# INTRODUCTION

## ANIMALS AS PROPERTY

By
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Social attitudes about animals are hopelessly confused. On one hand, many people regard at least some nonhumans—their "pets"—as members of their families. On the other hand, these very same people think nothing about eating animals other than "pets," wearing their skins, using them in experiments, or exploiting them for entertainment in films, circuses, zoos, and rodeos. On one hand, we all agree with the notion that it is morally wrong to inflict "unnecessary" pain and suffering on nonhumans; on the other hand, we routinely use animals in all sorts of contexts that could never be considered as involving any coherent notion of necessity.[1]

The reasons for our moral schizophrenia about nonhumans are, of course, as complicated as the concrete manifestations of our conflicting attitudes. Some of the reasons are historical alone; we have been exploiting animals for so long that we simply continue doing so by force of habit alone. Some reasons are rooted in culture and religion; we uncritically subscribe to various belief systems that proclaim humans (or some subset thereof, such as white males) as "superior" and that devalue nonhumans. Some reasons are economic; animal exploitation is a billion-dollar industry—and human beings appear to be able to justify most actions that result in monetary gain.

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[1] For example, not even the very conservative federal health authorities maintain that eating meat and dairy products is necessary for a healthy diet, and many health care professionals now maintain that eating meat and dairy can have an adverse impact on human health. Despite this lack of necessity to eat animals, we nevertheless kill over eight billion animals in this country every year for no better reason other than that we enjoy the taste of flesh or ice cream.

One thing, however, is clear: the law and legal systems of most Western nations have been primary culprits in facilitating the exploitation of nonhumans. Common-law and civil-law traditions are *dualistic* in that there are two primary normative entities in these systems: *persons* and *things*. Animals are treated as *things*, and, more specifically, as the *property* of persons. As Professor Reinold Noyes has observed, "legal relations in our law exist only between persons. There cannot be a legal relation between a person and a thing or between two things."[2] More recently, Professor Jeremy Waldron has stated that property "cannot have rights or duties or be bound by or recognize rules."[3]

The status of animals as property has severely limited the type of legal protection that we extend to nonhumans.[4] As a general matter, whenever we seek to resolve a perceived human-animal conflict,[5] we balance our assessments of the human benefits to be derived from the animal use against the interests of the animal(s) that will be "sacrificed" in the process. The limiting principle of this balancing process is that we treat animals "humanely" and that we not subject them to "unnecessary" suffering.

The problem is that the balancing process is nothing more than an illusion in which the outcome has been predetermined in light of the very different status of the supposedly competing parties. It is simply not possible to balance meaningfully human interests, which are protected by claims of right in general and of a right to own property in particular, against the interests of property, which exist only as a means to the ends of persons. This balancing is particularly unrealistic where, as here, the assessment is almost always sought to be made in the context of a human property owner seeking to act upon her animal property.[6]

The result of the property status of animals is that notions of "humane" treatment and "necessary" suffering or death are not interpreted by reference to some abstract standard of treatment. The law generally has consistently prohibited only that conduct that cannot be justified in light of the practices that develop within particular institutions of exploitation. As Lord Chief Justice Coleridge stated, any procedure "without which an animal cannot attain its full development or be fitted for its ordinary use may fairly come within the term 'necessary.'"[7] Not "every treatment of an animal which inflicts pain, even the great pain of mutilation, and which is

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[2] C. REINOLD NOYES, THE INSTITUTION OF PRIVATE PROPERTY 290 n. 13 (1936) (quoting AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF PROPERTY, Vol. I, at 11 (1936)).

[3] JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 27 (1988).

[4] For a general discussion of the status of animals as property, including a discussion of a number of the matters treated in this essay, see GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (1995).

[5] I use the expression "perceived human-animal conflict" to highlight my view that whether conflict exists in a particular situation is often a matter of social construction as to what can legitimately constitute a "conflict."

[6] *See generally* FRANCIONE, *supra* note 4; *see also* Gary L. Francione, *Animal Rights and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals*, 46 Rutgers L. Rev. 721 (1995).

[7] Ford v. Wiley, 23 Q.B.D. 203, 209 (1889).

cruel in the ordinary sense of the word is necessarily"[8] cruelty proscribed by law, which is only that pain inflicted for "no legitimate purpose."[9] Only those who act "for the glorification of a malignant or vindictive temper"[10] and who impose suffering and death *outside* of some form of accepted institutionalized animal exploitation, will be said to act without "legitimate purpose."

A study of American law across three centuries makes this plain. The Massachusetts Bay Colony enacted the first anticruelty statute in North America in 1641, and every state now has a law that protects animals from "unnecessary" cruelty. But almost every such statute contains specific exemptions for virtually *all* forms of institutionalized animal exploitation, such as the use of animals for food, scientific experiments, hunting and trapping. Even if a particular state statute does not contain an explicit exemption, liability under these laws often requires a *mens rea* of malice that is impossible to show when the defendant can point to accepted practices to explain behavior. Statutes such as the federal Animal Welfare Act allow determinations about the "necessity" of animal use and levels of pain to be determined by the animal users.

As a general matter, as long as a particular animal use is considered legitimate, then anything that facilitates that usage will be deemed under the law as "necessary." For example, as long as we accept that it is morally permissible for humans to eat nonhumans, then, if the dehorning or castration of animals is what is thought to make the animal more fit for that human use, the conduct will be deemed as "necessary." As long as the animal owner does not act with a "malignant or vindictive purpose" by imposing pain, suffering, or death *outside* of some socially accepted form of exploitation, the law will not intervene. The law assumes that the owners of animal property are, for the most part, best able to determine the value of their animal property, and accords a great deal of deference to such determinations. If the animal owner imposes harm on animals gratuitously, then the owner has diminished overall social wealth as well.

Any significant improvement in animal treatment will be most difficult to achieve as long as animals are regarded by the law as nothing more than property. The owners of animal property will always insist that the level of treatment that they are providing is appropriate given the particular use of the animal. For example, scientists frequently argue that animals used in laboratories are accorded appropriate treatment because if they were not, these animals would not provide valid scientific data. Scientists point to what they regard as the high quality of their research (from a scientific perspective), and conclude that the level of care is acceptable *given that use*. Food producers argue that the level of care provided to animals raised intensively is appropriate because, animals who are "abused" would not produce the volume of high-quality meat claimed by modern agribusiness. For the most part, disputes about animal protec-

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[8] Murphy v. Manning, 2 Ex. D. 307, 313-14 (1877).

[9] Lewis v. Fermor, 18 Q.B.D. 532, 534 (1887).

[10] Commonwealth v. Lufkin, 89 Mass. (7 Allen) 579, 581 (1863).

tion focus on whether, as an empirical matter, particular practices are or are not really "gratuitous." But no one challenges the institutions of exploitation themselves for the reason that there is simply no legal mechanism available to do so.

The property status of nonhumans cannot be defended consistent with any coherent notion of formal justice. We deny the personhood of animals because we claim that animals have certain "defects," such as the inability to use language or a supposedly inferior intelligence, that permit us to treat them instrumentally, as means to our ends. But there is simply *no* such "defect" that is possessed by animals that is not also possessed by some group of human beings. There are, for instance, human beings who are severely impaired and will never engage their environment as actively as a healthy dog. Nevertheless, we would never think of eating such a human, or using her in experiments. To disregard these characteristics in assembling our concept of the human "person" at the same time that we use them to disqualify nonhumans from any significant moral concern is a form of discrimination known as *speciesism.*[11] As a matter of logic and moral theory, speciesism, which involves the use of species to determine membership in the moral community, is really no different from using other criteria, such as race, sex, sexual orientation, or age.

If the law is to be a useful tool in liberating nonhuman animals from the arbitrary treatment that we presently accord them, reform efforts ought to be directed at the property status of animals. Anticruelty laws and federal laws concerning vivisection and slaughter all *assume* that these institutions of exploitation are acceptable, and that the only question concerns whether particular treatment is "humane" given the already-accepted use. These laws all share in common the normative notion that animals possess *no* interests that cannot be traded as long as the requisite benefit is determined to exist. But that state of affairs should not come as any surprise: to be property *means* to be exclusively the means to another's end.[12]

If the law regarding animals is to change, it is necessary to eradicate the property status of nonhumans. But it is folly to look to the legal system as playing a leading role in any such change. The principles of the common law and the process of common-law adjudication, both of which protect property interests, are scarcely candidates for effecting basic change.[13] The extent of dependence by federal and state legislators on

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[11] This term was first coined by British psychologist and author Richard Ryder.

[12] Humans who were slaves in America had a *de jure* status as persons and property, but were treated *de facto* as property, with no interests that were not ultimately subservient to the interests of the property owner. The status of human beings as slaves is generally condemned by a world community that tolerates a great deal of exploitation as a general matter. Slavery is seen as qualitatively different from these other forms of exploitation precisely because it does not recognize that *any* interests of the slave are entitled to the sort of protection accorded to at least some basic interests of non-slaves.

[13] There has been some discussion among some lawyers as to the advisability of a law suit seeking by judicial decision a declaration that at least some animals (e.g., chimpanzees) have personhood status. Although I believe that it is wrong to deny personhood status to

those involved directly and indirectly with animal exploitation is such that it is similarly unrealistic to look to the legislative process to lead in eradicating in any significant way the property status of animals.

This is not to say that there are no alternatives to anticruelty laws and other statutes of dubious value, such as the federal Animal Welfare Act. The primary problem with such measures is that they fail completely to recognize that animals have any non-tradable interests—other than the interest in being free from completely gratuitous suffering or death.[14] Anticruelty laws and most other laws assume the legitimacy of animal exploitation as a general matter, and seek only to identify those instances in which animal suffering or death is gratuitous, or not required to facilitate a socially approved form of animal exploitation. Many animal advocates believe that such laws will eventually lead to the abolition of various forms of animal use. But there is no empirical evidence that such laws lead to anything more than the irony of reassuring society that animals we exploit are really treated well after all, and there is no need for further moral concern. Moreover, the property status of animals renders structurally unsound any process that requires a comparative assessment of human and animal interests.

A more progressive approach to using the legal system to effect change in the property status of nonhumans would involve the recognition that animals have at least some non-tradable interests. For example, a prohibition on particular scientific procedures or experiments would not mean an end to vivisection, but it would mean a recognition that animals have an interest in not being subjected to certain treatment *irrespective* of the beneficial consequences for human beings. That recognition is at least the beginning of a repudiation of the property status of animals. Laws that seek to *prohibit* certain forms of exploitation will generally reinforce the status of nonhumans as holding at some non-tradable interests. Laws that merely *regulate* exploitation, such as laws that make laboratory cages bigger, generally reinforce the property status of animals whose only interest is in not being a "resource" wasted through the wholly gratuitous infliction of pain, suffering, or death.[15]

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chimpanzees and other animals, I also regard it as unrealistic to believe that there is any real possibility that a court will terminate property status in animals even in a limited way.

[14] Animal welfare laws have nothing to do with rights for animals. As Bernard Rollins has noted, rights are "moral notions that grow out of respect for the individual. They build protective fences around the individual. They establish areas where the individual is entitled to be protected against the state and majority even where a price is paid by the general welfare." Bernard E. Rollin, *The Legal and Moral Bases of Animal Rights*, in ETHICS AND ANIMALS 106, 106 (Harlan B. Williams & William H. Williams, eds., 1983). For a discussion of the differences between animal rights and animal welfare, see GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT (forthcoming 1996); Gary L. Francione, *Animal Rights and Animal Welfare*, 48 Rutgers L. Rev (forthcoming 1996).

[15] For a theory of incremental eradication of the property status of nonhumans, see GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT (forthcoming 1996).

Laws that prohibit forms of exploitation and that recognize that at least some nonhumans have some non-tradable interests will, of course, be more difficult to obtain precisely because they will impose greater costs on animal owners who will object vociferously. The passage of more progressive laws will require well-organized and planned campaigns to educate people about the need for a radical rethinking of the human/animal relationship. For example, a planned effort that was directed against the use of animals in the testing of military weapons or in drug addiction studies, and that sought the abolition of these animal uses through funding prohibitions or other mechanisms, would represent a recognition of the existence of non-tradable interests in a context that many people would support. Although there is certainly not yet broad social support for an end to all animal exploitation, there is an enormous amount of concern about the issue as a general matter, and support for more radical measures than have yet been proposed by major animal groups in this country.[16]

In the end, however, the *only* way—short of a coup staged by animal rightists—to eradicate the property status of animals is to convince a significant portion of society that at least some nonhumans, like humans, possess interests that cannot be traded away irrespective of the benefit that would be gained by doing so. Until a larger segment of society accepts, for example, that our enjoyment of the taste of meat does not—*cannot*, as a moral matter—justify killing animals for food, legal change for animals will necessarily be limited. Lawyers must educate the system about the need for change, but any demand for justice for nonhumans will fall on very deaf ears unless and until those concerned about the issue understand that much more work needs to be done to educate in order to gain the necessary social support to make any legal change meaningful.

This observation brings me back to the beginning. Our attitudes about animals are both complicated and the result of complex causes. Anyone who wants to change the status of nonhumans must recognize the need to confront entrenched economic interests, as well as religious and philosophical views that purport to justify our instrumental treatment of animals. Such confrontation is necessary for true social change, and, as Frederick Douglass, former slave, stated in the context of social reform, those who desire change without confrontation are as unrealistic as those who want "rain without thunder."[17]

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[16] In the fifteen or so years in which I have been involved in this area, I have been told by legislators at the state and federal levels that animal issues generate the most significant amount of constituency concern. For a discussion of the way in which the modern animal protection movement has rejected the notion of animal rights in favor of a conservative notion of animal welfare, see FRANCIONE, *supra* note 15.

[17] *See* Frederick Douglass, "Letter to an Abolitionist Associate" (1853).