *likes* them. Indeed, he needs them *because* he likes them; he brought them into his farm because he wanted to live with them. As Berry puts it, the farm works because the animals were liked before they were profitable. Lapp's

"delighted and affectionate understanding" is what brings the various parts of the farm together. Importantly, eating the animals is part of the order of the farm: "Eating, you feel the cycle turn, completing itself yet again. The cow eats, the hogs eat, the chickens eat, the people eat. The life of the place comes in as food, returns as fertility, comes in as energy, returns as care."⁷² Michael Pollan's description of Joel Salatin's Polyface Farm in *The Omnivore's Dilemma* similarly describes a complex system in which the health of the land, animals, and humans are deeply interdependent. All of the beings on the farm share in the "sheer ecstasy of life."⁷³ Even Jennifer Reese's decidedly unsentimental reflection on killing chickens draws on this traditional language of reciprocity. "I've always felt there was something powerful and right in the bond between humans and animals," she reports. "The turkey and 12 laying hens that I keep in my yard wouldn't last a day without my protection. They depend on me, I on them, and it is one of the simplest, most reciprocal relationships in my life. I am not sure whether they are fond of me, but I am certainly fond of them."⁷⁴

Some animal rights advocates would dismiss this testimony as self-serving. They do see death as a harm, so their moral intuitions tell them that raising animals for food violates our duty not to inflict unnecessary harm on sentient beings—even though acting on that intuition would mean that domesticated livestock would disappear from our communities.⁷⁵ What should we do when faced with competing moral intuitions like this, both of them plausible? I suggest that we ask ourselves, Which group seems more admirable? With whom would you like to be aligned? I'm inclined to choose the farmers over the animal rights advocates, at least in this case. People who raise livestock in this intimate, responsible, and humane manner commit themselves to a difficult and demanding job, and they make very little money from it. It doesn't make sense that they would choose this work just because they like to eat meat; they are not simply offering rationalizations for their diet. They choose this work *and* this diet because they like to raise animals. By contrast, the opposing view—that we must end livestock production altogether—does sound rather self-serving to me. Instead of preserving an ancient social practice that brings us into a deeply meaningful and demanding relationship with animals, these advocates want to get rid of that relationship *and the animals that are part of it*. True, we may be suspicious of farmers who insist that their animals are getting a fair bargain. But we should also be suspicious of people who want to avoid ethically and emotionally demanding relationships by eliminating the creatures on the other end of those relationships. Fulfilling the conditions of a reasonable domesticated animal contract asks a great deal more from us than simply ceasing to eat meat. We would have to radically

reform the way we raise livestock. As citizens, we would have to take a great deal more care to find out how livestock are raised and slaughtered, to agitate for their protection, and to support farmers so that they can fulfill their obligations to their animals. More generally, we would have to see livestock as animals to whom the political community as a whole has a particularly broad and compelling set of obligations. This, I think, is the harder ethical choice. In my view, it is the more admirable one.

In sum, I don't think it is deeply inappropriate or counterintuitive to consider livestock members of the social contract. On the contrary, if we are going to raise animals for food, we *must* consider them members and accept all the responsibilities that entails. Granted, many people will find my reasoning unpersuasive and conclude that vegetarianism is the only ethically defensible choice. This is reasonable as a matter of personal ethics; as I acknowledge above, this is a matter of competing moral intuitions, both of which are plausible. But here we are concerned with fashioning a public philosophy, one that can find support broad and deep enough to justify extensive government regulation of the livestock industry. The social contract logic is, I think, our best option. It is familiar and widely shared, and it suggests a clear agenda for reform.

Whether this same logic can be extended to research animals is debatable, since animal experimentation does not have the same pedigree and in most cases does not offer the same sort of mutuality that true animal husbandry does. I discuss animal research in more depth in the final chapter, but here I will simply suggest that excluding research animals from the social contract would be problematic: If we are going to use animals for our ends, we must care for them as though we are being held to a particularly demanding contract that serves their independent interests as well as ours.

Another hard case is feral animals and strays. Many communities are faced with growing populations of unowned domestic animals, particularly cats. Some people see them as pests (spreading disease and killing wildlife) that should be captured and killed. Others would treat them as community members whose populations should be managed humanely, through capture-neuter-release programs. While much of the debate centers on the most efficient way to manage these populations, many involved in the debates insist that we (the political community) should be worried about the welfare of the animals themselves. The debate in St. Paul, Minnesota, over the city's proposed capture-neuter-release program is instructive. Online commentary about the program reveals that advocates for feral cats worry about their vulnerability to harm and consider them a public

responsibility. Some comments recommended that the city remember to provide shelter, food, and water to the feral cats, even while trying to reduce their population. One praised St. Paul for caring for "the forgotten, unwanted and hopeless" cat colony. Another objected to tax dollars being spent to shoot or trap feral cats when a more humane approach is possible.⁷⁶ Commenting on a similar program in Washington, DC, one Humane Society official describes feral cats not as pests or problems but as "our neighbors."⁷⁷

Clearly feral animals and strays occupy a liminal space; their status is indeterminate and must be decided through public deliberation, which we should expect to involve a lot of contextual justification. Advocates for feral animals may draw on principles of justice toward animals, but they will also describe new social practices that will bring us into community with these animals, explaining how such community will improve our collective life or display desirable virtues (charity, compassion, generosity). Fortunately, our legislative bodies are well suited to dealing with the issue of inclusion. Legislatures can hear from many different perspectives, devise innovative approaches, and take incremental steps toward expanding or contracting public responsibility for different categories of animals. The debate over feral animals reveals this process in action.

Even as we expand the boundaries of the political community, however, we are still leaving many animals unprotected by the social contract. What can these nonmember animals expect from us? To be sure, we may and do protect many populations of wild animals for our own benefit, to preserve endangered species and game populations. International treaty obligations lead us to extend some protections to animals that are members of other political communities, or wild animals that many nations have an interest in preserving. Beyond these obligations, we may still have moral but not political obligations to nonmember animals. For example, we have a private moral duty not to inflict unnecessary pain on wild animals, even if the law permits it. Moreover, we can reasonably ask government officials to respect and accommodate these moral sensibilities, as far as possible (to avoid inflicting unnecessary suffering on wild animals in the course of managing their population, for example). But there are limits to public responsibility for nonmember animals. A liberal government shouldn't use tax revenues to satisfy our (potentially unlimited) charitable impulses toward wild animals. Nor should it punish people for making a sport of killing nonendangered wild animals, no matter how immoral this behavior may seem to the rest of the community. But it does make sense for the government to help rescue pets and livestock from natural disasters, to prohibit cruelty to and neglect

of such animals, and more generally to promote a culture supportive of healthy, positive human/animal relationships.

V. Conclusion

In sum, it appears that animal welfare laws do not pose a serious challenge to liberal principles after all. If we conceptualize the end of the social contract as the welfare of the community as a whole (rather than merely human autonomy) and recognize that animals may enjoy a kind of freedom that we cannot restrict without justification, then the social contract can include animals. These conceptual moves may be inconsistent with most contemporary social contract theories, but they do no violence to the broader liberal political tradition and the common practices of liberal regimes. We need not doubt our intuitions that Denise Okojo's dog Molly was a legitimate subject of government rescue efforts and that the legislators who voted for the PETS Act were not launching a radical departure from liberal principles.

Recognizing some animals as members of the social contract is not a major change from our current practice. On the contrary, the idea makes sense precisely because we already do it. Our public policies protect animals from cruelty, rescue them from disasters, and acknowledge that they have interests independent from those of their owners. We even justify those policies using the language of contract. Congressman Kenneth Keating, for example, defended the Humane Slaughter Act by declaring that we owe much of our "prosperity, our health, and our happiness" to livestock and are therefore obligated ("as human beings and as legislators") to protect them from unnecessary suffering.⁷⁸ Senator Jacob Javits, in support of the Animal Welfare Act, referred to our ethical obligations to the laboratory animals "that are suffering for us."⁷⁹ The language of reciprocity is a commonplace in legislative debate.

But we are not consistent in fulfilling our obligations to nonhuman members of the political community. Our legal system is still rife with anomalous doctrines that prevent pet owners from recovering damages for loss of companionship when their pets are killed, that prevent judges from considering the best interest of the pet in awarding custody in divorce proceedings, and that prevent animals from having standing to enforce laws intended for their benefit. We consistently fail to protect livestock, the animals to whom we are most heavily indebted. Many of these lapses can be corrected without working major changes in our social practices, but other practices would need radical reform under my reasoning. Most prominently, modern, large-scale livestock

production methods are inconsistent with our civic duties to livestock. Of course, these production methods also create substantial environmental harms and are dangerous work environments as well. So, while reform might be expensive, failing to reform these methods may well be more expensive. But I will have more to say about animals in the stream of commerce in the next chapter.

A final point, and a major difference between my approach and the arguments of the more radical animal rights advocates, is that the social contract I describe in this chapter 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. According animals legal rights may be a way to do that, but those legal protections will accomplish very little if they aren't supported by appropriate institutions and practices. In the end, these institutions and practices, not abstract theories about natural rights, will determine the terms of the social contract.

5

Reform

IN THE DECEMBER 6, 2010, edition of *Time* magazine, futurist Ray Kurzweil happily predicted that in the coming decades, “we’ll grow in vitro cloned meats in factories that are computerized and run by artificial intelligence. You can just grow the part of the animal that you’re eating.” According to Kurzweil, this would be a great improvement over factory farms. Getting meat from living animals, he pointed out, “is yucky.”¹

Kurzweil’s vision is one conception of progress; producing meat by cloning would certainly inflict less suffering on animals. But it would also mean the end of traditional practices of animal husbandry and the virtual disappearance of most livestock. Perhaps a better future would involve small-scale, sustainable operations that respect the cultural meaning of livestock and maintain, in improved form, traditional practices of animal husbandry. Grass-fed bison ranches, urban livestock production, or even hunting could also figure in a defensible vision of a better, more fully realized animal welfare society. In fact, we can imagine several different versions of that society. That’s the problem, and the beauty, of liberal pluralism. In a liberal society, citizens are expected to have different values and to pursue differing visions of the good life—for humans and for animals. Kurzweil’s vision may be a defensible choice, but it is not our only defensible choice.

But maybe Kurzweil’s point was that these different choices are irrelevant: The irresistible force of the market, combined with the direction of technological development, make cloned meat inevitable. There’s really no point arguing about which utopian system of livestock production we’d prefer; the

future is already written. Under this view, a liberal government is too limited to exercise any effective control over the direction of animal husbandry. Liberal governments are mostly concerned with respecting individual autonomy, and that means respecting the freedom of the market and technological development. Trying to move us toward any particular vision of the animal welfare society would involve some very illiberal restrictions on individual freedom. It is merely ironic (and not evidence of creeping totalitarianism) that our individual freedom is going to lead us all to choose Kurzweil’s cloned meat.

Fortunately, political theorists aren’t in the business of predicting the future of meat production. But we are in the business of explaining how liberal citizens should pursue social reforms aimed at realizing such visions. These reform movements pose two problems for the liberals. The first is pluralism: A mixed human/animal society could legitimately take many different forms, and there is no obvious way to choose among them. So whose vision of the future, if any, should the state endorse? I’ll address this problem in its most challenging manifestation: How should a liberal society that is moving toward greater protection for animal welfare deal with the practices of minority groups that are inconsistent with the majority’s vision? Should the state suppress minority practices in the name of protecting animal welfare, or should our zeal for reform sometimes give way to the value of respecting cultural diversity?

The second problem is the liberal state’s limited capacity to achieve social change: Even if we did agree on a specific vision of the animal welfare society, it seems that the state can’t do much to achieve that vision without violating liberal values—not, at least, if it must rely on its coercive powers, such as criminal prohibitions. Trying to enforce a particular vision of human/animal relations seems guaranteed to infringe more deeply on individual autonomy and equality than liberal citizens should tolerate.

These two problems, it turns out, are deeply interrelated; both will require us to turn our attention to the noncoercive, creative powers of the state and to the central role played by civil society in achieving more harmonious relations between humans and animals. I argue below that there are limits to liberal toleration of minority practices, but a liberal state interested in progressive reform ought to welcome and try to accommodate cultural diversity as far as possible. Therefore, liberal governments should use the coercive power of the state sparingly and judiciously to avoid extinguishing the creative energy generated by the free play of cultural differences.

In particular, I will sound a note of caution against pursuing animal welfare reform by relying heavily on criminal law. Regulations that impose severe

criminal penalties on people who abuse animals, violate regulations intended to ensure animal welfare, or engage in activities that endanger animals are the most common kinds of animal welfare laws, and they are the sort of regulations that spring to mind most readily when we think about protecting animal welfare. Indeed, chapter 2 was devoted to arguing that such criminal prohibitions of animal cruelty can be justified under liberal principles. But using that power as our *chief* means of changing social practices is problematic. Criminal laws tend to put human and animal interests into conflict and to raise the stakes so high that compromise becomes difficult. Even worse, expanding the reach of the criminal justice system may deepen long-standing racial and class inequalities. A reform movement that relies too heavily on criminalizing animal abuse will simply fuel the perception that we can protect animals only at the expense of humans.

Therefore, I argue that criminalizing animal abuse should be the last and least important element of any reform agenda. Creating a more fully realized animal welfare state requires more constructive work than simply enacting prohibitions and penalties. It requires us to develop social practices and build institutions that align human and animal interests and empower humans to care for animals better. The state's wide array of creative, noncoercive powers can contribute to this project. But the central sphere of this sort of activity is civil society, from animal welfare organizations to churches, schools, and professional associations. And this point takes us back to the importance of cultural diversity: Improving animal/human relations is a creative endeavor, requiring imagination, judgment, and a wide array of social skills. We will thus need the participation of a diverse array of civic associations and social groups, including minority racial, ethnic, and religious groups. Such groups may offer new insights and a wealth of creative ideas about how to transform both dominant and minority practices. Harnessing their energy and imagination is the best way to realize the aims of the social contract for both humans and nonhumans.

I. Animal Sacrifice and Liberal Toleration

In 2004, the city of Euless, Texas, sent police officers to the home of Jose Merced to stop him from killing a goat in his garage. The killing, according to the city, was in violation of a long-standing ordinance that regulated animal slaughter within the city limits. It should have been a routine exercise of the city's police power, its authority to protect the health and safety of the city residents.

But this case was far from routine. Merced is an oba, a priest of the Santeria religion, and he claimed that sacrificing a goat was an essential part of the ritual to initiate a new priest. According to the expert on Santeria who testified at Merced's trial, animal sacrifice plays an important role in the faith.

Santeria's practice centers around spirits called *orishas*, which are divine representatives of Olodumare, the supreme deity. Santeria rituals seek to engage these *orishas*, honor them, and encourage their involvement in the material world. Doing so requires the use of life energy, or *ashé*, the highest concentration of which is found in animal blood. Thus many Santeria rituals involve the sacrifice of live animals to transfer *ashé* to the *orishas*.²

Such rituals are performed at important events, such as the initiation of a new priest. So enforcing the Euless ordinance potentially violated Merced's freedom of religion—or so he argued in *Merced v. Kasson*, which came before US Court of Appeals for the Fifth Circuit in 2009.

Specifically, Merced argued that the city had no legitimate grounds to prevent him from killing goats in his garage. The sacrifices, he insisted, posed no health risk, nor did they constitute animal cruelty. He would purchase the animals from local markets and have them delivered to his house about fifteen minutes before the ceremony. The sacrifice itself involved slitting the animal's carotid artery with a short knife. The animal is typically cooked and eaten after the ceremony. He had been conducting such sacrifices, about one per year, for the past sixteen years, without interference, when police officers suddenly showed up at his house in September 2004 to inform him that the rituals were illegal.³

The city, on the other hand, insisted that it was just enforcing a standard zoning ordinance, common to many cities. Passed in 1974, the ordinance provides that "it shall be unlawful to slaughter or to maintain any property for the purpose of slaughtering any animal in the city." It also prohibits keeping any four-legged animal on lots smaller than one-half acre, even if only for a very short time.⁴ There's no question that Merced's animal sacrifices violated these ordinances. But Merced claimed that the ordinance should not be enforced in a way that infringes his constitutional right to the free exercise of religion.

Merced had good grounds for his complaint; this was not the first time the constitutionality of a prohibition on animal sacrifice had been challenged in federal court. In 1987, practitioners of a variety of Santeria opened the

Church of Lukumi Babalu Aye in the city of Hialeah, Florida. Predictably, the church caused great consternation among many other residents of the city. Objections focused on the practice of animal sacrifice, which was described by its opponents as “mutilating animals,” an “indefensible and repugnant” practice not consistent with “civilized behavior.” A lawyer representing several neighborhood organizations clarified their position: “Santeria,” he said, “is not a religion. It is a cannibalistic, Voodoo-like sect which attracts the worst elements of society, people who mutilate animals in a crude and most inhumane manner.” Reverend Dias of the Joreb Baptist Church was more restrained, but complained, “That there are still people in this era, in our civilized society of the United States, still sacrificing animals in religious rituals is indefensible and repugnant.”⁵ Many animal rights organizations, including the American Society for the Prevention of Cruelty to Animals and the Humane Society, are opposed to animal sacrifice, and there had already been a number of confrontations around the country between practitioners of Santeria and animal rights advocates. Indeed, when the *Hialeah* case arose, the Humane Society was lobbying city councils around the country to adopt a model ordinance proposing up to six months in jail and a thousand-dollar fine for anyone convicted of ritual animal sacrifice.⁶ The city of Hialeah didn’t go that far, but after a raucous meeting in which participants denounced Santeria as barbaric devil-worship, the city did adopt an ordinance banning animal sacrifice under penalty of a five-hundred-dollar fine or imprisonment for up to sixty days.⁷

The church promptly challenged the ordinance in court as a violation of their freedom of religion, but the trial judge disagreed. He was persuaded that the practice did constitute a potential health hazard to humans and was also influenced by testimony from the vice president of the Humane Society (Dr. Michael Fox) that cutting the carotid arteries was not necessarily a humane and painless way to slaughter animals. Fox testified that if both arteries aren’t severed cleanly at the same time, the animal might linger in considerable pain. And chickens, which have four carotid arteries, are particularly difficult to kill quickly and cleanly.⁸ The trial judge also accepted the city’s argument that banning the practice was necessary to prevent psychological harm to children who might be exposed to it.⁹ In short, the judge concluded that the ordinance did infringe religious freedom but that the infringement was justified by the government’s strong interests in preventing animal cruelty and protecting human health.¹⁰

That ruling, however, did not stand; although the appellate court affirmed it, the Supreme Court disagreed. In fact, the Supreme Court issued a unanimous opinion striking down the ordinance—a rare show of solidarity by

nine justices who are usually deeply at odds over the separation of church and state. Although several animal rights and animal welfare organizations filed amicus briefs in support of the city, the Supreme Court did not think protecting animal welfare was the real issue.¹¹ Justice Kennedy’s opinion for the Court focused instead on religious discrimination. Although he acknowledged that health hazards and animal welfare were legitimate subjects of government regulation, he concluded that the true motive behind the ordinance was hostility to the Santeria religion. He pointed to evidence like statements from the city council meeting that Santeria was “devil-worship” and noted that other kinds of ritual slaughter, like kosher procedures, were not prohibited. In fact, the ordinance was carefully drawn to protect every way of killing animals normally practiced in the city, except for ritual sacrifice by practitioners of Santeria. The ordinance was, according to the Court, a clear attempt to discriminate against a minority religious practice and therefore violated the church’s free exercise of religion.¹²

The *Hialeah* decision was welcomed by practitioners of Santeria as proclaiming a general right to practice animal sacrifice, but that isn’t precisely what the Court held. It did not reject the lower court’s rule that a religious practice may be prohibited when it conflicts with the government’s interest in preventing animal cruelty or protecting human health; it simply concluded that these were not the true motives behind this particular ordinance. Under the Court’s reasoning, a generally applicable law that is actually intended to protect animals from cruelty and not motivated by hostility toward any particular religion could be enforced against someone who was practicing animal sacrifice. So the *Hialeah* decision didn’t necessarily dispose of the issue in Merced’s case. There’s no evidence that the Eules ordinance, which was enacted long before Merced came to town, was motivated by a desire to suppress Santeria. True, its enforcement may have been; the police were apparently responding to a complaint about Merced, which may have been motivated by prejudice against Santeria. We can’t be sure, however, since the court never actually reached that issue.

Instead of addressing the constitutional issue, the judges upheld Merced’s other claim, that the ordinance violated the Texas Religious Freedom and Restoration Act. This statute prohibits a local government, such as the city of Eules, from enacting a land use regulation that imposes a “substantial burden” on religious practice, unless the regulation serves a “compelling government interest” and is the “least restrictive means” of serving that interest.¹³ The statute is designed to give protection to religious minorities who might be unduly affected by a generally applicable law. It represents a commitment

to religious freedom and diversity, and that commitment worked in Merced's favor. The *Eules* ordinance clearly did place a substantial burden on Merced's religious practice, so the court had to decide whether the city's reasons for forbidding animal slaughter in the city limits were "compelling" and whether there was another way to serve that interest without interfering with Merced's religious practices. To be sure, the city's purposes in enacting the ordinances were compelling: to protect human health and to protect animal welfare. But Merced's animal sacrifices, in the court's view, did not pose a threat to public health, nor were they (in the court's judgment) inhumane. It certainly wasn't necessary to ban all animal slaughter in order to serve the city's legitimate interest in protecting the health and welfare of its human and nonhuman inhabitants. Under the Texas law, Merced must be allowed to perform his rituals.

Of course, not all states follow Texas's practice of allowing exemptions from general laws to accommodate religious practice. Nevertheless, the *Hialeah* and *Eules* decisions bode ill for animal rights activists who hope to end the practice of animal sacrifice through legal prohibition. True, both decisions took for granted that protecting animal welfare is a strong, even a compelling, government interest. So a carefully drafted law prohibiting animal slaughter, supported by good public health and animal welfare concerns and not motivated by hostility to animal sacrifice per se, probably would pass judicial scrutiny even if it were applied against someone practicing animal sacrifice. But banning animal sacrifice itself—that is, allowing the humane slaughter of animals for any reason *except* a religious one—probably would not be allowed. According to these cases, such a ban conflicts with our liberal constitutional values of toleration and religious freedom.

But is that the right result, under liberal theory? How far should our animal welfare laws accommodate the diverse religious, moral, and cultural differences we find in our pluralist society?¹⁴ It is a familiar but tricky problem for liberal regimes: Should the political community insist that everyone follow general moral norms, or must we, in the name of respecting cultural diversity and religious freedom, tolerate social practices that violate those norms? For some philosophers, the answer to this question rests on one's position on moral relativism, or the view that there are no universally valid moral truths—that moral judgments derive from and only make sense within the context of a particular culture. Presumably a moral relativist would find it more difficult to justify condemning divergent cultural practices than would a nonrelativist. However, following my usual practice of avoiding metaphysical questions whenever possible, I'm not going to address this issue here. Whether or not universal moral truths exist on some metaphysical

plane, such moral uniformity clearly doesn't exist in the political world. Our problem isn't moral relativism but cultural pluralism: the fact that people within the same political community may ascribe to deeply divergent worldviews. This diversity poses a political problem, one that is particularly acute with respect to cultural minorities. We can expect, in a majoritarian political system, that the dominant cultural perspective will usually be reflected in our laws. (I am assuming there is a dominant cultural consensus; a political community composed entirely of deep and conflicting subcultures probably would not be governable by liberal means.) The question is how a liberal regime, committed to ruling with the consent of the governed, should deal with minority groups—groups like practitioners of Santeria, whose worldview and practices are very much at odds with those of the majority.

My answer to that question is going to turn, in large part, on which moral norms are being challenged, so it is important to clarify that the case against animal sacrifice involves two different kinds of claims. Animal welfare advocates in the *Hialeah* case, for example, put a great deal of emphasis on the claim that the specific practice (severing the carotid artery) might inflict unnecessary pain and suffering on the animal (if, for example, the artery isn't severed cleanly). The objection is not that killing an animal for purely spiritual reasons is necessarily immoral but that this particular method of slaughter is unnecessarily cruel, and that the general animal welfare laws should be interpreted (or rewritten) to prohibit it. Proponents of animal sacrifice, in turn, usually defend their practice by arguing that it is humane when performed properly and that the people conducting the ritual know how to do it correctly. They don't disagree with the moral norm that animals should not be subjected to needless suffering. They merely wish the laws to recognize their method of ritual sacrifice as one of the humane ways to kill animals. It may look like they're asking for an exemption from the generally applicable laws, but in fact they're really asking that the general laws be drafted carefully to avoid prohibiting a practice that is actually (in their view) perfectly consistent with the general moral norm of avoiding cruelty to animals.

This debate over the method of slaughter may be distinguished from a deeper kind of value conflict also at play here: Some opponents of animal sacrifice seem to believe that it is wrong to kill an animal except to fulfill a "real" human need, like our need for food or medicine. Under this view, the religious reason for killing the animal simply isn't valid; it isn't a reason that a civilized, rational person should take seriously. This objection is not just a dispute about the facts of animal suffering; it is a conflict between radically different religious beliefs and worldviews. The dominant religious groups in

the United States do not practice animal sacrifice. Christians take great pains to distance themselves from the practice. Nor do Muslims and Jews practice animal sacrifice; kosher slaughter as practiced by some orthodox Muslims and Jews is best understood as a ritualized way to slaughter animals for meat rather than a true sacrifice. Very few Americans can be expected to understand the theological premises and worldview that make sense of the Santeria ritual.

Of course, one might argue that kosher slaughter and even nonkosher slaughter isn't that different, morally, from animal sacrifice. They're all just different (but equally humane) ways to produce meat for the table. Some of the defenders of animal sacrifice take this position, but I think it misses the point of the moral objection. Surely the *reason* one kills the animal is relevant to the moral significance of the act (just as the *reason* the city is banning the practice also matters to whether the law is just). Jose Merced's primary purpose in killing animals is not to eat them. He sacrifices animals in order to release the spiritual energy concentrated in animal blood and to transfer it to the *orisha*. If one believes that this reason is just a lot of mystical nonsense, then it does look like Merced is killing animals for no good reason; he looks like someone who drowns cats just for fun. On the other hand, if one considers Merced's beliefs reasonable and worthy of respect, then his actions look more justified. Indeed, Merced may seem to be treating animals with greater dignity and a more profound appreciation of their spiritual value than do those of us who eat mass-produced, store-bought chickens.

The animal sacrifice controversy therefore involves a deep conflict between competing and possibly irreconcilable worldviews. Of course, as Claire Jean Kim perceptively argues, characterizing such conflicts as a "clash of cultures" oversimplifies matters quite a bit. Cultures, after all, are not homogeneous or stable, and people involved in these conflicts are often doing more than defending or attacking an established practice; they're trying to define who they are and who the "other" is.¹⁵ For example, there is a good deal of conflict among practitioners of Santeria over the nature and meaning of their faith. Santeria appeared first in Cuba, where it seemed to be a folk version of Catholicism combined with some elements of traditional African beliefs. But the founder of the Church of Lukumi Babalu Aye, Ernesto Pichardo, rejects any association with Catholicism. His aim in establishing the church is to purify the faith and return to the beliefs of its ancient African practitioners.¹⁶ Thus the *Hialeah* case wasn't merely a clash of two differing worldviews; it was also part of an intrafaith effort to work out what Santeria is and what relation it has to African identity and to Catholicism. Animal sacrifice is

important to the Church of Lukumi Babalu Aye in part because it helps to differentiate the faith from more Christianized versions of Santeria.

On the other side, there appears to be more at stake for the opponents of animal sacrifice than just animal welfare concerns. For example, the Catholic Church is uneasy about the fact that many Santeria practitioners identify themselves as Catholic. In 1986, the US Conference of Catholic Bishops was sufficiently concerned about the rise of Santeria to make a strong statement that animal sacrifice violates the Catholic liturgy and is not consistent with Catholic teachings. So resistance to animal sacrifice has also been, in part, a matter of defining Catholic identity. And, more problematically, most of Santeria's practitioners today are dark-skinned, working-class Cubans who flooded into south Florida during the 1980s. The religion has become associated in the media and among the white majority with drug dealing, crime, and poorly educated immigrants.¹⁷ Criticizing animal sacrifice as barbaric is one way to identify these recent immigrants as outsiders, to reinforce an ethnically and racially exclusive concept of American identity. Indeed, Claire Jean Kim points out that this "othering" language—characterizing a group as barbaric and uncivilized because of its treatment of animals—is a common trope in American culture, constituting a chief means of distinguishing "real" Americans from racial or ethnic outsiders.¹⁸

Clearly, one important lesson to take from this conflict is that there are ways of defending animal welfare that undermine human welfare by reinforcing racial divisions and exclusions—a problem I will discuss in greater depth below. But the point I want to acknowledge here is more limited: Subcultures and faith traditions are not homogenous, coherent, integrated wholes. Rather, they are fluid, ill-defined, overlapping, and contested. Respecting someone's cultural or religious practices begs the very difficult question of what exactly that culture or religion is. Unfortunately, however, that fact doesn't negate the problem posed by cultural pluralism. If anything, it deepens the problem, since it means that subcultures themselves are pluralistic. The fluid and contested nature of culture ensures that even within an apparently homogeneous cultural group, we can expect to find a great deal of individual value conflict. As a result, we can't expect everyone to agree on any set of fundamental values as a basis for public policy. Governing by consent is quite challenging in the face of this diversity.

One way to deal with this challenge is the approach suggested by John Rawls that we adopted in chapter 2: We decided to seek only an overlapping consensus of reasonable comprehensive moral doctrines, rather than complete, deep unanimity, to support our public (or governing) philosophy. As

long as there is broad support for a norm of protecting animal welfare (as there is among Santeria practitioners as well as other Americans), it doesn't matter much what deeper metaphysical commitments that norm is based on. Another move is to insist on a fairly limited scope for state power. Liberals' respect for individual autonomy—their insistence on protecting a sphere of individual freedom that the state may not infringe—is a good strategy for preventing the state from being drawn into these inevitable cultural and religious conflicts among different social groups. The state has no business, for example, getting involved in the religious sphere by deciding whether animal sacrifice is a legitimate spiritual practice or just “voodoo.”

But working against this laudable desire to keep out of cultural and religious conflicts is a competing liberal impulse, a desire to use the power of the state to change social practices, to better realize the ends of the social contract for humans and nonhumans alike. This progressive agenda seems to be what is driving the conflict over animal sacrifice. Groups like the Humane Society and the ASPCA would like to *extend* protections for animals beyond the status quo—to cultivate more respectful and humane attitudes toward animals across the board, among all groups in American society. Banning animal sacrifice is only one part of a larger program that might involve discouraging more widespread practices like hunting and factory farming. This is a perfectly reasonable agenda, under any number of moral philosophies. But it may not be reasonable to use the power of the liberal state to realize it, at least not if doing so would illegitimately infringe individual liberty and suppress cultural differences that ought to be allowed to flourish.

Admittedly, it is hard to draw a bright line telling us exactly how far the liberal state should be willing to protect or infringe on cultural differences. It is a matter of finding a workable balance between competing values. On one hand, some liberals (let's call them pluralists) put a great deal of value on cultural goods—that is, collective goods, like language and religious traditions, that can be made available to individuals only through participation in a vital, living culture. These pluralists would like for the liberal state and its citizens not just to tolerate but to celebrate and promote the flourishing of cultural differences. Will Kymlicka, for example, points out that the liberal idea of freedom centers on the importance of individuals' choosing their own life plan, and one can't do that without a societal culture that offers such choices and makes them meaningful. Kymlicka thus values cultural membership in itself, as an “anchor” for identity and a basis of self-respect, a vital foundation for self-development.¹⁹ But most pluralists celebrate not just cultural integrity but cultural *differences*: Being exposed to many different cultures makes it

easier to get critical distance on your own culture, and therefore to revise your vision of the good in light of insights from other cultures. Under this view, the condition of cultural pluralism is a rich source of new insights and ideas, contributing to individual rational autonomy and personal and social development.²⁰ Pluralists would therefore allow conflicting values to flourish (peacefully) with minimal state interference, and even with state accommodation and support—for example, the kind of support offered by Texas's Religious Freedom and Restoration Act, requiring general laws to accommodate minority religious practices.

On the other hand, many liberal theorists (call them the antipluralists) worry that celebrating cultural differences might undermine the liberal commitment to liberty and equality. After all, many subcultures endorse inegalitarian values, promote restrictions on individual liberty, and even violate human rights. On what basis could they claim any special treatment from a liberal state? Brian Barry, a leading spokesman for this position, argues that a liberal state is seldom justified in accommodating *any* deviations from our general laws to accommodate minority religious or other cultural practices. He argues that a central value of liberalism is that all citizens have a common set of legal rights and duties, and this commitment to equality trumps any argument for giving a group (religious, cultural, or otherwise) a special exemption from those rights and duties.²¹ Stephen Macedo also insists that a liberal state must promote and enforce certain general moral norms, even if they conflict with a group's traditional culture or religious beliefs.²² In fact, it may not be sufficient for the state to guarantee equal civil rights; the state may need to reach deep into the institutions of civil society—into churches, families, and other civic associations—to make sure they aren't promoting illiberal values that would undermine our public commitment to equality, individual liberty or, in our case, animal welfare.

One can see why someone committed to a progressive agenda of extending animal welfare protections might favor the antipluralist view. Reforming widespread social practices regarding animals would involve reaching deep into the institutions of civil society; it might involve changing our diets, recreational activities, and family relationships. It is tempting to resort to the state's coercive power to accomplish these changes, and the antipluralist position seems to offer a strong justification for doing so. But in fact, I don't think the antipluralist view supports such an agenda. I suspect even a thoroughgoing antipluralist like Brian Barry would hesitate to expand state power so deeply into our private lives. His commitment to equality is matched by his commitment to individual liberty: Returning to the principle of limited

government, he points out that a good way to ensure that the state is not treating citizens differently is to *limit* its interference in their daily lives—which would also allow for the flourishing of (a reasonable amount of) cultural diversity.²³

In practice, no one wants to stamp out all cultural differences. But neither is anyone willing to tolerate all cultural practices no matter how illiberal those practices are. Pluralist William Galston, for example, argues that there are some “core evils” that the government can and must prevent. These are harms to human welfare that reason and historical experience have taught us to abhor, universal “bads” that must be avoided if we are to have minimally decent lives. Galston lists tyranny, genocide, cruelty and humiliation, starvation, and epidemics as examples.²⁴ Kymlicka, another pluralist standard-bearer, would go further, insisting that a liberal society needn’t endorse any cultural practices that violate basic civil and political liberties.²⁵ These judgments may rest in part on our Rawlsian consensus of reasonably comprehensive moral doctrines: If virtually all moral theories condemn a practice as evil, we can confidently outlaw it. But Galston’s reference to experience gestures, also, toward what I called in chapter 2 “contextual justification”: One can justify outlawing a practice not only by referring to basic moral principles but also by showing that this prohibition is better than the alternatives, drawing on historical considerations and rich descriptions of what the world might look like if we chose one course of action over another. Drawing on these kinds of arguments, even committed pluralists can say with confidence that a liberal state may outlaw practices that violate the liberal value of respect for individual human dignity and autonomy. And if our argument in chapter 2 was persuasive, we should also be able to prohibit the wanton infliction of pain and suffering on animals. The liberal state is obligated to ensure decent lives for *all* members of the social contract, and that includes animal members.

But “decent” is a pretty low standard, and it is also clearly a malleable one. What counts as a “decent” life for both humans and nonhumans has changed dramatically over the past two hundred years, largely as the result of progressive reform movements like the animal welfare/animal rights movement. Better understanding of animal physiology and psychology has led to improvements in the basic standard of care for livestock and other domesticated animals. Reformers are certainly justified in seeking to raise that standard even further—to improve methods of handling livestock, for example, to better realize the end of humane treatment already widely accepted and codified in existing animal welfare laws. My argument is simply that they should be wary of relying on coercive state power to achieve their more ambitious ideals for social reform.

As argued in chapter 2, the use of coercive state power needs strong justification in a liberal state, and it is hard to find that justification for a program aimed at radical social change. It is not too difficult to come up with a reasonable consensus on a set of practices that clearly fall below the standard of minimal decency—Galston’s list of “bads.” But it is far more difficult to achieve a rationally defensible consensus on which set of social practices we should be aiming for. As Galston would put it, there’s a wide range of individual and communal ways of life that are rationally defensible, and there’s no way to come up with a rank ordering of them that everyone should agree on.²⁶ So there’s no universally valid conception of the good life that the state is justified in imposing on its citizens. As applied to animal welfare, this means that even though all of us (well, let’s say most of us) may agree that torturing animals is wrong and can be prohibited (at least with respect to animals that are members of the social contract), there’s no universally valid conception of the *best* relations between humans and animals that the state is justified in requiring all of its citizens to follow. Under this view, the state can legitimately use its coercive power only to outlaw the “bads” (and I would add the caveat, developed below, that even here coercion should be used with caution and restraint). But it should not coerce its citizens into adopting a certain conception of “best practices.”

This moderate, limited pluralism, I think, is practical and well suited to the moral and political world we twenty-first-century Americans live in. To be sure, we have a pluralistic society characterized by a great deal of value conflict. Nevertheless, very few people try to mount a defense in favor of torturing animals, and certain kinds of cruelty are uncontroversially banned. As I pointed out above, proponents of animal sacrifice usually don’t ask to be exempted from these bans. Rather, they insist (quite plausibly) that ritual slaughter is no more cruel than other legal methods of slaughter. They’re asking for equal treatment, not a special exemption from the general rules protecting animal welfare. True, there is plenty of room for factual debate over which practices do inflict pain and suffering, but those debates assume and even reinforce the shared value of preventing cruelty to animals.

The debate over whether humane slaughter laws should permit kosher slaughter also follows this pattern. Most such laws require that animals be stunned by an electric current or captive-bolt pistol before being killed, so that they are unconscious when their throats are cut. Kosher slaughter, by contrast, requires that the animal be conscious when the throat is cut, and the federal Humane Slaughter Act allows the use of this method as well (“whereby the animal suffers loss of consciousness by anemia of the brain caused by the

simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering").²⁷ Brian Barry argues, persuasively I think, that there is no justification for allowing orthodox Jews and Muslims to practice kosher slaughter if the legislature has determined it isn't humane. But that's not what the legislature has determined.²⁸ Rather, the Humane Slaughter Act explicitly declares that both of these methods—electric shock and severing the carotid artery—are humane and may be used (by persons of any religious faith) to slaughter livestock. Again, what looks like an exemption is not; it is simply a more careful or detailed statement of the general rule of humane treatment.

In sum, we needn't fear that a commitment to cultural pluralism means we must tolerate *any* sort of treatment of animals, or riddle our laws with exceptions to the basic standard of humane treatment. It does, however, require us to be tolerant of practices that, while not obviously cruel, don't make sense to us. Tolerating a practice does not mean simply ignoring it or pretending that it is none of our business, of course. Liberal pluralists argue, rightly, that liberal citizens (on both sides of the debate) must be willing to engage one another in discussion of serious moral issues. They must listen seriously to members of different cultures, take the time to understand their arguments, and make sincere efforts to find common ground and make reasonable accommodations of minority practices where such accommodations are practical and justified. As Galston puts it, tolerance does not imply or require "an easy relativism about the human good; indeed, it is compatible with engaged moral criticism with whom one differs." But it does mean "the principled refusal to use coercive state power to impose one's views on others, and therefore a commitment to moral competition through recruitment and persuasion alone."²⁹ In short, a commitment to cultural pluralism implies a commitment to maintaining social spaces free of state coercion, where citizens may debate with each other about the meaning and ethics of their practices and learn from one another without fear of being fined or jailed.

Under this view, animal rights advocates should not attempt to criminalize animal sacrifice. Instead, they should approach the issue as an opportunity to enter into conversation with a group of fellow citizens whose cultural practices look strange or different. And practitioners of animal sacrifice should be equally willing to engage the arguments of animal rights advocates, to take their moral arguments seriously. After all, much of the value of living in a pluralist society is the opportunity to learn from people with a different worldview. By resisting the impulse to use state power to stop practices one abhors, one opens up a space for such conversations—conversations in which

varying views of the moral and spiritual status of animals can be explored with a view toward developing richer, more meaningful relations with animals and with other human beings.

For example, many critics of animal sacrifice characterize the practice as an example of human arrogance and dominance, describing its practitioners as callously using animals for their own ends. Practitioners of Santeria see animal sacrifice very differently. For them, sacrifice is the essence of humans' relationship to the divine. While prayers merely express what people want from their relationship with the gods, sacrifice, as an act of communion, actually constitutes that relationship, making real the reciprocal bond between humans and the gods.³⁰ Indeed, far from expressing human dominance of nature, the sacrifice recognizes the physical and spiritual *interdependence* of living things:

Animals die so that human beings may live. . . . All are related by delicate exchanges and balances of nature that make human life possible. . . . [Animal] blood is offered to the *orishas* to show human beings their dependence on the world outside them and to give back to the invisible world something of what it gives to the visible.³¹

This practice is grounded on a view of the entire material world as sacred, as an expression of spiritual reality whose wholeness depends on making such exchanges. This perspective thus reinforces humans' dependence on and unity with the whole material and spiritual world.

Animals are particularly powerful and important in this worldview; even the *orishas* depend on the vitality of animal life. Some practitioners insist that the animal offers itself during the ritual, just as a human possessed by a spirit may be said to offer or sacrifice himself to that spirit. But whether or not the animal can be seen as a voluntary participant, the sacrifice itself is meant to be an act of profound humility and gratitude on the part of humans for this gift of life. From this perspective, our factory farms must look obscene, if not positively blasphemous. Indeed, perhaps a more spiritual and ritualized approach to animal slaughter would benefit our livestock. Recall the point made in chapter 3: Social practices that respect and allow us to express the various social meanings of animals can create a richer public culture that expands the options for living in community with animals. It is arguable, at least, that the Santeria ritual expresses a spiritual reverence for animals that the rest of us might learn from, if we are willing to approach their practices with respect and understanding.

Admittedly, this program of respectful dialogue may sound utopian—particularly given that Roger Caras, president of the American Society for the

Prevention of Cruelty to Animals, reacted to the *Hialeah* decision by calling Santeria a “voodoo-like religion” that “is not legitimate in the context of modern America.”³² But utopian ideals have a legitimate place in political discourse, and there are good pragmatic reasons to embrace this one. The alternative to dialogue and persuasion is the use of state power to coerce social change. That’s a much riskier program, as the next section argues.

II. The Limits of Criminal Law

In August 2007, Michael Vick, the African American starting quarterback for the Atlanta Falcons, pled guilty to federal charges of dogfighting. He was sentenced to twenty-three months in prison and agreed to pay \$928,000 for the care of some fifty-four dogs that were found on his property.³³ Professional dogfighting is a lucrative industry, attracting fans from a broad cross-section of American society, and it also seems to have become part of a subculture among professional athletes. Vick had ties with that subculture and was running a large dogfighting operation from his Virginia property. The Humane Society, which helped to build the case against Vick, saw the conviction of a star athlete as a way to draw attention to this growing industry’s particularly brutal mistreatment of dogs.³⁴

Predictably, public reaction to the case divided along racial lines. People for the Ethical Treatment of Animals (PETA) was among the most outspoken critics of Vick. The organization publicly called for a harsh prison sentence and suggested that a lifetime ban on all contact with animals would be an appropriate punishment—even after Vick successfully completed PETA’s own course on preventing animal cruelty. According to the PETA blog discussion of Vick’s case, “PETA believes that almost anyone can come to understand that animals are capable of suffering and deserve respect.” But “given the crimes Vick has admitted to, he needs to serve hard time and be banned from any contact with animals.” The blog item goes on to insist, “This is not a race issue. We don’t care if he’s orange. This is not a race issue. White people who fight dogs need to fry.”³⁵

PETA’s attempt to bracket the issue of race was doomed to fail. As I pointed out above, the charge of animal cruelty is an all-too-common way to establish a minority group as barbaric and un-American; it is one of the central practices by which we constitute racial difference. And the dogfighting controversy seemed to invite Vick’s critics to draw on a standard racist trope, the association of black men with bestiality. Claire Jean Kim describes several cartoons drawing on this tactic: “In one cartoon, Michael Vick is pictured next

to a fighting dog and the caption reads, ‘Pop Quiz: Find the True Animal.’ Many cartoons reversed the status of dogs and Vick. In one, a dog sitting curbside gives Vick the finger as the latter is driven away in a van labeled ‘Animal Control.’”³⁶ As Kim notes, the animalization of black people is a venerable Western tradition dating back to the 1500s and has served as one of the central strategies in establishing white supremacy. Given this history, it is naive at best to say that this issue doesn’t involve race.

African American leaders, sensitive to both the legitimate outrage over dogfighting and the racial dimension of the conflict, were ambivalent in their response. African American actor Whoopi Goldberg offered a hesitant defense of Vick, calling dogfighting “part of his cultural upbringing.” “Instead of just saying he is a beast and he’s a monster, this is a kid who comes from a culture where this is not questioned.”³⁷ (Indeed, PETA spokesman Dan Shannon said that before taking the PETA course, Vick seemed to be unaware of the scientific and biblical arguments against animal mistreatment.)³⁸ Michael Dyson argued that dogs are given greater respect than black men.³⁹ Dennis Hayes, interim president of the NAACP, would not exonerate Vick but sympathized with those who expressed support for him: “What we have to understand is the backdrop. We have to understand that what we’re hearing expressed by some African-Americans is their anger and their hurt, distrust, in a criminal justice system that they feel treats them as animals.”⁴⁰

The backdrop Hayes is referring to is not simply a subculture whose values differ from those of the majority. To be sure, this case does seem to involve real value conflict. Dogfighters often defend their practice by insisting that aggressive behavior is good and natural for dogs. This is partly a factual claim that can be argued on empirical grounds, but it also, arguably, is part of a larger set of beliefs about the nature of animals, the naturalness of cruelty and violence, and indeed about the meaning of “nature” itself. But, unlike the animal sacrifice case, in this case there are strong grounds for insisting that dogfighting violates the standards of decency embodied in our general animal welfare laws. Dogfighting involves the infliction of severe pain and suffering on dogs for no better reason than entertainment, and dogs subjected to this treatment do not flourish or live even minimally decent lives. A commitment to cultural pluralism does not require us to condone dogfighting.

But there is another backdrop that we have to consider before urging resort to criminal law to suppress this practice: a criminal justice system that is at best seriously compromised, and at worst hopelessly dysfunctional. The most striking feature of the American criminal justice system is that we incarcerate vastly more people than any other industrialized nation, with the

exception of Russia. Since 1973 (when the prison population was so low that experts were considering eliminating prisons altogether), the prison population has grown dramatically—increasing by 8 percent each year, to a rate of 648 persons per 100,000. By contrast, Finland incarcerates 56 persons per 100,000, and Italy is at 86 persons. Germany is on the high side, imprisoning 90 persons per 100,000. All of these countries have crime rates similar to ours, but we keep far more of our citizens in prison.⁴¹ In 2000, 6.47 million Americans were under penal oversight—in prison or on probation or parole.

But the rates for African Americans are far higher than those for whites. In 1993, the incarceration rate for African Americans was 1,895 per 100,000, compared to 293 per 100,000 for whites. By 2007, that rate had grown to 2,290 per 100,000 for African Americans, compared to 412 per 100,000 for whites.⁴² Although African Americans make up only 12 percent of the population, they supply over 50 percent of the prison population. Strikingly, 30 percent of African American men who do not attend college can expect to face jail time at some point. (The comparable figure for white noncollege men is 10 percent.)⁴³ These disparities cannot be explained by higher crime rates in African American communities. Although violent crime rates are higher among African Americans than they are among white Americans, convictions for violent crime have not been increasing dramatically. The disparity in incarceration is due largely to drug convictions: People of color are convicted of drug offenses at rates out of all proportion to their drug activity, which is roughly equal to that of other ethnic groups.⁴⁴ Such stark racial disparities have led one researcher to conclude that our criminal justice system is a “stunningly comprehensive and well-designed system of racialized social control that functions in a manner strikingly similar to Jim Crow.”⁴⁵

The growth in the prison population is largely due to changes in sentencing policy that were part of the federal “war on drugs,” which began in the 1980s. These changes included imposing mandatory prison sentences and longer sentences for relatively minor crimes—especially drug-related offenses.⁴⁶ The purpose of harsher sentences, one assumes, is to deter crime; presumably that is the principal rationale behind calls to increase penalties for animal abuse. But most of the social scientific evidence suggests that harsher sentences do not reduce crime rates. On the contrary, a recent study, after reviewing several decades of research on the subject, concluded that variation in sentence severity has *no effect* on levels of crime.⁴⁷

Increased sentencing severity does, however, have a dramatic effect on communities. Harsher sentences for animal abuse, for example, would likely fall the hardest on the same low-income minority communities that are currently

suffering disproportionate rates of imprisonment for drug crimes—not because they’re more likely to abuse animals but because these communities are heavily policed and people in them are less likely to have lawyers. Currently, 80 percent of criminal defendants are indigent, but funding for public defenders is extremely limited, and many defendants never meet with a lawyer at all. Moreover, nearly all criminal cases are resolved through plea bargains, and persons facing severe penalties are much more likely to accept a plea bargain even if they are innocent (and they certainly are more likely to do so if they cannot afford a lawyer!)⁴⁸ And accepting a plea bargain, even with limited jail time, can have serious consequences: Persons convicted of felonies often cannot vote, receive public benefits (including public housing), or get a license for a wide variety of professions. Parolees and probationers face a complex set of rules, violations of which can get them rearrested.⁴⁹ All of this makes it difficult for people convicted of felonies to be reintegrated into the community. The community often suffers from these inequities as well, as high rates of incarceration disrupt families and other social organizations. Whole communities can be destabilized by increases in incarceration rates.⁵⁰ There is little reason to believe that animal welfare would be better protected in such destabilized communities.

For these reasons, animal welfare advocates should be wary of expanding the reach of the criminal justice system in their quest to suppress practices like dogfighting. But there may be a deeper problem with relying on criminal penalties to create a culture conducive to animal welfare. Although, as I suggested above, there is real value conflict between the dog-fighters and their opponents, the conflict also involves problematic *shared* values: It is not hard to see the same notions of masculinity at play in both the practice of dogfighting and the PETA spokespersons’ savage denunciations of dogfighters. Both groups seem to be enacting an ideal that associates manliness with ritualized violence (dogfighting; trial and imprisonment). These rituals of violence may help to create communal bonds within their respective groups; perhaps some PETA members enjoy the same sense of bonding and group solidarity when facing off against dogfighters that dogfighters enjoy when watching a fight. But such rituals undermine broader communal bonds. Specifically, threatening dogfighters with imprisonment undermines communication and trust between animal welfare advocates and dogfighters, and it also threatens to disrupt the communities in which dogfighting goes on—the very communities that must be persuaded to adopt new and better practices. Animal welfare advocates may believe that calling for harsher criminal enforcement is the best way to express our social abhorrence of animal abuse and so express

the proper level of respect for animals' moral status.⁵¹ But resorting to the criminal justice system is divisive and threatens to weaken the very communal bonds that are the best protection for animal welfare.

If calling for increased criminal enforcement isn't the best response to a social practice like dogfighting, what is a better alternative? To begin, we must try to resist the frenzy of denunciation and take a clearer view of the practice and the people who engage in it. As Whoopi Goldberg was trying to suggest, we must at least aim for understanding before judgment. To be sure, dogfighting involves unjustified violence toward animals, but it isn't equivalent to the isolated, sadistic torture of animals. It is best understood as a form of poor, misguided animal husbandry. Michael Vick, for example, was raised in a community where dogfighting was common. (He witnessed his first fight when he was seven years old.) He became a licensed breeder and reportedly loved his dogs, even though he also admitted to some horrible acts of brutality. Such oddly mixed expressions of affection and pride for the dogs they are abusing are fairly common among dogfighters. My point is not to defend the practice but to suggest that it can contain the seeds of something worth preserving and building on. It appears, in Vick's case, to involve a desire on the part of this young African American man to be a member of a mixed human/animal community in the only way that seemed to be open to him.

This desire shouldn't be treated lightly; it has survived against remarkable odds. African Americans have a long and difficult history with dogs, which were used by members of the white ruling class before and after Emancipation to hunt down, torture, and kill fugitive slaves and other "troublemakers." Bloodhounds were, of course, bred for precisely that purpose. Indeed, Orlando Patterson suggests that blood sports were engrained in southern culture both because they were part of the Celtic culture of honor transmitted by the Scottish/Irish settlers and because they became an integral part of the culture of slavery.⁵² Dogfighting is undoubtedly a part of that troubled legacy.

But Alice Walker's perspective, as discussed in chapter 4, invites us to explore African American traditions more deeply and to consider how community with animals survived under such unfavorable conditions. She reports, for example, that she and her husband bought a dog when they moved to Mississippi to do civil rights work, in order to help protect their home from white violence. She also tells a story about civil rights activist Mrs. Hudson, who relied on a German shepherd as her sole protection against the Klan.⁵³ Dogs were not only members of southern rural African American communities; it seems the human/dog bond was part of the protective shield that *defended* those communities. And that devotion was returned—for

example, by victims of Katrina who refused to leave their dogs behind to drown in the flooding of New Orleans. This tradition of mutual care and protection is worth naming and reclaiming.

A defense of animal welfare that is sensitive to this history would sound very different from PETA's rhetoric of crime and punishment. It might instead go like this: Freedom includes the freedom to create and maintain healthy relationships with animals, although not the right to abuse them. These positive relationships are important in a mixed human/animal community not only because they enrich and protect our human lives but because they help to protect animals, who are among the most vulnerable members of the community. So our social policies should support, or at least not undermine, good practices of animal care and companionship as they arise in every subculture. Certainly in evaluating these practices, we must give due weight to the universalistic moral arguments offered by groups like PETA concerning the proper, respectful treatment of animals. But we must also attend to the social and political context in which these arguments are deployed, and avoid using them to undermine a social group's right to or capacity for animal husbandry. There is an indigenous tradition of animal husbandry, especially dog-keeping, in the African American community. If it overemphasizes violence as a result of our troubled history of race relations, that emphasis should be corrected. With proper attention placed on the social needs of dogs and their nonaggressive virtues, this tradition can serve as an important defense of the rights and welfare of our animal fellow-citizens and their human companions.

What would this defense of animal welfare mean for the Michael Vick case? At a minimum, it suggests that the proper law enforcement goal is Vick's rehabilitation as a dog owner.⁵⁴ Unfortunately for its proponents, the criminal justice system doesn't have a very good track record at rehabilitating offenders. A 2009 study suggests that being arrested and prosecuted merely increases the offenders' distrust of the criminal justice system. It does not typically lead them to take responsibility for their behavior or resolve to change it.⁵⁵ Thus far, the best rehabilitative model seems to be the drug court, a special court that promotes rehabilitation through court-ordered substance abuse treatment paired with intense judicial oversight, in which the judge can administer a range of sanctions short of incarceration. There is some evidence that this model does reduce recidivism in drug cases.⁵⁶ However, what works with drug offenders may not work with other kinds of offenders.

There are of course other alternatives to incarceration, and animal rights/welfare activists should fully explore them before urging imprisonment. Some

kinds of animal abuse (like animal hoarding and many cases of neglect) stem from mental health issues; offenders need treatment rather than imprisonment. People involved in dogfighting purely for profit shouldn't be treated as violent offenders, nor should the compulsive gambler. For these, too, probation under community-based supervision, involving treatment and community service, may be more appropriate than imprisonment.⁵⁷ The Humane Society and PETA, in their more reasonable moments, seem confident that education programs can help rehabilitate the casual or ignorant abuser. For the habitual violent offender, incarceration may remain the only alternative for the foreseeable future. But a truly effective response to animal abuse requires us to look beyond the criminal justice system. Instead, reformers are better advised to focus on programs aimed at public education, economic development, and community development—programs that can serve animal welfare *and* race and class relations simultaneously, rather than putting them into conflict. I discuss that approach in more detail below.

Unfortunately, the Vick case suggests that leading animal rights organizations like PETA are currently ill equipped to appreciate the racial dimension of animal welfare policy. That's not surprising; African Americans are underrepresented in all animal welfare organizations. A 2005 study found that of the thirteen organizations responding to the survey, eight had no African American employees, and African Americans made up only 4 percent of the total number of employees, with only 0.8 percent at the level of officers or managers. In no organization were more than 7 percent of the employees African American.⁵⁸ Under these circumstances, African Americans and other minorities concerned about their relationships with animals should consider creating their own animal welfare/animal rights organizations, with the aim of defending, elaborating, and publicizing their distinctive traditions of animal husbandry.

None of this is intended to suggest dogfighting should be legal or that Michael Vick should not have been prosecuted for his role in the dogfighting operation (although I don't think jail time was necessarily the right response). Nor am I arguing that we should decriminalize animal abuse altogether. My point here is more limited: When we rely too heavily on the criminal justice system to deal with a widespread practice like dogfighting, we risk deepening racial and class inequalities and disrupting communities without accomplishing any positive gains for animal welfare. A better response to the growth of the dogfighting industry is a creative, community-building approach that focuses on education, organization, and reforming existing practices. I doubt any experienced animal welfare/rights advocate would disagree with that

conclusion, of course; most of these organizations are heavily invested in such programs. But many of these organizations are also enthusiastically pursuing more extensive and severe criminal penalties. For example, the Humane Society, in addition to urging increasing the severity of penalties for dogfighting and trying to criminalize animal sacrifice, has sponsored campaigns to criminalize Internet and captive-animal hunting, the slaughter of horses for human consumption, and "crush" videos (videos of small animals being tortured—an appalling form of entertainment but one that is probably protected by the First Amendment). These practices may well be morally objectionable, but the punitive approach to ending them can have negative consequences for civil liberties and racial and class equality—and, consequently, for animal welfare. Instead, reformers should favor an agenda that brings human and nonhuman interests into closer alignment, thus improving our ability to protect vulnerable humans and nonhumans alike. The next section explores that possibility.

III. Protecting the Vulnerable

To be fair, the Humane Society is usually at the forefront of efforts to advance human and animal welfare simultaneously. Indeed, the organization grew out of the intersection of animal and child abuse. Its history begins, famously, with the story of Mary Ellen Wilson. Mary Ellen was ten years old in 1874, when she was rescued from the home of Mary Connolly by the American Society for the Prevention of Cruelty to Animals (ASPCA). The Connolly family had been keeping the girl prisoner in a dark, cramped tenement and subjecting her to severe beatings. Eventually, rumors of the girl's situation came to the attention of mission worker Etta Wheeler, who tried to get help from her church, from local charities, and from the police. But the charities explained that they had no authority to enter a private residence. The police needed evidence of abuse, not hearsay. In desperation, she turned to the ASPCA, which was happy to help. Mrs. Wheeler found several neighbors who could testify to the girl's abuse, and that was enough for ASPCA director Henry Bergh. On April 9, 1874, an ASPCA agent entered the Connolly's home and carried Mary Ellen to the chambers of a New York Supreme Court judge. The subsequent prosecution of Mary Connolly for assault and battery earned her a year in prison. But the other notable result of the case was the creation, by Henry Bergh and Elbridge Gerry, of the New York Society for the Prevention of Cruelty to Children. This organization prompted the creation of the first Humane Societies, devoted to the welfare of both animals and children.⁵⁹

The advantage of linking child protection to animal protection was that animal protection societies were unique among the reform and charity groups of the day: They had investigative and prosecutorial powers. Although there was a state law against child abuse, the police were often reluctant to get involved with domestic relations. But animal welfare activists did so routinely. Their agents were trained to enter homes, investigate, and prosecute violations of the animal welfare laws. Their power to penetrate the curtain of domestic privacy made them well positioned to address other kinds of domestic abuse. Thus child protection groups adopted the organizational models and some of the statutory precedents of animal protection.⁶⁰ Historian Susan Pearson argues further that the ASPCA's talk of animal rights—rights that are held by dependent, nonrational beings—helped to lay the foundation for the concept of children's rights and to support the view that the state has a duty to protect the welfare of children.⁶¹ In short, creating institutions and laws to protect animal welfare thus resulted in institutions and laws aimed at protecting vulnerable humans.

To be sure, the Humane Societies aimed to protect children, in part, by extending the reach of the criminal justice system—precisely the strategy I criticized above. But I think this story is only superficially about criminal justice. The work of the Humane Societies cannot be reduced to simply putting more people in jail. The reason the ASPCA was well positioned to help Mary Ellen Wilson was that it had developed investigative expertise and organizational capacity that other reform societies didn't have. Contemporary humane societies continue in that tradition, developing community-based programs that range from running animal shelters and mobile veterinary clinics, providing disaster relief for animals, running wildlife rehabilitation centers, working with corporations to adopt animal-friendly policies, organizing pet adoption programs, and engaging in an array of public education initiatives. Thus many of its programs are aimed not at punishing animal mistreatment but at making it easier for people to take care of animals, supporting and promoting mutually beneficial animal/humans relationships, and strengthening the human/animal community. Reform efforts aimed at this goal—improving our social capacity to protect the vulnerable and support the flourishing of all members of the community—harmonize animal and human interests rather than promoting one at the expense of the other.

A good example of this approach is taking shape among people concerned about domestic violence. An increasing number of animal welfare and domestic violence workers are recognizing that cruelty to animals is often part of a pattern of domestic abuse. Abusers of spouses and children often include the

family pets among their victims, or threaten or torture a victim's pet as a way to control the human victim. In one study, 52 percent of the battered women reported that their partners had threatened their pets (compared to 16.7 percent of nonbattered women). And 54 percent of the battered women reported that their partners had actually hurt or killed the pet (compared to 3.5 percent of nonbattered women). The same study suggested that abusing pets inflicted emotional trauma on the woman and children in the home and that concern for the pet's safety often delayed the decision to leave the home. This suggests that domestic violence may be best addressed in conjunction with efforts to address animal abuse.⁶²

Accordingly, the Humane Society launched its "First Strike" program in 1997 to facilitate coordinated approaches to domestic violence.⁶³ The HSUS recommends providing for pets at shelters, allowing animals to be included in protection orders, developing reporting systems that help animal welfare investigators notify police or social services of animal abuse or neglect, adopting interagency protocols for dealing with domestic and animal abuse, cross-training, and pursuing coordinated intervention strategies that involve animal control agencies. These institutional changes can increase the capacity of law enforcement and social service agencies to protect vulnerable humans and nonhumans in domestic situations.

Importantly, however, such reforms must go well beyond improving the coercive power of the state. Domestic violence is often shockingly cruel and offers some of the best candidates for imprisonment. But even in this domain, imprisoning offenders is a small part of addressing the problem. Domestic violence is often rooted in socioeconomic stressors, in problematic gender ideologies, in women's lack of opportunity and earning power outside the home, in mental health and substance abuse issues, in lack of community support for families—all problems that call for programs aimed at public education and community development rather than improved criminal enforcement. As scholar Claire Renzetti explains, much domestic violence is the result of weak or dysfunctional communities. Changing those community contexts may include investing resources in making neighborhoods afflicted with high abuse rates more livable and stable, improving relationships with the police, and improving coordination and provision of social services (especially during recessions).⁶⁴ And in pursuing these broader goals of community stabilization and development, we necessarily turn to the noncoercive power of the state, the power to provide resources and facilitate collective action. The same is true of efforts to improve animal welfare. Once we conceptualize our goal more broadly—not as prohibiting

mistreatment but as increasing our social capacity to protect vulnerable members of the community and to help them flourish—it becomes clear that these creative, facilitative state powers are more central to our project than state coercion is.

Unfortunately, the creative powers of the state have not received much attention in liberal political theory. As I've suggested above, liberal theorists have traditionally taken as their central task justifying coercive state power, and particularly criminal sanctions like imprisonment. Such coercive state action does require strong justification in a liberal state, but the modern state's noncoercive powers arguably are more pervasive and can have a significant *positive* impact on individual liberty. These powers include, for example, providing social services or funding civic organizations that do so, gathering data and making it publicly available, identifying and certifying "best practices," creating guidelines for government purchases, making changes to regulatory laws in order to make it easier for civic organizations to carry out their work, bringing together different civic actors on public commissions and the like to facilitate coordination, and making official statements of public values. The original federal Humane Slaughter Act, passed in 1958, is an example of this power: The federal government, reluctant to intrude on traditional state powers, did not actually prohibit nonhumane methods of slaughter. Rather, it specified that the federal government would buy meat only from slaughterhouses that complied with the Act, and it declared that humane slaughter is the public policy of the United States. The government thus used its purchasing power and legitimacy to shape industry practice, which made the expansion of the Act to all federally inspected slaughterhouses in 1978 much less controversial.⁶⁵ Even the bare statement of public policy was significant, because such policy statements could be used by courts to justify interpreting other laws to support that value (to conclude, for example, that protecting animal welfare is a compelling government interest).

To be sure, some of these powers (like the provision of social services) rest on the power to tax, which is backed by the state's coercive power. But as I argued in chapter 2, spending tax dollars is considerably less of an assault on individual autonomy than being subject to imprisonment or even heavily fined. Indeed, what is significant for liberal theorists about these powers is that their use can greatly *facilitate* individual liberty. By supporting stronger communities, animal-friendly workplaces, and more functional families, such policies can help to create a public culture that supports animal companionship and offers many opportunities for individuals to develop their capacities to take care of animals.

IV. Conclusion

Even the most compassionate liberal state cannot by itself create a supportive animal welfare society. It must work in partnership with a vibrant, active, and diverse civil society that provides individuals with the collective goods necessary to conceive and pursue a better, richer vision of the good life. This point returns us to the value of cultural diversity. Cultural development depends, in part, on generating new ideas, practices, and institutions. Diversity among the civic associations involved in animal welfare issues can help to produce this creativity. As innovative as the Humane Society has been, its efforts surely would be complemented by an animal welfare association that reflected, for example, the spiritual views of Santeria or the historical perspective and experiences of African Americans.

A preference for cultural diversity gives us another reason to favor the creative powers of the state, which can do a great deal to promote a more diverse array of civic associations. In contrast, expanding the coercive power of the state can create a hostile environment in which minority cultures are marginalized and cultural differences are suppressed. For example, imagine the consequences of banning animal sacrifice. Such a ban would be extremely difficult to enforce and would undoubtedly create tensions between the Cuban immigrant community and the broader public. Practitioners of Santeria might take their practices underground, thus becoming more isolated from the rest of the community. The resulting climate of hostility and distrust would make it very difficult for animal welfare organizations to work with this community to regulate or modify the practice. Animal welfare is unlikely to be enhanced under these conditions. In contrast, helping a cultural institution like the Santeria church to prosper—through tax breaks, accommodating zoning ordinances, and the like—could strengthen the Cuban immigrant community. A strong Santeria church would give animal welfare advocates a partner to work with in addressing animal welfare issues in that community. And Santeria priests are likely to have better ideas about how to address these issues than outsiders would.

In sum, the liberal state's coercive powers can play only a limited role in moving us toward a better, more fully realized animal welfare society. The limits of the liberal state, the fact and value of cultural pluralism, and the persistent inequities in our criminal justice system all should lead us to disfavor reliance on criminal prohibitions to improve protection for animal welfare. Indeed, focusing on criminal law betrays far too narrow a conception of the progressive goals of the animal welfare/rights movement: to create a

more humane society where humans and nonhumans can flourish together. The liberal state cannot force its citizens to conform to a particular ideal conception of that society. It can, however, promote the conditions for progress toward such an ideal, namely, a healthy and culturally diverse civil society. For all the emphasis on laws and government institutions in this book, the fact remains that civil society is the principal sphere in which different conceptions of mixed human/animal community are developed, proposed, and debated and new institutional and social practices are invented. It is not the liberal state but liberal citizens, acting together in the vast array of community, professional, educational, religious, and advocacy organizations, that will provide the creative energy needed to guide the evolution of human/animal relations.

Conclusion

The animal kingdom turns out to be at the heart of the contemporary debate on the relationship between man and nature.

—LUC FERRY, *The New Ecological Order*

ONE OF THE paradoxes I have discovered while writing this book is that everyone is interested in animals but no one thinks they're important. More precisely, despite the size and complexity of our animal governance apparatus, political scientists and political philosophers have devoted very little attention to how and why we govern animals. It should be clear by now that I think that's a mistake; animals are interesting and important enough in their own right to warrant scholarly attention, quite apart from their contribution to human well-being. Many of the animals we live with are sentient, intelligent beings that make moral demands on us every day. Why shouldn't our studies of politics attend to them as well?

But one can also defend such attention on the grounds that animals and humans are so interdependent that one can't govern a political community humanely and justly without attending to its animal members. Indeed, shifting our scholarly focus from humans to animals should give us a new perspective on government and on our political values. As Luc Ferry has argued, animals are central to our relationship with the natural world; they occupy the critical space between human and nonhuman nature. Thinking about how we govern animals is a good way to approach the complex relationship between the human community and the biotic community. In short, a study like this one should offer insights into how we can better care for the welfare of animals just for their own sakes, but it should also help us better govern humans and our natural environment. Toward those dual ends, this chapter offers some conclusions about the future of the animal rights movement and the future of liberalism.