

BETWEEN THE SPECIES

Virtue Ethics and Animal Law

ABSTRACT

This essay explores virtue ethical concepts in the context of animal law theory and practice. For reasons discussed in the essay, virtue ethics may not, on its own, serve as an adequate foundation for general anticruelty statutes, but it may have application in those contexts in which sufficient sharing of values enables participants in legal reform to work through differences in moral commitments to generate at least temporarily acceptable laws. The article considers a detailed example of that type of application, based on the actual and realistic situation of legislator-requested feral cat colony caretakers' participation in the development of ordinances that regulate the management of such colonies.

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Scholarship at the intersection of animal law and moral philosophy is varied, interesting in its own right, and important when contemplating productive approaches to law reform. Gary L. Francione has developed a coherent, compelling animal rights theory based on analysis of the legal status of other-than-human animals, current treatment of those animals, and careful consideration of Kantian moral philosophy (Francione 1995, 2008). David Favre has written several articles to propose animal law reform founded on a utilitarian approach (Favre 2000, 2005, 2010). In comparison to deontological and utilitarian theories, the application of virtue ethics to animal law is still new. And, while the most satisfying theory and basis for reform may ultimately combine deontological and virtue ethical theory, it is worth exploring some aspects of virtue ethics in the animal law context.

There are many philosophers focused on virtue ethics, but, for purposes of this essay, I rely heavily on the work of Rosalind Hursthouse. In her book *On Virtue Ethics*, Hursthouse begins with a simple contrast between utilitarian, deontological, and virtue ethical approaches:

Imagine a case in which it is obvious that I should, say, help someone in need. A utilitarian will emphasize the fact that the consequences of doing so will maximize well-being, a deontologist will emphasize the fact that, in doing so, I will be acting in accordance with a moral rule such as “do unto others as you would be done by,” and a virtue ethicist will emphasize the fact that helping the person would be charitable or benevolent (Hursthouse 1999, 1).

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Hursthouse contends that, although normative ethics has been dominated recently by deontological and utilitarian theories, virtue ethics can be an equally useful source of normative guidance on its own as well as in combination with deontological and utilitarian theories.

Hursthouse notes that the starting point for deontological or utilitarian analysis has been to determine the moral status of the being/entity about which there is a question of appropriate conduct. She questions whether such a starting point is useful or necessary for all normative theories, including virtue ethics. In her essay, "Virtue Theory and Abortion," Hursthouse explores whether it is necessary from a virtue ethical perspective to determine the moral status of a fetus before deciding what moral conduct is in regards to a fetus (Hursthouse 1997, 217-38). Similarly, in her article "Applying Virtue Ethics to Our Treatment of the Other Animals," Hursthouse begins with the question of whether it is necessary to determine the moral status of other-than-human animals before deciding what moral conduct is in regards to those animals (Hursthouse 2006, 136-54). She decides in both cases that behavior should be guided first and foremost by attention and reference to virtues and vices; how one behaves should be grounded in the kind of person one aspires to be and driven less at the outset by determinations of the moral status of the being/entity affected by one's behavior.

The type of being/entity affected by one's conduct or to whom one's conduct is directed soon becomes important, of course. What it means to be a virtuous person in relation to a rock is different from what it would mean to be a virtuous person in relation to a living being, for instance. But there is less difference in actual behavior (guided by virtue) than one might suppose. A virtuous person would be unlikely to kick a rock

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just because he or she can kick the rock because a virtuous person will be thoughtful at all times, in accordance with virtues that align with taking the least disruptive or potentially harmful action. Kicking a rock or throwing a computer out of a window in frustration would not be the act of a virtuous person because meaningless displacement of the rock or impulsive acting out of frustration does not match up well with several virtues such as patience and temperance in one's actions. Therefore, even if one imagines other-than-human animals to be no different than rocks, those animals should not be subjected to the type of suffering currently inflicted on them. That those animals are not rocks, that they are sentient, means that additional virtues, such as kindness, apply to situations involving them, but the focus is still on acting in accordance with virtues. One's first order priority is the application of virtues to one's actions, rather than basing one's actions on an assessment of whether an other-than-human animal is more like a rock or more like a human animal. Ideally one would ask, "What would a [kind, courageous, honest, temperate] person do?" and not "What does the moral status of this entity require of me?" In this way, virtue ethics takes care of a serious problem Hursthouse identifies with respect to moral status inquiries leaving unexamined the question of how one is supposed to behave in relation to those entities that are not considered to be inside the moral community (Hursthouse 1997).

Hursthouse does not use the example of law as it pertains to other-than-human animals. But the approach she questions—determining the status of such animals first, with moral obligation following from that status—is one of the most salient and problematic features of animal law. Other-than-human animals are legally the property of human animals, and what is appropriate conduct towards an other-than-human animal is almost

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entirely determined by that status (Francione 1995, 38-48). I say “almost entirely” because all states in the United States have enacted anticruelty statutes, which ostensibly prohibit human animals from inflicting severe suffering on an animal who is not a human (Wagman, Waisman, and Frasch 2009, 90-137). Other-than-human animals are not the property of human animals in the same way that, say, a table is property; inanimate objects such as tables are not covered by anticruelty statutes. Nevertheless, the rule that severe suffering and death can be inflicted if doing so is considered necessary effectively eviscerates the prohibition on inflicting suffering. In fact, it is most accurate to say that anticruelty statutes do nothing more than prohibit completely gratuitously inflicted severe suffering; they do not inhibit in the least, let alone prohibit, severe suffering inflicted on other-than-human animals as a matter of standard business practices in institutional or industrial settings (Ibrahim 2006; Francione 1995, 134-60). *All* institutionalized forms of inflicted suffering, as, for example, in factory farms, animal research facilities, and pest control activities, are accepted as “necessary.” Indeed, many of these activities are explicitly exempted, thereby eliminating any doubt about how a judicial evaluation of “necessity” would turn out. Thus, when it comes to factory farming, animal research facilities, pest control, and many other contexts in which other-than-human animals are harmed and killed, such animals are the legal equivalent of inanimate objects such as tables: any type or amount of harm can be inflicted, and the human animals who inflict that harm are legally free of the label “cruel” (Francione 1995, 134-60).

One could debate whether anticruelty statutes are most usefully understood as situated within a deontological framework, being categorical rules with many exceptions, or situated in a utilitarian framework, requiring at the outset the balancing of

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human animals' and other-than-human animals' interests to determine how the legal rule should be structured and apply. And, of course, one could also debate whether it is the role of law to embed or encourage individual moral conduct as opposed to the regulation of resources and maintenance of an orderly society.¹ However, my primary goal in this essay is to consider how virtue ethical concepts, many as developed by Rosalind Hursthouse, could enrich the discourse about animal law reform. I conclude that virtue ethical principles can be useful when dealing with a narrow class of animal law reform situations in which various potential legal alternatives exist, the alternatives are based on different moral conceptions of the best practice to be supported or required by the legal rule, and those involved in the reform effort share sufficient values relevant to the task at hand and respect for one another to work together to propose or refine legal rules, policies, or guidelines for particular situations despite holding differing moral judgments about the specifics of those rules, policies, or guidelines.

Features of a Virtue Ethical Approach

One of the goals of Hursthouse's book *On Virtue Ethics* is to examine how virtue ethics provides a (not unproblematic) guide to action, as do deontological and utilitarian systems (in not unproblematic ways). A person could decide not to pull a cat's tail because he has been told not to and is following that rule (derived from deontological or utilitarian reasoning) or because, as a person who values kindness, he wants to be kind in all endeavors including his interactions with the cat. With enough practice with the virtues, the virtuous person will eventually not even consider pulling the cat's tail, whereas the person who simply follows rules may still be tempted and find

¹ Some would say that even without intentionality, laws shape conceptions of the "good person" (Stout 2011).

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reasons why pulling the cat's tail on a particular occasion can be made to fit with an exception to the rule. Under many, if not most, circumstances involving other-than-human animals, mere rule-compliance becomes a proxy for gauging whether an individual is moral. Thus, an animal-based research scientist working within an exemption in an anticruelty statute escapes the label of "cruel," no matter how unnecessary the research and how much suffering other-than-human animal subjects endure because of it. If she measures her morality by reference to legal compliance, she can engage in research that would shock the moral sensibilities of observers without ever once doubting the sufficiency of her moral judgment. Some may argue that such indicates the inherent lack of sound moral judgment in the law itself. But, even if one grants that is so, and even if laws, including their exceptions, are based on sound moral judgments, mere legal compliance is at best a substitution of others' moral judgments for one's own responsibility to ensure that one's behavior is morally sound.

Virtue ethical conduct trains an individual in ever more virtuous behavior as he practices making decisions about what to do based on virtues he seeks to entrain and vices he seeks to avoid. By comparison, rule-following behavior *may* train the individual primarily or only in rule-compliance, which could include the (not particularly virtuous) ready adoption of exceptions to the rule so as to satisfy desires that cannot be resolved without apparent violation of the rule. This is not to say that the virtuous person never pulls a cat's tail. A kind person would pull a cat's tail if it were the surest and safest way of rapidly removing the cat from greater harm than the risk of harm to the cat from pulling his tail. But the virtuous, kind person would be exercising the virtue of kindness, rather than operational-

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izing an exception to a rule of “no cat tail pulling.” Kindness required the particular act—in this case, pulling the cat’s tail.

This is also not to say that incorporation of virtue is exclusive to virtue ethical reasoning. For example, it could be that the basis for a deontological rule to not pull the cat’s tail is also based on a principle of kindness. In that case, the virtue ethical rule not to pull the cat’s tail may differ from the deontological rule only in that the motivation of kindness is more salient in the former than in the latter. However, there could be other reasons for a “no cat tail pulling” rule that is situated in a deontological framework. It is not always the case that there is one possible basis for a deontological rule or that the basis is clearly known. In such a case, one may be following a rule simply because one has been taught to follow the rule and not because one understands the basis for the rule. One is not being kind or becoming more kind if one does not know that the reason for the rule against cat tail pulling is kindness, because there could be other reasons for the rule. Once rules are codified through legal process, their relationship to whatever moral rule once grounded them can become sufficiently attenuated that use of exceptions and the pursuit of loopholes become the predominant guide to action.

Being “virtuous” could come to include the behavior of “rule-compliance.” However, rule-compliance is a behavior and not a virtue, such as kindness, fairness, compassion, integrity, and courage. Moreover, *simply* behaving in a rule-compliant way does not necessarily lead to ever more virtuous conduct. In order for the conduct to be virtuous and promote the development of a virtuous character, one would need to know the basis in virtue for each rule, virtuous reasons for exceptions, and when to follow the rule or an exception in a virtuous way. One would

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have to desire and intend first and foremost to be and become ever more virtuous. This commitment to deontological rules for reasons of virtue would be an example of a hybrid virtue ethics-deontological type of reasoning. One's basic commitment to and actual acting in accordance with virtues and avoiding vices provides an ever-increasing ability to behave virtuously in relation to all situations, whether there are rules derived from other normative theories associated with those situations or not.

A person who, when confronted with a decision she identifies as a moral question, wonders "what kind of person do I want to be?" rather than "what rule am I to follow?" should be able to develop a moral compass that can stand her in good stead as she encounters decisions of different degrees of complexity and novelty. This is because she is constantly guiding her behavior by reference to virtues and avoiding vices, learning as she goes along how to behave more virtuously, and enjoying such evidence as she obtains that she is becoming more virtuous. She thereby trains her emotions as well as her behavior such that she can make increasingly better moral decisions. It seems an ideal way to build a virtuous character. It also seems to be a good perspective with which to engage in legal reform with others who understand that the legal issues at stake contain morally charged aspects.

Unfortunately, it is not easy or simple to build a virtuous character or to engage in legal reform when reformers disagree about what a good moral outcome would be. A significant challenge for a virtue-oriented individual is that different virtues may at times seem to require different actions, such as the occasional conflict between kindness and honesty to a friend. Those conflicts cannot always be readily prioritized in order to provide a clear course of action either on the individual level or when

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it comes to legal reform. Similarly, at times the expression of a single virtue may arise in connected contexts such that there is conflict or uncertainty about the most virtuous action one could take, such as a situation in which an expression of kindness to one person would result in an outcome that is not necessarily kind to another. How should one resolve such dilemmas? Should one resolve such a dilemma based on such characteristics as the closeness of one's relationship or assessments of the apparent virtue of each of those who would be differentially affected by one's actions? Should the dilemma be resolved based on some other aspects of the situation? How can laws be based on virtues when there are such priority problems? As I discuss later, this type of problem constrains applicability of virtue ethics in law, but it does not prevent all such application.

Priority and application problems are not unique to virtue ethical considerations, of course. They arise in deontological and utilitarian rule development and application contexts as well. Moreover, such dilemmas are exacerbated when they arise as to conduct involving other-than-human animals, if such animals are given any moral consideration in human animals' ethical decision-making at all.

As an example of priority and application challenges in the virtue ethical context, imagine an egg producer who knows that the suffering of egg-laying chickens is extremely severe (Vegan Peace Home 2012; Davis 1996, 51-82; Singer 1990, 107-119). He knows firsthand that, because the species of chickens used for egg production is not the same as those used for meat production, males of the species are economically useless. Imagine trays of recently hatched chicks on a conveyor belt taking those chicks past various workers. The males, who are totally useless for egg production, are tossed into grinders or thrown into

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plastic bags or dumpsters where they suffocate from the weight of those thrown in after them. Females continue down the conveyor belt where their beaks are seared or cut and their toes are cut (with no analgesic or anesthetic), ending up in small wire cages they rapidly outgrow. The cages have wire floors that slant so that eggs will roll forward for ease of human collection, meaning that a hen can never stand on a level surface. She has no privacy, which hens seek out under normal circumstances. There is no opportunity to dust bathe, and no opportunity to spread her wings, let alone spread her wings in the sun. As ambient ammonia levels rise from all the hens' waste that drops through the wire caging, severe eye irritation and blindness are common. Since it is difficult for workers to remove dead hens from crowded cages, a living hen may well have to share the cramped cage with dying and dead hens. When egg production drops off she may be starved along with the others so that those who survive the "forced molt" will have a few more cycles of increased egg production. When she is no longer useful for egg production, she can be killed, along with the others, in any number of terrible but inexpensive ways.²

Suppose that the egg producer knows that chickens can experience pain and apprehension, including the male chicks, and that kindness would dictate foregoing many, if not all of these acts. Indeed, he has considered the possibility that he ought not be in the egg production business at all, due to the suffering he knows he is inflicting on thousands of chickens. Yet, he might also genuinely believe that it is the only way he could make a living for his family and that earning money for his family is kind, even if it means harming chickens. Thus, the egg producer could consider himself to be a kind person even though some of his acts are not kind.

² Poultry are not covered by the federal Humane Methods of Slaughter Act (U.S. Code, Title 7, §§1901-1907).

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This example left to the side those people who do not know that chickens suffer. To them, it is not obvious that the virtue of kindness even enters the picture; to them, it would be comparable to being kind to a rock. However, scientists have confirmed that chickens experience pain (Nicol 2012), and, even if that had not been definitively confirmed, a kind person, watching a male chick trying desperately not to slip into a grinder, or slowly suffocating under the mass of other chicks thrown on top of him, or dehydrating and burning in the sun at the top of a dumpster, would err on the side of compassion and not participate in the cruelty that appears to be unfolding (Bravebirds 2012). In other words, a kind person who doesn't already know about the suffering inherent in egg production would take steps to learn whether an act in which he is engaged is unkind and seek the path of kindness. Indeed, the pursuit of practical wisdom in exercising virtues (such as kindness, compassion) and avoiding vices (such as cruelty, insensitivity) is an overarching virtue in Hursthouse's virtue ethical framework³ (Hursthouse 1999, 13, 59-62). Learning new information that informs that process is itself virtuous and necessary for the exercise of other virtues and avoidance of vices.

Pursuit of factual information alone will not solve the problem of priorities of virtues. In *On Virtue Ethics*, Hursthouse considers conflicting virtues and prioritizing virtues when she writes about dilemmas that may fall into three different categories: resolvable, irresolvable, and tragic. Understanding these categories is useful for the development of strategies for addressing priority and other application problems in virtue ethics and in the application of virtue ethics to law. Those problems

³ Wisdom is an overarching virtue because it is a virtue about which it cannot be said that a person has the virtue "to a fault." One can never be too wise, as one can be too honest or too frugal, for example. (Hursthouse 1999, 13, 59-62)

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are severe as to human animals' interactions with other-than-human animals because of ingrained dismissive and disrespectful societal attitudes toward other-than-human animals and the existence of laws that further those attitudes.

Resolvable dilemmas are dilemmas which can be resolved if the virtuous person has the wisdom to apply virtues appropriately. Equally virtuous people would ultimately arrive at the same resolution of a resolvable dilemma (Hursthouse 1999, 42-62). This is a type of dilemma that may be addressable through wise pursuit and integration of information into one's thinking about problematic situations. It is not kind to treat chickens as the egg producer treats them, and a virtuous person would pursue information and courses of action that would result in his not treating chickens that way. Once we reach a point at which it is clear that treating chickens as they are treated in American agriculture is unkind to chickens, unnecessary for human health, harmful in degrading water, air, and soil quality, and leads to inefficient utilization of plant resources in ways that aggravate prevalence of hunger, we have reached the resolution of the dilemma. It would seem at that point that the rule prohibiting such treatment should, as a moral matter, be codified. That such codification has not happened is arguably due primarily to political realities and consumer unwillingness to change pleasure-seeking practices, rather than genuine uncertainty about moral grounding for such a rule (Ibrahim 2006; Francione 2010). It is a sobering example of the limits of codification even if a moral dilemma is resolved.

By contrast, an irresolvable dilemma is one in which there isn't just one course of virtuous action that is preferable to another (Hursthouse 1999, 63-71). Stated differently, if two equally virtuous people were confronted with the same dilemma, one

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might choose one virtuous course of action, and the other might choose another equally virtuous course of action. An example might be the production of an amicus brief to support whales in a legal case filed by Japanese whalers to stop Sea Shepherd from thwarting their hunts. Suppose a virtuous philosopher wishes the court to know about the scientific and philosophical basis for appreciating the magnificence of whales and the desirability of protecting them from all human-inflicted harms. She is advised by a virtuous and experienced attorney that the judge responsible for the case will accept such a brief only if it is framed in terms of the public's (humans') interest in protecting whales and not directly for the sake of the whales themselves. This requirement conflicts with the philosopher's point of view that whales should be protected regardless of humans' interest in them. It is also the point of view she thinks that the whales would wish to be taken on their behalf. Her choice is whether to behave virtuously in the sense of being forthright with the court about what, based on the evidence about whales, she genuinely believes (and how she believes whales' would wish to be presented), or to behave virtuously in the sense of increasing the likelihood that evidence about whales will be heard at all by the court, albeit in a less whale-respecting way. Both express the virtues of kindness and compassion.

Hursthouse cautions that, to the actor herself, there may appear to be only one virtuous way to proceed, and for that person that particular dilemma appears to be a resolvable one. If, however, the actor herself recognizes that virtue could be understood to allow different responses to the same set of facts, she will find herself confronting an irresolvable dilemma. Of course, there can be much disagreement about whether two or more courses of action are in fact equally virtuous and about whether a truly virtuous person could not find a way to engage

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all applicable virtues equally in her action. But, the point here is that there will be such situations in which equally virtuous but different reactions to the same set of facts will be possible and the virtuous actor will, herself, be aware of the dilemma. In those cases, there is no single virtuous response to the dilemma, leading some to criticize virtue ethics as failing to provide action guidance. This presumes that action guidance must result in one and only one virtuous course of action. Letting go of that presumption sufficiently to give virtue ethics a fair trial is, perhaps, one of the greatest challenges a newcomer faces. It is particularly difficult in a legal context, if one's objective is to find one and only one legal rule that can be derived from a virtuous process of reasoning.

Finally, there are tragic dilemmas (Hursthouse 1999, 71-85). In these situations the virtuous agent's life will be marred by whatever virtuous action she might take. Philosophers often present railroad track ("trolley problem") scenarios in which either one person or several people will be killed depending on the action or inaction taken by a person positioned so as to affect whether the one or the several will be killed. In the end, the person who acts or who fails to act will have the blood of at least one person on her hands; no matter how virtuous the reasoning process and the resultant act, her life will be forever marred by the commission or the allowance of a death to occur.

A similar example is the tragic dilemma faced by feral cat colony caretakers who discover an aggressive cat in the midst of the colony. The cat attacks other cats to the point that they may develop life-threatening abscesses, but there is no possibility of relocating the aggressive cat or the victim cats. Killing an aggressive cat will undoubtedly save some unknown number of victim cats from deaths from abscesses or being chased

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into the path of cars. But killing the one to preserve the lives of the others obviously involves taking a unique and individual animal's life. Either way, the colony manager will have blood on her hands.

Whether the example of the aggressive feral cat is seen as a “tragic dilemma” might appear to turn on how one thinks about the value of cats and the killing of cats. If a person cares little about the lives of the cats or the violence attendant to killing them (or other other-than-human animals), that person might understand the dilemma as salient but not tragic by Hursthouse's terms. That may be because the actor either does not value cats or, perhaps, does not think that veterinary-assisted killing is violent and disrespectful to the cats and, therefore, doesn't believe her life would be marred by either course of action that would involve killing the one or the many. However, the facts that other-than-human animals experience suffering and value their lives means that killing the one or the many in a situation similar to a trolley problem raises the same tragic dilemma as in a trolley problem involving potential human victims.

We will return later to the feral cat situation and apply it in a legal context, but, at this point, it is important that all categories of dilemmas defined in Hursthouse's terms—resolvable, irresolvable, and tragic—have a subjective, agent-centered quality to the extent that the agent must take responsibility for becoming ever more virtuous. To Hursthouse, it is the manner in which the actor reasons through the options by reference to furthering virtues and avoiding vices that enables us to characterize an actor as a person of virtue or not. It is not by absolute reference to the act itself and its consequences. For example, she is careful to note that vegetarianism is not itself a

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virtue, even though vegetarianism, practiced for whatever reason, results in less suffering experienced by other-than-human animals (Hursthouse 2006, 141-43). If one is a vegetarian exclusively for reasons of one's own health or for reasons of disliking neighboring cattle ranchers, the individual's vegetarianism does not necessarily indicate that the person is kind, and her vegetarianism is not the exercise of the virtue of kindness (although it may be the exercise of another virtue or virtues). She makes no headway with entraining the virtue of kindness, even if others might attribute kindness to her on the basis of her vegetarianism.

Keeping all of the foregoing in mind, we can return to the egg producer who knows that his actions cause chickens to suffer terribly but who nevertheless engages in those actions for reasons of supporting his family. Would the egg producer consider the dilemma to be "resolvable," "irresolvable," or even "tragic?" Would it matter? And, if he does perceive the situation as a dilemma, as a virtuous person would he not acquire the wisdom necessary to find a different way of supporting his family? Stated differently, is the egg producer a "kind" person because he understands his acts to be kind to his family; must he consider the chickens at all? Since chickens suffer and show many signs of valuing their lives, it is simply not possible to consider one kind if one does not take into account those characteristics of chickens when deciding how to act in relation to chickens. And that is as true of consumers as of producers of eggs and chickens.

Hursthouse does address the problem of a virtuous person who, having premised a decision on a particular virtue, realizes that another or the same virtue has been negatively impacted (Hursthouse 1999, 44-48). She writes of this "remainder" as a

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cause for remorse, which, if recognized as such, provides some support for the virtue that is under-represented in the ultimate decision. However, stopping at that point—the experience of remorse about the road not taken—is not virtuous if the actor does not also continue in the quest for a way of eliminating the conflict that results in harm to some being or entity. The egg producer who is just sad about inflicting suffering on chickens, without searching for a way to accomplish the goals of kindness to family *and* kindness to chickens—or, at least, not participating in their suffering—is simply not a kind or virtuous person.

Legal Applications

Taking into account the ease with which the meaning and application of virtues can be manipulated, virtue ethics does not seem to provide a straightforward basis for a general anticruelty statute. Here I am distinguishing “general” from “specific” anticruelty statutes. General anticruelty statutes state in general terms that it is a criminal offense to mutilate, torment, torture, or kill an animal without necessity to inflict such serious suffering or death. One can understand these laws as creating a duty not to harm other-than-human animals, with recognized exemptions and exceptions to the rule. Or, one can understand them as creating a balancing requirement captured by the requirement that infliction of suffering be justified as “necessary.” The language of general anticruelty statutes supports either understanding.

Jurisdictions also have specific anticruelty statutes, such as a statute that prohibits cutting off the tails of dairy cows because of the suffering the cows endure when their tails are cut off (California Penal Code § 597n). Those are equally susceptible of being understood as requiring balancing as to each applica-

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tion of the law or as establishing duties for which exceptions are allowed. Nevertheless, it is in this context of more specific codification that virtue ethics may in some cases provide a procedural pathway to the enactment of virtue-oriented legal provisions. I will explore a specific example of that process shortly. At this point, however, I note only that it is unlikely that a general anticruelty statute written from an explicitly virtue ethical approach would look any different or be any different in operation than the current anticruelty statutes apparently premised on deontological or utilitarian grounds. For instance, an example of an apparently virtue-ethically-based law (but not a criminal anticruelty statute) is California's Civil Code section 1834, which requires "depositories of living animals," such as shelters and people who find apparently lost other-than-human animals, to treat those animals "kindly." The virtue of kindness is explicitly invoked. However, there is no specified content of what it means to treat an other-than-human animal "kindly," and, sadly, most animals held by animal shelters in California actually are not treated kindly despite the law requiring kind treatment. As in the case of this California Civil Code section, the level of statutory generality of general anticruelty statutes, too, provides too little guidance regardless of the moral philosophical platform on which it was enacted. It does not anticipate or address how priority or application problems could be resolved. If we all shared an understanding of what such "kindness" would entail in general terms, we would still have difficulty with application in specific contexts.

Another problem for codification of a virtue ethical standard is that codification freezes a process that must be dynamic until there is no remainder or apparent irresolvability. In fact, Hursthouse explicitly cautions against the impulse to codify rules premised on outcomes resulting from the exercise of virtues

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(Hursthouse 1999, 39-42, 56-59). Even if the unique intersection of circumstances and virtues could be captured in a rule, to be virtuous, one must seek to become ever more virtuous and not settle for the resolution of dilemmas that leave remainders and remorse. And codifying only one way of behaving when in fact there are several virtuous ways of behaving would not be virtuous, either. Codification would be appropriate only when apparent irresolvability has been resolved or accepted within the structure of the statute or when virtuous behavioral outcomes consistently result in no remainder. We as a society are a long way from that as concerns other-than-human animals and general anticruelty statutes.

If not in the context of general anticruelty laws, how could virtue ethical rules be used in the development of specific laws, which are, after all, written at some level of generality in order to be codified? According to Hursthouse, being a virtuous person involves commitment to developing in oneself an engrained, virtuous approach to living in the world. The question one asks of oneself is “what kind of person do I want to be?” Moreover, the truly virtuous person enjoys living virtuously and does not begrudge “having” to be virtuous. To get to that point, a person has to exercise virtues repeatedly until they are second nature, without each time asking oneself whether one “must” act in accordance with particular virtues or if the damage to one’s character will be too great if one doesn’t. Can law create the circumstances under which a person is required (or given enough choice) to behave virtuously in specific, particularized circumstances?

We think of laws as creating duties and rights, often but not always on a utilitarian basis. Is there room for the kind of approach Hursthouse envisions, an approach whose primary goal

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is not the creation of duties and rights? Although it is difficult to imagine codification of an effective law that requires kindness or compassion or integrity, there may be a few types of legal proceedings in which virtue ethical principles supply some guidance. In the remainder of this essay, I return to my earlier example of feral cat colony management to explore the possibility of such an approach in the context of disputes about feral cat colony regulation. Such disputes are numerous in the United States (as well as in other countries), and various legal approaches for dealing with feral cat colonies are emerging such that they can provide a means for considering possible virtue ethical-legal approaches.

A Virtue Ethical Approach to Feral Cat Colony Regulation

Because virtue ethical concepts can be understood and applied only in finer grained, particularized contexts, it is important to have some sense of who feral cats are. The quality of “feral-ness” pertains to the degree of contact and control a cat will readily accept from humans. Cats exhibit temperaments that range from completely docile and trusting to totally human-avoidant. But that spectrum does not convey an accurate picture. Many indoor cats behave at the docile end of the spectrum when they are with their human families but behave at the opposite end of the spectrum when they are around unfamiliar humans or in frightening or novel situations such as animal shelters or veterinary clinics. Some indoor cats who have received inadequate care or have been victimized by outright abuse may have behavioral triggers even though they are usually docile.

Outdoor cats are equally difficult to categorize. Free-roaming human-appreciating cats, who may spend chunks of time in-

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doors with human families, may look the same as free-roaming completely human-avoidant cats. Moreover, completely tame cats can “go feral,” and the offspring of completely feral cats can be tamed if they receive socialization by humans before they reach the age of 3 months. Thus, the categories of feral and non-feral cats are fairly fluid. Accordingly, beginning with an inquiry as to the moral status of feral cats prior to developing normative expectations of conduct towards feral cats would be difficult unless one retreated to classification based on their status as other-than-human animals.

That fluidity also confers more protection to cats than if the categories of feral and non-feral cats were distinct, with feral cats being treated as wild animals easily characterized as “pests,” such as raccoons and squirrels, for example. Ambiguity or fluidity in categorizing cats results in a variety of protective responses to feral cats when there are proposals to use lethal methods to reduce outdoor cat populations. For instance, some people think of all cats as similarly dependent on the kindness of people and deserving of protection; some worry only about the possibility of mistaking a pet cat for a feral cat; some actually respect feral cats for their fiercely independent characteristics. Thus, for various reasons, cats potentially subject to lethal population reduction have many vocal defenders when they are in danger.

Outdoor cats have vociferous detractors as well. When outdoor cat population sizes grow there are calls to trap and kill the cats who are blamed for predation on birds or use of flowerbeds as litter boxes, for example. Defenders argue that cats should not pay with their lives for someone’s heartless abandonment and that trap-neuter-return programs are more humane and more effective over time. Both sides appeal to local legislators

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for codification of their approach, and legislators increasingly respond with some kind of legislative action, if only to dial down the volume of the controversy.

Some jurisdictions opt for kill-oriented approaches. In 2002, ordinances in Akron, Ohio, allowed for the trapping and immediate killing of “fractious” cats (City of Akron 2002). Although those statutes have been revised, the idea of killing or allowing the hunting of feral cats emerges with some frequency. Wisconsin (Schabner 2005), New Jersey (Singer 2010), and Utah (Adams 2011) have all considered allowing hunting of feral cats.

Nevertheless, there are also municipalities that reject trap-kill methods of population control if feral cat colony caretakers agree to follow rules about colony management so as to minimize perceived nuisance or health risks. Colony caretakers and the heads of nonprofits dedicated to feral cat protection are sometimes called to help draft legislation that would allow feral cat colonies to exist as long as certain conditions are met. The cities of Glendale and Beverly Hills in California are two examples. Both cities enacted ordinances after participation in the process by feral cat colony caretakers and nonprofits dedicated to the protection of stray cats (City of Glendale 2004; City of Beverly Hills 2009). Yet the process of developing rules is arduous and time-consuming because feral cat colony caretakers have very different approaches to management and, having struggled with the moral and ethical dimensions of their decisions, often feel that they have an ethical obligation to cats to press for codification of their way of doing things.

It is in this context that a virtue ethical approach might be useful both in terms of how to ethically allow an outcome that does not wholly reflect one’s own sincere moral choices and as

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to what type of ordinance would be a logical outcome of the process. The participants in this context share an interest in protecting feral cats and are uncertain only about the specifics of colony management to be codified in a regulatory scheme. The example that follows suggests that, as to situations in which important relevant facts are unknowable, legal rules should not be finally codified until those facts become knowable. This means that such rules should have built-in mechanisms for revisiting particular aspects of a rule, and there should be concerted effort on the part of participants to further educate themselves or, as Rosalind Hursthouse might recommend, pursue the practical wisdom necessary to revisit particular aspects in a virtuous way.

Suppose, as has happened in several localities already, that a legislative body, such as a city council or county board of supervisors, calls on feral cat colony caretakers and the heads of organizations dedicated to the protection and defense of feral cats to participate in a series of meetings for the purpose of designing an appropriate set of conditions by which feral cat colonies could be maintained without causing a nuisance. Participants are likely to agree without dispute that all cats must be spayed or neutered so as to prevent population growth.⁴ Not only is it through uncontrolled reproduction that cats become a nuisance to their human neighbors, spaying and neutering cats apparently confers health advantages to the individual cats.⁵

This is not to say that there are no risks to individuals as a

⁴ The description of feral cat caretakers' approaches in this section is based on many interviews with feral cat caretakers in the greater Los Angeles area and my reading of the literature that pertains to feral cats and managed colonies.

⁵ Reported advantages to spayed females include less physiological stress associated with repeated pregnancies, births, and nursing in circumstances of limited access to food, with some data suggesting that there is a lower incidence of breast cancer in spayed cats. Neutered males reportedly roam

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result of surgical intervention in their reproductive capacities or that interference with individuals' reproductive capacities is morally unproblematic. However, there is currently no less invasive or drastic a way of limiting feral cat population growth. There may be considerable disagreement about whether the spay requirement should also apply to pregnant females, since that would involve abortion, but discussion of spay-neuter requirements usually begins on a platform of general agreement due to a recognition that it is the only currently feasible way of reducing the suffering attendant to uncontrolled population growth. By comparison, discussion of other possible requirements is not likely even to start from a position of agreement. I will work with just one example here because my goal is not to actually develop feral cat guidelines; my objective is to illustrate features of virtue ethical reasoning in a particular type of legal setting. In order to maintain focus on that objective rather than the specific content of the example, I have chosen an example about which I would expect the reader not to have an immediate reaction. It is the issue of whether to require the testing of feral cats for Feline Immunodeficiency Virus (FIV) and to require that the cat be killed if he or she tests positive. People who are generally ethical and who care very much about feral cats differ as to what to do about FIV infection and the ethical obligations of a feral cat caretaker as to FIV-infected members of their feral cat colonies.

FIV infection is similar to human HIV infection in that infection causes the individual to become more susceptible to other infections and illnesses. Individuals can lead long and healthy lives if they receive prompt veterinary care for illnesses, high quality food, and other incidents of a healthy lifestyle. Unfortunately, not many feral cats have access to regular veterinary and fight less than unneutered males, which reduces their risks of contracting certain illnesses, abscesses, and other infections.

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care, and most live outdoors in less than ideal circumstances for the prevention of secondary effects from FIV infection. Moreover, there are individual FIV-infected cats who, like some human individuals with HIV infection, suffer such severe wasting and vulnerability to illness that their deaths can be fairly attributed to the infection itself. Those individuals may suffer considerably before their deaths.

FIV is transmitted between cats during mating or by way of deep bites through which the virus carried by one cat's saliva can enter the blood stream of the other cat. It can also be transmitted from mothers to their unborn kittens. It is not transmitted when one cat eats or drinks from the same bowl as an FIV-infected cat. Although the question is very difficult to study scientifically, the percentage of feral cats with FIV is thought to be very low.⁶ However, there can be colonies with high rates of FIV infection, and FIV could spread through a colony if an infected individual fights frequently with other cats in the colony.

There is currently no cure for FIV infection, despite the reported development of some drugs useful in treating the condition.⁷ Also, there are very few sanctuary options for FIV-infected cats. Also relevant is the fact that cats who have been

⁶ It is actually difficult to get a good assessment of FIV prevalence because it is difficult to study feral cat populations. Moreover, people who do study feral cat populations are usually not neutral; they are usually invested somehow in promoting either the killing or preservation of feral cats. However, a localized study conducted in 2010 in western Canada produced the following results: among 1,205 cats, 5.5% tested positive for FIV infection. (Ravi et al. 2010, 271).

⁷ T-Cyte Therapeutics claims to have developed a USDA-approved drug for the treatment of FIV infection (<http://tcyte.com/?gclid=CNnwpetC3rMCFSFyQgodnwkA3Q>). However, it is not billed as cure. Also, it is not currently practical to inject feral cats with any type of medicine except when the cat is already sedated (as for spay/neuter), and, therefore, it would not be possible to follow a treatment protocol involving more than one injection.

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vaccinated against FIV will sometimes test positive for the antibodies in a subsequent FIV test. Since some feral cats are abandoned cats who have “gone feral,” there is the possibility that a cat will test positive only because of previous vaccination.

Feral cat colony caretakers sort and weigh all of this information differently. A colony caretaker might decide to kill an FIV-positive cat who is not yet suffering actively from FIV rather than return her to the colony. Her conscientious and compassionate assessment of the benefits and risks from the cat’s and other cats’ perspectives may well be based on actual experience dealing with cats whose FIV infection has developed in such a way that the cats appeared to have suffered horribly before and as they died. Having been trapped once, many cats will not go near a trap again, and a colony caretaker may be helpless to relieve such a cat’s final suffering. Indeed, some cats disappear when they become debilitated, presumably having found a protected place to die. The caretaker might also be calculating risk of other cats’ exposure, with the knowledge that veterinarians cannot tell her which FIV-positive cats are likely to develop a full-blown, debilitating case. Taking all of these factors together and making a decision based on compassion for the individual cat, concern for other members of the community, and respect for life, the colony caretaker who kills can be said to have virtuously resolved the dilemma of what to do about an FIV-positive feral cat in her colony as current information and options now stand.

Another equally virtuous feral cat colony caretaker might understand the same virtues—compassion, regard for others, and respect for life—as requiring her to return the cat to the colony. She may consider the risks of FIV progression and

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transmission too low and life too precious for her to take the cat's life. Such a person is actually better off not testing at all, and, in fact, her understanding of her ethical obligations to the cat and the colony might cause her justifiably and virtuously to resist a legal requirement that feral cat colony caretakers FIV test all cats trapped for spay/neuter. After all, getting a definitive FIV test can be expensive and saps funds caretakers could spend on cat food and spay/neuter surgeries.

It would appear that this is what Rosalind Hursthouse would identify as an irresolvable dilemma. At this state of scientific knowledge about the illness and without alternatives such as FIV cat sanctuaries, equally virtuous feral cat caretakers could reach equally virtuous but completely different conclusions about moral conduct in the case of a feral cat who tests positive for FIV. Yet this is a situation in which only one way of handling the situation would be embedded in the ordinance; either there would be a requirement of testing and killing or there would not be, with the outcome under the latter circumstance that some feral cat colony caretakers would not be testing at all or would be knowingly returning an FIV-positive cat to their colonies.⁸ As unethical as that seems to the caretaker who would test and kill if the FIV test result is positive, it makes sense to leave the

⁸ Feline leukemia spreads more easily than FIV infection because it can be transmitted by shared water and food bowls. Feline leukemia also more certainly results in death directly attributable to leukemia. For those reasons, some caretakers test for leukemia and will kill in the context of a positive test result, if they have no hospice options. Currently, many veterinarians offer a combination feline leukemia and FIV test. If the FIV test comes back positive, a more definitive but expensive test can be run. There are caretakers who will not kill in the presence of a negative leukemia test result even if there is a positive FIV result, and they will not request the more expensive definitive FIV test because they would not kill strictly for the reason of FIV-positive test results in any case. These circumstances can result in some apparently FIV-positive cats being returned to colonies.

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law open on this point and not to require one course of action or another. That is because the reason for the irresolvability of the dilemma has to do with factually quite volatile factors. Information about FIV infection, the development of FIV positive cat sanctuaries, and possible cures for FIV infection could all emerge after the initial legal regime has been put in place. Similarly virtuous feral cat caretakers could take similarly morally defensible but completely different actions with dramatically different effects on cats.

Suppose that the legal regime is put in place without specification of obligations as to FIV testing. After that regime is enacted, veterinary medical science determines that FIV infection can be managed or its transmission prevented in ways that are financially affordable and easy to accomplish even as to feral cats whom caretakers cannot touch at all. The first caretaker—the caretaker who tests and kills if a cat tests positive for FIV—should be willing to adjust her policies accordingly, and the existing law not requiring testing/killing would facilitate that adjustment. A virtuous person might delay making the change until she is convinced by more studies than it would take to convince another caretaker, but ultimately a virtuous caretaker will remain open to new reliable information that is relevant to her ways of doing things. Indeed, a virtuous caretaker would seek out such information in order always to be making decisions with as much information as possible. The one thing she cannot do as a virtuous caretaker is decide *as a permanent matter* how she is going to handle a life and death matter for a cat and thus fail to continually look for relevant information, be it veterinary medical information or information about FIV-positive cat sanctuaries. Being virtuous must include remaining flexible enough to reshape one's decisions.

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Similarly, the second caretaker—the caretaker who doesn't test at all or who doesn't test and kill—must remain open to the possibility that new information could result in a different calculation of risk and ethical obligations flowing from that risk. It might take a lot of change in relevant data before such a caretaker would shift from life-preserving to life-taking because, after all, taking another's life is serious moral business, even if a feral cat could tell us that she would choose death under the circumstance of a positive FIV test result. What the caretaker cannot do and remain virtuous in her management of the colony is blind herself to new relevant information or fail to seek out relevant information. To use Rosalind Hursthouse's terminology, virtuous caretakers should resist embedding specific legal provisions, even if those provisions would comport with their genuine beliefs about virtuous conduct, as long as a resolvable dilemma has not yet been resolved or as long as an irresolvable dilemma is irresolvable (there is more than one equally virtuous approach). Those aspects of the law should remain open until enough information becomes available to have some measure of comfort that the dilemma is resolved or resolvable. Of course, it is not always easy to identify which dilemmas fall into these categories and, therefore, require leaving those matters open for the time being. Because of commitments to their own virtuous resolutions of dilemmas, caretakers could fail to see a dilemma as irresolvable or as not yet resolved from another virtuous person's point of view. Lack of confidence that others are equally virtuous can make one skeptical that others who have resolved the dilemma differently have resolved the dilemma in a virtuous way.

In the example I have considered, the feral cat caretakers would most likely agree that requiring spay/neuter would be important in any regulation for the establishment or legal rec-

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ognition of a feral cat colony, even though there are some moral and ethical issues associated with forever altering the reproductive capacity of an animal and with spaying pregnant cats. The dilemma of whether to spay/neuter feral cats is resolvable, albeit with the “remainder” of regret for some adverse consequences of the resolution. It is possible to argue that utilitarianism plays an important role in virtuously responding to a particular dilemma, but Rosalind Hursthouse does not contend that hybrid utilitarian-virtue ethical or hybrid deontological-virtue ethical outcomes are inferior to virtue ethical applications. She contends only that virtue ethics, too, has a valid and valuable role to play in providing guidance in the resolution of questions about how we ought to behave in particular situations.

As the example of FIV testing illustrates, several other aspects of feral cat colony management might well be left open either with the possibility of revisiting the ordinance as part of a sunset provision or as part of an explicit procedural mechanism by which future amendments are considered. If a law is scheduled to “sunset” (expire) on a particular date, there will be a date certain at which the law will be reviewed in light of currently available information and alternatives. Although it might be more difficult or expensive than a sunset provision, it would be more helpful if the law instead contained a mechanism for regularly updating associated regulations or rules as, for instance, the establishment of a committee charged with regular review of information and perspectives relevant to feral cat colony maintenance. Through either mechanism, over time, apparent gaps in substantive laws would be filled as once irresolvable dilemmas are resolved or as true irresolvability is recognized and the law is left open enough for different virtuous avenues to be taken.

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It is important to clarify that “leaving a law open” on a particular point, such as not requiring FIV testing in a feral cat colony management ordinance, is not the same thing as creating an “ambiguous” law. A law that does not speak to a particular activity, such as FIV testing, may be quite clear and non-ambiguous as to requirements actually established by the law. Indeed, all laws need to be sufficiently clear that those affected by them can know what compliance entails. “Ambiguity” or “vagueness” as a standard argument to undermine, invalidate, or repeal laws in all sorts of different legal contexts is not absent in the animal law context. State anticruelty statutes have been challenged as unconstitutionally vague as to which other-than-human animals are covered and which acts, prohibited. More recently, an unsuccessful lawsuit filed by an egg farmer in California claimed that a law ending intensive confinement caging systems in egg production in California and codified in California’s Health and Safety Code sections 25990-25994 is unconstitutionally vague because it does not include sufficient guidance for farmers to enable them to avoid criminal punishment and fines (Cramer v. Brown 2012). Not including a requirement, such as not requiring FIV testing, does not subject a colony caretaker to risk of punishment for violating an ambiguous law.

Conclusion

Bringing people together to participate in decisions, be they about refinement of substantive rules or dispute resolution about particular conflicts, does not ensure that those people will behave virtuously. People who have been taught that they are virtuous if they follow rules, even without understanding the foundation of those rules in virtue, or if they successfully exploit loopholes in laws, may not readily adopt a different conception of virtue that requires ongoing practice in the de-

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velopment of practical wisdom in applying virtues within the structure of a law left open for that purpose as to some aspects. It does not appear that we have a culture of virtue in that sense or, if there is a culture of virtue, that the virtues most highly prized are ones that lead to compassionate outcomes for other-than-human animals. Indeed, humans arguably display the most creativity and ingenuity when justifying decisions that are not virtuous and in blinding themselves to their flaws. Moreover, it does not seem that legal process is a good place to instill an approach to living that may be best embedded through other avenues in our society. For that reason, legal rules premised directly on virtues, such as “owners of living animals shall treat them kindly,” have little utility in the American legal system. The level of generality at which they are enacted provides insufficient guidance to those who would be potentially liable.

It seems that a virtue ethical approach in animal law is most likely to be productive, if at all, in situations like the example of substantive rule refinement by participants who share sufficient values and interests to proceed in good faith. People whose moral commitments vary greatly from one another would have difficulty cooperating productively in the creation of legal rules premised primarily on the operation of virtue ethical theory. However, it does seem that a virtue ethical approach could be possible in the development of substantive legal rules through processes that require relatively virtuous participation by those who understand virtues and virtuous conduct in similar ways in the specific contexts at issue. As the feral cat example illustrates, participants in the process may start with strong moral attachment to particular regulatory requirements. But, if it can be shown that there is some informational uncertainty associated with their position and that there are morally justifiable reasons to leave an apparent gap in the law, they should be

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willing to leave substantive rules open to future development as new information comes available, thereby facilitating more rapid resolution of issues to put in place laws that are at least somewhat kinder than existing laws. Through the inclusion of sunset provisions or automatic review provisions, more provisions can be adopted and existing provisions can be revised when more information is available to resolve dilemmas once understood as irresolvable.

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