



## **Proximity: A Levinasian Approach to Justice for Animals**

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## Proximity: A Levinasian Approach to Justice for Animals

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### Table of Contents

1. Introduction.....	1
2. Formulating a realistic basis for the actual legal protection of animals.....	3
3. The significance of witnessing.....	4
4. The face of the animal: A Levinasian animal ethics.....	6
5. Justice for animals.....	10
6. A possible encounter between law and animals.....	14
7. Conclusion.....	15

### 1. Introduction

The texts published in the 70's and 80's by Peter Singer and Tom Regan has had an immeasurable impact on the discourse on the ethical-legal standing of animals. Today they form the theoretical backbone of the animal welfare movement to such an extent that the very subject matter of the ethical-legal status of animals often is referred to using Regan's central concept 'animal rights'.<sup>2</sup> A significant segment of contemporary academic texts on the ethical-legal status of animals is concerned, however, that the potential of the rights discourse has been exhausted, or at least that a sufficient level of protection of animals cannot be attained solely on this basis.<sup>3</sup> This reflects the fact that the increased use of terms associated with rights appears to have led, at the most, to only moderate changes with regard to the actual level of protection and the underlying ethical-legal status of animals. Whereas the rights discourse may have been a logical first step, there appears to be underlying issues that cannot be adequately addressed through this discourse.

While the current legal protection of animals at a first glance appears to grant all animals a similar level of protection, even a more superficial investigation reveals that the ethical-legal status of an

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<sup>2</sup> Tom Regan, *The Case for Animal Rights*. 1983. Berkeley and Los Angeles, University of California Press.

<sup>3</sup> This is e.g. the case within the feminist care tradition as is seen in most of the contributions in Josephine Donovan & Carol J. Adams, eds., *The Feminist Care Tradition in Animal Ethics*. 2007. New York, Columbia University Press.

animal is in fact differentiated according to the purpose that underlies human interaction with the animal in question. Such different purposes include food production, testing, hunting, exhibition in circuses or zoos, human company, biodiversity, etc. Some animals appear to serve no purpose at all, and some are even considered pest. The discordance between the apparent universality of rights and the *de facto* differentiation according to purpose will be further explicated in chapter II.

A closer investigation, which will be conducted in chapter III, indicates that the human purpose of an animal does not exhaust the basis for its ethical-legal status. The degree and the nature of the actual contact with the animal also play a significant role. Proximity, in fact, would appear to be the more fundamental relational aspect, which, in an ethical sense, precedes the purpose of the animal as seen from a human perspective. Since many animals are kept out of the realm of proximity of the public, their ethical-legal status nevertheless depends almost entirely on how they are categorized according to purpose.

In chapter IV recourse is made to Levinasian ethics in order to gain further understanding of the interplay between proximity and purpose. The analysis will be grounded in the ethical significance of being face-to-face with another being and how the derived notion of proximity challenges the stigmatization that is entailed by the categorization of animals according to purpose. In this regard it will be examined how Levinas's own ambivalence towards the ethical status of animals as well as a well-known intervention made by the curator par excellence of Levinasian philosophy, Jacques Derrida, appear to have had an almost preemptive effect on applying Levinasian ethics to animals. In contrast, it will be argued that a phenomenological approach similar to that of Levinas is in fact very well suited for addressing the question of the ethical significance of animals.

In his ethical thinking, Levinas himself moves from the level of responsibility towards the unique other to the level of justice, when we are faced with several others – a condition which is, in fact, permanent due to the constant, implicit presence of others. In chapter V, the focus of the analysis will likewise be expanded to encompass the dimension of justice. Here it will be noted that despite the universal and distributive nature of justice, proximity nevertheless plays a vital role since there always “remains the impossibility of passing by the closest”, using a Levinasian phrase. This concretely implies a need for a judge to be in “the midst of proximity” – a need which, for example, is reflected in fundamental procedural rules. However, when it comes to the role of animals in processes relating to adjudication and law-making there is a lack of similar rules and processes, which may ensure such proximity. Based on these findings it is suggested that within the field of legal animal protection attention should be refocused from substantive legal provisions to those processes through which the legal protection of animals are defined, *inter alia* procedural law. The aim should, ultimately, be to change the status of animals from that of anonymous creatures belonging to certain categories to that of individual beings.

This leads on to chapter VI containing some provisional implications with regard to legal processes and institutions and relevant future research areas are sketched out. Finally, chapter VII contains a short conclusion to the analysis.

## 2. Formulating a realistic basis for the actual legal protection of animals

Since the passing, more than 200 years ago of the first legal statutes seeking to limit cruelty towards animals, the wording of such legal provisions has consistently become more ambitious: An increasing number of animals have been protected from a growing variety of mistreatment. Within the European context, many constitutions as well as the Treaty on the Functioning of the European Union now contain principles according to which “[t]he state shall protect ... the animals by legislation”,<sup>4</sup> or which stipulate that there must be paid “full regard to the welfare requirements of animals”,<sup>5</sup> or similar. And those European countries without such constitutional provisions instead tend to have within their animal welfare legislation emphatically formulated broad provisions according to which, for example, it is an offense to cause vertebrates “unnecessary suffering”<sup>6</sup> or which stipulates that animals (i.e. *all* animals) shall be protected “as much as possible” against pain, suffering, anguish etc.<sup>7</sup>

Legal provisions that cover all animals, or at least all vertebrates, in this manner correspond well with the prevalent ethical-legal principle of equality according to which moral differentiation must be founded on ethically relevant differences,<sup>8</sup> and it is a type of legislative technique that fits legal discourse and legal self-understanding. However, with regard to animals (and possibly in other contexts as well) it is, purposefully or not, inadequate and misleading. Despite the ambitious wordings of such provisions, they fail to ensure a certain level of protection for all animals that fall within their ambit. Constitutional provisions tend to function rather as political declarations of intent than ensuring certain levels of protection, and provisions such as those prohibiting unnecessary suffering leave it to more specific regulation and case-law to define what constitutes ‘unnecessary’ suffering in concrete contexts. Instead of a common level of protection for all animals in question, my own review of Danish legal practice indicates that the actual legal protection invariably depends on the underlying purpose, which the animal serves from a human point of view.<sup>9</sup> On the one hand, for instance, it may be accepted to raise, transport and slaughter farm animals at a low cost despite the well-known suffering that it entails, and likewise to inflict illnesses, pain and suffering on test animals in order to test medical products, chemicals etc. Companion animals, on the other hand, are generally better protected and some practices, which are allowed with regard to farm animals and test animals, may lead to indictment when companion animals are concerned.

If one were to formulate legal provisions corresponding to the actual legal protection based on the purpose of the human interaction with the animal instead of the current, rights-inspired provisions, they could be construed along the following lines:

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<sup>4</sup> The German Grundgesetz, Article 20a (Translation revised by Professor Christian Tomuschat and Professor Donald P. Kommers in cooperation with the Language Service of the German Bundestag).

<sup>5</sup> The Treaty on the Functioning of the European Union, Article 13.

<sup>6</sup> The English Animal Welfare Act, Clause 4.

<sup>7</sup> The Danish Animal Welfare Act, § 1 (my translation). See also the Austrian Federal Act on the Protection of Animals, in particular the general provisions of Chapter 1, the wording of which may well be the most ambitious in Europe in regard to establishing a high level of protection.

<sup>8</sup> Regan, *The Case for Animal Rights*, pp. 128f.

<sup>9</sup> E.g. Søren Stig Andersen, 'Dyrerettigheder' (in Danish; Eng.: 'Animal Rights'), *Juristen*, Vol. 7, 1998, p. 249-267, and Søren Stig Andersen, 'Dyrets ansigt - vejen til mere effektiv retsbeskyttelse' (in Danish; Eng.: 'The Face of the Animal - the Path to More Efficient Legal Protection'), *Retfærd - Nordic Journal of Law and Justice*, Vol. 4/139, 2012, p. 38-56.

*Article 1.* Pests are offered no protection.

*Article 2.* Animals within industrial farming are offered protection to the extent that it (i) serves national retail and export interests inasmuch as enabling the industry to claim acceptable standards, (ii) prevents food products from constituting human health hazards or (iii) there is a sufficiently forceful public outcry demanding an end to certain practices.<sup>10</sup>

*Article 3.* Test animals should enjoy proper hygienic and nutritional standards. If not interfering with the purpose of the tests, they should be anaesthetized during testing and euthanized when their purpose is fulfilled.

*Article 4.* Circus and zoo animals: there is no settled ethical-legal stance in relation to these animals. On the one hand, they serve economic purposes as well as general purposes such as education and entertainment. On the other hand, due to the fact that an actual encounter between these animals and the public takes place, the status of these animals is particularly liable to changing public sentiments. The legal protection should be flexible and correspond with these changing views.

*Article 5.* Companion animals that take part in people's everyday life, and who to a large extent are treated similarly to family members, enjoy a relatively high level of protection.

*Article 6.* All reasonable measures should be taken to conserve the life of an animal belonging to a species threatened by extinction.

This sample of provisions obviously does not exhaust the wide variety of purposes – or lack of purpose – that characterize human relationships with animals and they may, admittedly, appear to be somewhat oversimplified. The point, however, is that provisions such as these more realistically than the prevalent rights-inspired provisions would reflect the actual legal status of different categories of animals.

### **3. The significance of witnessing**

The *de facto* legal differentiation that takes place according to the purpose or the role of the animal in a human perspective mirrors a similar differentiation with regard to the ethical status of animals. However, when assessing the ethical status of a concrete animal, its purpose cannot stand alone. Take for example a polar bear cub or a male giraffe calf that is raised in a zoo. If such an animal becomes widely known by name, and if its picture is extensively published, the cub or the calf appears to achieve an ethical status that is different from the status of other zoo animals despite the fact that the purpose of that particular cub or calf fundamentally is not different from that of any other zoo animal. Likewise, a farm animal on a small farm, where the animals are given names and are individually recognized by the farmer, may – at least from the point of view of the farmer –

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<sup>10</sup> See to this point Miyun Park, 'Opening Cages, Opening Eyes' in Peter Singer, ed., *In Defense of Animals. The Second Wave* (Malden, Oxford and Carlton, Blackwell Publishing, 2006), pp. 174-180.

have a different ethical status than its peers in large industrialized farms.

The ethical significance of such specific relational aspects has notably been addressed within the feminist care theory with its insistence on the ethical significance of the experience of the concrete other being – human or animal – in its individuality.<sup>11</sup> In regard to animal ethics, the care theory has in particular challenged the abstract concept of rights invoked by Tom Regan, according to whom it is necessary to generalize beyond the individual and particular instance of caring and compassion.<sup>12</sup> Care theory instead points to concrete sympathy as the basis for compassion and thus for our ethical relationship to other beings.<sup>13</sup> Care theory thus agrees with more psychological approaches and their insistence on the significance of empathy emerging from witnessing the suffering of an animal.<sup>14</sup> When, for instance, a consumer looks at the packaged meat in the supermarket, the distance between her and the animal that has been raised and slaughtered in order to supply the meat rules out the kind of compassion that the very same person may experience towards her sick dog at home.

The significance of witnessing is illustrated by the fact that today one of the primary battlefields between the animal industry and animal welfare organizations consists in the latter trying to obtain access to the animals in the surroundings, in which they are bred and raised, while the former strives to prevent such contact.<sup>15</sup> While one reason for the attempts at obtaining access is to gather proofs of the conditions in which the animals are kept, i.e. ‘witnessing’ in a legal sense, witnessing also has another, more fundamental aspect inasmuch as it facilitates a contact between, on the one hand, humans – the activist as well as, indirectly, the public, the legal system, politicians and even people working within the animal industry itself – and, on the other hand, the concrete, individual animal. Witnessing in this sense consists in giving a face to the otherwise anonymous creature. As all animal activists know, the most effective photograph not only testifies to the wounds inflicted on an animal or the lack of maneuver space, etc. Equally important is the face of the individual animal; its expression of terror and its defenseless eyes. This, of course, is no different from how human relief organizations seek to awaken public compassion.

Drawing on the insight offered by the feminist care ethics with regard to the significance of witnessing, it may be concluded that two different relational parameters are involved with regard to our ethical attitude toward an animal: purpose and contact. Often these two parameters accord with each other; an animal used for food production or testing, for instance, is in fact normally exempt from contact in the above sense whereas such contact by definition is the norm in relation to a companion animal. From time to time, however, a contact between human beings and an animal that belongs to a category that normally is exempt from such contact challenges the stigmatization

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<sup>11</sup> Carol J. Adams, ‘The War on Compassion’, in Donovan & Adams, *The Feminist Care Tradition in Animal Ethics*, p. 25.

<sup>12</sup> See Josephine Donovan, ‘Attention to Suffering: Sympathy as a Basis for Ethical Treatment of Animals’ in Donovan & Adams, *The Feminist Care Tradition in Animal Ethics*, p. 184.

<sup>13</sup> *Ibid.*

<sup>14</sup> See Marti Kheel, ‘The Liberation of Nature: A Circular Affair’ in Donovan & Adams, *The Feminist Care Tradition in Animal Ethics*, p. 49. See also Melanie Joy, *Why We Love Dogs, Eat Pigs and Wear Cows* (San Francisco, Conari Press, 2010).

<sup>15</sup> Cf. Kenneth Shapiro, ‘The Caring Sleuth: Portrait of an Animal Rights Activist’, in Donovan & Adams, *The Feminist Care Tradition in Animal Ethics*, p. 165. See also Miyun Park, ‘Opening Cages, Opening Eyes: An Investigation and Open Rescue at an Egg Factory Farm’ and Karen Dawn, ‘Moving the Media: From Foes, or Indifferent Strangers, to Friends’, both in Singer, *In Defense of Animals*.

of such animals. The categories may then dissolve and an ethical-legal crisis ensue; a crisis that challenges not only our ethical-legal standards with regard to the specific animal, but with regard to such animals in general. If, for example, one witnesses a piglet having its tail cut off or being sterilized without being anesthetized, one's sense of inconsistency concerns the entire pork industry and not only the singular piglet. When such an experience by means of publication, broadcast or through social media is shared by a large number of people it becomes publicly undeniable that there exists an underlying ethical-legal inconsistency. If the ensuing demand for changes is sufficiently forceful, the conditions of the particular kind of animals, which have given rise to the ethical-legal crises, may be altered. The underlying inconsistency, however, is rarely, if ever, seriously addressed.

#### **4. The face of the animal: A Levinasian animal ethics**

Levinasian ethics addresses the ambivalence between, on the one hand, categorization according to purpose and, on the other hand, the significance of an encounter with something altogether other – the Other. Without such an encounter, the I would be restricted to understanding the world exclusively according to its own needs. There would be no other perspective: the I would be for-itself. The Other, however, cannot be reduced to the categories through which the I understands the world in order to satisfy its needs; the Other is signified by being prior to any thematization and categorization.

According to Levinas the source of the radical otherness of the Other is to be found in the face, which contains a transcendent trace which is identified as an epiphany.<sup>16</sup> While it is possible to recognize and describe any number of details of the face, it simultaneously contains an infinite and irreducible surplus that lies beyond (or rather before) any rational discourse. The face thus makes up an exteriority that enables true communication inasmuch as it is a communication with something entirely foreign. Following Levinas, this communication contains a command through which the Other “in the total nudity of his defenseless eyes”<sup>17</sup> awakens one’s morality. The ethical effect of the encounter may be described as a responsibility beyond choice; a responsibility that happens to one rather than something that one freely chooses.<sup>18</sup> Being prior to reason and priorities, this responsibility is limitless and irreciprocal and something that one cannot pass on to somebody else. In the vocabulary of Levinas, the responsibility takes one hostage; it is a question of substitution of me for the other. The term, which Levinas uses to qualify this in effect one-sided relationship, is *proximity*.

Despite constituting the founding ethical event, proximity does not guarantee any certain moral conduct and may even give rise to responses that contravene ordinary moral standards because the proximity of the Other in itself sparks a desire to subsume the Other under the same and thus to

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<sup>16</sup> E.g. Emmanuel Levinas, *Totality and Infinity*, transl. Alphonso Lingis (Pittsburgh, Duquesne University Press, 1991), p. 199.

<sup>17</sup> Ibid.

<sup>18</sup> Emmanuel Levinas, *Ethics and Infinity, Conversations with Philippe Nemo*, transl. Richard A. Cohen (Pittsburgh, Duquesne University Press, 1986), p. 96.

silence the otherness of the Other.<sup>19</sup> Zygmunt Bauman accordingly speaks of the responsibility that becomes least endurable in proximity and how, consequently, “[t]he same soil breeds love and hatred”.<sup>20</sup> Despite the face being the source of the founding ethical event, it therefore is impossible to prove or disprove the occurrence of such an event by pointing to certain actual actions.

Levinas only rarely discussed what precisely constitutes a face. To enter into a discussion in regard to whether a newborn baby or a chimpanzee has a face would in fact have been in contradiction to the very significance that Levinas attributed to the face as being prior to all categorizing and language.<sup>21</sup> Accordingly, even though it undoubtedly was the *human* face that was the object of Levinas’s phenomenological investigation, Levinas was reluctant to rule out that an animal may be considered to have a face in an ethical sense. This is well illustrated by a remark that Levinas once made in a conversation with John Llewelyn. First, Levinas had explained that an animal is restricted to pure being inasmuch as its purpose of being is identical to being itself, and that an animal therefore does not have the capacity to obtain an ethical dimension through an encounter with others. However, as Levinas’s subsequent observation makes clear, he had not exhausted the question of the face of an animal: “I don’t know if a snake has a face. I can’t answer that question. A more specific analysis is needed.”<sup>22</sup> Despite the large number of scholars, who have commented on Levinas’s ambivalence or even agnosticism in regard to the ethical status of the face of an animal,<sup>23</sup> nobody appears to have carried out the analysis asked for by Levinas; an analysis that Levinas undoubtedly envisaged to be of the same phenomenological nature as his own analysis of the (human) face.

Jacques Derrida’s omission in regard to such an analysis may have been particularly significant due to his status as one of the primary curators of Levinas’s ethical thinking. In his lectures entitled *The Animal That Therefore I Am*, for instance, Derrida chooses an easy path by means of refuting those who, according to Derrida, dream of reconciling Levinas’s ethics with animals. Derrida sees this as a testimony of an “idolizing” of the dog named Bobby in Levinas’s *The Name of a Dog, or Natural Rights*,<sup>24 25</sup> that came to the prisoner-of-war camp where Levinas was kept in captivity during World War II. However, whereas Levinas’s account of Bobby does in fact not appear to offer any support

<sup>19</sup> See Pierre Legrand, ‘The Same and the Different’ in Pierre Legrand and Roderick Munday, eds., *Comparative Studies: Traditions and Dynamism* (Cambridge, Cambridge University Press, 2003).

<sup>20</sup> Zygmunt Bauman, *Postmodern Ethics*, (Malden, Oxford and Carlton, Blackwell Publishing, 1993), p. 89.

<sup>21</sup> See likewise Matthew Calarco, *Zoographies. The Question of the Animal from Heidegger to Derrida* (New York and Chichester, Columbia University Press, 2008), p. 64, and Christian Diehm, ‘Alterity, Value, Autonomy: Levinas and Environmental Ethics’, p. 12, in William Edelglass, James Hatley & Christian Diehm, eds., *Facing Nature* (Pittsburgh, Duquesne University Press, 2012).

<sup>22</sup> Emmanuel Levinas, ‘The Paradox of Morality: An Interview with Emmanuel Levinas’ in Robert Bernasconi and David Wood (eds), *The Provocation of Levinas: Rethinking the Other* (London, Routledge, 1998), pp. 171f.

<sup>23</sup> Diane Perpich, ‘Scarce Resources? Levinas, Animals, and the Environment’, pp. 67-73, as well as Christian Diehm, ‘Alterity, Value, Autonomy: Levinas and Environmental Ethics’, pp. 12-14, both in Edelglass, Hatley & Diehm, *Facing Nature*. See also David Clark, ‘On Being “the Last Kantian in Nazi Germany”: Dwelling with Animals after Levinas’ in Barbara Gabriel and Suzan Ilcan, eds., *Postmodernism and the Ethical Subject* (Montreal & Kingston, London, Ithaca, McGill-Queen’s University Press, 2004), and Calarco, *Zoographies*, pp. 55-77. See also Jonathan Crowe, ‘Levinasian Ethics and Animal Rights’, *Windsor Yearbook of Access to Justice* 26, 2008, pp. 313-328, Peter Atterton, ‘Levinas and Our Moral Responsibility Toward Other Animals’, *Inquiry* 54, No. 6, 2011, pp. 633-649, as well as most of those other contributions in Edelglass, Hatley & Diehm, *Facing Nature* not already mentioned above.

<sup>24</sup> Emmanuel Levinas (1990), ‘The Name of a Dog, or Natural Rights’ (first published in 1975) in *Difficult Freedom, Essays on Judaism*, transl. Seán Hand (London, The Athlone Press, 1990) p. 152.

<sup>25</sup> Derrida, *The Animal That Therefore I Am*, p. 114.

for attributing a face to dogs or other animals,<sup>26</sup> this can hardly be sufficient reason for omitting an actual analysis a phenomenological nature of the face of an animal.<sup>27</sup>

The reluctance within Continental philosophy to take up the cue from Levinas and enter into an analysis of the face of an animal may, as pointed out by Matthew Calarco, be seen as the result of a strong anthropocentric tendency.<sup>28</sup> But even critics of this continental anthropocentrism appear to be either unwilling or unable to carry out such analysis. Calarco himself, for instances, declines to develop “a phenomenological ethics of nature based in the interruptive force of diverse kinds of nonhuman life”.<sup>29</sup> On the one hand, Calarco points to the nonsensicalness of drawing a line between those beings or entities, who may constitute an ethical relevant otherness, and those who may not. On the other hand, he points to the absurdness of claiming – with a paraphrase over Socrates – that “lower animals, insects, dirt, hair, fingernails, ecosystems, and so on” may constitute such otherness.<sup>30</sup> This reasoning illustrates a recurring problem when continental philosophy founded on phenomenological methodology is applied by analytical thought and its inherent desire to operate with well-delimited concepts and definitions. The idea that the Levinasian concept of the face constitutes a precisely delimited category that can be tested by borderline examples thus runs counter to the very essence of Levinasian phenomenology. Here, the uncertainty or opaqueness of a phenomenon – e.g. the lack of a defining limit between those entities that may and may not constitute otherness – does not disqualify the phenomenon but is, on the contrary, constitutive of the phenomenon.<sup>31</sup> In this regard it is particularly important to note that the face and the ethical significance of other entities/beings constitute phenomena whose significance depends on the concrete situation and the identity of the one by whom they are encountered.<sup>32</sup>

Despite his own reservations Levinas’s analysis of the (human) face may in fact offer an important basis also with regard to the animal face. The authority and influence of Levinas’s texts appear to rest primarily on the precision of his use of concepts and the stringency and recognizability of his phenomenological analysis, the latter depending on whether the reader finds that her own experience accords with Levinas's texts. For the reader of Levinas, who finds his ethical analysis compelling not only when the face is taken to be the face of a human being but also when it is taken

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<sup>26</sup> Instead of using the vocabulary that Levinas elsewhere employs to describe the significance of the face – proximity, responsibility, epiphany, etc. – he rather emphasizes that it is with neither “*ethics* nor logos” (Levinas, *The Name of a Dog, or Natural Rights*, p. 162, emphasis inverted) that the dog attests to the dignity of its person. According to Levinas, the transcendence of the dog is of another kind than that of the face, cf. John Llewelyn, ‘Am I Obsessed by Bobby’ in R. Bernasconi and S. Critchley (eds.), *Re-Reading Levinas* (Bloomington, Indiana University Press, 1991).

<sup>27</sup> Calarco, *Zoographies*, p. 118, appears to be more favorable towards Derrida’s commentary on this point.

<sup>28</sup> In *Zoographies*, Calarco not only demonstrates the anthropocentrism of Levinas but also of Heidegger (in particular with regard to the concept ‘as such’) as well as Agamben and Derrida.

<sup>29</sup> Calarco, *Zoographies*, p. 68.

<sup>30</sup> *Ibid.*, p. 71. Peter Atterton, on the other hand, In ‘Levinas and Our Moral Responsibility Toward Other Animals’, p. 641, proposes a well-defined limitation of animals that may count as the Other, i.e. those animals that “actually have the capacity to feel pain, or can suffer”.

<sup>31</sup> See ‘Réflexions sur la ”technique” phénoménologique’ in Levinas, *En découvrant l’existence avec Husserl et Heidegger* (Paris, Vrin, 2001).

<sup>32</sup> It may even be suggested that some people are altogether deprived of the potential of encountering the Other and thus of ethical subjectivity (and hence of subjectivity as such). See in this regard the analysis in regard to psychopathology by Paul Marcus in ‘You are, therefore I am’, *The Psychoanalytic Review* 94, No. 4, 2007, pp. 515-528.

to be the face of an animal,<sup>33</sup> there may be no need for further analysis: The existing analysis is in itself sufficient for recognizing the animal's face, which, in its radical otherness, gives rise to an infinite responsibility. At any rate, similar to inter-human encounters further analysis and discussions appear difficult; either one sees the face of the animal or one does not.

A pragmatic way to counter the ethical relevance of an animal's face would be to point out that within the farming industry or for the purpose of testing or pest control or for yet other reasons such as hunting, horse racing etc. suffering is customarily being inflicted on animals. In the eyes of those who inflict this suffering, these animals most probably do not appear to have a face in the Levinasian sense. The fact that a considerable proportion of the population thus appears not to see the face of the animals that they deal with could be seen as strong evidence against attributing an ethical relevance to the face of an animal.

There is, however, a yet more likely explanation for this un-seeing of the face of the animal. The culture of the Western World as well as most other societies thus appears to contain a variety of myths and stories as well as practices that founds, teaches and supports such blindness.<sup>34</sup> Even without a genealogy with regard to the discourses and subjectivation in relation to animals, it seems likely that animals by such means are denied individuality and instead are reduced to categories such as production units, vermin, game or similar (the last two examples exemplifying how the deprivation of individuality semantically is facilitated by the use of nouns that exist only in plural).<sup>35</sup> By such categorization and stigmatization it becomes much easier to not see a face in the Levinasian sense. Obvious examples from the interhuman domain include the treatment of natives from Western Africa in the 18th century, who were caught, chained and forcefully transported to the New World as slaves, and the Holocaust, where the Star of David constituted a visible step in the general strategy of obscuring the individual face behind the category 'Jews'.<sup>36</sup> Keeping refugees segregated in distant camps and denying them access to a normal public judicial process in regard to their right to asylum<sup>37</sup> likewise obscures the faces of a certain group, which accordingly risks being reduced to a faceless category.

These are dramatic examples of institutionalized exploitation of a common and deep-rooted social need for maintaining a distance to intrusive proximity and the demanding presence of others – a need that, as noted by Slavoj Žižek, is predominantly ensured by habits and customs.<sup>38</sup> This

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<sup>33</sup> Such experiences are shared among the majority of those commentators on Levinas referred to in this article. See as yet another, very convincing example Christian Diehm, 'Alterity, Value, Autonomy: Levinas and Environmental Ethics', pp. 4 and 17f.

<sup>34</sup> In relation to the significance of zoos in this regard, see Joseph Berger, *Why Look at Animals* (London, Penguin Books, 2009).

<sup>35</sup> See also Peter Atterton, who in 'Levinas and Our Moral Responsibility Toward Other Animals', p. 642, makes the point that one may become inured to feelings of sympathy and compassion when 'witnessing' animals in pain if one as for example a meat packer or scientist on a daily basis is exposed to the routine suffering of animals.

<sup>36</sup> The latter example is analyzed extensively on the basis of a Levinasian ethics by Zygmunt Bauman, *Modernity and the Holocaust* (Cambridge, UK, Polity Press, 1989). As regard Levinas's own metaphoric use of animals as illustration of the Nazi's reduction of Jews, see David Clark, in 'On Being "the Last Kantian in Nazi Germany"', p. 69, on Levinas's 'The Name of a Dog, or Natural Rights'.

<sup>37</sup> In Danish Law, the deprivation of asylum seekers' access to a judicial process is, practically speaking, the only exception to the constitutionally protected right to have administrative decisions tried before the courts.

<sup>38</sup> Slavoj Žižek, *Living in the End Times* (London & New York: Verso, 2010), p. 123. See also Lyn H. Lofland, *A World of Strangers – Order and Action in Urban Public Spaces* (New York, Basic Books, 1973).

mechanism implies that the industrial interests in keeping animals unseen by the public is mirrored by an interest of consumers and others in not being confronted with the ethically demanding proximity of animals whether through physical presence, images or in other ways. These overlapping interests obviously are nurtured by the fact that the worlds of human beings and animals increasingly are kept separate and that human beings therefore increasingly move around in their worlds without even the possibility of being exposed to the face of animals except those animals which, as pets, are given a status resembling that of family members.<sup>39</sup>

## 5. Justice for animals

Up to this point of the analysis, the primary focus has been the significance of the face-to-face contact and the responsibility which it entails. In actual life, however, our responsibility towards the unique other never stands alone. The presence of a third party, who “is other than the neighbor, but also another neighbor, and also a neighbor of the other, and not simply his fellow”,<sup>40</sup> thus complicates the ethical situation of pure responsibility. We are responsible for both the other and the third and therefore cannot remain indifferent to their mutual relationship: “What have they done one another? Which passes before the other?”<sup>41</sup> According to Levinas, the ethical responsibility for both the other and the third implies a requirement for justice, which again necessitates comparing what is incomparable due to the irreducibility of each of the others’ faces. This, according to Levinas, is the ultimate source of rationality and its use of categories and language.

Whereas the ethical responsibility is born out of an actual encounter, justice does not depend on the presence of those concerned since – with the words of Levinas – all the others, in a certain sense, are present in the face of the Other.<sup>42</sup> This does not, however, render concrete proximity ethically irrelevant, since, “there also remains the impossibility of passing by the closest”.<sup>43</sup> The responsibility associated with proximity thus is not neutralized by the demand for justice, but rather retains its significance along with it. This point is crucial to Levinasian ethics: Despite the implicit presence of third parties, the concrete proximity of another being always gives rise to an irreducible responsibility towards that particular being. This, by the way, corresponds well with the common experience, that the weight of the interests of those affected by a decision increases, the closer they are.<sup>44</sup>

Central to Levinas’s account of justice is that it requires *both* responsibility for the other *and* distributive justice in the sense that everyone is treated according to the same standards. In regard to adjudication, the implication is straightforward, as explicated by Levinas:

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<sup>39</sup> Cf. Berger, *Why Look at Animals*, pp. 12ff.

<sup>40</sup> Emmanuel Levinas, *Otherwise than Being or Beyond Essence*, transl. Alphonso Lingis (Pittsburgh, Duquesne University Press, 1998), p. 157.

<sup>41</sup> *Ibid.*

<sup>42</sup> Emmanuel Levinas, *Entre nous*, transl. Michael B. Smith and Barbara Harshav (New York, Columbia University Press 1998), p. 105. See also more detailed Levinas, *Otherwise than Being*, p. 158.

<sup>43</sup> Levinas, *Otherwise than Being*, p. 159.

<sup>44</sup> It also raises questions regarding the interdependence between, on the one hand, the degree of proximity and, on the other hand, the level of 'directness' and way of mediation (e.g. face-to-face encounter, video conference, one-way live transmissions, phone call, or photo) – questions that will be further addressed below.

“Justice is impossible without the one that renders it finding himself in proximity. His function is not limited to the ‘function of judgment’, the subsuming of particular cases under a general rule. The judge is not outside the conflict, but the law is in the midst of proximity. Justice, society, the State and its institutions, exchanges and work are comprehensible out of proximity. This means that nothing is outside of the control of the responsibility of the one for the other.”<sup>45</sup>

The significance of proximity or being face-to-face to one another in regard to legal disputes or other kind of conflicts that necessitate intervention is also addressed in *The Rights of Man and the Right of the Other*,<sup>46</sup> which is one of Levinas's few texts that explicitly addresses questions relating to law. Here he argues that the very essence of respecting the rights of the other is to face one's neighbor. Conversely, if the other is considered exclusively from the point of view of a conception of freedom, the ordinary rights of man are no longer defended.<sup>47</sup> In this manner, the right to be face-to-face with one's neighbor underlies all other rights; a fact that very likely has led to the historically and culturally deeply rooted right for an accused to appear before the court as well as the universal and fundamental procedural principles of orality and immediacy.

The widely accepted fundamental principle of procedural law of being entitled to – and in some cases obliged to – physical presence during the hearing of a legal case,<sup>48</sup> however, only applies in regard to human beings. In proceedings involving animals, these are not present nor, as a main rule, represented.<sup>49</sup> The law, in other words, is not ‘in the midst proximity’. The judge is, instead, on the one hand, faced with one or more human parties, who accordingly are recognized as individuals with a face and a narrative presence. The faceless animals, on the other hand, are merely identified and categorized as belonging to a certain species who, to make matters worse, according to prevailing dogma are not part of any social contract and thus not entitled to any rights. Documentation in terms of photographs or video footage may, when available, depict how the animals have been treated and may even to some extent create a sense of witnessing but do not create a situation comparable to an encounter in the Levinasian sense.

In continuation of these considerations the following, related question must be asked: Under which circumstances may absent (third) parties that will be affected by a decision be implicitly present in an ethical relevant way? Under which circumstances, for instance, will a litter of pigs that have been

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<sup>45</sup> Levinas, *Otherwise than Being*, p. 159.

<sup>46</sup> In Emmanuel Levinas, *Outside the Subject*, transl. Michael B. Smith (Stanford University Press, 1993), pp. 116-125.

<sup>47</sup> *Ibid.*, p. 123.

<sup>48</sup> E.g. the case-law of The European Court of Human Rights on Article 6 of the European Convention on Human Rights and the Sixth Amendment of the Constitution of the United States. The principle traces back to Habeas Corpus from 1679. See also Robert Gibbs, ‘Verdict and Sentence: Cover and Levinas on the Robe of Justice’ in Desmond Manderson (ed.), *Essays on Levinas and Law, A Mosaic* (Palgrave Macmillan, 2009), pp. 89ff.

<sup>49</sup> Cf. the Swiss Bundesbeschluss of 25 September 2009 whereby a referendum was held on a constitutional amendment ensuring *inter alia* the representation of animals by an animal advocate. The proposed amendment was rejected by a majority of the electorate. There are well-documented cases dating from the period from the 13th to the 18th century of criminal trials against animals where animals often were present. See Keith Tester, *Animals and Society: The humanity of human rights* (London, Routledge, 1991), pp. 72ff, who mentions a famous case from 1510 where the celebrated French lawyer, Bartholomew Chassenée, succeeded in having a case against a pack of rats repealed because they risked being attacked by their enemies, the cats, if they were to try to make way to the court in Autun. Today, most questions relating to the representation of animals in litigation relate to civil proceedings in particular concerning animals as beneficiaries according to wills. See also Doug Halls, ‘Agency, Vulnerability, and *Societas*’, in Edelglass, Hatley & Diehm, *Facing Nature*.

badly neglected, achieve an implicit presence during the court case against the breeder? A minimum requirement seems to be that there has been, at some stage, an encounter with an Other who to a sufficient degree shares characteristics with the third party in question. Reversely, if one has had ethical encounters only with other human beings, it seems unlikely that there is a basis for a responsibility by proxy towards the piglet in the example. In other words, for one to be subjected to the demand of justice towards an animal that is not present there must have been a prior ethical encounter with an animal with a sufficient degree of similar characteristics.<sup>50</sup> On the other hand, having once seen the face of an animal in the Levinasian sense may appear to suffice to become responsible by proxy. Such an encounter thus is essential with regard to how one views not only those animals, which are encountered in one's everyday life, but also how one views those animals that are hidden from one's gaze.

The lack of proximity, or rather the one-sided proximity in cases concerning violation of animal welfare rules, is of particular significance in view of the specific nature of the interaction between the legislator and the judiciary, between rule-making and application. As noted already by Aristotle, the law represents the general just and is thus incapable of achieving concrete justice. Therefore it is necessary to make corrections with regard to what is fair in a concrete situation. Gunther Teubner accordingly distinguishes between the represented and the unrepresented aspects of law, which interact with each other in an interplay that resembles a hermeneutic circle.<sup>51</sup> The singular and unrepresented, of which the face is the ultimate and – according to Levinas – only example, thus exhibits the lack of justice of the represented aspects of law, i.e. rules, case law, legal theory, legal discourse etc. Being faithful towards the responsibility for the Other and for being just implies adjustment of the represented law through the judicial decision in the concrete case. This does not, however, once and for all settle what is just. The represented law, on the contrary, is challenged each time that law is met by the Other, i.e. by non-law, and adjusted accordingly. This vital interplay between what is represented in law and what is not represented, between law and non-law, depends on a presence of the Other through which law becomes subjected law.

Any lack of such an encounter between law and non-law obviously is problematic and may impair the legitimacy of law.<sup>52</sup> In judicial processes involving animals, it is particularly problematic due to the innate absence of animals also from the legislative process. To a wide extent, reason and categorization thus remain unchallenged both within the legislative branch of law and within the judicial branch – a fact that renders both concrete and general justice illusory.

The only remaining branch of law, which may then allow for proximity in regard to animals, is the executive branch where especially veterinary control carried out by various government agencies ensures a more direct encounter with animals. This platform for proximity between the legal sphere and animals may, however, be impaired if those, who perform the control, lack actual independence from the animal industry, or if they over time and through their training adapt to an institutional

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<sup>50</sup> See along the same lines Doug Halls, 'Agency, vulnerability, and *societas*: toward a Levinasian politics of the animal' in Edelgrass, Hatley and Diehm, *Facing Nature*, p. 47.

<sup>51</sup> Gunther Teubner, 'Self-subversive Justice: Contingency or Transcendence Formula of Law', *Modern Law Review* 72, 2009, pp. 1-23.

<sup>52</sup> Søren Stig Andersen, 'Why and how does proximity matter in litigation: a Levinasian approach', *Archiv für Rechts- und Sozialphilosophie – Beihefte* 130, 2012, p. 68.

'blindness' towards the otherness of an animal.<sup>53</sup> Furthermore, reports that originate from the veterinary control, and which often form the basis for indictments, are typically formulated according to the logic and language of law whereby elements of non-law are filtered out. The same may be said about reports and similar texts that are used as a basis for regulating the conditions of animals. The potential for proximity and presence of non-law offered by veterinary control thus often is at risk of being reduced drastically. The significance of proximity stemming from the physical contact that underlies veterinary control, nevertheless, can hardly be overestimated: In reality this will often be the only instance in which there is at least a possibility of animals being perceived beyond purpose and categorization.

Summing up, the two main aspects of relational ethics – on the one hand, the purpose of the relationship, rationality and distance, and, on the other hand, responsibility, ethics and proximity – run counter to each other with the former aspect often being decisive in regard to animals due to the lack of an encounter. But does this, one may ask, give reason for concern? What are the consequences for a society that avoids seeing the face of certain groups of sentient beings in order not to have to deal with the consequent responsibility? Does not the common interests of both industry and consumers in ensuring cheaper and more efficient meat production, easier access to animal testing etc. constitute sufficient reason for avoiding proximity? Could it, in a more abstract manner, be argued that without proximity there is no ethical responsibility for ensuring proximity? In other words: If nobody within a society ever has ethical relevant encounters with animals used for food production etc., and if no images or accounts ever are released, there might in fact be no ethical responsibility.

To accept such reasoning would appear, however, to contravene the very basis of ethics and would seem akin to a renouncement of one's ethical existence as such. Moreover, from a practical point of view it would appear to be an entirely hypothetical scheme. Despite the secrecy surrounding the industrial use of animals, images and accounts of their conditions are continuously being publicized and, as a result, a great number of people do in fact feel an ethical responsibility towards these animals. Even without a direct encounter, ethical subjects, who at some stage have had an ethical experience of an animal's face, may experience a sense of responsibility also towards those animals that are hidden away. The ensuing division of the society into two decisively separate parts – those who have (once and for all) seen the face of an animal and those who have not (yet) done so – exemplifies the kind of polarization that occur when one part of society recognizes the faces of a group of individuals whereas the other part of society only sees the faceless category. Other examples from the history of Western societies include the earlier mentioned examples of African natives subjected to slavery in the 18th century and the treatment of Jews by the axis powers in the 1930s and 1940s. As an additional example one could also mention the ethical status of fetuses/unborn babies, which in particular illustrates the significance of the image as there is little doubt that photographs of fetuses and their faces while still in the womb have given new strength to anti-abortion sentiments.

Normally, moral dilemmas concern justice in a distributive sense and appear in situations involving

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<sup>53</sup> See Martin Balluch, 'How Austria Achieved a Historic Breakthrough for Animals' in Singer, *In Defense of Animals*, p. 158.

the interests of two or more ethically relevant individuals and. Disagreements over the very ethical status of individuals are of a more fundamental nature and are extremely difficult to reconcile. When the face of an animal, who fulfills certain purposes, is ignored, and when an encounter face-to-face with such an animal is made impossible, it amounts to denying those animals the very possibility of being recognized as ethical relevant beings – also by those, who are responsible for making decisions regarding their protection from suffering. In the eyes of those, for whom an animal does have a face, this is not only a matter of concrete injustice; it undermines the very ethical foundation of the society. This might very well be the underlying reason why commentators repeatedly warn that our treatment of animals not only constitutes grave injustice towards animals but that it also may corrupt the morality of society as such. Following Levinas, a state in which the interpersonal relationship – the possibility of being face-to-face – is impossible, is a totalitarian state. Or, as he also writes, “it is in terms of the relation to the Face or of me before the other that we can speak of the legitimacy or illegitimacy of the state”.<sup>54</sup>

## 6. A possible encounter between law and animals

The foregoing analysis indicates that the key to challenge the stigmatization of animals according to purpose lies in facilitating proximity in terms of concrete encounters within the legislative as well as the judicial processes. Levinas’s analysis may at first sight appear to build upon the assumption that there is no graduation of such proximity. However, as indicated above, Levinas does in fact not deny the common experience of different levels of proximity and responsibility. While images of even far-away suffering people may affect one and give rise to an ethical responsibility that cannot be ignored in terms of just actions, this responsibility may be outweighed by a more immediate proximity.<sup>55</sup> From a practical point of view this leads to the important question as to the *degree* of presence that is needed in order to enable an ethically relevant encounter.

Whereas it is difficult to find explicit analysis carried out by Levinas as to what exactly is required in terms of sensory perception in order to ensure a basis for an ethical encounter,<sup>56</sup> some further insight into the significance of different kinds of sensory perceptions may be gained from the field of social psychology. The research of *inter alia* John Short into social presence is particularly ambitious and supports the intuitive premonition that the degree of social presence increases with the number and intensity of communicative channels that are employed. The highest degree of social presence is found in face-to-face communication, whereas video mediated communication, purely audial or visual forms of communication, and lastly written communication give rise to decreasing levels of social presence.<sup>57</sup> As in Levinasian ethics, the actual physical encounter face-to-face thus stands out as the most forceful mode of proximity, while video transmission is a

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<sup>54</sup> Levinas, *Entre Nous*, p. 105.

<sup>55</sup> See in relation to animals Matt Ball, ‘Living and Working in Defense of Animals’ in Singer, *In Defense of Animals*, p. 158.

<sup>56</sup> Cf. Emmanuel Levinas, ‘Language and Proximity’ in *Collected Philosophical Papers*, transl. Alphonso Lingis, (Dordrecht, Martinus Nijhoff Publishers, 1987) where Levinas opens up his analysis towards the question of the significance of different physical senses with regard to proximity.

<sup>57</sup> See John Short, Ederyn Williams and Bruce Christie, *The Social Psychology of Telecommunications* (London, John Wiley & Sons, 1976) and Theresa Ditton and Matthew Lombard, ‘At the Heart of It All: The concept of Presence, *Journal of Computer-Mediated Communication*’, Vol. 3, No. 2, 1997.

stronger substitute than still pictures or written accounts. To ensure the highest possible degree of proximity with regard to animals, legislative and judicial practices accordingly should be aimed at ensuring those respective modes of contact in that very order.

Concerning the legislature, an overall goal would be to ensure that legislators, e.g. members of parliamentary agricultural committees, and other policymakers involved in regulating the conditions of animals, enter into situations of proximity with the animals in question. Such encounters should preferably take place in relevant contexts, e.g. within production facilities including transportation units and slaughterhouses. Since the mere passing through such facilities obviously does not ensure an ethical relevant encounter with the animals concerned, visits to production sites etc. should be arranged with the particular purpose of facilitating encounters, for example by means of an actual physical contact with the animals (policymakers who may find such contact repulsive perhaps are not fitted to regulate animal welfare). Since the electorate through the election of the legislature indirectly is responsible for the regulation of the conditions of animals, the general public also should be ensured access to such facilities to the largest possible extent.

In relation to adjudication, a similar high degree of presence to animals would be desirable when cases relating to animal welfare are adjudicated. An actual physical encounter between judge and the animal would be preferable or, if this is not feasible, the best possible substitution such as video footage.

When a case involves the treatment of animals within the food industry or of test animals, it may be instrumental to encounter animals kept and treated under conditions similar to the animals in question. If, for example, an indictment concerns inadequate conditions under which some pigs have been transported by truck from a pig farm to a slaughterhouse, an encounter by the judge with pigs that are transported in a similar kind of truck may ensure a degree of responsibility for doing justice to the mistreated pigs that is altogether different than without such an encounter. The basis of the court ruling will thus not, as often is the case, be limited to the text of the indictment, possible statements by witnesses and, the presence of – and thus ethical responsibility towards – the indicted truck driver. Instead it will also reflect the responsibility for doing justice towards those individual pigs that have been mistreated. And if such a set-up is not feasible, even an encounter with animals outside the kind of environment, in which the abuse is supposed to have taken place, will most likely facilitate the undoing of the categorization and stigmatization.<sup>58</sup>

## 7. Conclusion

Proximity signifies the undoing of prejudices and categorizations and thus is a prerequisite for justice. The significance of presence and proximity within the administration of justice is recognized to such a degree that it – at least in some contexts – is guaranteed in legal key documents such as the European Convention of Human Rights and the US Constitution.<sup>59</sup> From the

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<sup>58</sup> In relation to the effect of witnessing a battery chicken after it has been released from the production site, see Martin Balluch, 'How Austria Achieved a Historic Breakthrough for Animals', p. 174.

<sup>59</sup> See footnote 47.

foregoing analysis it appears that the need for creating platforms for challenging the categorization of animals and the ensuing stigmatization is particularly important since a large proportion of the animals dealt with by human beings presently are exempt from such proximity. The focus of attention with regard to the legal standing of animals therefore should be shifted from substantive law to processes concerning adjudication as well as law-making and enforcement. While some brief, introductory remarks have been made above in this regard, further and more specific research and analyses are needed. Such re-thinking of legal processes will necessitate radical, paradigmatic changes in our perception of animals as legal objects, perhaps even leading to the notion of the legal animal *subject*. Faced with the inability of traditional legal approaches such as the rights discourse to decisively enhance the legal protection of animals and to ensure justice for them, such a new paradigm appears indispensable.