ARTICLE

SUBJECT OF A DEATH

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Tom Regan, a leading animal rights philosopher, stood firmly on the "rights" side of the "rights"/"welfare" divide in much of his writing. By contrast, a different philosopher, Peter Singer, has taken the position that individuals have no rights; the moral imperative is to maximize welfare along whatever dimension (hedonic, preference, etc.) is appropriate. In the second memorial lecture in Regan's honor, reproduced here, along with questions and answers, as an Article, Colb argues that despite their many differences, Regan and Singer share something found in the writing of most animal protection advocates—the view that although animals are entitled to moral consideration, humans are entitled to much more than animals are. This Article asks why theorists so often feel the need to make this declaration and explains why it is destructive even when it seems relatively innocuous (such as when it appears in the context of an unrealistic hypothetical scenario). Colb proposes the substitution of sentience for both "subject of a life" (Regan's formulation) and what Singer designates as the capacity to conceive of oneself over time. Sentience, the great equalizer among animals, is also the only relevant criterion when the rights or privileges in question revolve around the interest in being free from suffering and death.

I am very grateful for the chance to celebrate with you Tom Regan's life and work. I got to know Professor Regan a little when he gave an informal keynote address at a "Thanksgiving for the Turkeys" celebration. This was my first one, and Regan approached the podium and began telling the following story. A man went to confession and sat down across the partition from the priest.[1] The penitent said nothing, just sat in his seat

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1 Tom Regan, Keynote Address at the Farm Sanctuary Celebration for the Turkeys (Nov. 21, 2009) [hereinafter Regan, Keynote Address].

silently for what felt like a long time.[2] The priest, not wanting to rush the man but wondering what was going on, finally knocked on the partition.[3] "Sorry," said the man on the other side, "no toilet paper here either."[4]

The story had no connection to animal rights or to Thanksgiving, and that's part of what made it irreverent and fun, and that seems like a fitting snapshot of Tom Regan. Beyond his sense of humor, one of Regan's many important achievements was to explain why not only human beings but also animals are entitled to rights protection. He explained that rights belong to all "subjects of a life," and he thereby offered an alternative to Peter Singer's utilitarianism as an avenue to protecting animals' interests.[5] Rights-based theorists could thus remain in that camp while extending moral consideration to animals.

My approach to honoring great work is to point out how it might be even better. In the tradition of admiring our betters by offering a critique of their ideas, I want to talk today about something that we find in both Tom Regan's and Peter Singer's work: a hierarchy among animals. Regan calls those animals who qualify for rights "subjects of a life."[6] I named my talk for today "subject of a death" because one of the rights that Regan grants qualifying animals is the right to live free of humans' lethal exploitation.[7] So animals have moral status, but they exist in a hierarchy.

What do I mean by a hierarchy among the animals? George Orwell said in *Animal Farm* that "all animals are equal, but some animals are more equal than others."[8] The two main theorists of the Twentieth Century who demanded moral consideration for animals were Peter Singer and Tom Regan. Others have followed in their footsteps and made refinements, but the two of them were and are important pioneers.

Singer is a utilitarian, so he weighs the harm against the good consequences of a proposed action to determine its moral

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2 *Id.*

3 *Id.*

4 *Id.*

5 TOM REGAN, THE CASE FOR ANIMAL RIGHTS 243, 266–329 (2d ed. 2004) [hereinafter THE CASE].

6 *Id.* at 243.

7 *See* Tom Regan, *The Moral Basis of Vegetarianism*, CANADIAN J. PHIL. 181, 205–212 (Oct. 1975), http://www.animal-rights-library.com/texts-m/regan01.pdf [https://perma.cc/F3LN-8BJ7] (arguing that any arguments in favor of humans having a right to life also apply to animals).

8 GEORGE ORWELL, ANIMAL FARM 112 (1994).

import.[9] He pointed out that in calculating the greatest good for the greatest number, we should include the suffering and joy of nonhuman animals.[10] In *Animal Liberation*, Singer documented the torture that billions of animals endure in the food industry.[11]

Regan explained his views in *The Case for Animal Rights*[12] and later in *Empty Cages*.[13] In his work, Regan praised Singer for including animals in the community.[14] Most utilitarians, as you know, consider only human experiences. Regan went on, however, to identify some general problems with utilitarianism that he thought extended to the utilitarian approach to animals.[15] I hardly need to review the problems for this audience. One well known difficulty is that you could, in theory, attack and kill one animal (or one human) to provide needed organs to five or six other animals (or humans). Regan, like other deontologists, regarded this result as counterintuitive—there is something sacred about the individual, whether he is human or nonhuman, and no one should hurt or kill one to accomplish some greater good for others.[16] This idea explains why nonconsensual human experimentation became a violation of international law after World War II,[17] and it is why we require consent for organ donation.[18] It is also why we absolutely prohibit slavery, rather

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9 *Peter Singer*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Peter-Singer [https://perma.cc/2JCS-U9VV].

10 *See* PETER SINGER, ANIMAL LIBERATION 26–30, 185 (3d ed. 2015) ("If a being suffers there can be no moral justification for refusing to take that suffering into consideration. No matter what the nature of the being, the principle of equality require that its suffering be counted be counted equally with the like suffering—insofar as rough comparisons can be made—of any other being.").

11 *See id.* at 153 (detailing the poor conditions animals experience on factory farms).

12 *See generally* REGAN, *supra* note 5 (describing Regan's theory that non-human animals who are "subjects of a life" have rights).

13 *See generally* TOM REGAN, EMPTY CAGES (2004) (explaining the concept of animal rights and how industries violate the rights of animals).

14 REGAN, *supra* note 5, at 219.

15 *Id.* at 226–41.

16 *See id.* (describing why utilitarianism can produce counterintuitive and inequitable results).

17 *See, e.g.*, *Nuremberg Code*, U.S. HOLOCAUST MEMORIAL MUSEUM, https://www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/doctors-trial/nuremberg-code [https://perma.cc/4DGQ-82B6] (last visited May 16, 2020) (describing the creation of the Nuremberg Code as the result of nonconsensual human experimentation after World War II).

18 *See, e.g.*, *General Information on Organ, Eye and Tissue Donation*, N.Y. STATE DONATE LIFE REGISTRY, https://donatelife.ny.gov/about-donation/

than subjecting it to a balancing test of how much the slaveholder would gain versus how much the slave would lose.[19] Regan explained that rights are trumps—an expression that probably sounded very different to him from how it sounds to us now.[20]

Regan meant that your body belongs to you. No matter how much someone else wants or needs to use your body for some higher purpose, you get to decide. And that is true even if someone else will die without the use of your body, and you would live either way. So it is an absolute sort of right. Well, it isn't exactly absolute. The government can conscript people into the military.[21] But for the most part, you get to direct the use of your body in the way you see fit, so long as in doing so, you don't substantially infringe upon anyone else's interests.

Virtually everything that humans do when it comes to animals violates their right to decide what will happen to their bodies. We capture animals who were previously free, and we breed others into a confined existence from birth. We mutilate animals by castrating them or removing other parts of their bodies to make them easier for us to manage or their flesh more palatable.[22] We separate baby and adult animals from their family members, including infants and mothers as on dairy farms, family and factory alike, even as the animals bellow to each other and try so hard to reunite.[23] When one of a bonded pair manages to escape, she will sometimes run miles and miles to return to her beloved parent or child.[24] We violate those bonds and the individual wills of each of the animals

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[https://perma.cc/WWS8-3JSK] (last visited May 16, 2020) (noting that any New Yorker wishing to donate organs must "sign[] up as an organ and tissue donor").

19 *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

20 REGAN, *supra* note 5, at xxviii.

21 *See* U.S. CONST. art I, § 8, cl. 12 (giving Congress the authority to "raise and support" troops).

22 *E.g.*, *Castration*, BEEF CATTLE RESEARCH COUNCIL (Oct. 28, 2019), http://www.beefresearch.ca/research-topic.cfm/castration-67 [https://perma.cc/S4JE-NJXX].

23 University of Veterinary Medicine, Vienna, *Early Separation of Cow and Calf Has Long-Term Effects on Social Behavior*, SCIENCEDAILY (Apr. 28, 2015), www.sciencedaily.com/releases/2015/04/150428081801.htm [https://perma.cc/8P7Z-T6Q6].

24 *See, e.g.*, Ameena Schelling, *Devastated Mother Cow Chases Truck Taking Her Baby Away*, THE DODO (Sept. 21, 2015), https://www.thedodo.com/mother-cow-chases-baby-1360693533.html [https://perma.cc/8UPX-JLP5] (describing a cow running after a truck taking her calf away while the calf cried out to her).

when we consume dairy. Regan and Singer were both conscious of this cruelty, though Regan thought about it as a matter of individual entitlement—not bigger cages but empty cages.[25]

Neither Singer nor Regan, however, treated all animals as equal to one another. Each elevated humans over nonhumans. How do we know that? For Singer, all sentient beings are entitled to be free of the suffering we inflict upon them for an inferior interest.[26] If I torture a cow, and all I get out of it is pleasure from eating cow flesh instead of Beyond Burgers, then I act immorally. For purposes of evaluating the moral weight of suffering, Singer treats all sentient animals equally.[27] My suffering a certain amount is neither more nor less important than another human or another animal suffering that same amount.[28]

But Singer's treatment of the interest in life differs from his treatment of the interest in avoiding suffering.[29] How does Singer go about allocating the interest in life? Singer does not extend the same egalitarian approach to life that he does to freedom from suffering.[30] To qualify for personhood, for a serious interest in life, an individual must be the sort of creature that can experience herself as a continuous consciousness over time.[31] Singer has expressed the view that normal humans, Great Apes, and maybe elephants, whales, and dolphins have the intelligence to qualify in this way for keeping their lives.[32] Other animals, according to Singer, do

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25 *See generally* REGAN, *supra* note 13 (arguing that animals have absolute rights and that the animal-agriculture industry violates these rights even when it claims to treat animals humanely).

26 *See* SINGER, *supra* note 10, at 30 ("No matter what the nature of the being, the principle of equality requires that its suffering be counted equally with the like suffering—insofar as rough comparisons can be made—of any other being.").

27 *Id.*

28 *Id.*

29 *See id.* at 37–40 (asserting that "[t]he wrongness of killing a being is more complicated" than the wrongness of inflicting suffering upon a being, and finding that killing certain animals may be permissible as long as the number of animals killed does not exceed the number of animals born).

30 *See id.* at 232 (arguing that "for a being capable of having desires for the future there may be something particularly bad about being killed. . . . [b]ut in the absence of some form of mental continuity it is not easy to explain why the loss to the animal killed is not, from an impartial point of view, made good by the creation of a new animal who will lead an equally pleasant life").

31 *Id.* at 53, 329.

32 *Id.* at 52–53; Peter Singer, *Great Apes Deserve Life, Liberty and the Prohibition of Torture*, GUARDIAN, (May 26, 2006, 7:03 PM), https://www.theguardian.com/commentisfree/2006/may/27/comment.animal

not.[33] They experience things right now but do not connect mentally with their having had various experiences over time.[34]

The capacity to perceive oneself as one being over time, on this account, is what would morally entitle a living being to avoid dying between time 1 and time 2.

For anyone who hasn't thought that much about continuing consciousness (and I suspect I now refer to a null set in this audience), imagine that a particular animal has no memories of the past and no ability to think about and plan for the future. If this animal bites a different animal and gets scratched in return, he will have no recollection of being scratched and will therefore go back to the same animal and bite him again tomorrow, with no fear of repercussions. If he looks down the street and sees a life-threatening situation, he isn't able to choose a different path as a means of protecting his life, because he cannot remember the past and plan for the future.

If I cannot extend my mental life either backwards or forwards in time, then I am perhaps not the same person as I was yesterday or as I will be tomorrow. I may occupy the same body, but I am otherwise a distinct individual. I do not try to protect future me, and I do not feel self-empathy for past me. Singer believes this means that if someone comes along and painlessly kills me and then replaces me with someone who enjoys life as much as I did, then that someone would have done just about nothing wrong.[35] If I cannot in any way perceive that my existence continues beyond the present into the future, then present "I" has no interest in ensuring that future "I" will exist, any more than present "I" has an interest in ensuring that some other person will exist in the future. In the language of the law, I lack standing to assert the right to exist of future "me." I have no personal interest in the continuing life of someone I neither know nor feel in any way connected to.

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welfare [https://perma.cc/2LG4-9E4C].

33 *See* SINGER, *supra* note 10, at 40 ("[W]e could still hold, for instance, that it is worse to kill a normal adult human, with a capacity for self-awareness and the ability to plan for the future and have meaningful relations with others, than it is to kill a mouse, which presumably does not share all of these characteristics. . . .").

34 *Id.* at 40–41.

35 *See id.* at 232 ("But in the absence of some form of mental continuity it is not easy to explain why the loss to the animal killed is not, from an impartial point of view, made good by the creation of a new animal who will lead an equally pleasant life.").

We can put aside the notion that such mental continuity is required to have any moral entitlements at all. Singer does not hold that view.[36] If someone is capable of feeling pleasure and pain—the fulfillment and the frustration of preferences, then she has an interest in avoiding pain and frustration and in experiencing pleasure and fulfillment right now. If someone else comes along and inflicts pain and misery on her, then that someone harms her. And he harms her regardless of how well she can later remember the harm that she experienced or of how well she could have anticipated the harm that she endured and perceived it as belonging to her.

Regan's approach is different from Singer's. For Regan, a being has to be a "subject of a life" to have rights, but being such a subject requires only a rudimentary amount of cognitive capacity.[37] He hypothesized that mammals of one year of age and older qualify for rights under this criterion and that maybe many other animals do too.[38] At Thanksgiving for the Turkeys, he spoke of our friends of "fur, feather, and fin," so he apparently thought that at least mammals, birds, and fishes were subjects of a life.[39]

It is also clear that Regan did not buy into Singer's idea that we could ethically replace most animals as mere vessels of utility. So Regan's view was more animal-friendly in this sense. Still, much like Singer, Regan concluded that qualifying for moral consideration or rights did not mean that one was equal to all others who qualified. Singer, as I said, believes that sentient beings who do not perceive themselves as one being over time could be ethically slaughtered.[40]

Regan's hierarchy among subjects of a life came up in triage situations. If four humans and a dog found themselves on a lifeboat and one had to drown to prevent the boat from

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36 *See id.* at 39 (arguing that we should consider the suffering of all animals capable of experiencing suffering, even if they do not have such mental continuity).

37 *See* REGAN, *supra* note 5, at 243 ("[I]ndividuals are subjects-of-a-life if they have beliefs and desires; perceptions, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference- and welfare-interests; the ability to initiate action in pursuit of their desires and goals; a psychophysical identity over time; and an individual welfare in the sense that their experiental [sic] life fares well or ill for them. . . ."); *id.* at 244 (describing how both moral agents and moral patients, like young children, are subjects-of-a-life).

38 *Id.* at xvi.

39 Regan, Keynote Address, *supra* note 1.

40 *See supra* notes 23–24 and accompanying text.

sinking, it would be the dog who would have to drown.[41] The reason for the choice is that a human can enjoy more opportunities for satisfaction than a dog, and his life therefore holds greater intrinsic value. Regan went on to say, moreover, that even if the lifeboat held a million dogs and four humans, which sounds like a pretty awesome lifeboat, the right thing would be to throw the million dogs overboard rather than touch any of the four humans. This sounds like Regan was saying that humans are infinitely more valuable than dogs.

One possible response to Regan's hierarchy is to say that the circumstances in which we must distinguish between the equal animals and the animals who are more equal than others are purely theoretical and therefore irrelevant to our lives. There are no situations in which it is necessary for a million nonhuman animals to die in order to avoid the death of four humans. Or are there?

People who experiment on animals to find medical cures would characterize their own work as a lifeboat situation, though Regan rejected this characterization.[42] If we experiment on many, many mice, rats, rabbits, cats, dogs, and monkeys, we may discover cures for diseases that take countless lives.[43] The ratio of laboratory animals to numbers of humans saved might actually be lower than a million-to-four. Animal experiments in theory offer the potential for saving a large number of human lives.[44] There are, to be sure, alternative methods of study.[45]

Yet people who believe in animal rights—including Regan—reject animal experimentation.[46] In fact, some people who eat animals and animal products stigmatize animal experimentation. Mark Twain was such an individual.[47] He said he did not care whether vivisection helped save humans, and proof of its efficacy would in no way alter his opposition to

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41 *See* REGAN, *supra* note 5, at 352.

42 *Id.* at xxxi.

43 *Animal Research Continues to Save Lives*, NAT'L ASS'N BIOMEDICAL RES., https://www.nabr.org/animal-research-into-the-worlds-five-deadliest-diseases/ [https://perma.cc/N6DZ-EVVL] (last visited May 16, 2020).

44 *Id.*

45 *Alternatives to Animal Testing*, NAT'L INST. OF ENVTL. HEALTH SCI., https://www.niehs.nih.gov/health/topics/science/sya-iccvam/index.cfm [https://perma.cc/G9PA-GT7Z] (last visited May 16, 2020).

46 *Id.*

47 Letter from Mark Twain to London Anti-Vivisection Society (May 25, 1899), http://www.twainquotes.com/Vivisection.html [https://perma.cc/VK2D-8GQ5].

it.[48] So what is the difference between experimentation and throwing 1 million dogs off the lifeboat?

One distinction is between using another living being as a means, on the one hand, and simply killing or failing to rescue someone in a triage situation, on the other. Imagine that when a prisoner seems especially violent and unlikely to change, we administer terminal anesthesia and take his organs for harvesting. That punishment, rather than simply acting as retribution, exploits the body of the condemned for the good of other people. Many of us, and certainly Regan, would have the intuition that such conduct is wrong.

Imagine now that a building is burning, and the violent prisoner and a kind philosophy professor are both inside the building. Most of us would have no problem with the firefighter who can save only one of the two people rescuing the kind philosophy professor. That is because in triage situations, we permit many criteria for rescue that we would never tolerate for exploitation. You might save your own baby if a building were on fire, but you would not—and neither the law nor most conceptions of morality would permit you to—kill other babies in order to provide organs to yours.

The famous trolley problem brings out these two intuitions. As everyone here knows, the trolley is coming down a track, about to kill five people. You can make the trolley switch tracks so that it kills only one (different) person and saves the five previously in its path. Most people think it is right to throw the switch. If the same trolley is coming down the first track, however, and you can save the five people by pushing the famous fat man off a bridge that overlooks the tracks, people tend to say that such an act would be wrong.[49] Some critics have argued that there is no coherent distinction between the two examples, so that people who distinguish them are simply reacting to how "up close and personal" the fat man is.[50] And if that's true, the critics are right—there is

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48 *Id.*

49 Robert Herritt, *Would You Kill the Fat Man? And Other Conundrums*, DAILY BEAST, (Dec. 6, 2013, 5:30 PM), https://www.thedailybeast.com/would-you-kill-the-fat-man-and-other-conundrums [https://perma.cc/RNV5-VMX3].

50 *Cf.* Laura D'Olimpio, *The Trolley Dilemma, Would You Kill One Person to Save Five?*, CONVERSATION (June 2, 2016, 9:12 PM), http://theconversation.com/the-trolley-dilemma-would-you-kill-one-person-to-save-five-57111 [https://perma.cc/VRQ9-AXP6] (describing research by neuroscientists showing that "when we consider pushing the bystander, our emotional reasoning becomes involved and we therefore *feel* differently about killing one in order to save five" and asking, "are our emotions in this instance

no moral distinction between inflicting death up close and doing so from a distance.

As Dave Grossman has said, it is psychologically much easier to kill from far away than it is to kill someone nearby with your bare hands.[51] It is ironic, I suppose, that when the U.S. dropped the "Fat Man" over the Japanese city of Nagasaki, the people who did it rejoiced and seemingly felt little distress.[52] Unlike the fat man shoved over the hypothetical bridge, the nuclear weapon headed for Japanese civilians from a great distance, maybe diffusing remorse and even sadness on the part of those who incinerated the inhabitants of a city.

Evolution has not kept pace with technology. As a result, our feelings distinguish based on a victim's proximity even when this variable is morally irrelevant. Someone might be happy to order a leg of lamb but feel unable to slaughter a lamb herself. Yet the critique of the trolley problem as offering a distinction without a difference is, I think, unfair.

What properly distinguishes the two scenarios for deontologists like Regan (and me) is the fact that in one but not the other, the subject is using one individual to save five others. Throwing the fat man over the bridge so he will block the train literally uses his body as a kind of brake to rescue the other people. We can fairly characterize switching tracks, on the other hand, as effectively swerving a car to avoid five people with the undesired but known result of killing one. Under the doctrine of double effect, it may under some circumstances be permissible to knowingly bring about a death even when it would be impermissible to cause it on purpose.[53]

Could Regan rely on this distinction as a reason for condoning the lifeboat killing of a dog (or a million dogs) even as he condemned animal experiments? I don't think so, not really, although he tried.

The lifeboat scenario is really something in between pure

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leading us to the correct action?").

51 DAVE GROSSMAN, *Killing and Physical Distance*, *in* ON KILLING 97, 98 (2009).

52 *Cf.* Interview by Renee Garrelick with Charles W. Sweeney, Major General, U.S. Air Force (Nov. 30, 1998), https://concordlibrary.org/uploads/scollect/OH_Texts/Sweeney.html [https://perma.cc/DDC5-5F3W] (interview with commander of Nagasaki mission, in which the commander contests assertions that the mission was "too mean," mentions how he got his crew's "adrenaline going," describes how, after dropping the bomb, he thought that it might have ended the war, and expresses no remorse about the mission).

53 Herritt, *supra* note 49.

exploitation and dispatching a threat. The humans are not using the body of the dog or whoever else gets thrown off the lifeboat. They are stopping the dog from sinking their boat; in that sense we might say that the dog poses a threat to the humans by his weight, and the humans are defending themselves. On the other hand, the dog is not truly threatening the humans in the way that an aggressor does. The humans' weight poses the same threat to the dog as his poses to the humans. And importantly, under the law, it is not clear that you are allowed to throw people off a lifeboat in order to keep it from sinking. One might try to argue something called a necessity defense for throwing someone off the boat, but it is not obvious that the defense would work. So the law may reject the idea that fellow lifeboat passengers are aggressors. And the decision to throw fellow lifeboat passengers into the water where they will drown would surely make the throwers aggressors.

Another distinction between the lifeboat and self-defense is the addition of the 1 million dogs in Regan's statement. Even if we treat the lifeboat as a triage situation, the level of triage that elevates the humans, whoever they might be, over a million dogs is arguably different not only in degree but in kind from choosing one human over one dog. The hierarchy is such that we completely subordinate the interests of the dogs in their own lives (their intrinsic value) to the interests of any one normal adult human being. Killing a million dogs in order to keep one human alive really doesn't feel very different in a lifeboat versus in a laboratory. That is evident from the very unreality of a lifeboat holding a million and four large mammals. It is purely a thought experiment aimed at showing that there is no number of dogs that can ever equal one human, and that is the value judgment that underlies not only animal experimentation but all animal exploitation. Just imagine if someone said that not only should you save a magician, rather than an accountant, from a burning building, but you should also allow all the accountants in the world to burn to death rather than allowing even one magician to do so. Such a statement means you do not much value the lives of accountants, and that in turn paves the way for exploiting such people for their body parts, even if it does not expressly endorse such exploitation.

Regan strongly opposed the exploitation of animals, even for the sake of finding a cure for human disease. But he had a blind spot, I think. He considered nonhuman animals to

have so much less intrinsic value than humans that a head-to-head contest on who lives would infinitely favor the human. And favoring the human by that much leaves little ground for objecting to a life-saving animal experiment or a million such experiments. Once we're throwing away lives, we might feel comfortable about using them too.

So for both Singer and Regan, one needs to have some level of intelligence, in addition to sentience, to be entitled to an equal right to live. The fact that both of these giants within the philosophical tradition of animal protection saw things in this way is noteworthy and, I would add, not that surprising. Philosophers value the capacity to think; indeed, some early philosophers imagined that one could figure out everything worth knowing simply by consulting one's intellect and thinking.[54] In a tribute to this approach, some law school professors practice the so-called Socratic method, through which the teacher helps a student to figure things out by asking a series of helpful, probing questions about what the student already knows.

Other animals tend to be more empirical about deciphering reality. They look around to find out whether there are predators about.[55] And they smell the air to learn if a fire is headed their way.[56] They can be extremely intelligent, even if they are not Great Apes, dolphins, whales, elephants, or even mammals at all. But what interests me about the ways in which both Singer and Regan have thought about animal intelligence is not mainly that they believed one had to be a close relative of humans to have much of it. It is that they both assumed that some level of intellect is what gives an animal rights, whether to live or to be free of human violence.

To be fair, it is not just philosophers who prize intelligence over all other qualities. When people find out that I am vegan

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54 *See* Stephen Cave, *On the Dark History of Intelligence as Domination*, AEON (Feb. 21, 2017), https://aeon.co/essays/on-the-dark-history-of-intelligence-as-domination [https://perma.cc/DW3N-F44C] (describing how ancient philosophers were "obsessed" with intelligence and how Plato claimed "that the truth about reality could be established through reason, or what we might consider today to be the application of intelligence").

55 Renee L. Rosier & Tracy Langkilde, *Behavior Under Risk: How Animals Avoid Becoming Dinner*, 2 NATURE EDUC. 8, 8 (2011), https://www.nature.com/scitable/knowledge/library/behavior-under-risk-how-animals-avoid-becoming-23646978/ [https://perma.cc/AD3P-RV82].

56 Laurie L. Dove, *How Does a Forest Fire Benefit Living Things?*, HOW STUFF WORKS (Apr. 22, 2013) https://science.howstuffworks.com/environmental/green-science/how-forest-fire-benefit-living-things-3.htm [https://perma.cc/MK6F-XD7W].

and that my reason has to do with animals, they'll often say how intelligent we are as a species. They'll assert further, on occasion, that one of the reasons we're so smart is that we needed to be smart in order to organize around hunting for meat to eat. I'm not sure the latter is any kind of moral argument. Our intellect likely made us fitter because it made it easier for us to attack and kill other human tribes too because then we could take their resources. Yet few today defend wars of unprovoked aggression and territorial conquest on the ground that it was part of what made us the geniuses we are today.

But what about our intellect itself? It seems like arranging various species according to intellectual capacity is a non-speciesist way of determining the hierarchy of beings, right? It really isn't, for two different reasons.

First, being smarter is not always better. Regan said that a human's life is infinitely more valuable than a dog's because the human has greater opportunities for satisfaction than the dog.[57] But is that true? Some dogs seem to experience ecstasy in response to the simplest of things. The opportunity to eat a pizza crust that has fallen on the floor, for example, can be cause for canine celebration.

Second, dogs do exercise a kind of intelligence. The dog is able to enjoy the capacity to detect smells with ten thousand to a hundred thousand times greater acuity than humans bring to the task.[58] Research has suggested that one of the ways that dogs know it's time for you to come home is that they can tell what 5 or 6 or 7 o'clock smells like.[59] Humans have a hard time even getting their heads around this idea. But humans tend to believe that what they are able to do is more important than what members of other species are able to do. That belief, of course, is profoundly speciesist and helps

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57 *See* REGAN, *supra* note 5, at 325 (discussing the notion that it is better to kill a million dogs than one person); *cf. id.* at 337 ("If we were certain to ruin our health by being vegetarians, or run a serious risk of doing so . . . and given that the deterioration of our health would deprive us of a greater variety and number of opportunities for satisfaction than those within the range of farm animals, then we would be making ourselves, not the animals, worse-off if we became vegetarians.").

58 Peter Tyson, *Dogs' Dazzling Sense of Smell*, NOVA (Oct. 4, 2012), https://www.pbs.org/wgbh/nova/article/dogs-sense-of-smell/ [https://perma.cc/ML6T-TN5J].

59 Stanley Coren, *Can Dogs Tell Time?*, PSYCHOLOGY TODAY (Nov. 22, 2019), https://www.psychologytoday.com/us/blog/canine-corner/201911/can-dogs-smell-time [https://perma.cc/C937-JAEC].

explain but does not justify animal exploitation.

Consider the criterion of being able to perceive oneself as the same being over time. Are there really sentient creatures who have no sense of continuity over time? It would make no evolutionary sense for any living creature to have the capacity to feel pain but lack the ability to experience anything beyond the present moment. Sentience costs an organism energy, so an organism that cannot use the information acquired through sentience will not be the "fittest" compared to other organisms who can.[60] Accordingly, it seems safe to assume that just about every sentient being has some capacity to remember what came before and to anticipate a future in which painful stimuli could repeat themselves.

I generally find arguments from marginal cases of limited utility. If we really think that some trait distinguishes humans from all other animals, then the fact that a hypothetical human might lack that trait should not necessarily change anything. Yet such arguments can be useful when we confront the apparent importance of continuity of identity that humans and some—but not all—nonhuman animals may have. Think about memory.

There are humans who suffer from a kind of amnesia called Korsakoff Syndrome, which interferes with learning and the formation of new memories and which sometimes results from alcohol abuse.[61] John Bargh, an experimental psychologist at Yale, wrote about a clinician whose patient had Korsakoff and could not retain a memory for more than fifteen minutes.[62] The patient would greet the clinician and shake hands each day as though the two were meeting for the first time. The clinician decided one day to tape a thumb tack in his hand so that the patient would experience a painful stimulus when carrying out the daily greeting. As always, the patient forgot what had happened after 15 minutes. However, the next time she reached out to shake hands, she reflexively pulled back at the last second.

Why do I tell you this story? First, because it might look

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60 *Sentience*, SCIENCEDIRECT, https://www.sciencedirect.com/topics/neuroscience/sentience [https://perma.cc/SG37-ERHT] (last visited May 16, 2020).

61 *Korsakoff Syndrome*, ALZHEIMER'S ASS'N, https://www.alz.org/alzheimers-dementia/what-is-dementia/types-of-dementia/korsakoff-syndrome [https://perma.cc/F7FT-HUPA] (last visited May 16, 2020).

62 JOHN BARGH, BEFORE YOU KNOW IT: THE UNCONSCIOUS REASONS WE DO WHAT WE DO 125–26 (2017).

like an organism cannot remember things, but he or she may have an unconscious memory, and unconscious memory is memory. Second, why would we want to limit rights—or at least an interest in continuing one's own life—to those who can consciously contemplate their future existence and experiences? If our only account of *why* this capacity defines our greatness is simply to reiterate that "we" (whether we are philosophers, law professors or homo sapiens) do it, then we are just indulging a prejudice, not identifying an actual basis for extending a preference to our group. The patient who pulls back after sensing the thumbtack really is, at some level, the same being at times 1 and 2. And if this patient could not register such events at all but still seemed to enjoy her life, would we truly think it harmless to painlessly kill her? If not, then there is every reason to extend our intuition to other animals who share this woman's inability to remember.

Furthermore, as everyone here can surely explain, there is an argument with roots in the thought of Heraclitus, Buddhism, and David Hume that no one is the same person at T2 as he was at T1.[63] Memory only creates the illusion that we are.[64] If we agree, then the perception that we are continuous over time is wrong. And if we assume that everyone *is* the same creature over time, then the difference between experiencing life that way and not seems like just another arbitrary

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63 *See* James Giles, *The No-Self Theory: Hume, Buddhism, and Personal Identity*, 43 PHIL. E. & W. 175, 186 (1993) (explaining how in Buddhist thought, the self does not exist because our bodies, thoughts, and feelings are constantly coming and going); *see also* Daniel W. Graham, *Heraclitus*, STAN. ENCYCLOPEDIA PHIL. (Sept. 3, 2019), https://plato.stanford.edu/entries/heraclitus/ [https://perma.cc/9XQ7-2FCW] ("A human body could be understood in precisely the same way, as living and continuing by virtue of constant metabolism—as Aristotle for instance later understood it. On this reading, Heraclitus believes in flux. . . ."); *Anatta (Buddhism)*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/anatta [https://perma.cc/PQG9-CQH9] (last visited May 16, 2020) (defining "Anatta" as the Buddhist "doctrine that there is in humans no permanent, underlying substance that can be called the soul [but] [i]nstead, the individual is compounded of five factors . . . that are constantly changing"); DAVID HUME, A TREATISE OF HUMAN NATURE 164 (David Fate Norton & Mary J. Norton eds., 2007) ("If any impression gives rise to the idea of self, that impression must continue invariably the same . . . [b]ut there is no impression constant and invariable . . . [so] there is no such idea [of self]."); *id.* at 169 ("[It is] still true, that every distinct perception, which enters into the composition of the mind, is a distinct existence, and is different, and distinguishable, and separable from every other perception, either contemporary or successive.").

64 *See* HUME, *supra* note 63, at 182 (describing self as "that succession of related ideas and impressions, of which we have an intimate memory and consciousness").

characteristic to denigrate animals.

My suggestion of speciesism here seems dissonant relative to both Regan and Singer. Singer has long demanded that we stop ignoring the moral implications of using animals.[65] He has compared such speciesism to racism.[66] But then, he resorted to a supposedly "neutral" criterion. The criterion of perceiving oneself as continuous over time is one that humans happen to excel in.

Regan also resisted speciesism. He criticized himself for earlier in his career citing the Martin Buber "Ich und Du" ("I and Thou") relationship as one that two humans could have and the perhaps "Ich und es" ("I-and-it") relationship as one for a human and an animal.[67] Animals ought to have rights, no trespass signs, around themselves, notwithstanding their species, he said.

I think that both men have accordingly taught us not only about animals but also about human nature. Humans like hierarchy, especially when it places us at the very top. So we will tend to see traits that we have as the most valuable and important ones and therefore as neutral bases for drawing distinctions. But doing that without a real justification partakes of the same prejudiced thinking that Regan and Singer have so eloquently railed against. Even the smartest and most egalitarian among us are vulnerable to hierarchy preference.

I named this speech "subject of a death" long before I started writing it. I thought it was clever because of Regan's "subject of a life" category. Most of my speech, however, has been about "subject of a life" and the hierarchical ordering of sentient beings—into subjects and not, and then, among subjects, the moral agents (normal adult humans) that Regan describes as superior to moral patients (such as dogs).[68] I bring up death, because animal theorists tend to approach it in confusing ways.

As I mentioned earlier, Singer says that he considers animals who fall "below" most great apes, elephants, and dolphins in cognitive capacities ineligible for a right to live.[69]

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65 *See, e.g.*, SINGER, *supra* note 10, at 36 (arguing that animals should receive moral consideration because they experience suffering).

66 *See id.* at 28–35.

67 *See* REGAN, *supra* note 13, at 29.

68 *See, e.g.*, REGAN, *supra* note 5, at 331 ("Because animals are not moral agents, their rights can be overridden. . . .").

69 *See supra* notes 23–24 and accompanying text.

Because they cannot think about themselves as consistent beings over time, if we kill them and replace them with others equally able to satisfy their preferences, then we do nothing wrong. Regan never denied animals the right to live based on intelligence, but he did say that a sentient being who is not the subject of a life will not hold rights, presumably including the right to life.[70] Furthermore, if an animal who is a subject of a life finds himself and a million of his closest friends in a lifeboat with a human, the human's right to life will weigh more in the moral balance than all of the animals' lives put together.[71]

If someone we loved were on a lifeboat, of course, we might well dump a million other people overboard to save the one. But no one tells us that we have a moral obligation or even permission to do that. Indeed, the most we could expect from the community would be tolerance, and if we were really talking about a large number of people, it is highly unlikely that we would benefit from even that. The extremity of Regan's lifeboat scenario tells us that the hierarchies we erect often do more than simply place our own group a little higher than others. They place us in an infinitely more valuable category, from which it becomes hard to imagine denying us anything relative to them. Hierarchies, like Frankenstein's monster, cannot necessarily be controlled. Even if the plan is to mostly protect animals except for in a small zone, that zone could grow over time

Just to be transparent, I'll mention that my approach to animals is to say that sentience defines the line between rights and no rights. If someone lives in the world and has experiences, then she is entitled to be left alone, absent some compelling reason to interfere with her. I wouldn't impose a hierarchy among the sentient, though I'd leave it to people to prefer their own family and friends in true triage situations. And I'd take differences in experience into account in defining what a right would mean for different animals.

When you heard that my speech was called "Subject of a Death," you probably thought I would say something about the right to life. Should nonhuman animals have this right as well?

Answering this question in a theoretically satisfying way is challenging, and it is really just an afterthought or footnote here. Maybe I should not have called this talk "subject of a

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70 REGAN, *supra* note 5, at 243.

71 *Id.* at 352.

death" after all. It is very difficult to explain why any one of us has an interest in continuing to live, assuming death is unexpected and painless.

Epicurus said, to comfort humans scared of death, that no one should fear the end.[72] So long as we are alive, death is not with us, and when we are dead, we are gone and do not experience the deprivation. If we agree that dying painlessly does us no harm, because we cannot wish we had lived, what is wrong with killing?

We do treat killing as wrong, indeed as the greatest wrong deserving of the harshest punishment. Perhaps this is yet another human irrationality, like our view that intellect trumps all else. I do not expect us to adopt a posture of neutrality toward painless murder any time soon, however, notwithstanding Epicurus. And thus we ought to show the same respect to the lives of other animals as we show to our own, despite the Epicurean question. The lifeboat is really a fiction, of course. We will probably never struggle for survival in a lifeboat with even one dog, let alone a million. In reality, Regan told us not to hurt or kill animals. And painless death at the slaughterhouse is another fiction, a grotesquely inaccurate one. So in reality Singer told us not to slaughter billions of animals. In real scenarios, the two men showed us the way to stop harming the innocent beings who share this planet with us. As I remember Tom Regan, my best way to honor that legacy as well is to pledge not to pay the slaughterhouse to carry out its cruel, painful, and lethal work, no matter what I might do on a magic lifeboat.

QUESTIONS AND ANSWERS

Q1: Thank you so much for your talk. I really enjoyed thinking about this, as this is not my area, so it was sort of interesting for me to think about. So I found your examples sort of really compelling, and talking about the distinction in between sort of like thought experiments versus sort of the world we find ourselves in, and I was wondering if you could speak a little bit more, not only about individual animal lives, but also about species, right? Because we find ourselves in a situation where some species are endangered, some species are not, maybe there are problems with understanding the idea

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72 Tim O'Keefe, *Epicurus (341–271 B.C.E.)*, INTERNET ENCYCLOPEDIA PSYCHOL., https://www.iep.utm.edu/epicur/ [https://perma.cc/LJC3-XCZC] (last visited May 22, 2020).

of a species being endangered. And I was just wondering if you could speak a little bit more about if that should change our views of how we ought to act towards certain groups of animals as opposed to individual animals?

A1: Yeah, that's a great question. So I think the issue of species is really interesting. It's challenging because, as someone once stated in my animal rights course, "Well, the Endangered Species Act is sort of an animal rights law." I thought about it, and I concluded that it's not. And the reason—and you know, it's up to me—the reason it's not is because the ESA is really about DNA. And I wrote a column about how in a sense, it's kind of like Plato's cave, where the concept of this animal is more important than the actual animal.[73] And so we want to have exemplars in the world, but not one of them matters. And we can kill a bunch of animals as long as they're not part of the favored species. So I don't necessarily think we need to have a specific attitude towards species, or to say, "Well, there are a lot of this species, and not that many of those, so we can kill animals in the first group." But I think that we need to plan our behavior, to some degree, carefully because if there's some area where there's some animal and there are not a lot of that animal, we might not want to have a suburb that we build there, or something like that. So I do think there's a place for it, but the emphasis is a little bit different because you're thinking about exemplars rather than thinking about the animals as valuable individuals.

There was this case about a giraffe at a zoo, and then the zoo killed the giraffe, and his name was Marius.[74] It's always the ones that are given names that we are sad about. And people became very upset. And the zoo was saying, "We have enough of this. We have too many of these giraffes." So that's kind of the thinking there. On the other hand, preserving the environment can lead to individuals surviving, so there's overlap.

Q2: Hi there. Yeah, I have loads of questions, but I'll

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73 Sherry Colb, *The Fortieth Anniversary of the Endangered Species Act and Plato's Allegory of the Cave*, VERDICT (Jan. 8, 2014), https://verdict.justia.com/2014/01/08/fortieth-anniversary-endangered-species-act-platos-allegory-cave [https://perma.cc/WK7S-W3Z6].

74 Lars Eriksen, *Marius the Giraffe Killed at Copenhagen Zoo Despite Worldview Protests*, GUARDIAN (Feb. 9, 2014, 1:23 PM), https://www.theguardian.com/world/2014/feb/09/marius-giraffe-killed-copenhagen-zoo-protests [https://perma.cc/3LGF-6N8H].

randomly select one of them. I have non-vegan parents, and one of the questions, one of the things that my mother says to me is, she thinks it's a real stumper, is "Well, if we didn't eat these animals or take their milk or eggs, they wouldn't exist in the first place, so we're giving them life." I've tried to respond to that, but what would be your most compelling response?

A2: That is definitely a very common question that I get, too, that I'm somehow supporting genocide of the cow. And I guess my answer is very much related to the earlier question, which is to say that species don't have interests. Living individuals have interests. So there isn't going to be a nonexistent cow who's really bummed by not being brought into existence so that we can use her and then slaughter her. That is because there's no one there to have that interest. There's also a kind of zero-sum game aspect to life. So if we have all of these animals, we have a specific department of, I think it's called wildlife damage management, where predator animals are killed in order to preserve the lives of the animals who are going to be slaughtered and eaten. So even on its own terms, I think, it's not all that convincing. But also, it's just that nonexistent beings don't lose anything by not coming into being. It is sort of like the parent–child argument that happens, where it's, "Oh, I gave you life," and the child (more likely teen) says, "I never asked for that." And I don't know if that's the most compelling, but that's the response I give.

Q3: So I wanted to defend Singer and Regan against the charge that they are, sort of, themselves, sort of re-implementing a kind of hierarchy, a species-based hierarchy. So sort of three general things to say in defense to this. First, I think it's really different from the sort of speciesism, right, that sort of Singer calls out, right? The speciesist is adding a sort of, there are two elements, right? They think that there's the harm inflicted, right, on say a human and the pig that we consume, and then the moral modifier, right? And that's what Singer is talking about when he says that all animals are equal, right, the thought that there isn't a moral modifier. You just look at the interest. And so there's a real big difference between Singer and the sort of speciesist, because he's just saying no, there isn't the moral modifier. But there are differences in the kinds of interests that different organisms have. And so the second point, that it's not sort of hierarchical to appeal to the weight of different kinds of interests, right? So for example, maybe Ami, gentleman to my right over here, is really annoyed at my comments right now, and he wants to

punch me in the face, right? And he just held his fist up really violently. You can all see he's a very strong gentleman. If he were to punch me in the face, it would cause a great deal of suffering, and so you're, as you told here, is going to say, "No, Ami shouldn't do that." But not because he's sort of establishing that Scott is—Scott is pure hierarchy, it's just that there's a lot more suffering cost to me. And finally, and I don't remember what Regan would say in this, but I know Singer at least, it seems like if you had an animal that didn't have the relevant capacities, right, he would think that it would require different treatment, right? So if you had an elephant, he'd defend the higher sort of legal protections for nonhuman primates and elephants. But presumably, on the basis of their interests, and if you had the elephant that didn't have the sort of same capacities as its other elephant kin, it seems like as a consistent utilitarian, he'd say, "Okay, that one doesn't, we don't need to give that one as many protections," but again, not because it is that elephant in particular, anything about it, or its species. Instead, it's just, "It doesn't possess that capacity and so we can't harm it." And if it's about the kind of capacity it has, that we can harm it in certain ways, it doesn't seem like an objectionable kind of hierarchy in the same way that, even though we have this idea that animals can vote with their feet, right, it's not the same kind of voting that makes it the case that we're wronging ducks by not letting them have voting rights in our presidential elections. They just have no relevant capacities.

A3: Okay, so that's a really good point. So I agree with you that sometimes different kinds of animals or humans are differently situated with respect to a particular event. So if somebody, as in the example that Singer gave, smacks a horse at a certain level, that might not feel as bad as if you smacked a baby at that same level. And so you would want to weigh one as worse than the other, and that's not speciesist. And I agree with that. I don't think ducks should vote, or other animals; I'm not going to discriminate against ducks specifically. I don't think geese should vote either. But my suggestion, which you can obviously disagree with, is that it goes beyond that—that actually there are traits that are specific to humans that are then utilized as a reason for giving humans more rights, even though those traits are not specifically relevant to the exercise of the rights in question in the way that having a certain intelligence is relevant to voting. For example, there's the idea that being able to perceive yourself over time means that you

would lose something if you died. And of course, if you killed someone painlessly and unexpectedly, what exactly are they losing, since they're dead, like Epicurus said, and that is true no matter what one's sense of oneself over time is. So I think some of these distinctions are not rational distinctions between humans and animals, and that therefore, they're really, well, "We can play the piano, we can do calculus, whatever." And so that's all that I'm suggesting, that that's where the speciesism creeps in, not in any distinction. If I give somebody who needs more food more food than someone who needs less, that's not an arbitrary line, I agree.

Q4: Very simple question. Animals eat other animals, so wolves would eat rabbits, birds would eat bugs, and we, people, are kind of animals as well. Perhaps we are so smart that we invented this way to eat other animals.

A4: So it's true that a lot of animals eat other animals, but a lot of animals don't, right? Some do, and some don't. Like cows—I mean, certainly people feed them things that are made of other animals, but that's not their preferred diet. So it's not clear why we would want to emulate the ones that do rather than the ones that don't, especially because we're conscious about our behavior. One of our special human things is we can think about the environment we're destroying, and animals can't, although they're also not destroying it. Also, I would say that even if we want to emulate animals, and it's not clear why we'd want to do that, but then we say, "Well I want to be like a lion." But if we want to emulate them, we would still want to be fair, right? So we would eat lions, right? We wouldn't be eating the innocent animals who don't do anything to anybody, and in fact, we'd probably want to select specific animals, like, "Well that lion's never done me any harm, so I'm not going to eat that one." Not that I'm proposing that we should eat "bad" lions, but it seems like the way in which we normally do justice doesn't map on well to the way that animals function, and also it seems that there's a lot of variation among what animals do, and we might want to select one like bonobos, that are peaceful. They're our closest relative other than the chimp, and just as people who like the warlike qualities tend to pick the chimpanzee, those who don't tend to pick the bonobo. Either way, we're not lions.

Q5: I understand that Regan and Singer, so they tried to fight speciesism by introducing, or saying that we should use impartial objective criteria to rank animals, and you came against it and said that the mere choice of specific criteria is

biased towards humans. For example, we think that intelligence is more important than the ability to exuberate over crumbs on the floor, or other examples.

So that's an interesting criticism. The question that this raises is what is the alternative to using criteria, like any criterion we would think of could be said that is centered around the way we see the world in some way, enhance bias towards us, whoever that us would be. I'll give an example. You could say, "Well, don't rank animals at all. Just all animals are equal, and none are more equal than the others." There was a talk today about the potential moral status of robots, and the speaker said that thinking that all animals are more important than some future robots that would have AI that is sufficiently sophisticated would be biologism, that is thinking that because we are biological creatures, we're more important than robots. And even saying that we just treat all animals equal, can still be a criterion that is egocentric in the sense of biology centric. So what is the alternative of being biased?

A5: Okay, so that's a good question. At this point, I guess I would say that we don't currently have non-biological entities that are sentient, and there's a lot of disagreement over whether that's going to come. I think at the point when it looks like we're about to have a robot who can experience things, then we might want to start consulting our rules and saying, I guess I would say, "Well, let's talk about sentient life," rather than focusing on whether it's an animal, if there were a bunch of robots with interests, too. The thing I found a bit unfair about your question is that I wasn't suggesting that liking crumbs was equal to an intellect. I was suggesting that if one is taking satisfaction out of life as the index of the intrinsic value of a life, then I'm not sure humans have more of it than dogs, for example, do. If joy is the index, then why should it be that the pig satisfied counts for so little? I don't think any time you have a criterion it's necessarily a problem, but the way we know that the criterion is a problem is that it doesn't really make that much sense when you try to think about the rationale for the particular criterion. Why are we applying this criterion? Like if I said, "Okay, well I have a class, and it's oversubscribed, so everyone over 5'6" gets to take it." You would ask, "Why? What does that have to do with anything? Is it a height class?" So that's the suggestion, that whenever we are situated in a particular place, we are vulnerable to identifying something that we can do as the most important thing. And that doesn't mean it's inevitable that we rely on

irrelevant and arbitrary criteria. As to the robots, I think if there were sentient robots, then we would probably want to not harm them. I mean that's in essence the simplicity of the mandate, is just to stop harming, rather than to do anything special. To that degree, it's very different from Singer, because he is a utilitarian.

Q6: You said at one point, according to both Regan and Singer, some level of intelligence is needed. That seems to me to really shunt things in the wrong direction, okay? I mean, I think the term intelligence is best connected with problem solving behavior, right? And I don't know of any moral philosophers who think that problem solving behavior is relevant to, for example, right to life. I think what's crucial is the capacity for thought. Now I mean I think that, consider the following thought experiment. Suppose you were a virus that interferes with the brain and temporarily blocks your capacity for thought. But then you, the body is able to cope with it, and bring back the capacity for thought, right? And then it recurs again, and it lasts for a longer period of time, and you see a doctor, and you say, "What's going on?" They say, "Oh, it's just a new virus, and what it does is occurs more frequently. And eventually, it completely wipes out the capacity for thought for the rest of your life." Okay, you will still have experiences, and so forth and so on. And so you're saying, "That doesn't sound like good news." And the doctor says, "Well, there is a drug that when it works, it will cure you completely, and you'll have the capacity for thought."

And you say, "Is there a downside?" And the answer is, "It either cures you or kills you." So you now have the option. You can refrain from taking the drug, in which case you'll live normal lifespan, have various experiences, sensory, auditory, so on so on sort, but you'll never have any thoughts at all. I don't mean any deep thoughts. I mean any thoughts at all. You won't think, for example, "This is an enjoyable experience," or "This is painful," right? So the question is, what sort of probability do you need in order for you to decide to take the drug? Now, in my own case, I'd like to. As the doctor says, "This is the last day you can make a choice. If you don't take the drug now, you'll be, you will stay, you will never be able to have any thoughts at all for the rest of your life." I say, "I don't care how low the probability is unless it's, as long as it's greater than zero, right?" So what my question is, do you have a different view? Do you have a higher probability, or are you saying, "Well, unless it's one, I'm just going to let the disease

go ahead and complete its way." So the idea is that most people I've talked to take the drug, and they don't seem to care how low the probability is, right? And so what this shows is that the value of such individual's assigned to a life with the capacity for thought, is much, much greater, than the value they assigned to a life without the capacity for thought, right? And so then the question is whether the value that people assign these sorts of cases isn't relevant, to, so to speak, well, the objective value of right to life.

A6: Okay, so that's interesting. I'm not sure I understand what it means to be able to have all sorts of physical sensory experiences, but not thought, unless by thought, you mean sort of meta thought, where someone can actually cogitate about the experience they're having. But you said no, it's not that.

Q6-B: I mean surely you think there's somehow obviously the development of capacity for thought of some sorts?

A6-B: Hmm. I guess that's possible. It seems to me that part of feeling pain is having a basic kind of thought, of "Ow, this hurts," but without the words. But, and then the question is which I would do? I guess I would probably take the drug. I don't know. But I'm not sure; I don't want to be held to that. But yes, I agree that the experience of being able to think about things is something that people, that humans value a great deal. So I'm not denying that—in fact, I think that that's part of why people come to the conclusion that that is a universalizable proposition, that this is just simply valuable. It's simply more valuable than the other things to us, but other kinds of animals may prioritize differently. They might suffer more under some conditions than we do. And if we use suffering to mean something beyond pain, but really suffering, than maybe their level of frustration is greater—it's hard to talk about it because I don't know of an animal that can't think at all, but if we assume there is one, then I don't believe we know what it's like for them. But I think we can observe them. So it's not like trying to imagine what it's like to be a bat, and I think there are things we can observe about what that's like anyway. We know that they don't like being hit with a bat. So I think the assumption that higher thought is what makes life valuable, and therefore all these animals don't have valuable lives, that's a different kind of inference.

Q7: Hi. So I'd like to ask you to distinguish between a couple of different contexts that you talked about, specifically eating animals and using animals for medical research. And I

should say, apparently, your arguments on the former are very compelling. My sister took your evidence class at Cornell, and she wanted me to tell you that your book is what made her a vegan.

Yeah. But why I'm interested in this, because it strikes me that it's pretty easy to make an argument for vegetarianism or veganism on the basis of an argument about animal interests. But I work with a lot of biomedical scientists, and they have very compelling arguments for why it's necessary to do biomedical research with animals. And I think some of the things you've said actually point in the direction of supporting their arguments, namely that I think they conceive of it as a form of triage, right, and kind of a necessary evil, where you have family members and community members who can communicate their suffering to you. And animals, right, can't do that. And so in some way there is this kind of prioritization of those that are close to us. But I think there is this sense that if we treat animals well, and right, there are lots of regulations for how we treat animals in this research, then it's permissible to do it again because of this kind of triage necessary suffering idea. So I wonder what you might say about that.

A7: Thanks. That's really a good question. I do think, the first thing I'll say, is of all the different kinds of animal exploitation, there's an argument that eating is more frivolous than animal experimentation. So that in one case, you're eating something that's actually harmful to your health, at best, or maybe not at best, but it's not necessary for your health. But here's this necessity, so it's different. So I think that as, between them, if one were hierarchically organizing the different kinds of exploitation, that that would be the case. In terms of communicating suffering, I think you're, I mean you're right that humans can say that they're suffering in ways that animals cannot say it, although there are some animals who have been taught sign language, and then they say it quite eloquently. But you can see that they're suffering. I mean, there are photographs from slaughterhouses where there are tears coming out of the eyes of these animals. Now you can say, "Oh, that's not real crying," but I think then it's a little bit of, "Well, when they do this stuff that we do, it means something else," even though our nervous system is really not that different. In terms of the regulations, the Animal Welfare Act, which I guess is the primary law that regulates this stuff, it generally regulates animals on their way to the experiment

and then afterwards.[75] But the experiment is not directly regulated, and you know, there can be pain experiments, and a lot of the experiments are quite painful. And also, the Animal Welfare Act only applies to "animals," and it defines "animals" as animals other than rodents, which are the primary animals used in research. And this is sort of an interesting use of language.[76] But what I'd say is I guess it is triage in a sense. But it's the kind of triage that we think of as sort of beyond the pale when it comes to humans. So let's say somebody can't talk, like they're really disabled in some way. We don't say, "If we do a surgery on this person, we could find out information that could save so many humans." We don't do it. In fact, that would be a lot more efficient, because they're more like other humans than a rat would be. And then with all these drugs that are tested on rats, a lot are either fine with them, and then really dangerous to us, or vice versa. It's upwards of 90 percent of animal experiments that are useless. Aysha Akhtar has written about the ways in which animal experimentation gets us off the path of actually learning what's going to help humans.[77] And I'd also say that there is a sacredness, and that we're not really entitled to use animals in this way. Why are we entitled to do this to them, even if we'll die otherwise? I could say, "I'll die if I don't take this organ from my neighbor." But it's not mine to take. It's his.

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75 Animal Welfare Act, 7 U.S.C. ch. 54 (2018).

76 7 U.S.C. § 2132(g) (2018).

77 *See* Aysha Akhtar, *The Flaws and Human Harms of Animal Experimentation*, 24 CAMBRIDGE Q. OF HEALTHCARE ETHICS 407, 407 (Sept. 14, 2015) ("The unreliability of animal experimentation . . . undermines scientific arguments in favor the practice. . . . [A]nimal experimentation often significantly harms humans through misleading safety studies, potential abandonment of effective therapeutics, and direction of resources away from more effective testing methods.").