When is animal suffering 'necessary'?

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Despite a legal revolution in South Africa in 1994, there has been no change to the legal framework governing animal welfare.[1] The key act in this area remains the Animal Protection Act of 1962 ('the Act').[2] Despite some disparate initiatives to review this Act and identify some of its inadequacies, there has not been any concerted push towards law reform.[3] Unfortunately, concerns relating to animals are not currently accorded much attention by the legislature and executive unless there is a society-wide outcry such as in the case of rhino poaching. Though it is of importance to build a campaign for reform in the longer-term, there is a strong possibility that the law may not be changed any time soon. In this context, it is thus of importance to consider the existing legislative framework and whether it contains as yet unexplored possibilities to enhance the protection the law provides for animals.

One of the key problems with the Animal Protection Act as it stands is that it contains a number of vague provisions which are poorly defined. Cases often do not reach the higher courts and so there is limited precedent to help resolve these uncertainties. Prosecutors – often less than enthralled to take cases relating to animal cruelty[4] – may thus decide not to prosecute a case given the lack of clarity as to whether it is likely to succeed. This, in turn, reduces the protection afforded

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[1]There have been some significant changes in environmental law which have some implications for animals but this legislation largely avoids addressing animal welfare specifically. For a notable exception, see National Norms and Standards for the Management of Elephants in South Africa GN 251/2008 (National Environmental Management: Biodiversity Act 10 of 2004)

[2]Act 71 of 1962. The first piece of animal welfare legislation is the Prevention of Cruelty to Animals Act 8 of 1914.

[3]Animal Rights Africa held a successful conference to review the Animal Protection Act at the University of the Witwatersrand in 2009, but this initiative did not translate into a strong campaign to have the Act reformed.

[4]Many organisations working for the protection of animals attest to their experience of prosecutors who are often reluctant to enforce the Act.

by the Act to animals. The focus of this paper will be on the definition of criminal offences in the Act.[5] Many of the offences identified are qualified by the term 'unnecessarily': for instance, section 2(1)(c) states that a person who 'unnecessarily starves or under-feeds or denies water or food to any animal' commits an offence. The wording thus raises the question as to when one can be said to deny water or food to an animal as a matter of 'necessity'. Similarly, section 2 contains the catch-all offence that is committed by a person who 'by wantonly or unreasonably or negligently doing or omitting to do any act or causing or procuring the commission or omission of any act, causes any unnecessary suffering to any animal'.[6] The offences in the Act thus appear to be designed to prohibit causing, whether intentionally or negligently, the 'unnecessary suffering' of an animal.[7]

This paper will focus on trying to make sense of this rather complex idea and provide an understanding of it in accordance with of its underlying purpose that will offer the possibility of increased protection for animals in the law. The first part of the paper will review existing case law and attempt to capture the main approach adopted by South African courts towards these offences. I also consider certain features of the approach adopted by the English courts which provides a contrast to and, in some cases, a helpful clarification of the position in South Africa. I then consider two critiques levelled against the notion of 'necessary suffering' by two prominent philosophers, namely Gary Francione and Michael Fox. The notion of 'necessity' they claim is, firstly, a manner of masking human exploitation of animals and fails to capture anything that is normatively fundamental. Secondly, the notion is fundamentally related to an 'animal welfarist' philosophy that retains the idea that animals lack intrinsic value, lack rights and may be used for human ends.

In deciding whether these criticisms are apposite, the second part of this paper considers the way in which the concept of necessity ought to be understood in relation to the Act. I first consider the role of the notion of necessity in criminal law, in relation to fundamental rights and in relation to animal welfare. I attempt to demonstrate that there is a significant overlap in the manner in which the necessity enquiry has been developed in these areas of the law. I identify two key

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[5] A problem of clarity also attaches to the definition of 'animal' which includes all domestic animals but only wild animals if they are kept 'in captivity or under the control of any person' (s 1 of the Act). The notion of control is extremely vague and could refer, on the one hand, to animals dependent on humans for food and shelter or, on the other, simply to animals that are owned by an individual and fall within a fenced-off area of property. The latter interpretation would include many more animals and, accord with an interpretation that gives effect to what I understand to be a key purpose of the Act which is to accord animals general protection against cruelty. However, the lack of clarity in this regard, means that the Act may be understood by some magistrates and judges according to the first interpretation and thus its scope will be narrowed with many animals falling outside its ambit.

[6] Section 2(1)(r) of the Act.

[7] These offences, if proved, attract a punishment of one year in prison or a fine of R20 000. Such sanctions represent another key problem with the Act which provides woefully inadequate sanctions for brutal acts of cruelty.

components of the necessity enquiry that, I contend, should be recognised as central to the enquiry in relation to the offences in the Act: first, the objective for which any suffering is caused must be evaluated; secondly, it must be ascertained whether the means adopted is suitable, and necessary for achieving the objective and whether, ultimately, it is proportionate to the harm caused to the animal.

Understood in this way, I turn in the last section to respond to the critiques lodged against this concept. I contend that the notion of necessity is not founded upon a notion that animals lack intrinsic value and offers us a manner to deal with a normatively foundational problem where rights and significant interests clash. The notion of necessity will indeed be an important (and, possibly, indispensable) component of reasoning for those who accept the intrinsic worth and rights of animals. A proper understanding of necessity will mean that any suffering inflicted upon animals must only occur in relation to a significant objective: this element rules out subjecting animals to suffering simply for purposes of pleasure or profit alone. I attempt to show, however, that judges are unlikely to discard purposes – such as meat-eating – which are regarded widely in society as being of importance (even if they lack an objective worth). The second component of necessity, in these circumstances, becomes of much significance as it does not allow any means to be adopted in achieving these socially sanctioned purposes. Such means must be evaluated in light of alternatives that could realise the purpose in a real and substantial manner and cause less harm to the animals in question. Applying this test consistently and with due regard for the important interests of animals in avoiding suffering, could lead, I argue, to a significant improvement in animal lives and thus help curb the worst excesses of the current treatment of animals in South Africa. Such an approach, moreover, under the non-ideal conditions of society at present, has much to recommend it to those adopting an animal rights approach as well. The notion of 'necessary suffering' is likely, I argue, to be contained in any animal protection statute of the future and its progressive potential in the current Act should be used and developed so as to improve the lot of animals.

1 The existing contours of the legal concept and its critics

Though animal cruelty occurs on a daily basis, South Africa lacks a large amount of judicial precedent surrounding the interpretation of the Animal Protection Act. Many of the precedents that exist come from cases that were brought in relation to the 1914 Act, the predecessor of the current Act. In the early case of *Rex v Mountain*,[8] Barry J had to interpret the offence prohibiting 'cruelly' ill-treating an animal. The offence, he held, involved the following: 'objectively the act was ill-treatment, and subjectively the accused intended to cause unnecessary suffering

[8] 1928 TPD 86

or inflict pain … so that to "cruelly ill-treat" an animal means that a person willfully caused pain without justification, or ill-treated an animal with the intention of causing it unnecessary suffering'.[9]

1.1 Suffering

Barry J's brief statement highlights a number of important elements of this offence. First, there must objectively be 'ill-treatment' or, in the current Act, 'suffering' caused. This dimension of the offence appears simple but is in fact of great importance. It recognises that animals can suffer in their own right and that this is a matter that is capable of objective determination. In other words, animal suffering is not something that is merely a subjective matter of opinion amongst differing human beings, but it is capable of objective, and we might add, scientific verification.[10] The inclusion of this idea in the legislation involves a rejection of a line of philosophical thought originating in the philosophy of Descartes, that animals are simply complex machines, incapable of having subjective mental states that could give rise to pain and suffering.[11]

Suffering can be defined rather broadly as 'experiencing one of a wide range of extremely unpleasant subjective (mental) states'.[12] This very notion implies that animals are beings with a subjective consciousness, and thus, as sentient beings, have the capacity at least to feel pleasure and pain (and possibly many mental states beyond this). The recognition by the Act that animals can suffer attests to the fact that they are conceived of as beings that have interests in their own right and that require protection. Cameron J, in a minority judgment, recently affirmed this point by holding that the Animal Protection statutes 'recognise that animals are sentient beings that are capable of suffering and of experiencing pain. And they recognise that, regrettably, humans are capable of inflicting suffering on animals and causing them pain. The statutes thus acknowledge the need for animals to be protected from human ill-treatment.'[13]

Cameron's statements do not lead him to recognise that animals are 'persons' or 'legal subjects'; yet, they must render us uncomfortable with this designation.[14]

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[9] *Id* 86.

[10] See, for instance, Dawkins 'The scientific basis for assessing suffering in animals' in Singer (ed) *In defense of animals* (2006) 26-39 who states: 'just as we think we can understand other people's experiences of pleasure, pain, suffering, and happiness, so, in some other ways, we may begin to understand the feelings of animals – if, that is, we are prepared to make an effort to study their biology' (27).

[11] For a discussion and rejection of the Cartesian line of thought, see Regan *The case for animal rights* (2004).

[12] Dawkins (n 9) 28.

[13] *NSPCA v Openshaw* 2008 5 SA 339 (SCA) para 33.

[14] Cameron, *id* para 34, continues to hold that animals remain the objects of the law rather than its subjects. I have criticised these remarks and the refusal to recognise that the statute can itself be read to extend rights to animals in Bilchitz 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' (2009) *SAJHR* 38, 48-50.

Indeed, there can be no doubt that the Act, in this respect, immediately casts animals as being *sui generis* in their nature: no offence is possible in relation to 'ordinary property' that involves causing 'suffering'. If animals remain property, then they must be a special class within this broad genus. I would go further and suggest that the very recognition of animals as having interests that are deserving of protection means that their status as 'legal objects' or 'property' cannot coherently be maintained. We are required – for purposes of doctrinal coherence and consistency (and substantive morality) – to recognise their enhanced status in law which should entitle them to certain rights.[15]

1.2 Justification and necessity

The *Mountain* case recognised that the *mens rea* requirement for the offence involved the *intentional* causation of suffering. The 1962 Act extended this element of the offence to include the negligent infliction of unnecessary suffering as well. Moreover, in elaborating upon the meaning of 'cruelly ill-treat', the judge in *Mountain* saw the prohibition as being directed against causing pain to animals 'without justification'. This requirement immediately raises the question 'what form of justification can allow one to escape liability under the law for causing pain to animals?' Importantly, the law does not allow any justification to count but requires that it meet the legal standard of being 'necessary'. Thus, an intentional or negligent action that causes an animal to experience suffering will not be unlawful or wrongful if it is deemed to be 'necessary'. Understanding what this concept entails is thus central in determining the protection offered to animals by the Act.

The notion of 'unnecessary suffering' in the Act has attracted very limited judicial pronouncements. Perhaps the most helpful discussion, albeit brief, occurs in *Rex v Moato*.[16] The case dealt with a situation in which two dogs began fighting in the street. The accused, whose dog was involved in the fight, hit the complainant's dog with a metal stick, causing it a severe wound of eight inches long and one inch deep and was charged with violating the 1914 Prevention of Cruelty to Animals Act. A full bench of the Orange Free State Provincial Division overturned the conviction of the accused in the magistrate's court. In order to reach its conclusion, however, it outlined an approach towards interpreting the notion of 'unnecessary suffering'.

Van den Heever J held that two elements were of central significance in explicating the notion of necessity. First, the notion requires that there be a reasonable purpose for causing suffering to an animal. If there is no reasonable purpose for causing suffering, then such actions will clearly be found to be 'unnecessary'.[17]

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[15] I have made this argument in Bilchitz *id* and shall thus not elaborate upon it further here. The most important point here is that the Act already recognises animals as having interests in their own right.
[16] 1947 1 SA 490 (0).
[17] *Id* 492 (my translation).

Secondly, the means used to achieve the purpose must be evaluated. Indeed, the judge held that even if the accused had a lawful purpose, 'he can still violate the boundaries of reasonableness, for example, in his choice of an instrument or in the manner in which he causes pain'.[18] He gave two examples to illustrate these cases: the first is of a person who hits a horse over the head with a pick-axe handle and thus commits an offence in the choice of means; the second is of a person who uses a rider's crop but beats a horse until it faints or dies. The overarching test, says the judge, is whether a person acted in a way that the normal, civilized person in society would regard as reasonable and decent: if not, then the actions are objectively 'cruel' and would be regarded as involving 'unnecessary suffering'. [19]

It is important to understand that two important limitations were placed upon this conception of 'necessity' by the judge. He was clearly concerned that the Act could require major changes in the institutional practices relating to farm animals, such as prohibiting farmers from castrating and branding their animals. Van den Heever J considers the possibility that necessity could ground an action against individuals in such circumstances where alternatives were available that cause less suffering to the animals: for instance, he considers the possibility that farmers could be charged for failing to give their cattle pain-relieving medication during castration or failing to brand them on the horns or hooves (instead of their hides).

The judge, however, rejects the notion that the Act was designed to have such wide-ranging implications for farming and other uses of animals that involve institutional cruelty. He thus limits his holding in two important ways. First, he holds that the mere existence of alternatives that cause less suffering to animals is not determinative as to whether suffering caused by an individual is 'necessary' or not. The key test here is whether 'reasonable' means have been used to achieve the purpose. Secondly, he renders the prohibition on unnecessary suffering relative to the 'normal moral perceptions of the average civilized person today'.[20] This means, in his view, that the law does not require a fundamental change in farming practices and cattle could continue to be branded or castrated even though this is painful. Indeed, these considerations lead Van den Heever to conclude that the entire purpose of the Act is to prohibit any legal subject from acting 'in such a cruel way towards an animal that he thereby offends the finer feelings and sensibilities of his fellow citizens'.[21]

The second element of necessity outlined in *Moato* – relating to the means adopted to achieve the purpose in question – was elaborated upon and found to be

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[18] *Id* 492-3 (my translation).

[19] I have sought to summarise and translate the findings of the judge on pages 492-493 of the judgment.

[20] *Id* at 492.

[21] *Id* at 492. The judge's reasoning in relation to the purpose of the Act has been severely criticised by Cameron J in *Openshaw* (n 12) at fn 13 as well as by Karstaedt 'Vivisection and the law' (1982) *THRHR* 349 and Bilchitz (n 13) 44-46.

determinative in *S v Edmunds*.[22] This case concerned a situation where a Dachshund crawled under the wire of the neighbours' fence that enclosed their ducks. The accused saw what was happening, picked up his son's pellet gun and shot at the dog, hitting it with a pellet. His conviction for violating the Animal Protection Act in the magistrate's court was upheld in the Natal Provincial Division. Miller J quoted *Mountain* and *Moato* largely with approval, finding that the Act must be read against the 'background of the mores of the times'.[23] The judge held that the Act was designed, at least partly, 'to prevent degeneration of the finer human values in the sphere of treatment of animals'.[24] On the facts of the case, Miller J held that there was no doubt that the accused's actions had caused the dog to suffer. Despite the fact that the accused was trying to avoid harm to his ducks, 'there are certainly other ways than by discharging a pellet gun at it of dealing with a yapping Dachschund which is making a nuisance of itself'.[25] The accused could have, for instance, chased the dog away or hit it lightly and spoken to the neighbours about finding ways to avoid similar incidents. Since the accused did none of these things and willfully hurt the dog, his conviction was upheld.

1.3 Necessity in the United Kingdom

The approach adopted by the South African courts in the cases discussed above is, not surprisingly, very similar to that adopted in the English courts. Indeed, animal protection legislation in South Africa was modelled on the UK statutes, which were the first such statutes in the world.[26] The English courts have as a result had a longer period to grapple with defining the concept of 'unnecessary suffering' and elaborate upon it in a little more detail. I consider below two features of the jurisprudential approach adopted in the UK that are helpful in understanding and developing the position of our own law.

First, the courts have held that the focus of animal protection laws is upon criminalising the harm of causing suffering to animals but not death. In *Patchett v Macdougall*,[27] the English court was confronted with a set of facts whereby the appellant shot and killed a dog. Since there was no direct evidence that the animal had suffered, the court felt compelled to acquit the accused despite regarding the conduct as 'reprehensible'.[28] Importantly, this means that the law provides no protection to animals against being killed unnecessarily in a manner which does not cause them suffering.

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[22] *S v Edmunds* 1968 PH H398 757 (N)
[23] *Id* 758.
[24] *Id*.
[25] *Id* 759.
[26] For a history of the first animal protection statute in England, see Shevelow *For the love of animals: The rise of the animal protection movement* (2008).
[27] 1984 SLT 152.
[28] *Id* 154.

Secondly, the judges in England expressly recognise that the notion of necessity involves a balancing exercise where 'the amount of pain caused, the intensity and duration of the suffering and the object to be attained must, however, always be essential elements for consideration'.[29] Like the position adopted in South Africa, the attainment of a legitimate objective is not sufficient to prove necessity; there must also be a 'proportion between the object and the means'.[30] The English courts, however, on some occasions, have held that it is not entirely sufficient to contend that a cruel practice is simply accepted in a particular society. In the case of *Waters v Braithwaite*, the court dealt with a case that concerned the cruelty of bringing cows to the market in an un-milked state which causes them much pain. The court held that '[i]f the custom of doing this exists it is time that it should cease and people must find some other means of judging whether a cow is a good milker or not'.[31] This doctrinal position allows for the critical evaluation of existing practices and thus rejects the second limitation placed upon the concept of necessity in *Moato*. It is submitted that this position provides greater protection for animals and conforms more strongly with the purposes of the Act than a doctrine that simply sanctions a cruel status quo on the basis of conventional practices.

The English courts have also, however, been rather equivocal about challenging large instances of institutional cruelty, particularly where they have been permitted by legislation either expressly or by implication. They held, for instance, that the meaning of necessity does not require that animals be caused the least suffering possible; rather, an action is legitimate provided 'it is carried out in a reasonable manner'.[32] This in turn importantly qualifies the usefulness and strength of the test given that reasonableness has been interpreted to be relative to the practices that are legislatively sanctioned. Such reasoning led to the failure of an action challenging the raising of veal calves in cruel conditions. Whilst simple societal acceptance of cruel practices is not sufficient to prove necessity, legislative sanction appears to be. This avoids the need to harmonise differing pieces of legislation,[33] avoids an enquiry into whether a practice is in fact 'necessary' and thus reduces the impact of the law in challenging 'institutional cruelty'.[34]

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[29] *Ford v Wiley* (1889) LR 23 QBD 203, 218.
[30] *Id* 210 and 215.
[31] (1913) 78 JP 124, 125.
[32] Radford *Animal welfare law in Britain* (2001) 249. This book is a very useful engagement with the history and content of animal welfare law in the UK.
[33] Clearly if a legislature has sanctioned a practice, then it renders it difficult for courts to use another piece of legislation to prohibit it. However, the choice is often not as stark as this: the legislature rarely approves of the details of specific practices and, thus, whilst courts will not be able to prevent meat-eating as a whole in light of the Meat Safety Act, they often can prohibit certain specific, cruel practices that are used in producing meat, for instance, as a way of harmonising the different pieces of legislation.
[34] *Id* 249-250.

1.4 Critiques of necessity and the protection it affords to animals

The discussion thus far has sought to outline the contours of the legal concept of 'necessary suffering' in animal protection statutes as it has been developed by courts in South Africa and England. Whilst the notion has in certain cases (such as *Edmunds*) worked in favour of animals, we have seen that judges have built in a number of strong limitations to prevent it from being used to challenge severe cases of institutional cruelty. These limitations have come to be identified as defining the concept and thus the very notion of 'unnecessary suffering' has attracted strong critiques from leading thinkers in the animal rights movement. These thinkers argue that the notion in question is not simply benign but can be positively harmful to animals, masking an ideology that regards it as permissible to exploit animals. I shall examine this critique as it appears in the writings of Gary Francione and Michael Fox.

1.4.1 Francione: a concept that masks exploitation

Gary Francione has written a number of important books that articulate an uncompromising animal rights perspective.[35] For Francione, animal welfare laws do not provide any significant protection for animals as they retain the idea that animals are simply 'property' to be exploited for human ends. The property status of animals means that any balancing of interests between humans and animals cannot be meaningful: the interests of humans will almost always outweigh those of animals whose interests are given very little weight. The concept of 'unnecessary suffering' exemplifies these concerns. As we have seen, the legal contours of the concept involve understanding some object with reference to which suffering must be justified. The problem, according to Francione, is that the test does not require us to determine that these objects are themselves necessary. He writes:

> we ask only whether particular treatment is necessary given uses that are per se not necessary. We look to the customs and practices of the various institutions of exploitation and we assume that those involved in the activity would not inflict more pain and suffering than required for the particular purpose because it would be irrational to do so, just as it would be for the owner of a car to dent her vehicle for no reason.[36]

Thus, the test of 'unnecessary suffering' does not lead us to question the necessity of eating meat or dairy products; rather, it simply accepts these objects as legitimate. The question it requires us to ask is whether the pain imposed upon animals we use for food goes beyond that which is a necessary consequence of

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[35] Perhaps the most well known of these is Francione *Rain without thunder: The ideology of the Animal Rights Movement* (1996).

[36] Francione 'Reflections on *Animals, property and the la*w and *Rain without thunder*' (2007) *Law and Contemporary Problems* 10.

the practices ordinarily undertaken in animal agriculture. This weak enquiry in turn leads to the acceptance of such practices that Van den Heever J, for instance, was worried would be prohibited by the Act in *Moato*: 'to the extent it is customary for farmers to castrate or brand animals, both very painful activities, we regard such actions as "necessary" because we assume that farmers would not mutilate animals for no reason'.[37] The result of this approach by the courts, according to Francione, is that 'the level of care required by animal welfare laws rarely rises above that which a rational property owner would provide in order to exploit the animal in an economically efficient way'.[38]

Francione uses this framework as a launching pad for attacks on the very ideology behind these laws which he refers to as 'animal welfarism': this notion involves in his view a commitment to incremental changes in legislation and practices that have the purpose of rendering the treatment of animals more humane and minimising their suffering. Francione believes that the welfarist position retains the idea of animals as being property, and fails thus to recognise their inherent value; consequently, it is simply a way of making the exploitation of animals more efficient. Instead of leading incrementally to the abolition of animal exploitation, Francione contends that the welfarist position will in fact lead to its entrenchment. Normatively, he proposes that we accord to animals the basic right not to be treated as property and 'this requires that we seek to abolish, and not merely regulate, institutionalised animal exploitation'.[39] Practically, he contends that animal activism should focus on education for the abolition of animal exploitation and encouraging individuals to become vegans.[40]

1.4.2 Fox: A vague and spurious concept

Michael Fox seeks to extend Francione's analysis in relation to the notion of 'unnecessary suffering' into the field of animal experimentation. Interestingly, he originally wrote a book defending the use of animals in experiments and argued for the position that animal suffering could be 'necessary' if it furthered the ends of the human community.[41] 'Unnecessary suffering', on this understanding, involved only what was excessive or preventable. 'Excessive suffering is the result of procedures that fail to yield important benefits for humans or nonhumans; preventable suffering is the product of thoughtless or faulty experimental design'.[42] The 'necessity test' here was understood in purely instrumental terms in relation to the benefits an experiment would hold for humans.

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[37] *Ibid*.
[38] *Ibid*.
[39] *Id* 11.
[40] *Id* 43.
[41] Fox *The case for animal experimentation: An evolutionary and ethical perspective* (1986).
[42] Fox 'On the "necessary suffering" of nonhuman animals' (1997) *Animal Law* 26.

Fox, however, changed his mind on the legitimacy of animal experimentation and now contends that 'the notions of necessary and unnecessary suffering are empty of meaning and no significant difference exists between them'.[43] Relying on the work of Francione, he contends that there is no consistent interpretation of 'necessity' amongst animal welfarists; moreover, the notion does not necessarily prohibit any test from being performed, no matter how much pain and suffering is caused to the animal. Moreover, both those advocating for animal welfare and those who exploit animals often agree that causing 'unnecessary suffering' is wrong: this suggests that there is something irreducibly vague and problematic with the concept. Finally, Fox claims that the idea of 'unnecessary suffering' involves a type of cost-benefit analysis, weighing for instance, the benefits of an experiment against the harm done to the animals. All of the costs, however, 'are assigned to one class of sentient beings, and all of the benefits accrue to another. However one looks at it, this seems to be a model of injustice'.[44]

Fox differs from Francione in thinking that animal welfarism may have had a 'small, but positive impact on the scientific community'.[45] Nevertheless, his reflections lead Fox to very strong conclusions about the notion of 'necessary suffering' which he regards as spurious. 'None of the suffering of nonhuman animals at the hands of humans is necessary, all of it is unnecessary. And if animals' lives have value independent of their interests to others, all of their suffering is morally unjustified'.[46]

2 Understanding necessity in legal reasoning and its role in the Animal Protection Act

I have thus far outlined some of the legal contours of the concept of necessity as it has been developed by judges in relation to animals. The courts, as we have seen, have indeed adopted a narrow approach towards 'necessity' and shown a disappointing willingness to approve of institutional cruelty that is socially accepted. Indeed, Radford recognises, in his discussion of the veal case in Britain, that the relativisation of standards of necessity to practices accepted in a particular industry provides 'some force to Francione's contention that "the question whether the conduct is "necessary" is decided not by reference to some moral ideal but by reference to norms of exploitation already deemed legitimate"'.[47]

I shall argue, however, that a considered response to this problem need not be to jettison the concept; rather, we should recognise that the courts have failed properly to understand and apply it in the field of animal protection. In the

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[43] *Id* 25.
[44] *Id* 29.
[45] *Id* 30.
[46] *Id* 30.
[47] Radford (n 31 above) 250 commenting on and quoting Francione (n 34) 130.

following sections, I shall first seek to understand the role of necessity in legal reasoning in the fields of criminal law and fundamental rights law. I shall highlight certain key features of the concept which are similar to its development in animal protection law yet support a stronger approach in the latter field. Necessity in fact, when understood properly, captures a number of normatively fundamental issues in legal and moral reasoning, and this applies even for those who adopt an animal rights philosophy. When we understand the conceptual possibilities of the concept, I shall argue that it provides a tool that has significant potential for improving the protection granted to animals in our law.

2.1 Necessity in criminal law

The notion of necessity is not unique to animal protection law. In fact, it is a notion that appears in many guises within different branches of the law. The uses of the concept all bear an interesting resemblance to one another, which helps us to determine its role in legal reasoning.

In criminal law, for instance, necessity constitutes a defence against liability for the commission of a crime. In *S v Pretorius*, for instance,[48] it appeared on the evidence that a child, aged two years, had a dangerous health-related complaint and his parent wanted to get him to hospital as soon as possible. The parent travelled by car at a high speed and, on the way to hospital, was caught by a traffic officer and fined. The court acquitted the accused on grounds of necessity: in order potentially to save the child's life, the parent broke the law but was justified in doing so.

The defence of necessity arises when an accused person is confronted with a choice between allowing an evil to occur and breaking the law, and she chooses the latter alternative.[49] The defence thus provides individuals with a justification for the commission of a crime if this is done in order to avert a greater harm (such as the death or suffering of an individual). This notion importantly involves the weighing up of various harms. Some judgments summarise the requirements that must be met for this defence to be sustained as follows: (a) a legal interest of the accused must be endangered; (b) by an imminent threat; (c) the threat must not be caused by the accused; (d) it must be necessary for the accused to avert the danger and (e) the means used for this purpose must have been reasonable in the circumstances.[50]

Several important elements can be identified in the structure of reasoning used in the necessity enquiry in criminal law. Firstly, we are in a situation where there are two important normative issues at stake: on the one hand, obedience to the law and the norms it protects, and on the other hand, an important interest of the accused.

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[48] 1975 2 SA 85 (SWA).
[49] Burchell and Milton *Principles of criminal law* (1997) (3 ed) 142-3.
[50] *S v Alfeus* 1979 3 SA 145 (A) at 152H and *S v Adams* 1979 4 SA 793 (T) at 796.

Secondly, in cases of conflict between these two norms, the more important of the interests can justify violating the one that is of lesser importance. Finally, such a violation of the law cannot take place in any way: the means adopted must be directed towards averting the harm and must be proportionate and reasonable.

2.2 Necessity in fundamental rights law

This structure of reasoning is not confined to criminal law and, importantly, appears again significantly in the field of the law relating to fundamental rights. Both international law and most domestic legal systems recognise that there are circumstances under which fundamental rights can be limited. These circumstances must clearly be restricted. Courts and other adjudicative bodies have reached a remarkable degree of convergence on the process of reasoning to be adopted when deciding whether rights should be limited. The South African Bill of Rights has a general limitation clause which provides that a limitation must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose'.[51] In the *Makwanyane* judgment that declared the death penalty unconstitutional, Chaskalson P stated that 'the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality'.[52] This approach has become the dominant one when addressing the limitation of fundamental rights in South Africa and its operation can be nicely illustrated by considering the case of *S v Manamela*.[53]

The case concerned the constitutionality of a reverse onus provision that required an accused person who was in possession of stolen goods to prove that s/he had reasonable cause at the time of acquiring the goods to believe that they were not stolen. If the accused failed to discharge the onus, s/he would be guilty of the offence of receiving stolen property knowing it to be stolen. The majority of the court found that this provision violated the right to a fair trial which included the right to remain silent and to be presumed innocent.[54] In deciding whether this violation was justified, the court reasoned that the right to remain silent was a time-honoured right of great importance.[55] On the other hand, the reverse onus provision was enacted for a legitimate and important purpose, namely, the

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[51] Section 36(1) of the Constitution of the Republic of South Africa, 1996.
[52] *S v Makwanyane* 1995 3 SA 391 (CC) para 104.
[53] 2000 3 SA 1 (CC).
[54] Section 35(3)(h) of the Constitution.
[55] *Manamela* (n 52) paras 35 and 36.

problem that 'dealing in stolen property is a scourge in our society. The practice involves massive corruption and immorality that can permeate and perversely normalise itself in every area of society'.[56] Despite this important purpose, the court held that 'the prevalence of serious crime calls for government action, but does not provide a blank cheque for the legislature to erase all procedural safeguards'.[57] Indeed, section 36, the judges stated, does not permit 'a sledge-hammer to be used to crack a nut'.[58]

A reverse onus provision would require the accused to prove his innocence beyond a reasonable doubt: this could allow conviction in cases of uncertainty. Moreover, given the wide-ranging nature of the goods to which the provision applied, it could often be difficult for an accused to meet the onus of proof, particularly, in relation to movable goods. The offence was also a serious one and could attract long periods of imprisonment: the risk of a serious infringement of an accused's rights through wrongful conviction was therefore high, particularly in the circumstances of illiteracy and poverty in South Africa. The court also considered the fact that there was a viable alternative of placing an evidentiary burden (but not a full onus) upon accused persons when charged with such offences. Such a measure would be less invasive of the rights of the accused but nevertheless help to achieve – albeit in a manner that might be slightly less effective – the legitimate purpose of the state in curbing the trade in stolen property where the evidence lay within the accused's knowledge. The majority thus concluded that the reverse onus provision was disproportionate and thus placed an unjustifiable limitation on the accused's right to be presumed innocent.

This case helps to highlight the key features employed by the courts in dealing with the limitation of fundamental rights. First, it is clear that a fundamental right may only be limited for the purpose of achieving a significant and legitimate objective.[59] Such an objective must be determined against the backdrop of what is of importance in a society based on human dignity, equality and freedom. Secondly, any limitation of a right must meet the test of proportionality.[60] Academic authors have identified three vital sub-components that make up this enquiry. First, the measure must meet the requirement of 'suitability': it is irrational to limit a right unless there is a rational relationship between the measure that is adopted and the purpose sought to be achieved.[61] Secondly, the measure must be 'necessary':[62] this component may be formulated

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[56] *Id* para 36.
[57] *Id* para 37.
[58] *Id* para 34.
[59] Section 36(1)(b) requires an engagement with importance of the purpose of the limitation.
[60] In breaking down the components of the proportionality test, I invoke the highly influential analysis provided by Alexy *A theory of constitutional rights* (trans Rivers) (2002).
[61] Section 36(1)(d) contains the suitability requirement.
[62] Section 36(1)(e) requires that 'less restrictive means to achieve the purpose' be considered. I have sought to analyse the necessity requirement in Bilchitz 'Does balancing adequately capture

in different ways but requires a consideration of alternative measures that can still achieve the purpose in a real and substantial manner[63] but have a lesser impact on the rights in question. The existence of such alternatives, as in *Manamela*, would count against a measure being found to be justifiable where it has a very drastic impact upon fundamental rights. Finally, a measure must meet the test of 'balancing': this requires an overall assessment as to whether the harm done to the right is 'proportionate' to the benefits sought to be achieved by the objective.

2.3 Necessity in protecting animals

I have thus far sought to show the way in which the notion of necessity functions in other areas of law. It should be evident that there is a clear link between the structure of reasoning in these fields and the manner in which courts have interpreted the notion of 'necessity' in animal protection statutes. In relation to the latter, courts have insisted that there must be an objective that can justify subjecting an animal to suffering; moreover, there are restrictions placed upon the means that can be adopted to realise such an objective. As we saw, there has been limited development of these tests in the field of animal protection: this is where the greater normative understanding of this notion in other areas of law can assist.

Indeed, the legislature cannot reasonably be understood to have intended that the notion of necessity be interpreted wholly *de novo* in the field of animal protection. This concept must draw on its ordinary meaning as well as the manner in which it functions within the legal system in general. When we consider the concept in this light, it is clear firstly that the necessity enquiry only arises in cases of normative conflict between two different and important goods. Understanding this point means that the legislature must have intended that the suffering of animals be taken seriously and seen to be a highly important good which, if compromised, can only be justified where a strong alternative normative objective is at stake. Secondly, necessity is a strict and restrictive standard that cannot easily be satisfied. The concept of 'necessity' thus requires the circumstances in which animal suffering is allowed to be restricted and limited.

Finally, the necessity enquiry must involve a close attention to the relationship between the means adopted, the purpose it is designed to achieve and the harm caused to the animal. In other words, the necessity enquiry requires a form of proportionality analysis to be adopted. To understand why this is so, it is important to recognise that the core notion of necessity involves the idea that

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the nature of rights?' (2010) 25 *SAPL* 433-444 and in a more recent paper Bilchitz 'Necessity and proportionality: Towards a balanced approach?' in McCrudden *et al* (eds) *Adjudicating human rights diversely* (2013 forthcoming).

[63]Here I follow the sensible formulation adopted by the Canadian Supreme Court in *Alberta v Hutterian Brethren of Wilson Company* 2009 SCC 38: 'the test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner'.

a measure must in some sense be 'required' to achieve an important objective. For a measure to be required, it must first meet the test of 'suitability': there must obviously be a rational connection between the measure and realising the objective sought to be achieved.[64] Without such a link, it is not clear why the measure is being adopted in the first place.

Secondly, alternatives must be considered that can also realise the purpose of the legislature but have a lesser impact on the animal. If such alternatives exist, then there is no reason to subject the creature to the higher level of suffering that the original measure involves. It is important in assessing alternatives to take into account the important dictum of McLaughlin J of the Canadian Supreme Court in the *Hutterian Brethren* case, which dealt with the circumstances under which the right to religious freedom may be limited. The case concerned a grouping that objected to being photographed on religious grounds. The government, in seeking to reduce fraud relating to drivers' licenses, had introduced new regulations requiring all drivers to have photographic identifications without any exemptions. The majority per McLaughlin J, in finding that the government's regulations were a justifiable limitation of the right to religious freedom of the grouping had to consider possible alternatives to the existing scheme in order to determine that it was necessary. Justice McLaughlin wrote: 'the court need not be satisfied that the alternative would satisfy the objective to exactly the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunise the law from scrutiny at the minimal impairment stage. The requirement for an "equally effective" alternative measure … should not be taken to an impractical extreme'.[65] The Canadian Supreme Court thus adopted the notion that an alternative measure must be capable of achieving a legislature's purpose in a 'real and substantial manner'.[66]

Importantly, this introduces a third component into the necessity test, which is a degree of balancing.[67] For, once we recognise that two measures are usually not exactly equally effective in achieving an objective, we will need to consider the following scenario. A particular means (M1) can realise an objective better than an alternative but will have a more detrimental impact on an animal (or person in a fundamental rights case); on the other hand, an alternative means (M2) may realise the objective to a lesser degree but have a much better effect on the animal (or person). In deciding whether to adopt M1 or M2, it seems that a balancing process must be conducted between how far the objective is achieved and the harm done to the animal (or person) in question. This analysis has thus

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[64] See *R v Oakes* [1986] 1 SCR 103 para 70 for the classic formulation of this test.
[65] *Hutterian Brethren* (n 62) para 55.
[66] See (n 62).
[67] For a full version of this argument, see Bilchitz 'Necessity and proportionality: Towards a balanced approach?' (n 61).

sought to show that, logically, the necessity enquiry in animal protection law should be taken to include all three sub-components of proportionality.

I have thus far argued that the notion of necessity requires us to engage in a structured process of reasoning. The structured process of reasoning itself also contains within it normative assumptions that require that the suffering of animals be taken seriously and only inflicted in a restricted set of circumstances. Moreover, the structure of reasoning has the potential to direct the minds of judges to possibilities and alternatives they may not otherwise have considered and thus, it is hoped, can help extend the protection that is accorded to animals by the law. In the next part of this paper, I shall attempt to understand the virtues and limitations of the 'necessity' enquiry understood in the more expansive manner outlined above and the possibilities it offers for improving the position of animals in law through considering possible responses to the critiques of Francione and Fox outlined in part I.

3 The importance and limitation of necessity in protecting animals in the law

3.1 Objectives

One of the key problems Francione identifies with the necessity test is that it allows animal suffering to be justified on the basis of objectives which are not themselves 'necessary'. This raises a number of important questions concerning the purposes for which an animal can be subjected to suffering. As has already been indicated, the very test of 'necessity' and the recognition that animal suffering is an evil to be avoided, implies that such a purpose must be one that is of some importance. A purely frivolous purpose cannot be said to justify animal suffering without rendering the protections in the Act meaningless: if a person could justify cruelty on the basis that she derived pleasure from it, it is hard to imagine any circumstance under which a conviction could be obtained. Similarly, the notion of necessity cannot be constructed in isolation from other offences outlined in the Act. Consider, for instance, the offence of exposing an animal 'to immediate attack or danger of attack by other animals or wild animals'[68] or the offence of using or driving an animal that is so diseased or injured that it is 'unfit to be driven or to do any work'.[69] These offences make it clear that the imposition of suffering cannot be justified simply for the purpose of achieving economic gain or profit. If these were sufficient reasons to impose suffering on animals, then it would be hard to justify such clearly prohibited activities as a ban on dog fighting or the use of an injured animal where this would bring profit to the owner. Moreover, little protection would be granted to animals if such a rationale of achieving profit could outweigh their most basic interests in avoiding suffering.

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[68]Section 2(1)(g) of the Act.
[69]Section 2(1)(i) of the Act.

Francione, however, is concerned that animal suffering may nevertheless be caused by purposes that people regard as important but are not in fact 'necessary'. Human beings do not 'need' to eat meat (though some regard this as being important) and therefore no suffering should be capable of being justified for the purposes of eating meat. However, it is important to understand that Francione is making reference to a different notion of 'necessity' in this objection than the one contained in the Act.

Francione can be understood to be referring to two different notions of necessity. On the one hand, there is the notion of 'biological necessity': without food and water, a human being will not survive or experience severe pain. This notion, however, is not necessarily moral in nature and simply expresses what is needed descriptively for a biological purpose. It does not tell us what to do, nor how much weight we should give to a particular purpose nor how to evaluate competing interests between humans and other animals, for instance. It thus cannot be adequate for the argument Francione wishes to make. He needs instead a notion of 'moral necessity' which involves evaluating a course of action as being 'necessary' in light of an objective that is taken to have a high degree of moral importance. Thus, we can, for instance, imagine a situation where an individual human being and a goat are on a lifeboat without any food or water. In such a situation, the human being may claim that it is morally necessary to slaughter the goat. It may be 'biologically necessary' for the human being to kill the goat to survive given his weakening state; yet, it is of course not necessary as a matter of any metaphysical requirement that the person survive. Nevertheless, it becomes 'morally necessary' if we evaluate that individual human being's survival as having great importance and trumping the goat's survival. 'Moral' necessity is thus a complex notion and generally has the structure that a course of action will be necessary given something else that is of great importance and needs to be achieved. That objective must then be compared to the harm involved in causing an animal suffering (or loss of life in the example under discussion). Whether an objective that involves causing animals to suffer is necessary thus involves a substantive normative enquiry and judgment into whether the purposes for which the animal is being harmed are of sufficient importance to justify the suffering concerned.

Importantly, when we understand the structure of reasoning that necessity requires into the objectives for which animal suffering can be caused, it becomes evident that the notion does not in and of itself presuppose a philosophy that justifies animal exploitation, as Francione incorrectly maintains. Indeed, some consideration of differing objectives in evaluating courses of action relating to animals will be justifiable from a perspective that is sympathetic to an animal rights philosophy as well. The necessity enquiry, as has already been contended, presupposes that animals have certain interests in avoiding suffering. This is entirely consistent with an animal rights view that accords intrinsic value to

animals.[70] The question that will determine how much value we place on their interests relates to the conditions under which those interests may be overridden.

In some sense, all people must be prepared to recognise that, unfortunately, there exist some forms of suffering in the world that occur for reasons of great importance. The suffering of a buck torn up alive by wild dogs falls clearly within that category, tragic as it may be. We may also in some cases be obliged to subject an animal to some form of suffering for its own welfare. We can imagine a situation where all lions in the Kruger National Park have a terrible disease which is debilitating and will eventually lead to their deaths.[71] If we can shoot a self-executing (treatment or prophylactic) injection into them which causes the animal to suffer muscular pain for half an hour, most people – including those adopting an animal rights position – would agree that such a course of action should be followed. There will also be clear cases where a sensible animal rights' perspective will allow the imposition of suffering for the sake of another. Such instances include those in which there is a clash between differing interests of great importance (whether human and animal or between differing species of animal).

Consider, for instance, a case, as happens frequently, where a group of elephants move into a human settlement because of hunger.[72] These animals often cause havoc and can endanger the lives of all the people in the settlement. By using a helicopter (and in some cases darts), the elephants can be chased (or removed) from the settlement. The helicopter will no doubt frighten the elephants significantly; the dart may also be risky, and can cause pain and unpleasant side effects. On the other hand, if this course of action is not adopted, individuals in the settlement could die and have their homes destroyed. I would suggest that many people sympathetic to an animal rights perspective would agree with chasing and darting the elephants in these circumstances. These actions would be taken for the purpose of achieving an objective of great importance.

An animal rights position would not, however, countenance causing an animal suffering for an objective that was not of great importance and that could not morally take precedence over the interests of the animal. I would suggest that even a weaker position that does not recognise the Act as giving rise to rights for animals

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[70] Animal protection statutes may not recognise a 'right to life' on the part of animals but nevertheless can be seen to accord them a 'right not to suffer'. For a defence of such a position, see Garner 'A defence of a broad animal protectionism' in Francione and Garner (eds) *The animal rights debate: abolition or regulation?* (2010) 112-120.

[71] This is not just an imaginary scenario as lions have suffered from tuberculosis in recent years in the Kruger National Park: see, for instance, 'Tuberculosis imperils lions in Kruger' available at http://www.awf.org/content/headline/detail/1065 (accessed 2012-02-27).

[72] Again, this is not a hypothetical problem and affects many people across Africa: see, for instance, Lotter 'The ethics of managing elephants' available at http://www.tuskertrails.co.za/Ethics_of_Managing_Elephants.pdf (accessed: 2012-02-27) for a description of the problem. I do not endorse the author's conclusions concerning the management of elephants (particularly on culling which I believe to be unjustified).

should not readily countenance suffering unless there is a particularly strong reason to do so. An 'exploitation position' – which would simply hold that any human interest could take precedence over an animal interest – should be rejected. That exploitation position fails correctly to capture the respective moral weights of the human and animal interests involved and should be rejected. Apart from this, as has been argued above, such a position would render the Act meaningless and thus does not reflect the intention of the legislature in enacting this law which recognises that animal suffering cannot be caused lightly. Judges should thus reject individual claims that a particular practice is of great importance where it is simply designed around achieving their individual self-interest (such as in the acquisition of great profits). They must also be prepared to reject disingenuous claims that a practice is of importance when it is motivated purely out of individual greed. Thus, an adequate test of necessity in the Animal Protection Act must require a judicial evaluation of the respective moral weights of the interests involved and must require a strong justification for imposing suffering upon animals.

As has been argued, the necessity enquiry understood in this way is consistent with according very strong protection to animal interests in accordance with an animal rights philosophy. However, at this point, it is important to recognise the limitations for animal protection that such a judicial evaluation is likely to produce. Unfortunately, there are strong differences in perspective in our society concerning the objectives that may justify causing suffering to animals. An animal rights position will reject the notion that an animal can be subjected to suffering for purposes of the consumption of meat by humans, for instance. However, meat-eating is generally taken to be a facet of a majority of people's lives which many consider to be of great importance to them. Though there are very strong arguments to show that meat-eating is not biologically necessary for humans to survive or to live well, most people in South Africa do eat meat and regard it as of some importance in their lives. In any evaluation of necessity, judges are highly unlikely to discard objectives in relation to the treatment of animals that are generally perceived to be of societal importance such as the eating of meat or achieving scientific progress through animal experimentation.[73]

The objectives identified in the necessity enquiry will thus allow judges in some cases to make progress, but will also limit the possibilities that may be attained by having to take into account general social attitudes concerning the uses of animals that are legitimate. Does this recognition imply that the notion of 'necessity' loses its usefulness in extending protection for animals? The very relativity of the objectives for which suffering may be caused to matters regarded by society as being of importance may itself be a benefit derived from the notion of 'unnecessary suffering'. For this notion allows judges to increase the protection afforded to animals as societal attitudes change. As Garner puts it, ' over the past

[73]This is so even when the benefits of animal experimentation for scientific progress are doubtful.

few decades what is regarded as unnecessary suffering has expanded to reflect a growing awareness of the different ways animals can suffer, changes in cultural norms and technological developments that have made it possible to use alternatives. Thirty years ago or so, for example, the wearing of fur and the testing of cosmetics on animals was regarded as acceptable. Now, many people in the Western world frown upon both practices'.[74] Yet, it may be responded that, whilst this flexibility may assist animals in the long run as attitudes change, it does not help to alleviate severe forms of suffering imposed upon large numbers of animals in the shorter term where there is a general societal acceptance of the objectives concerned. It is at this point, however, where an objective which results in the suffering of animals is recognised as of importance by the prevailing societal attitudes, that the second element of necessity reasoning becomes vital.

3.2 Means-end reasoning and its usefulness

The second component of the necessity enquiry involves considering very closely the connection between the means that cause suffering to animals and the ends sought to be achieved. The necessity enquiry in the Act does not simply involve weighing two important normative purposes against one another; it involves also a close examination as to whether there are alternatives that realise the purposes in question in a real and substantial manner and yet cause less suffering to animals than the measure adopted. Importantly, as I have argued in part II, this brings all three elements of a proportionality enquiry into the means-end necessity evaluation which I believe has significant potential to extend the protection the necessity test affords to animals.

The proportionality enquiry again is not in itself contrary to an animal rights perspective. Indeed, as with human rights, it can be vital in evaluating competing courses of action. Consider the example of the elephants who wander into human settlements causing havoc. There could be several different ways of dealing with the issue. Some may propose shooting the elephants dead; others may propose causing great pain and suffering to the elephants when they enter any human settlements to teach them never to return; others may propose darting and relocation; and, yet others, that they be chased away. Importantly, the proportionality enquiry itself will lead to an outcome whereby certain alternative courses of action are not permissible. Whilst significant individual interests are at stake in ensuring elephants leave the human settlement, there is a duty not to adopt a method that is overly harmful to the elephants compared to the range of possible alternatives that can realise the purpose in question in a real and substantial manner. This would, in most cases, rule out the option of shooting the animals dead or causing them great pain. Such a process of reasoning requires that one must retain decent and respectful treatment of animals even where countervailing values are involved.

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[74]Garner (n 69) 142.

This proportionality aspect of the necessity enquiry becomes particularly important when dealing with cases where the objectives are perceived by society to be of great importance, such as in the case of eating meat. As has been mentioned, judges are unlikely to rule against such objectives in their reasoning. Yet, that does not end the matter: whilst it is likely that the objective of eating meat will be regarded as of sufficient importance to justify killing animals for food, this does not mean that any method of raising and killing animals is justifiable. If we take animal suffering seriously, as we are enjoined to do by the Act, then a socially sanctioned objective such as eating meat can only be realised in a manner that is suitable, necessary and proportionate to the harm caused to the animals. Many modern methods of factory farming such as battery cages and sow stalls would fall foul of such a test: there are alternatives that can still allow for the objectives of eating eggs or pork to be met, and that do not cause such extreme harms to these animals or treat their interests with utter disregard. Many of the worst modern practices relating to animals could be outlawed if a proportionality enquiry were applied properly in this regard.

Let us return to the reasoning in the *Moato* case discussed above where the judge failed properly to think through the very means-end reasoning he proposed. Castration and dehorning are immediately regarded by the judge as being justified practices without investigating whether they in fact meet both steps of the necessity test. The objectives for which they are performed may themselves be questioned. Yet, let us assume that they are recognised as being acceptable by the standards of the society of the time (and perhaps today too). We need still to ask whether there are alternatives that would realise these objectives in a real and substantial manner and yet cause less suffering to animals. Castration without anaesthesia is an example of a practice that seems extraordinarily hard to justify on this test: even if the purposes of castration are legitimate, there is a readily available alternative, namely, providing anaesthetic or pain-relief medication to the animals. One could still achieve the purposes involved without causing such severe pain; profit – an insufficient justification as discussed above – provides the only reason not to provide pain relief to these animals. Thus, castration without anaesthesia should be regarded as failing to pass the necessity test.

In this manner, we can see the manner in which the necessity enquiry could assist in addressing serious forms of institutional abuse. Moreover, the argument above suggests that judges do need to understand the objectives sought to be achieved by people in their treatment of animals – the first stage of the necessity test – with some degree of consideration for what is considered acceptable in society at the time. However, if we rest content with that standard alone, we can be led to legitimise unspeakable acts of cruelty. In my view, the means-end component of necessity – the second stage of this test – should not be relativised to social attitudes in the same way and thus can help prevent prevalent attitudes from sanctioning unspeakable practices. This approach, as was discussed above, was adopted in the

United Kingdom case of *Waters* which prohibited the standard practice of bringing unmilked cows to market that involved great suffering for these animals.

Another important and groundbreaking application of necessity that included many of the proposed elements discussed above occurred in the *Noah* case which had important implications for institutional forms of cruelty.[75] The case concerned the acceptability of the cruel practice of force-feeding geese to produce foie gras in Israel. Strasberg-Cohen J, writing for the majority of the Israeli Supreme Court, held that 'the leading tendency with respect to this issue strives to reach the appropriate balance between the interest to protect animals and the right of Man to use them for his livelihood'.[76] In determining the balance, three factors are considered: first, the purpose for which the suffering is caused must be socially valuable; the means used and its connection with the purpose must be considered; finally, a judgment must be reached that there is a proportionality between the purpose to be achieved and the harm caused.[77] The majority of the court found that foie gras was a 'luxury food' rather than a necessary one; the practice of force-feeding geese in the production of foie gras caused severe harm to the geese; and there was no proportion between the benefit sought to be achieved by humans and the harm caused to the animals. Importantly, the court found that profit-making from foie gras and even the existing livelihoods of goose farmers were insufficient to justify the harm to the geese.[78] The court thus declared the regulations governing the industry invalid effectively paving a way for a ban on foie gras.[79]

3.3 Is the necessity test against animal rights?

I have outlined how I envisage that a stronger more robust necessity test could work in helping to advance the protection of animals in South African law (and elsewhere). Yet, some animal rights theorists such as Francione are opposed to working with the very concept of 'necessity' and simply wish to outlaw any use of animals that does not respect their intrinsic interests. Francione would also contend that the test is too weak in allowing purposes to count that are regarded as socially important (where they are actually not) and would argue that we should simply jettison the concept of 'necessary suffering'. Instead, we should focus our energies upon educating people to abolish practices that use animals and becoming vegan ourselves. [80]

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[75] *Noah (Israel Association for the Protection of Animals) v Attorney General* HCJ 9231/01 [2002-3] available at http://www.animallaw.info/nonus/cases/cas_pdf/Israel2003case.pdf.
[76] *Id* para 5.
[77] This test is laid out in *id* para 10, quoting Judge Cheshin in another case.
[78] See *id* paras 16 and 23: the judge states that '[i]ndeed, one should consider the legitimate interest of farmers in preserving their livelihood within an industry promoted by the authorities. But this interest cannot automatically override the conflicting interest of protecting animal welfare'.
[79] Sullivan and Wolfson 'What's good for the goose … the Israeli Supreme Court, foie gras and the future of farmed animals in the United States' (2007) 70 *Law and Contemporary Problems* 139.
[80] He defends this position in Francione 'The abolition of animal exploitation' in Francione and Garner *The animal rights debate: Abolition or regulation?* (2010) 1.

Against Francione, I have argued in this article that the Act is best understood to recognise the intrinsic value of animals. Indeed, I have sought to contend that the concept of 'necessary suffering' contains normative elements that cannot be disregarded by those adopting an animal rights philosophy as well. I also believe that a perspective that fails to recognise the importance of incremental improvements in the position of animals in law (and other spheres), whilst seemingly favourable towards animals, in fact fails to treat them as being of importance in their own right. The reality, unfortunately, is that abolition of practices – such as meat-eating and animal experimentation – is extremely unlikely at present. To refuse to work for the improvement of animal lives within the meat industry (through regulation) because of some long-term goal of abolition, is to treat individual animals as a means to some long-term utopian ideal rather than seeing them as ends in themselves. If we are to respect the intrinsic value of animals, then we cannot in any individual case refuse to minimise their suffering which is extremely severe at present. One may not agree with what many people perceive to be objectives of importance in their lives (such as including meat in their diet); yet, what we can impress on them is that animals do have value and thus those objectives must be achieved in the manner least harmful to those animals. If this line of reasoning will help individual animals suffer less, then treating them as individuals requires us to reduce their suffering now. Long-term strategies such as education to abolish the use of animals can be adopted as well but they are no substitute for campaigning for a reduction in the suffering of animals now. It thus seems to me that a person sympathetic to a rights view of animals should, in the non-ideal conditions of the current world, focus on minimising suffering in the present. Arguing for the means-end necessity test to be employed is not to accept the exploitation of animals; rather, it is to impress on others who do not share a sense of the weighty value of animal lives that animal suffering must count significantly in the evaluation of alternative methods of achieving their objectives.

4 Conclusion

I have sought in this paper to investigate the notion of 'unnecessary suffering' in the Animal Protection Act. Part I considered the legal development of the concept, which has received only limited jurisprudential attention in South Africa. Criticisms of the concept were identified which argued that it does not provide any significant protection for the interests of animals and enshrines a view of animals that does not see them as having intrinsic value.

I sought to counter both criticisms through investigating the conceptual possibilities that the notion of necessity holds within South African law. In part II, I considered the meaning of necessity in both criminal and human rights law. Significant overlaps were identified with the use of this notion in relation to the protection of animals and I argued that its key virtue lies in requiring the courts to go through a stringent process of reasoning where animal suffering has been (or may

be) caused. That process involves two components: first, it requires understanding and specifying the objectives for which the suffering may be caused. These objectives must be weighted against the harm to the animal concerned. I argued that this process requires recognition of the intrinsic interest of animals in avoiding suffering and that only objectives of a significant weight be allowed to justify causing suffering to animals. The second component is the means-end test which involves considering whether there is an alternative means that realises the objective in question in a real and substantial manner and would cause less suffering to the animals in question.

I have sought to argue that the necessity test is not necessarily one that should be rejected by people who believe in the intrinsic worth of animals. Indeed, some version of a necessity test will be something that those who support an animal rights philosophy will also require in a wide range of circumstances. I nevertheless acknowledged that courts are likely, at least in the foreseeable future, to accept that some socially sanctioned uses of animals are legitimate objectives which many animal advocates will not accept. Even if this is the case, I contended that the means-end component of the necessity enquiry can be useful in providing animals with significant protection if interpreted in a manner that seeks to give effect to the purpose of the statute and thus places strong value on the sentience of animals. The means-end component of necessity, I suggested, can be used to challenge many facets of the current treatment of animals including widespread institutional abuses. Though some contend that means-end reasoning is only consistent with a welfarist view focused on reducing animal suffering, I believe, given the non-ideal conditions of current society, that it is a stance that an animal rights perspective should adopt as well.

The Animal Protection Act needs revision of many of its facets. This article suggests some of the contours of reform that may be of assistance when re-drafting the legislation to give greater specificity to the enquiries required by the necessity test. Even when reformed, however, it is unlikely that a balancing process between human and animal interests can and should be left out. This piece has sought to argue, however, that much of the balancing we need to accomplish in relation to the crime of causing 'unnecessary suffering' can be performed within the framework of the current Act. It is a matter of drawing out the implications of existing legislation, and adopting an interpretation of necessity that takes account of its meaning in other areas of law and seeks to realise the purpose of the statute which fundamentally involves taking the interests of animals seriously. This article thus supports the idea that the protection afforded to animals in our law can and should be extended by the courts through existing legislation even if parliament fails to act.