

# REFLECTIONS ON *ANIMALS, PROPERTY,* *AND THE LAW AND RAIN WITHOUT* *THUNDER*

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## I

### INTRODUCTION

In my 1995 book, *Animals, Property, and the Law*, I argue that animal-welfare laws do not provide any significant protection to nonhuman animals because nonhumans are the property of humans.<sup>1</sup> Animals are *things* that we own and that have only extrinsic or conditional value as means to our ends. We may as a matter of personal choice attach a higher value to our companion animals, such as dogs and cats, but as far as the law is concerned, even these animals are nothing more than commodities. As a general matter, we do not regard animals as having any intrinsic value and we protect animal interests only to the extent that it benefits us to do so.

We claim to take animal interests seriously from both a moral and legal perspective, which is why we have anticruelty and other animal-welfare laws in the first place. We purport to balance human and animal interests, but because animals are property, there can be no meaningful balance. Animal interests will almost always be regarded as less important than human interests, even when the human interest at stake is relatively trivial and the animal interest at stake is significant. The result of any supposed balancing of human and nonhuman interests required by animal-welfare laws is predetermined from the outset by the property status of the nonhuman as a “food animal,” “experimental animal,” “game animal,” et cetera.

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1. GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* (1995). Throughout this article, I use “nonhuman” and “animal” interchangeably, but it should not be forgotten that humans are animals as well. In addition, I use “animal who” rather than “animal that” to emphasize that nonhumans are not objects, as implied by our reference to them as “it.”

Although we supposedly prohibit the infliction on animals of “unnecessary” suffering, we do not ask whether particular animal uses are necessary even though most of the suffering that we impose on animals cannot be characterized as necessary in any meaningful sense.<sup>2</sup> Rather, 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.

For example, although it is not necessary for humans to eat meat or dairy products and these foods may well be detrimental to human health and the environment, we do not ask about the necessity per se of using animals for food. We ask only whether the pain and suffering imposed on animals used for food go beyond what is regarded as acceptable according to the customs and practices of animal agriculture. To the extent it is customary for farmers to castrate or brand farm animals, both very painful activities, we regard such actions as “necessary” because we assume that farmers would not mutilate animals for no reason.

The result of this framework 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. Because animals are property, we consider as “humane” treatment that we would regard as torture if it were inflicted on humans.

In my 1996 book, *Rain Without Thunder: The Ideology of the Animal Rights Movement*,<sup>3</sup> I argue that there are important theoretical and practical differences between the animal-rights- and animal-welfare positions and that welfarist regulation intended to make animal treatment more “humane” will, for the most part, do nothing but make animal exploitation more efficient. Welfarist regulation, I maintain, does not recognize or protect the inherent value of animals and will not lead in some incremental way to the abolition of

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2. For a discussion of the necessity of animal use, see GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? 1–49 (2000). Courts have explicitly recognized that prohibitions against “unnecessary” suffering or “needless” killing must be interpreted by reference to institutional uses that are per se not necessary:

The flesh of animals is not necessary for the subsistence of man, at least in this country, and by some people it is not so used. Yet it would not be denied that the killing of oxen for food is lawful. Fish are not necessary to any one, nor are various wild animals which are killed, and sold in market; yet their capture and killing are regulated by law. The words “needlessly” and “unnecessarily” must have a reasonable, not an absolute and literal, meaning attached to them.

*State v. Bogardus*, 4 Mo. App. 215, 216–17 (1877). Courts have also recognized that practices that are regarded as “cruel” as we normally use that term in ordinary discourse are permitted within the meaning of anticruelty laws. See FRANCIONE, *supra* note 1, at 146; FRANCIONE, *supra* note 2, at 58–63; see also *infra* notes 174–78 and accompanying text (discussing anticruelty laws).

3. See GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT (1996).

animal exploitation. For example, the federal Humane Slaughter Act,<sup>4</sup> which supposedly requires the “humane” slaughter of nonhumans for food purposes, prohibits suffering only to the extent that it ensures worker safety, reduces carcass damage, and provides other economic benefits for humans.<sup>5</sup> It would, however, be an absurd use of the word to characterize any slaughterhouse as “humane.”

To the extent that animal advocates seek protection for animals that exceeds what is necessary to exploit them for a particular purpose, the property status of nonhumans and the political compromise that is required invariably result in regulations that do little—if anything—to affect adversely the interests of human property owners or to improve the treatment of nonhumans. The primary effect of these measures is to make the public feel better about animal exploitation, which actually may result in a net increase of animal suffering through increased use. A central thesis of *Rain Without Thunder*, as well as my later work,<sup>6</sup> is that, if animal interests are to be morally significant, we must accord to nonhumans the basic right not to be treated as property, and this requires that we seek to abolish, and not merely to regulate, institutionalized animal exploitation.

A number of my critics have argued that, although we do treat animals badly, there is nothing inherent in the property status of animals that would prevent us from changing the law to require that animals be accorded better treatment and so animal advocates ought to pursue incremental improvements in animal welfare.<sup>7</sup> Although I maintain that we cannot justify the property

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4. Humane Methods of Slaughter Act of 1958, Pub. L. No. 85-765, 72 Stat. 862, (codified at 7 U.S.C. §§ 1901–1907 (2000)). Usually referred to as the “Humane Slaughter Act,” the Act originally applied to animals slaughtered for sale to the federal government, but was reauthorized in 1978 and covers animals slaughtered in federally inspected plants. For a discussion of the considerations that motivated the Humane Slaughter Act, see FRANCIONE, *supra* note 3, at 95–102. See also *infra* notes 107–09 and accompanying text (discussing failure to enforce the Humane Slaughter Act).

5. See FRANCIONE, *supra* note 3, at 95–102. The “[f]indings and declarations of policy” of the Humane Slaughter Act make clear the importance of economic considerations in assessing matters of animal welfare:

The Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering; results in safer and better working conditions for persons engaged in the slaughtering industry; brings about improvement of products and economies in slaughtering operations; and produces other benefits for producers, processors, and consumers which tend to expedite an orderly flow of livestock and livestock products in interstate and foreign commerce.

7 U.S.C. § 1901 (2000).

6. See generally FRANCIONE, *supra* note 2; Gary L. Francione, *Animals—Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

7. See, e.g., ROBERT GARNER, ANIMALS, POLITICS AND MORALITY (2d ed. 2004); MIKE RADFORD, ANIMAL WELFARE LAW IN BRITAIN: REGULATION AND RESPONSIBILITY 102–04, 394–95 (2001); David Favre, *Integrating Animal Interests into Our Legal System*, 10 ANIMAL L. 87 (2004); Robert Garner, *Political Ideology and the Legal Status of Animals*, 8 ANIMAL L. 77 (2002); Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 62 SOC. RES. 539 (1995); Cass R. Sunstein, *Slaughterhouse Jive*, NEW REPUBLIC, Jan. 29, 2001, at 40 (reviewing GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? (2000)); Steven M. Wise, *Thunder*

status of nonhumans irrespective of how “humanely” we may treat them—just as we cannot justify human slavery even if it is “humane”—I certainly agree that we could treat animals better than we do and stated so explicitly in *Animals, Property, and the Law*.<sup>8</sup> The status of nonhumans as property, however, militates strongly against significant improvement in our treatment of animals, and animal welfare will do little more than make animal exploitation more economically efficient and socially acceptable.

There can be no doubt that the animal-protection community in the United States—and, indeed, throughout the world—has in the years since I wrote these books achieved a greater degree of economic power and social prominence than at any point in history. Therefore, if my critics are correct, and the property status of nonhumans is not as significant an obstacle as I have claimed, it would seem that there should be some evidence of progress that does not fit the model that I have described. That is, there should be evidence of animal protection that goes beyond what is required for efficient exploitation, reflecting at least a nascent recognition of the inherent value of animals as opposed to their exclusively extrinsic value as property. Instead, the events of the past decade or so reinforce the view that the property status of nonhumans is a greater obstacle than my critics and the animal-protection movement have recognized or appreciated.

Part II of this article examines whether animal welfare in the United States has moved us closer to recognizing the inherent value of nonhumans and concludes that it has not. This is not a complete survey of federal and state law or of changes that have occurred through the voluntary action of animal users; rather, it focuses on those developments that animal advocates appear to regard as most significant. Part III discusses some general reasons why the property paradigm militates against better treatment of nonhumans. These remarks are made primarily in the context of responding to criticisms of my views made by Cass Sunstein.<sup>9</sup> Part IV discusses the false dichotomy promoted by my critics that we must either pursue traditional welfarist regulation or sacrifice nonhumans to the “utopian” goal of abolition that will not be achieved for many years, if ever. Part V offers some observations on the field of “animal

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*Without Rain: A Review/Commentary of Gary L. Francione's Rain Without Thunder: The Ideology of the Animal Rights Movement*, 3 ANIMAL L. 45 (1997).

8. In the Introduction to *Animals, Property, and the Law*, I state:

I do not maintain that characterizing sentient beings as property *necessarily* means that those beings will be treated exactly the same as inanimate objects or that property can never have rights as a matter of formal jurisprudential theory. For example, although slaves were, for some purposes, considered “persons” who technically held certain rights, those rights were not particularly effective in providing any real protection for slaves. We *could* decide to grant certain rights to animals while continuing to regard them as property. The problem is that as long as property is, as a matter of legal theory, regarded as that which cannot have interests or cannot have interests that transcend the rights of property owners to use their property, then there will probably always be a gap between what the law permits people to do with animals and what any acceptable moral theory and basic decency tell us is appropriate.

FRANCIONE, *supra* note 1, at 14.

9. See Sunstein, *supra* note 7.

law” as it has emerged in the past decade. Part VI addresses the view advanced by some in the legal community that we ought to treat certain animals, such as great apes, in a different manner based on their cognitive similarities to humans.

## II

### THE FAILURE OF ANIMAL WELFARE

In the years since I first proposed the thesis about the property status of animals, and despite claims by my critics that the property paradigm is consistent with recognizing the inherent value of animal interests, there have been no significant improvements in animal welfare or animal-welfare laws in the United States,<sup>10</sup> and almost all changes have been linked explicitly to making animal use more efficient. That is, welfare changes are based on such considerations as increasing productivity or reducing labor costs and do not recognize that animals have inherent value requiring that we respect their interests even when there is no benefit to us. These developments serve to confirm my views about animals as property and of the generally ineffective and often counterproductive nature of alleged advances in animal welfare. This part discusses several examples of the “victories” proclaimed by animal advocates during this time.

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10. Peter Singer claims as one of the general “successes” of the animal-rights movement that the numbers of animals used in experiments in Britain has fallen to less than half of what it was in 1970. Peter Singer, *Animal Liberation at 30*, N.Y. REV. BOOKS, May 15, 2003, at 25. Singer does not mention, however, that the number of animals used in Britain has increased in recent years. For example, in 2003, there were 2.8 million experiments involving animals in Britain, which was the largest number since 1994 and followed an increase of four percent from the previous year. Moreover, there have been significant increases in experiments involving physical trauma, psychological trauma, thermal injury, and aversive training. See BRITISH UNION FOR THE ABOLITION OF VIVISECTION, UK ANIMAL EXPERIMENTS STATISTICS 2003, available at <http://www.buav.org/pdf/Stats2003.pdf> (discussing report by the Home Office of the United Kingdom).

Robert Garner states that “[i]n many European countries . . . factory farming is much nearer to being phased out by state action” than it is in the United States. Garner, *supra* note 7, at 90. Garner’s statement is certainly not accurate in that intensive agriculture is still very much the norm in Europe. In any event, there cannot be any real doubt that nonhumans in Europe are, despite any differences, still treated very badly. Moreover, there have been difficulties with domestic legislation to implement certain E.U. animal-welfare measures and the effect of free-trade agreements and other globalization efforts on domestic animal-welfare measures, many of which do not take effect until after 2010, remains to be seen. As a general matter, whenever human interests are implicated, nonhuman interests are ignored. For example, fear over the H5N1 virus, which is commonly called the “bird flu,” has resulted in producers of free-range chickens returning to more intensive methods. See, e.g., Brian Brady and Richard Gray, *Jabs for Poultry Workers as Bird Flu Fears Grow*, SCOTLAND ON SUNDAY, Feb. 26, 2006, at 11. Finally, European animal-welfare measures are often based on consideration of economic efficiency and have nothing to do with recognizing the inherent value of nonhumans.

Another comparative example offered frequently involves the fact that some nations, such as Britain, Sweden, and New Zealand, have laws or policies that afford more protection to great apes based on their similarity to humans. For the most part, there had been very little use of great apes in those countries, and restrictions were both easier to enact and less meaningful. Differential treatment of great apes also serves to reinforce speciesist hierarchies rather than to erode them. See *infra* notes 181–86 and accompanying text (discussing “similar-minds” theory).

### A. Farm Animals and Industry Self-Regulation: A “[R]ay of [H]ope”?

Peter Singer, author of *Animal Liberation*<sup>11</sup> and a defender of animal-welfare regulation, cites as an example of a “successful American campaign[]” efforts by animal advocates and organizations, such as People for the Ethical Treatment of Animals (PETA), that led to agreement by McDonald’s to “set and enforce higher standards for the slaughterhouses that supply it with meat” and to provide increased space to hens confined in egg batteries.<sup>12</sup> Singer claims that these actions by McDonald’s, which were followed by Wendy’s and Burger King, are a “ray of hope” and “the first hopeful signs for American farm animals since the modern animal movement began.”<sup>13</sup> PETA claims that “[t]here’s been a real change in consciousness”<sup>14</sup> concerning the treatment of animals used for food and praises McDonald’s as “‘leading the way’ in reforming the practices of fast-food suppliers, in the treatment and killing of its beef and poultry.”<sup>15</sup>

To the contrary, however, this supposed “change in consciousness” is, for the most part, no different from the concerns for increasing the efficiency of animal exploitation that motivated the passage in 1958 of the Humane Slaughter Act and does not reflect any recognition that animals have interests that should be protected even if there are no economic advantages to humans.<sup>16</sup> The slaughterhouse standards praised by Singer and PETA were developed by Temple Grandin, who designs “humane” slaughter and handling systems and who is discussed at length in *Rain Without Thunder*.<sup>17</sup> Grandin’s guidelines, which involve techniques for moving animals through the slaughtering process and stunning them, are based explicitly on economic concerns. According to Grandin:

Once livestock—cattle, pigs and sheep—arrive at packing plants, proper handling procedures are not only important for the animal’s well-being, they can also mean the

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11. PETER SINGER, *ANIMAL LIBERATION* (2d ed. 1990).

12. Singer, *supra* note 10, at 26.

13. *Id.*

14. Stephanie Simon, *Killing Them Softly; Voluntary Reforms in the Livestock Industry Have Changed the Way Animals Are Slaughtered*, L.A. TIMES, Apr. 29, 2003, at A1 (quoting Bruce Friedrich of PETA).

15. David Shaw, *Matters of Taste; Animal Rights and Wrongs; When It Comes to Defending Livestock, Some Activists Are Going to Extremes*, L.A. TIMES, Feb. 23, 2005, at F2 (quoting Lisa Lange of PETA).

16. See *supra* notes 4–5 and accompanying text; see also *infra* notes 107–09 and accompanying text (discussing enforcement of the Humane Slaughter Act).

17. See FRANCIONE, *supra* note 3, at 99–100, 199–202. Grandin, who claims that her autism enables her to understand the emotions of cows and other nonhumans, was the subject of a 1998 documentary, *Stairway to Heaven*, by filmmaker Errol Morris. The title of the film is based on a ramp designed by Grandin that is supposed to lead cows more calmly from the holding pen to their slaughter. Grandin maintains that “[p]roperly performed, ‘slaughter is more humane than nature.’” OLIVER SACKS, *AN ANTHROPOLOGIST ON MARS* 268 (1995) (quoting Temple Grandin). Grandin ignores that cows would not die in “nature” as they would not exist if we did not cause them to come into being for the purpose of eating them. See also TEMPLE GRANDIN & CATHERINE JOHNSON, *ANIMALS IN TRANSLATION: USING THE MYSTERIES OF AUTISM TO DECODE ANIMAL BEHAVIOR* (2005) (discussing the ways in which Grandin’s autism supposedly provides her with insight about animal cognition).

difference between profit and loss. Research clearly demonstrates that many meat quality benefits can be obtained with careful, quiet animal handling. . . . Properly handled animals are not only an important ethical goal, they also keep the meat industry running safely, efficiently and profitably.<sup>18</sup>

In talking about stunning animals before slaughter, Grandin states:

Stunning an animal correctly will provide better meat quality. Improper electric stunning will cause bloodspots in the meat and bone fractures. Good stunning practices are also required so that a plant will be in compliance with the Humane Slaughter Act and for animal welfare. When stunning is done correctly, the animal feels no pain and it becomes instantly unconscious. An animal that is stunned properly will produce a still carcass that is safe for plant workers to work on.<sup>19</sup>

She maintains that “[g]entle handling in well-designed facilities will minimize stress levels, improve efficiency and maintain good meat quality. Rough handling or poorly designed equipment is detrimental to both animal welfare and meat quality.”<sup>20</sup>

In discussing as a general matter the slaughter and battery-cage improvements to which Singer refers, McDonald’s states:

Animal welfare is also an important part of quality assurance. For high-quality food products at the counter, you need high quality coming from the farm. Animals that are well cared for are less prone to illness, injury, and stress, which all have the same negative impact on the condition of livestock as they do on people. Proper animal welfare practices also benefit producers. Complying with our animal welfare guidelines helps ensure efficient production and reduces waste and loss. This enables our suppliers to be highly competitive.<sup>21</sup>

Wendy’s also emphasizes the efficiency of its animal-welfare program: “Studies have shown that humane animal handling methods not only prevent needless suffering, but can result in a safer working environment for workers involved in the farm and livestock industry.”<sup>22</sup> In a report about voluntary reforms in the livestock industry, the *Los Angeles Times* stated that “[i]n part, the reforms are driven by self-interest. When an animal is bruised, its flesh turns mushy and must be discarded. Even stress, especially right before slaughter, can affect the quality of meat.”<sup>23</sup>

In short, the producers of animal products—working with prominent animal advocates—are becoming better at exploiting animals in an economically efficient manner by adopting measures that improve meat quality and worker safety. But this has absolutely nothing to do with any recognition that animals

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18. TEMPLE GRANDIN, RECOMMENDED ANIMAL HANDLING GUIDELINES AND AUDIT GUIDE 6 (2005), available at <http://www.animalhandling.org/guidelines/2005RecAnimalHandlingGuidelines.pdf>.

19. Temple Grandin, Humane Slaughter: Recommended Stunning Practices, <http://www.grandin.com/humane/rec.slaughter.html> (last visited Mar. 19, 2007).

20. Temple Grandin, Stress and Meat Quality: Lowering Stress to Improve Meat Quality and Animal Welfare, <http://www.grandin.com/meat/meat.html> (last visited Mar. 19, 2007).

21. Bruce Feinberg & Terry Williams, Animal Welfare Update: North America, [http://www.mcdonalds.com/content/corp/values/report/archive/progress\\_report/north\\_america.html](http://www.mcdonalds.com/content/corp/values/report/archive/progress_report/north_america.html) (last visited Mar. 19, 2007).

22. Wendy’s, Wendy’s Animal Welfare Program, [http://www.wendys.com/community/animal\\_welfare.jsp](http://www.wendys.com/community/animal_welfare.jsp) (last visited Mar. 19, 2007).

23. Simon, *supra* note 14.

have inherent value or that they have interests that should be respected even when it is not economically beneficial for humans to do so. Any supposed improvements in animal welfare are limited to and justified by economic benefits for institutional exploiters. Moreover, there is serious doubt whether these changes actually provide any significant improvement in animal treatment. A slaughterhouse that follows Grandin's guidelines for stunning, prod use, and other aspects of the killing process is still an unspeakably horrible place and it is misleading for Singer, PETA, or anyone else to suggest otherwise. Battery hens that supply some of the major fast-food chains may now live in an area equivalent to a square of approximately 8.5 inches rather than the average industry standard—a square of approximately 7.8 inches—but it would be nonsense to claim that the existence of a battery hen in the larger cage is anything but miserable. Indeed, “cage-free” hens are often packed together so tightly in sheds that they are crushed and have very limited movement.

To the extent that McDonald's and others are incurring any costs whatsoever in making these changes, they are surely outweighed significantly by the fact that these corporations can now point to the praise of animal advocates such as Singer and PETA for their supposedly “humane” treatment of nonhuman animals. PETA presented its 2004 Visionary of the Year Award to Grandin, who is a consultant to McDonald's and other fast-food chains, for her “innovative improvements” in slaughtering processes.<sup>24</sup> Some welfarists, such as Paul Waldau, director of the Center for Animals and Public Policy at Tufts University, proclaim that these supposed improvements in animal agriculture indicate that “[a] certain segment of the population is beginning to consume with conscience.”<sup>25</sup> This is precisely the sort of comment that encourages the public to believe that it is now more acceptable to eat animal products because animals are being treated more “humanely,” and that demonstrates the generally counterproductive nature of animal welfare.

## B. Legislation

A cursory review of federal and state animal-welfare legislation in the past dozen years provides several notable examples of the sort of legislation described in *Rain Without Thunder* as providing a greater benefit to animal-advocacy organizations, which need legislative “victories” to raise funds, than to nonhuman animals.

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24. PETA, <http://www.peta.org/MC/NewsItem.asp?id=5667&pf=true> (last visited Mar. 19, 2007).

25. Patricia Leigh Brown, *Is Luxury Cruel? The Foie Gras Divide*, N.Y. TIMES, Oct. 6, 2004, at F10 (quoting Paul Waldau). See also *infra* notes 137–41 (discussing the idea that we can be “conscientious omnivores”).

1. Federal Legislation: The Chimpanzee Health Improvement, Maintenance, and Protection (CHIMP) Act<sup>26</sup>

The CHIMP Act of 2000 was enthusiastically supported by many national animal-advocacy organizations and by primatologist Jane Goodall, and many animal advocates regard the CHIMP Act as the most significant piece of federal legislation since the 1985 amendments to the federal Animal Welfare Act,<sup>27</sup> itself an extremely modest law. The stated purpose of the CHIMP Act is to establish a national sanctuary system for chimpanzees that are designated by the Secretary of Health and Human Services (the Secretary) as no longer needed for research conducted or supported by federal agencies.<sup>28</sup> Chimpanzees not owned by the federal government may also be accepted into the sanctuary program if the owner transfers title and other conditions are met.<sup>29</sup> The sanctuary system is to be operated by a nonprofit private entity chosen by the Secretary, and costs are to be shared, with the nonprofit entity paying not less than ten percent of costs to establish the sanctuary and twenty-five percent of the costs of operation.<sup>30</sup>

Although the Act purports to express a moral concern about chimpanzees used in research, it is clear from the legislative history that Congress was at least equally as concerned about the high costs of warehousing these nonhumans in laboratories and regarded the sanctuary system as being a cost-effective solution that would be financed in part through private funds.<sup>31</sup> The CHIMP Act was described as “fiscally sound legislation that will better serve the taxpayers as well as the animals.”<sup>32</sup> Animal advocates also promoted the legislation as cost-efficient.<sup>33</sup>

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26. 42 U.S.C. § 287a-3a (2000) (establishing a sanctuary system for surplus chimpanzees).

27. 7 U.S.C. §§ 2131–2159 (2000). For a discussion of the Animal Welfare Act, see FRANCIONE, *supra* note 1, at 185–249. See also *infra* notes 104–06 and accompanying text (discussing exclusion of animals from coverage under the Act).

28. 42 U.S.C. § 287a-3a(a), (b).

29. *Id.* § 287a-3a(c), (d)(4).

30. *Id.* § 287a-3a(e)(4)(A), (B).

31. See 146 CONG. REC. S11654-55 (daily ed. Dec. 6, 2000). Senator Smith stated: “It costs \$8-\$15 per day per animal to care for chimpanzees in a sanctuary, where they live in groups in a naturalized setting. That is compared to the \$20-\$30 per day per animal that the federal government is now spending to maintain the chimpanzees in laboratory cages.” *Id.* at 11654. Senator Durbin added: “And this legislation creates a public-private partnership, to generate non-federal dollars that will help pay for the care of these chimpanzees. Right now, their care is financed strictly through taxpayer dollars. Under the bill, the private sector will cover 10 percent of the start-up costs and 25 percent of the operating costs of the sanctuary system.” *Id.* For further discussion on the legislative rationale for the CHIMP Act, see S. REP. NO. 106-494, at 3 (2000) (“The CHIMP Act provides a cost-effective solution to the long term care needs of these chimpanzees. Sanctuary care for animals requires less intensive management than animals in research facilities, and therefore entails lower daily costs.”)

32. 146 CONG. REC. S11655 (daily ed. Dec. 6, 2000) (statement of Senator Durbin).

33. See, e.g., *Chimpanzee Health Improvement, Maintenance, and Protection Act: Hearing on H.R. 3514 Before the Subcomm. on Health and Environment of the H. Comm. on Commerce*, 106th Cong. 34 (2000). Tina Nelson, Executive Director of the American Anti-Vivisection Society, stated: “I wish to emphasize the cost effectiveness of this solution. Sanctuaries offer considerable savings compared to the cost of housing chimpanzees in laboratories.” Nelson’s statement was offered on behalf of her own organization as well as the American Society for the Prevention of Cruelty to Animals, the National

Moreover, the CHIMP Act was explicitly proposed as a way of ensuring that research involving chimpanzees can continue. Senate sponsor Robert Smith (R-NH) stated that the CHIMP Act was “basically a cost of doing business. If the federal government wants to keep using chimpanzees for medical research, it has to assume the responsibility for their care after the research is done.”<sup>34</sup> Euthanizing the animals was not an option:

“Some of the best and most caring members of the support staff, such as veterinarians and technicians would, for personal and emotional reasons, find it impossible to function effectively in an atmosphere in which euthanasia is a general policy, and might resign. A facility that adopted such a policy could expect to lose some of its best employees.”<sup>35</sup>

According to Senator Smith, “because chimpanzees and humans are so similar, those who work directly in chimpanzee research would find it untenable to continue using these animals if they were to be killed at the conclusion of the research.”<sup>36</sup> Senate co-sponsor Richard Durbin (D-Ill) stated that “if the Federal government is to keep using chimpanzees to advance human health research goals, long-term care of the animals is a pre-requisite.”<sup>37</sup> Like the supposed improvements in farm-animal welfare discussed in the previous section, the CHIMP Act provides yet another, and a particularly relevant, illustration of a point made continually in my work: Animal-welfare measures, which are regarded as a “cost of doing business,” may very well facilitate continued animal exploitation by making it more acceptable.<sup>38</sup>

Although the CHIMP Act purports to prohibit further invasive research on “retired” chimpanzees in the sanctuary system, the Act has two important exceptions. First, sanctuary chimpanzees can be used for

noninvasive behavioral studies or medical studies based on information collected during the course of normal veterinary care that is provided for the benefit of the chimpanzee, provided that any such study involves minimal physical and mental harm, pain, distress, and disturbance to the chimpanzee and the social group in which the chimpanzee lives.<sup>39</sup>

Second, the Act permits invasive research on a “retired” chimpanzee if the Secretary finds that the research “is essential to address an important public health need”;<sup>40</sup> a sanctuary chimpanzee is needed because there is no other chimpanzee “reasonably available” outside the sanctuary system with a similar

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Anti-Vivisection Society, Society for Animal Protective Legislation, and The Humane Society of the United States.

34. 146 CONG. REC. S11655 (daily ed. Dec. 6, 2000) (statement of Senator Smith).

35. *Id.* (quoting NATIONAL RESEARCH COUNCIL, CHIMPANZEES IN RESEARCH: STRATEGIES FOR THEIR ETHICAL CARE, MANAGEMENT, AND USE 39 (1997)).

36. *Id.* (statement of Senator Smith).

37. *Id.* (statement of Senator Durbin).

38. *See generally* FRANCIONE, *supra* note 3 (arguing that animal-welfare regulations do not lead to the abolition of animal exploitation and, indeed, make exploitation more acceptable as a general matter).

39. 42 U.S.C. § 287a-3a(d)(3)(A)(i) (2000).

40. *Id.* § 287a-3a(d)(3)(A)(ii)(III).

medical history and prior research protocol;<sup>41</sup> and that there are “technological or medical advancements that were not available at the time the chimpanzee entered the sanctuary system, and that such advancements can and will be used in the research.”<sup>42</sup> The exception for invasive research also requires that “the design of the research involves minimal pain and physical harm to the chimpanzee, and otherwise minimizes mental harm, distress, and disturbance to the chimpanzee and the social group in which the chimpanzee lives (including with respect to removal of the chimpanzee from the sanctuary facility involved).”<sup>43</sup>

The exception for noninvasive behavioral studies or medical studies is not qualified, and it appears as though this research may be done without limitation. Although the exception for invasive research appears to be carefully qualified, it is easy to satisfy. If the government and researchers want to do research, it is, by definition, to address an “important public health need.” No two chimpanzees will have the exact same medical history even if they were involved in the same research protocol, so this exception leaves the door wide open for researchers to claim that a sanctuary chimpanzee is in some way or other unique. Technological and medical advances occur every day and there is no qualification as to what is required. The requirement that the design of any invasive research involve “minimal” pain and harm is, in my view, as meaningless as a requirement that we not impose “unnecessary” suffering on animals.

Furthermore, whether the proposed design for invasive research satisfies the exception is to be evaluated by the board of directors of the entity operating the sanctuary system, and the Secretary must accept those findings unless he or she finds them to be arbitrary or capricious.<sup>44</sup> There is a notice-and-comment requirement for research on sanctuary chimpanzees<sup>45</sup>, and no one who has been previously “fined for, or signed a consent decree for, any violation of the Animal Welfare Act” can use a sanctuary chimpanzee for any research.<sup>46</sup> There is no review or approval mechanism specified in the Act for noninvasive behavioral studies or medical studies.

Animal advocates who supported the CHIMP Act either failed to appreciate that such a sanctuary system controlled by the government would facilitate, and not inhibit, research on “retired” chimpanzees, or they ignored that fact.<sup>47</sup> Before the CHIMP Act, many chimps were being warehoused in

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41. Id. § 287a-3a(d)(3)(A)(ii)(I).

42. Id. § 287a-3a(d)(3)(A)(ii)(II).

43. Id. § 287a-3a(d)(3)(A)(ii)(IV).

44. Id. § 287a-3a(d)(3)(B)(ii). The requirements for invasive research do not apply to noninvasive behavioral studies or medical studies. Id. § 287a-3a(d)(3)(A)(i).

45. Id. § 287a-3a(d)(3)(B)(iii).

46. Id. § 287a-3a(d)(3)(C). This provision appears to apply to both noninvasive and invasive research.

47. Some organizations that initially supported the CHIMP Act claimed to withdraw support when the bill was amended to allow continued invasive research on sanctuary chimpanzees. This withdrawal

laboratories, and record keeping was spotty at best. A vivisector trying to find chimpanzees for particular experiments faced considerable opportunity costs in locating suitable animals. The creation of a national sanctuary system under the effective control of the Department of Health and Human Services (HHS) considerably reduces those opportunity costs through a centralized information bank that makes the location and medical histories accessible to the research community. This system allows vivisectors to locate supposedly unique chimpanzees whose use in experiments will arguably satisfy the “public health need” requirement.

Supporters of the CHIMP Act claimed that the exception for invasive research was needed to get support for the bill by the National Institutes of Health (NIH)—and that is precisely the problem. NIH was not willing to drop its opposition unless sanctuary chimpanzees continued to be available for research, which suggests that NIH regards these supposedly retired chimpanzees as being more on a leave of absence. Many advocates pointed to statements by legislators that invasive research on these chimpanzees “would rarely, if ever, take place.”<sup>48</sup> It must be remembered, however, that in the matter of the “Silver Spring monkeys,” who were removed from a federally funded laboratory after authorities determined that the animals were being treated in a cruel manner, NIH made an explicit written representation to Congress that the primates would never be used in experiments once they were transferred to the Delta Regional Primate Center.<sup>49</sup> Despite its commitment to Congress, NIH allowed further experiments because the monkeys were claimed to be unique in light of their previous medical histories. Congress complained strenuously but NIH ignored the protest, claiming scientific need. It is unclear why any animal advocate believes that the CHIMP Act sanctuary situation will not involve a repeat of what occurred with the Silver Spring monkeys.

In the face of concerns expressed by myself and others about the CHIMP Act before its enactment, animal advocates who supported the Act argued that

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of support was often done quietly. For example, the American Anti-Vivisection Society, which actively supported the bill, see *supra* note 33, claimed to withdraw support after the bill was amended, but this withdrawal consisted only of a withdrawal of active support and not any public opposition to the bill. See Letter from Tina Nelson, Executive Director of the American Anti-Vivisection Society, to Hon. James Greenwood (Oct. 23, 2000) (on file with the author). I was unable to find any indication that organizations that supported the Act objected at any point to the exception for noninvasive behavioral research or medical studies, even though these may involve some level of harm, pain, distress, and disturbance.

The National Institutes of Health proposed regulations to implement the CHIMP Act. See Standards of Care for Chimpanzees Held in the Federally Supported Chimpanzee Sanctuary System, 70 Fed. Reg. 1843 (Jan. 11, 2005) (to be codified at 42 C.F.R. pt. 9). A coalition of animal-protection organizations commented on the proposed regulations and argued that there should be no further research on animals in the “sanctuary” system. See Center for Great Apes, et al., Comment on Proposed Rules for Chimpanzees Held in the Federally Supported Chimpanzee Sanctuary System, (Mar. 14, 2005), [http://www.neavs.org/downloads/programs/campaigns/Comments\\_on\\_Proposed\\_Rules.pdf](http://www.neavs.org/downloads/programs/campaigns/Comments_on_Proposed_Rules.pdf). As of the time that this essay went to press, the regulations were not available.

48. 146 CONG. REC. S11654 (daily ed. Dec. 6, 2000) (statement of Senator Smith).

49. For a discussion of the Silver Spring monkey case, including NIH representations to Congress, see FRANCIONE, *supra* note 1, at 72–78, 86–89.

the solution to the problem presented by the exception allowing invasive research was to support the Act and then to challenge in court any determination to use sanctuary chimpanzees in further research.<sup>50</sup> The problem is that, for all intents and purposes, it is virtually impossible to challenge the discretionary decisions of an administrative agency.

First, it is not even clear that animal advocates would have legal standing to bring a judicial challenge to a decision by the Secretary to allow use of a “retired” chimpanzee in further research. That is, the court may very well dismiss the challenge without considering the merits of the Secretary’s decision.

Second, and more important, even if animal advocates were found to have standing, the applicable standard of judicial review would effectively insulate these decisions from challenge. The CHIMP Act provides two levels of protection to administrative decisions to perform experiments on sanctuary chimpanzees. Under the Act, the sanctuary system is to be operated by a non-profit organization that is awarded a contract by the Department of Health and Human Services (HHS), or that is established by HHS.<sup>51</sup> The board of directors of the sanctuary is given the power to determine whether the design of invasive research complies with the requirement to minimize pain and harm, and, assuming that the Secretary determines that the other conditions are satisfied (that is, that an exemption should be granted), the Secretary is bound by the board’s determination unless it is arbitrary or capricious. In addition, the Secretary’s determination about the board’s determination, as well as the Secretary’s own determination about whether an exemption should be granted, will be insulated from challenge unless it is can be demonstrated to be arbitrary or capricious. Finally, the “retired” chimpanzees can be used without limit for noninvasive behavioral studies or certain medical studies as long as only “minimal physical and mental harm, pain, distress, and disturbance” are involved, and there is no mechanism in the Act for review of this research.

In September 2002, the National Center for Research Resources of NIH awarded the contract for the sanctuary to Chimp Haven, Inc., the board of which includes several members who either are presently or who have been involved with the use of nonhumans, including nonhuman primates, in experiments.<sup>52</sup> The board of Chimp Haven will determine whether the design of a proposed experiment on a “retired” chimpanzee minimizes physical and

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50. See, e.g., Statement of GAP [The Great Ape Project], Nov. 29, 2000 (on file with author): “Some major supporters of GAP choose to support the amended bill (Jane Goodall, Marc Bekoff, Steve Wise), arguing that the sanctuary should be created and then we should fight with all our might if someone attempts to remove a ‘retired’ chimpanzee.” I was unable to find any discussion of concern about noninvasive behavioral research or medical studies.

51. 42 U.S.C. § 287a-3a(e).

52. For the announcement by the National Center on Research Resources of the award of the contract to Chimp Haven, Inc., see [http://www.ncrr.nih.gov/compmed/cm\\_chimp.asp](http://www.ncrr.nih.gov/compmed/cm_chimp.asp) (last visited Mar. 19, 2007). For information about Chimp Haven, Inc., including its board of directors, see <http://www.chimphaven.org/about-board.cfm> (last visited Mar. 19, 2007). Chimp Haven is apparently facing financial difficulties. Melody Brumble, *Chimp Haven Faces Money Problems*, THE TIMES (Shreveport, La.), Feb. 23, 2006, at 1A.

mental harm, and that decision must be accorded deference by the Secretary whose own decision about whether the board has acted properly, and whether the research should be done at all, must also be accorded deference. In short, decisions by the Secretary to allow invasive research on sanctuary chimpanzees will be immune from any meaningful legal challenge, even if animal advocates have standing to bring such a challenge. Although the Act contains a notice-and-comment provision so the public can comment about proposed experiments on chimpanzees in the sanctuary system, federal agencies are notorious for ignoring the often considerable public objection to animal use in experiments.

In sum, the CHIMP Act recognized that a “sanctuary” system—particularly one financed in part by and effectively approved by animal advocates—is a much cheaper way to house these animals and makes continued use of chimpanzees in research more acceptable to the public. The system lowers the cost for researchers of identifying the existence of animals with particular medical histories, and “retired” animals can still be used for certain noninvasive behavioral or medical studies, and for invasive research if there is a “public health need.” The Act fits perfectly the model of welfarist legislation that I have described in that it has nothing to do with recognizing the inherent value of nonhumans and everything to do with economics and perpetuating animal use. The Act did not move any distance at all from the property paradigm; indeed, it reinforced the notion that chimpanzees are commodities and that animal-welfare standards should be linked to the economically efficient exploitation of those commodities.

## 2. State Legislation: Florida’s “Ban” on Gestation Crates

Many animal advocates see state law as a more fertile ground for welfarist change than federal, but the results over the past years do not support that view. Peter Singer characterizes the amendment in 2002 of the Florida Constitution to “ban the keeping of pregnant sows in crates so narrow that they cannot even turn around” as “[a]n even greater triumph” than the voluntary changes in the handling and slaughter of animals used for food.<sup>53</sup> Animal advocates, led by The Humane Society of the United States (HSUS), Farm Sanctuary, and others, succeeded in getting nearly 700,000 signatures to put on the ballot a proposal to ban what are known as “gestation crates.” Florida voters approved the proposal, and the Florida Constitution now makes it a

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53. Singer, *supra* note 10, at 26. In response to the question, “In your opinion, what has been the most important victory for the animal movement?,” Singer responded that in addition to a campaign against vivisection by the late animal-welfare advocate Henry Spira, he would:

also put the recent referendum victory on sow crates [gestation crates] in Florida very near the top, because that was the first time that a major form of factory farming has been banned in any state in America, and it showed that the public is on our side, when they have a chance to vote on the kind of confinement that is standard in factory farms.

*COK Talks with Peter Singer*, COMPASSION OVER KILLING, <http://www.cok.net/abol/15/06.php> (last visited Mar. 19, 2007).

misdeemeanor to confine a pregnant pig in “an enclosure,” or to tether a pregnant pig “in such a way that she is prevented from turning around freely.”<sup>54</sup>

For a number of reasons, characterization of the Florida amendment as a “triumph” demonstrates that the bar of progress is ridiculously low where animal welfare measures are concerned. First, the campaign against gestation crates, which began in Florida but is now being conducted in other states, is based explicitly on economic considerations. Animal advocates promoted the amendment as a way to keep larger, intensive hog operations out of Florida, and thereby protect property values and tourism.<sup>55</sup> These advocates maintain, as a general matter, that alternatives to the gestation crate, such as group housing, will reduce production costs and increase productivity.<sup>56</sup> Second, there were only two hog farmers in the state of Florida who were affected by the amendment, and there was almost no opposition to the amendment.<sup>57</sup> On the other hand, large animal-advocacy organizations spent well more than \$1 million on the campaign.<sup>58</sup> Third, the amendment defines “enclosure” as “any cage, crate or other enclosure in which a pig is kept for all or the majority of any day,”<sup>59</sup> and this would presumably mean that the use of a gestation crate for less than the majority of a day would not be prohibited. Fourth, the amendment explicitly allows the use of the gestation crate for “prebirthing period,” which is

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54. FLA. CONST. art. X, § 21(a). The amendment takes effect in 2008. *See id.* § 21(g) (effective six years after approval by voters).

55. According to Floridians for Humane Farms, the Amendment “will prevent mega hog factories from moving into Florida as they have in North Carolina. We don’t want Florida to follow North Carolina’s experience where the environment has been damaged, property values have gone down, and the tourist industry has suffered.” Floridians for Humane Farms, [http://www.bancruelfarms.org/faq\\_print.htm](http://www.bancruelfarms.org/faq_print.htm) (last visited Mar. 19, 2007).

56. The Humane Society of the United States, which, with Farm Sanctuary, is promoting the prohibition of gestation crates in other states, focuses heavily on the economic argument, and maintains that European studies demonstrate that sows raised in group housing with electronic sow feeding are generally more healthy, sow productivity is higher, and production costs are lower. THE HUMANE SOCIETY OF THE UNITED STATES, AN HSUS REPORT: THE ECONOMICS OF ADOPTING ALTERNATIVE PRODUCTION SYSTEMS TO GESTATION CRATES (2006) [hereinafter HSUS REPORT: GESTATION CRATES], available at [http://www.hsus.org/web-files/PDF/farm/econ\\_gestation.pdf](http://www.hsus.org/web-files/PDF/farm/econ_gestation.pdf). A similar proposal on crates for sows, also applicable to calves, was passed in Arizona in November 2006, and Smithfield Foods stated in January 2007 that it would phase out gestation crates over a ten-year period. *See The Humane Society of the United States Praises Smithfield Move to End Confinement of Pigs in Gestation Crates*, U.S. NEWSWIRE, Jan. 25, 2007, <http://news.corporate.findlaw.com/prnewswire/20070125/25jan20071000.html>. Time constraints and editorial deadlines made it impossible to discuss these developments in this article, but they do not in any way affect my view that welfare reforms are generally linked to the efficient exploitation of animals.

57. The only two Florida hog farms that used gestation crates sent their animals to slaughter and closed their hog operations. Both could be eligible for state grants of up to \$275,000. Allison North Jones, *State Hog Farmers Receive a Bailout from Lawmakers*, TAMPA TRIB., May 14, 2005, at Metro 1.

58. Curtis Krueger, *1.2-Million Greases Path of Pig Proposal*, ST. PETERSBURG TIMES, Oct. 13, 2002, at 1B. The Florida Elections Commission charged Farm Sanctuary and its president, Gene Bauston, with 210 violations of Florida law for collecting “thousands of dollars in donations and funnell[ing] them to the amendment campaign, violating a law that requires that the names of all contributors be disclosed.” *See Lucy Morgan, Panel Says Pig Proposal Backers Broke Election Law*, ST. PETERSBURG TIMES, Oct. 30, 2002, at 5B.

59. FLA. CONST. art. X, § 21(c)(1). This is significant because some producers are moving toward a modified system in which pregnant sows will be confined for part of the day.

defined as “the seven day period prior to a pig’s expected date of giving birth,”<sup>60</sup> and allows for the use of crates for “veterinary purposes” for a period “not longer than reasonably necessary.”<sup>61</sup> Like the “unnecessary suffering” language discussed earlier, any legal standard concerning nonhumans that allows an action to be done if, or as long as, “reasonably necessary” is an invitation to ignore relevant animal interests. Fifth, although advocates suggested that the amendment would likely result in any affected pigs being raised in group housing systems,<sup>62</sup> the amendment provides only that the pig must be able to turn around “without having to touch any side of the pig’s enclosure”<sup>63</sup> and not that the pig must be kept in group housing. Sixth, the amendment served as the “poster child” for a successful campaign to require a supermajority to amend the Florida Constitution and thereby restrict such initiatives in the future.<sup>64</sup>

The Florida amendment may have been a fund-raising “triumph” for animal organizations that claim it as a victory. But the amendment and similar efforts do little to help animals and, indeed, are counterproductive. HSUS claims that farmers who adopt alternatives to the gestation crates can not only increase productivity and decrease production costs, but can “increase demand for their products or earn a market premium.”<sup>65</sup> Making exploitation more efficient and increasing demand for meat have nothing to do with recognizing the inherent value of animals or doing anything other than treating animals strictly as economic commodities.

### 3. State Legislation: California’s Foie Gras “Ban”

The state law that has elicited the most enthusiastic response from animal advocates, however, was passed in California. In 2004, Governor Schwarzenegger signed into law Senate Bill 1520, which nominally prohibits the force feeding of birds to produce foie gras<sup>66</sup> and the sale of products that are the “result of force feeding a bird for the purpose of enlarging the bird’s liver beyond normal size.”<sup>67</sup> Senate Bill 1520, characterized as “an ‘unprecedented

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60. *Id.* § 21(b)(2), (c)(6).

61. *Id.* § 21(b)(1).

62. *See, e.g.,* Ban Cruel Farms, Frequently Asked Questions, [http://www.bancruelfarms.org/faq\\_print.htm](http://www.bancruelfarms.org/faq_print.htm) (last visited Mar. 19, 2007) (“In European countries where similar legislation has been enacted, pig farmers have generally gone to a group housing system where the sows are kept together in more spacious conditions.”).

63. FLA. CONST. art. X, § 21(c)(5).

64. Etan Horowitz, *Amending Constitution Polarizes Sides*, ORLANDO SENTINEL, Nov. 4, 2006, at B1. Supporters of the amendment offered as “[t]heir poster child: a \$1.6 million campaign by animal-rights groups in 2002 that won passage of an amendment preventing the caging of pregnant pigs, an amendment that affected only two farmers in the state.” *Id.* The supermajority amendment was approved by voters on November 7, 2006. Howard Troxler, *Stop Us Before We Amend Again!*, ST. PETERSBURG TIMES, Nov. 8, 2006, at 8A. The first line of the article reads: “It must have been the pregnant pigs that did it.” *Id.*

65. HSUS REPORT: GESTATION CRATES, *supra* note 56, at 2.

66. CAL. HEALTH & SAFETY CODE §§ 25980–84. (Deering 2005).

67. *Id.* § 25982. Some animal advocates have claimed that consumption of foie gras in California will be prohibited after July 1, 2012. This claim is unwarranted. Californians will still be able to purchase foie gras from sellers outside of California for personal use but may not resell it within the

victory for animals,”<sup>68</sup> was supported by most of the large animal-advocacy groups and by numerous celebrities.<sup>69</sup>

The California law is one of the few instances in which animal welfare is not linked explicitly to economic concerns. That is, the law does not seek to make exploitation more “humane” incidental to making it more beneficial economically through lowering costs or increasing productivity. Although foie gras certainly involves the barbarous treatment of animals, so does most of our other animal food. Foie gras is unusual because it is not part of domestic food culture; indeed, it is associated with France, toward which many Americans are hostile as the result of various political differences. It is produced in the United States by only two companies, and is consumed by the relatively few people who can afford it and regard it as a desirable luxury. Foie gras is analogous in certain respects to bullfighting, which is no more barbaric than rodeos or some other, more traditionally American, forms of animal “entertainment,” but, because foie gras is a “foreign” form of exploitation, can inspire passionate opposition.<sup>70</sup>

Although Senate Bill 1520 may arguably be said to recognize that at least some animals have more than extrinsic or conditional value, there are a number of reasons why the law is more properly characterized as a victory for California’s only foie gras producer, Sonoma Foie Gras. First, the law does not take effect until July 1, 2012, and it explicitly provides that this date reflects “the express intention of the Legislature . . . to allow a seven and one-half year period for persons or entities engaged in agricultural practices that include raising and selling force fed birds to modify their business practices.”<sup>71</sup> In transmitting the signed bill to the Senate, Governor Schwarzenegger stated:

This bill provides [seven] and one half years for agricultural husbandry practices to evolve and perfect a humane way for a duck to consume grain to increase the size of its liver through natural processes. If agricultural producers are successful in this endeavor, the ban on foie gras sales and production in California will not occur.<sup>72</sup>

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state. Restaurants may be able to continue to serve foie gras if it is served as a “chef’s gift” with a meal and is not sold. The legislation has no effect on the production, marketing, or consumption of liver from birds who have not been force fed.

68. 2004 Legislative Review, 11 ANIMAL L. 325, 360 (2005) (quoting HSUS sources).

69. Andrew Gumbel & John Lichfield, *An Ending Made in Hollywood for an Epic Fight Over Foie Gras; The Headlines Proclaim That Arnold Schwarzenegger Has Saved the Geese*, THE INDEPENDENT (LONDON), Oct. 1, 2004, at 12.

70. See, e.g., Justin Berton, *When All Else Fails, Throw Your Muleta at the Bull and Run*, S.F. CHRON., June 18, 2006, at A1 (describing the experience of Americans at a bullfighting school in California). Another example of this phenomenon involves animal sacrifices. Practitioners of a Caribbean religion known as Santería—usually immigrants and people of color—have been prosecuted for conducting ritual animal sacrifice as part of their religion. Animal sacrifice, although quite horrific, is really no different from what goes on at a federally regulated slaughterhouse. See FRANCIONE, *supra* note 2, at 163–64 (discussing prohibitions of particular practices associated with other cultures or certain socioeconomic groups).

71. CAL. HEALTH & SAFETY CODE § 25984(a), (c) (Deering 2005).

72. Governor’s Message to the California State Senate on Signing Cal. S.B. 1520 (Sept. 29, 2004), available at LEXIS, 2003 Legis. Bill Hist. CA S.B. 1520.

Second, the law explicitly provides that Sonoma Foie Gras is immunized until July 1, 2012, from civil or criminal lawsuits concerning the practice of force feeding or sale of products resulting from that practice, and that any pending civil action against Sonoma concerning the practice of force feeding shall not proceed.<sup>73</sup> This immunity has the practical effect of legalizing force feeding until 2012, although the status of that practice was in question at the time the law was passed.

Third, the owner of Sonoma Foie Gras, Guillermo Gonzalez, actually supported the law and lobbied for its passage. He stated that “[w]e will go on with our business” and “[w]e supported this bill and thank the governor and the legislature for their very serious consideration and deliberation.”<sup>74</sup> Gonzalez “professed to welcome the measure, which grants him immunity from lawsuits, and gives him seven and a half years, in the governor’s words, ‘for animal husbandry practices to evolve’ and to ‘perfect a humane way for a duck to consume grain to increase the size of its liver through natural processes.’”<sup>75</sup> But Gonzalez also “hopes to use the reprieve to prove the ducks do not suffer”<sup>76</sup> and he will “work with scientists and scholars to find ‘clear, unbiased answers on the question of the welfare of the ducks,’ including stress tests.”<sup>77</sup> Mr. Gonzalez claims to have already identified animal scientists who maintain that force feeding does not cause animals to suffer.<sup>78</sup> Further,

[t]he University of California-Davis has been working behind the scenes with the governor’s office to put a plan into place that would allow the university’s animal science department and the veterinary medicine school to conduct research to

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73. CAL. HEALTH & SAFETY CODE § 25984(b)(1), provides that “[n]o civil or criminal cause of action shall arise on or after January 1, 2005, nor shall a pending action commenced prior to January 1, 2005, be pursued under any provision of law against a person or entity for engaging, prior to July 1, 2012, in any act prohibited by this chapter.” Section 25984(b)(3) provides that this immunity applies only “to persons or entities who were engaged in, or controlled by persons or entities who were engaged in, agricultural practices that involved force feeding birds at the time of the enactment of this chapter.” Sonoma Foie Gras was the only producer of foie gras involved in the force feeding of birds at the time that the law was enacted. See Gumbel & Lichfield, *supra* note 69. “Until 2012, meanwhile, Sonoma Foie Gras will be immune from all lawsuits—two of which had been pending before the courts but will now be dropped.” *Id.*

When Governor Schwarzenegger signed Senate Bill 1520 into law, a number of animal advocacy groups announced the signing as a victory for animals, and not one that I saw mentioned that any pending civil action against Sonoma would be dismissed and that Sonoma was immunized from civil and criminal action until 2012. For example, Farm Sanctuary, an organization that sponsored the legislation, omitted any reference to these crucial facts. See NoFoieGras.org, Schwarzenegger Terminates Form of Animal Cruelty, [http://nofoiegras.org/FS\\_cabill\\_PR2.htm](http://nofoiegras.org/FS_cabill_PR2.htm) (last visited Apr. 1, 2007).

74. Gumbel & Lichfield, *supra* note 69 (quoting Guillermo Gonzalez).

75. Brown, *supra* note 25.

76. Gabrielle Banks, *Duck Farm Is on Capitol Agenda; The Owner’s Production of Foie Gras is the Focus of Legislation That Would Ban Force-Feeding of the Birds, Decried as Cruel*, L.A. TIMES, July 7, 2004, at B1.

77. Brown, *supra* note 25.

78. *Id.*

determine whether foie gras production is humane. If the research indicates that the process is humane, it could be used as ammunition to challenge the law.<sup>79</sup>

Moreover, the California legislature may well repeal the law or modify it to allow force feeding with specially designed equipment or accompanied by the use of drugs that supposedly mitigate any suffering if the legislature determines that such changes make the practice “humane.” Given that the legislature expressed its intention to delay the effective date of the law precisely to allow those involved in force feeding birds “to modify their business practices,” such an outcome seems more likely than not.

Senate Bill 1520 provides an excellent example of why animal-welfare legislation is so problematic. This law requires the dismissal of pending litigation and effectively insulates the industry completely at least until 2012 although the prohibition is unlikely ever to come into effect in any event. In the meantime, researchers will use animals in painful experiments in order to determine whether force feeding is “humane” or to develop a way to get enlarged liver through “natural processes.” If by some miracle the law does come into effect in 2012, these birds will still be able to be raised intensively and slaughtered. Although they may not have tubes shoved down their throats, their livers will be enlarged in some way determined to be “natural,” or about which there will be litigation for years, and the birds will continue to live bleak lives. Moreover, this sort of law deludes people into thinking that animal welfare works, that things are getting significantly better for nonhumans whom we exploit for food, and that we can “consume with conscience.”<sup>80</sup>

The California foie gras law was such a victory for Sonoma Foie Gras that the only other domestic producer of foie gras, Hudson Valley Foie Gras, in upstate New York, is seeking to have a similar law passed in New York that would provide complete immunity from any criminal prosecution or civil action through 2016 for force feeding birds.<sup>81</sup>

### C. Legal Standing: *Animal Legal Defense Fund, Inc. v. Glickman*<sup>82</sup>

As far as judicial decisions are concerned, animal advocates have stated that *Animal Legal Defense Fund, Inc. v. Glickman* provides broad standing to sue to “enforce the Animal Welfare Act.”<sup>83</sup> It is, however, more accurate to

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79. Carolyn Jung, *Study Could Disrupt Planned Foie Gras Ban*, SAN JOSE MERCURY NEWS, Oct. 27, 2004, at 1F.

80. See Brown, *supra* note 25.

81. Lawrence Downes, *Face to Face With the Foie Gras Problem*, N.Y. TIMES, June 26, 2005, at 11: “One Senate sponsor, John Bonacic, is an upstate Republican who says he has no special sympathy for ducks or geese, despite what his bill says. He says he wants only to help a Sullivan County constituent—Hudson Valley Foie Gras, the nation’s leading producer of fresh foie gras, which has not only lobbied for the bill, but also helped to write it.”

82. 154 F.3d 426 (D.C. Cir. 1998) (en banc).

83. *The Legal Status of Nonhuman Animals*, 8 ANIMAL L. 1, 3–4 (2002) (comment by David Favre). See also Favre, *supra* note 7, at 95 (claiming that *Glickman* held that there was standing “to question the decisions of a federal agency” concerning animals). Favre is a national officer of the Animal Legal Defense Fund.

characterize the case as providing a “small window for standing”<sup>84</sup> in certain limited situations.

In *Glickman*, an animal advocate claimed that he suffered aesthetic injury when he visited a game farm and saw nonhuman primates in what he regarded as inhumane conditions. He argued that if the United States Department of Agriculture (USDA), which enforces the Animal Welfare Act, had promulgated appropriate regulations as required under the 1985 Amendments to the Act,<sup>85</sup> the animals would not have been in these conditions. An en banc D.C. Circuit held that the advocate had standing to challenge the failure of USDA to promulgate regulations to establish minimum requirements for a physical environment that would promote the psychological well-being of primates.

The plaintiff did not appeal the portion of the lower-court ruling which held that agency decisions to enforce the Animal Welfare Act were generally not reviewable by courts as such decisions were committed to the discretion of the agency.<sup>86</sup> The appellate court holding was limited only to whether the advocate was standing to challenge the failure of the agency to promulgate regulations as required under the Act. Therefore, assertions that *Glickman* established standing to enforce the Act are not correct.

Moreover, the appellate court explicitly distinguished the situation of the game farm from the use of primates or other animals in experiments because, in the latter situation, Congress had explicitly provided for oversight in the form of an animal-care committee with “private citizen members.”<sup>87</sup> Therefore, claims by animal advocates that *Glickman* provided for standing to challenge the use of animals in experiments are unfounded.

Finally, en banc consideration was limited to the question of the standing of the individual advocate, and the court left for a future panel of the court review of the trial court’s finding that the agency did violate the Act by failing to promulgate adequate regulations. A subsequent panel of the Court of Appeals considered the claim on the merits and held that the standards that were promulgated by USDA, which in essence delegated the development of standards to on-site veterinarians employed by the dealers, research facilities, and exhibitors covered by the Act, were sufficient.<sup>88</sup>

In sum, it is inaccurate to characterize *Glickman* as anything more than a narrow decision based only on the aesthetic interests of the plaintiff and not the interests of nonhumans, in a situation in which Congress had not provided other

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84. Rebecca J. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 81 (2002).

85. 7 U.S.C. § 2143(a)(2)(B) (2000).

86. *Glickman*, 154 F.3d at 431 n.3.

87. *Id.* at 445.

88. *Animal Legal Defense Fund, Inc. v. Glickman*, 204 F.3d 229 (D.C. Cir. 2000). The appellate court reversed a trial court decision, *Animal Legal Defense Fund, Inc. v. Glickman*, 943 F. Supp. 44 (D.D.C. 1996), which held that the USDA had not promulgated the regulations required by the Animal Welfare Act.

oversight mechanisms. Moreover, the subsequent litigation made clear that regulations that provide no meaningful protection for animal interests will suffice.

#### D. Additional Failures of the Welfarist Approach

The foregoing is not intended to be a complete survey of all developments that have occurred in the past dozen years. Rather, it focuses on what most animal advocates regard as the most significant advances during that period. There certainly have been some minor successes, particularly at the state level. For example, many states have now made felonies of at least some violations of state anticruelty laws,<sup>89</sup> and a number of states have increased penalties and closed loopholes concerning animal fighting.<sup>90</sup> But given the amount of time, energy, and money that has been expended by the animal-protection movement, a complete lack of success would be as shocking as what animal advocates appear to regard as major victories. Moreover, anticruelty laws affect a relatively small number of nonhumans, and animal fighting is one of the very few activities that we have historically been willing to prohibit. The brutal Hegins Pigeon Shoot, where thousands of pigeons were killed and wounded in a carnival-like setting every Labor Day in Hegins, Pennsylvania, which had for many years been the target of protests by animal advocates, was stopped by its organizers, but live bird shoots continue throughout Pennsylvania.<sup>91</sup>

There have been, however, no major success stories. Fur was a major target of animal organizations throughout the 1990s. Peter Singer claims that, as the result of efforts of animal advocates, the fur industry has been damaged and has not recovered.<sup>92</sup> Singer's claim is unfounded. Although fur sales in the United States fell in the 1990s to a reported \$1 billion, "[s]ince 1999, sales have climbed steadily, reaching a record \$1.8 billion in 2003."<sup>93</sup> The sale of furs "jumped to \$11.3 billion worldwide in 2002, from \$8.1 billion in 1998."<sup>94</sup> There has been a dramatic increase in the number of stores carrying fur and the number of designers using fur combined with a significant drop in the average age of fur buyers.<sup>95</sup> "In 2004, a Gallup poll found that 63 percent of respondents

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89. Stephan K. Otto, *State Animal Protection Laws—The Next Generation*, 11 ANIMAL L. 131, 134-38 (2005). See also FRANCIONE, *supra* note 2, at 68 (discussing whether this change will make any difference given the scope of application of anticruelty laws, the mens rea requirement, and the general reluctance to prosecute anticruelty cases); *infra* notes 174-78 and accompanying text (discussing anticruelty laws generally).

90. 2004 *Legislative Review*, *supra* note 68, at 351-54 (2005).

91. Ian Urbina, *Animal Lovers See an Interstate Trade in Moving Targets*, N.Y. TIMES, June 10, 2004, at B1. For a description of the Hegins event, see FRANCIONE, *supra* note 1, at xiii-xv.

92. Singer, *supra* note 10, at 25.

93. Julie Scelfo, *Real Fur Is Fun Again*, NEWSWEEK, Oct. 11, 2004, at 48.

94. Lizette Alvarez, *'New Fur' Doesn't Look as if It Ever Kept a Mink Warm*, N.Y. TIMES, Oct. 15, 2004, at A4.

95. Wendy Navratil, *Fur's Hot Again; The Animal-Rights Message Has Skipped a Generation*, CHI. TRIB. Jan. 18, 2004, at Q1.

pronounced the buying and wearing of clothing made with animal fur ‘morally acceptable.’”<sup>96</sup>

The failure of the anti-fur campaign presents a case study in the failure of welfarist strategy. Even advocacy organizations that purport to oppose all fur garments, including those made from “ranch-raised” animals, have routinely focused on the fur of certain animals, such as dogs and cats, or seals, as somehow morally distinguishable from the fur of other nonhumans.<sup>97</sup> This nonsensical distinction, combined with the general failure of the movement to confront squarely that clothing made from other animal parts, such as leather and wool, is no less morally problematic than fur, has understandably made many people conclude that the campaign against fur is arbitrary. Finally, PETA’s continued use of sexist campaigns to oppose fur (and other animal uses) has alienated many progressives and has trivialized the issue of fur in particular and animal exploitation in general.<sup>98</sup>

There have been a considerable number of instances in which animal advocates have failed to get even modest and ostensibly uncontroversial legislative changes. For example, attempts starting in 1975 to get a federal ban on leghold traps, which are prohibited or seriously restricted in only a handful of states, have been unsuccessful even though these traps are illegal in approximately ninety countries.<sup>99</sup> Attempts to pass a federal law to provide for the immediate and “humane” euthanasia of non-ambulatory, or “downed” animals, have been unsuccessful.<sup>100</sup> Efforts by legislators to ban shooting animals in enclosed areas, or “canned hunts,” have been unsuccessful on the federal level, and only about half the states have laws that prohibit or regulate this activity even though many hunting groups regard these captive “hunts” as unsporting.<sup>101</sup> Despite decades of protests and boycotts by animal advocates, the Canadian seal cull continues, and the Canadian “government announced in 2003 a three-year total allowable catch of 975,000 animals.”<sup>102</sup>

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96. Rob Walker, *The Way We Live Now: Consumed; Pelt Appeal*, N.Y. TIMES, Feb. 12, 2006, at 30.

97. For example, both PETA, FurIsDead.com, China's Shocking Dog and Cat Fur Trade, <http://www.furisdead.com/feat-dogcatfur.asp> (last visited Mar. 19, 2007), and HSUS, Dog and Cat Victims of the Fur Trade, [http://www.hsus.org/furfree/dogs\\_cats/dog\\_and\\_cat\\_victims.html](http://www.hsus.org/furfree/dogs_cats/dog_and_cat_victims.html) (last visited Mar. 19, 2007), recommend that consumers purchase no fur products, but have campaigns that focus on dog and cat fur. See *infra* note 102 on the seal campaign.

98. I have often discussed PETA’s use of sexism in campaigns. See, e.g., FRANCIONE, *supra* note 3, at 74–76.

99. 2003 *Legislative Review*, 10 ANIMAL L. 363, 364–67 (2004).

100. *Id.* at 367–70.

101. 2002 *Legislative Review*, 9 ANIMAL L. 331, 338–40 (2003).

102. Canadian Press, *Eyes of World on Seal Hunt That Starts Tomorrow*, GUELPH MERCURY, Mar. 24, 2006, at A6. A number of animal-advocacy organizations, including HSUS, have formed a coalition, the ProtectSeals Network, to end the seal slaughter through a boycott of Canadian seafood. The Network urges those opposed to the seal slaughter to sign a pledge “not to buy Canadian seafood products such as snow crab, cod, scallops, and shrimp until Canada ends its commercial seal hunt for good.” The petition may be found at <https://community.hsus.org/campaign/protectseals> (last visited Mar. 19, 2007). This suggests, of course, that sea animals have a different moral status than do seals, and implies that it is acceptable to eat Canadian seafood as soon as the commercial seal hunt ends.

This article does not discuss the myriad instances in which there were new laws that actually have moved the animal-welfare agenda backward and have sought to strengthen or expand animal exploitation in various respects. For example, a number of states are strengthening protections for hunters and preempting restrictions on hunting through amendments to make hunting a constitutional right.<sup>103</sup> There are, however, two examples involving the primary federal animal-welfare laws—the federal Animal Welfare Act and the federal Humane Slaughter Act—that demonstrate just how ineffective animal-welfare legislation is and thus deserve special mention.

The first example involves the application of the federal Animal Welfare Act<sup>104</sup> to rats, mice, and birds—approximately ninety percent of the animals used in laboratories. In 1970, Congress amended the Act to define “animal” to include “any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary [of Agriculture] may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet.”<sup>105</sup> The Secretary consistently refused to determine that rats, mice, and birds were used for research or were pets, and for thirty years, animal advocates tried in a variety of ways to challenge this exclusion by the Secretary. In 2002, after the Secretary agreed to a regulation that would include rats, mice, and birds, Congress amended the Act to explicitly exclude rats, mice, and birds bred for use in research,<sup>106</sup> thus ending one of the longest campaigns in the history of the animal-protection movement and establishing that the minimal provisions of the Act do not apply to the overwhelming percentage of nonhumans used in biomedical research in the United States.

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103. 2003 *Legislative Review*, *supra* note 99, at 378–82 (2004).

104. *See supra* note 27. Singer acknowledges that it is not possible to know the number of animals used in experiments in the United States, but he claims that estimates “suggest a similar story” of significant decline as in Britain. Singer, *supra* note 10, at 25. Putting aside the validity of this claim as applied to Britain, *see* note 10 *supra*, it is unclear how Singer can make such a claim about the United States since rats, mice, and birds, which account for over ninety percent of the nonhumans used in the United States, are not covered by the Animal Welfare Act and their numbers are not reported. Therefore, no one knows the number of animals used. Government statistics on the relatively small numbers of animals covered by the Act indicate that animal use has decreased somewhat but not in the dramatic way Singer suggests. *See, e.g.*, USDA, ANIMAL WELFARE REP. FISCAL YEAR 2004, at 10 (2004), available at <http://www.aphis.usda.gov/ac/awreports/awreport2004.pdf>.

105. Animal Welfare Act of 1970, Pub. L. No. 91-579, 84 Stat. 1560, 1561 (codified as amended at 7 U.S.C. § 2132(g) (2000)).

106. The exclusion of rats, mice, and birds from the definition of “animal” in the Animal Welfare Act was included as title X, subtitle D, section 10301, of the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107–171, 116 Stat. 134 (2002). The exclusion is now codified at 7 U.S.C. § 2132(g) (2002). All vertebrate animals used in activities conducted or supported by the Public Health Service (PHS) are regulated in accordance with PHS policy. *See* OFFICE OF LABORATORY ANIMAL WELFARE, NATIONAL INSTITUTES OF HEALTH, PUBLIC HEALTH SERVICE POLICY ON HUMANE CARE AND USE OF LABORATORY ANIMALS 8 (2002).

The second example involves the other major centerpiece of animal welfare, the federal Humane Slaughter Act.<sup>107</sup> In 2001, *The Washington Post* published a story exposing widespread serious violations of the Act in slaughterhouses across the country.<sup>108</sup> This report, which discussed incidents such as the skinning and dismemberment of animals who were still alive, made clear that the Act was doing little to alleviate the suffering of nonhumans being slaughtered and that the USDA was not enforcing the Act. The response was a resolution stating that it is the sense of Congress that the Secretary of Agriculture should enforce the Act and “prevent needless suffering.”<sup>109</sup> It is unclear which is more disturbing—the meaningless congressional response, or the reaction of the animal-protection community that the resolution is meaningful coupled with the persistent belief of many animal advocates that the Humane Slaughter Act is a significant piece of legislation in the first place.

### III

#### PROPERTY: STRUCTURAL LIMITS ON THE PROTECTION OF THE INTERESTS OF NONHUMANS

We could, of course, treat animals better than we do even if they retained their status as our property. For instance, the treatment of animals in certain European countries may be marginally better than it is in the United States, although animals have property status in those countries as well.<sup>110</sup> But it is important to understand that the property paradigm presents important structural and practical limitations on the human–animal relationship. Moreover, if we do accord protection to animal interests beyond what is required to be protected in order to facilitate their exploitation in a cost-

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107. See *supra* note 4. The United States Department of Agriculture, which enforces the Humane Slaughter Act, interprets the Act to exclude poultry, which account for the largest number of animals slaughtered for food. See 9 C.F.R. §§ 313.1–90 (2006). The exclusion of poultry under the Humane Slaughter Act parallels the exclusion of rats and mice under the Animal Welfare Act (although rats and mice are covered under other federal laws). See *supra* notes 104–06 and accompanying text. Animal advocates, led by HSUS, filed a lawsuit over the USDA’s exclusion of poultry. See Elizabeth Williamson, *Humane Society to Sue Over Poultry Slaughtering; Suit Demands That Birds Be Killed or Rendered Unconscious Before Butchering*, WASH. POST, Nov. 21, 2005, at B02. HSUS argues that the present system of stunning poultry in an electrified water bath causes illness in humans through fecal contamination and increases injuries to slaughterhouse workers. The alternative proposed by HSUS is “controlled atmospheric killing,” or gassing, of poultry. According to HSUS, this alternative “results in cost savings and increased revenues by decreasing carcass downgrades, contamination, and refrigeration costs; increasing meat yields, quality, and shelf life; and improving worker conditions” and “can improve worker conditions and safety, decreasing labor costs due to production line inefficiencies, injuries, and turnover from handling conscious birds.” THE HUMANE SOCIETY OF THE UNITED STATES, AN HSUS REPORT: THE ECONOMICS OF ADOPTING ALTERNATIVE PRODUCTION PRACTICES TO ELECTRICAL STUNNING SLAUGHTER OF POULTRY 2 (2006), available at [http://www.hsus.org/web-files/PDF/farm/econ\\_elecstun.pdf](http://www.hsus.org/web-files/PDF/farm/econ_elecstun.pdf).

108. Joby Warrick, *They Die Piece by Piece*; *In Overtaxed Plants, Humane Treatment of Cattle Is Often a Battle Lost*, WASH. POST, Apr. 10, 2001, at A01.

109. The resolution on “humane” slaughter was included as title X, subtitle D, section 10305 of the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002).

110. See *supra* note 10.

effective manner, that may in a formal sense represent a diminution of the property status of the nonhuman, but it would not necessarily represent a recognition of the inherent value of nonhumans or be a step in the direction of recognizing the right of a nonhuman not to be treated as the property of humans.<sup>111</sup> Also, such additional protection, like animal-welfare measures generally, may perpetuate and even increase animal exploitation by making people feel better about supposedly more “humane” animal exploitation.

In discussing my views on animals as property, Professor Cass Sunstein claims that there is nothing inherent in property status that limits the protections that we can provide to animals and that property ownership is limited in all sorts of ways. He notes:

You own your house, but you are probably not allowed to burn it down or blow it up, or to use it as a concert hall. You own your stereo, but if you have nearby neighbors you cannot play music as loud as you want. In most domains, the rights of “owners” are severely qualified.<sup>112</sup>

Sunstein argues that “the status of ‘owner’ is not incompatible, in principle, with a firm commitment to preventing the unnecessary suffering of animals or even with treating animals as beings with both legal rights and intrinsic value.”<sup>113</sup> He claims that “[t]he fact of ownership even protects animals in important ways” through the duties imposed by animal-welfare laws.<sup>114</sup> He argues that we should seek to ban and to restrict “the most indefensible practices” concerning nonhumans.<sup>115</sup> Sunstein’s position is problematic in several respects.<sup>116</sup>

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111. See FRANCIONE, *supra* note 3, at 190–219 (discussing welfarist changes that may represent incremental eradication of the property status of nonhumans); see also *infra* notes 132–55 and accompanying text (discussing new welfarism and incremental change, including whether changes result in change in property status).

112. Sunstein, *supra* note 7, at 44.

113. *Id.* Similarly, David Favre argues that “[i]t is an incorrect legal analysis that the interests of animals cannot be accommodated within the legal system if they remain legal property.” Favre, *supra* note 7, at 91. He states that we can accord animals “the legal respect that they deserve,” *id.*, “by dividing the concept of title into legal and equitable categories and then awarding the equitable title to the animal.” *Id.* at n.11. Putting aside the lack of clarity of the expression “the legal respect that they deserve,” there are at least three responses to Favre’s proposal. First, however Favre wants to characterize it, what he is doing is proposing limits on property ownership. It is not clear why he thinks that going about this limitation in the rather peculiar way that he proposes will be any more socially or legally acceptable than would the conceptually more simple prohibitions on the use of animals that are presently available and largely rejected. Second, to the extent that the rights of “equitably self-owned” nonhumans will be shaped by anticruelty laws, as Favre proposes, nonhumans will receive little protection because anticruelty laws provide almost no protection to animals. Third, Favre also suggests that the human–nonhuman relationship be modeled on the parent–child relationship, which does not address anything more than the relationship that humans have with companion animals and would have no application to nonhumans used in other contexts.

114. Sunstein, *supra* note 7, at 44. Sunstein once again finds an ally in David Favre. See David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 495 (2000) (“Under our present system, full responsibility comes with ownership.”). See *infra* note 196 and accompanying text (discussing the “benefit” that nonhumans receive from property status).

115. Sunstein, *supra* note 7, at 43.

116. For a further discussion of Sunstein’s views, see Gary L. Francione, *Equal Consideration and the Interest of Nonhuman Animals in Continued Existence: A Response to Professor Sunstein*, 2006 U. CHI. LEGAL F. 231.

### A. Animal Property and Animal Interests

Sunstein is, of course, correct to say that property ownership is qualified and limited, but he ignores certain aspects of property theory and the distinction between property and persons, which make his comments inapplicable to animal property. Although there are limitations on how we use our property, those limits are imposed to benefit other persons (natural or corporate); they are not imposed for the benefit of the property itself. It is true that I cannot burn my house down or blast my stereo so that it disturbs my neighbors. But that is because we are concerned about the effect of my actions on other persons—others who may be in or near my house when I set it ablaze or my neighbors, who might be trying to sleep. Prohibitions on the destruction of landmarks are not imposed for the benefit of the property involved but to protect human interests in the enjoyment of that property.

Sunstein is also correct to note that “current law forbids people from treating animals however they wish to treat them.”<sup>117</sup> But he overemphasizes the extent to which the law regulates our treatment of animals. Although the law requires that I provide food and shelter to my dog, there is nothing to stop me from beating her on a regular basis to train her as a guard dog or to discipline her, or from keeping her on a chain in the back yard and never having contact with her, or from taking her to a veterinarian and having her “put to sleep” for no reason other than that I no longer want her. Indeed, I can as a general matter kill her myself as long as I do so in a “humane” way and as long as I do not violate other laws and regulations that are not in any way concerned with the welfare of the dog, such as local prohibitions on slaughtering animals in multi-family dwellings or discharging firearms in particular places. I have an obligation to provide food and water to the animals whom I keep on my farm, but I may keep them in confined conditions and perform a number of procedures on them that are very painful.

Sunstein also fails to appreciate the limiting principle that animates the legal regulations that do exist. To the extent that the law applies (and many animal uses are exempt from regulation) and recognizes that certain animal interests must be protected, that protection is, for the most part, limited to ensuring that the animal can be exploited for a particular purpose. In order for us to exploit animals, we must provide some minimal protection for their interests so that they can serve the purposes for which we are using them. The law allows me to treat a dog that I use as a guard animal very badly, but I cannot (at least in theory) starve her to death. I am legally obligated to provide a minimal level of care to her, but not much more than is required to keep her alive so that she can serve that purpose. If I do not provide minimal sustenance and veterinary care to my cows and pigs, they will die prematurely and their corpses will not be suited to be sold as meat. If I do not provide adequate food or water to a laboratory animal, and the experiment does not call for starvation or

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117. Sunstein, *supra* note 7, at 44.

dehydration (as some do), then I have introduced a variable that may result in invalid scientific data. Given that we allow researchers to conduct starvation and dehydration experiments on nonhumans, a requirement that animals exploited in laboratories receive food and water has nothing to do with recognizing that animals have inherent value or that their interests have moral significance. The standards of animal welfare are more concerned with recognizing that if we want to exploit animals in particular ways we have no choice but to provide at least some protection for their interests.

## B. Animal Property and “Unnecessary” Suffering

Sunstein argues that the status of animals as property is not inconsistent with a commitment to prevent “unnecessary” suffering and that we ought to prohibit or ban “the most indefensible practices.” The problem is that Sunstein does not—and, indeed, cannot—provide a coherent theory of what constitutes “unnecessary” suffering and what is an “indefensible” practice. A central point of my argument that Sunstein and other critics fail to address is that *most* of our uses of animals cannot plausibly be described as “necessary” and that these uses per se are, indeed, morally indefensible irrespective of whether we treat animals “humanely.”<sup>118</sup> We do not need to eat animals, wear animals, or use animals for entertainment purposes, and our only defense of these uses is our pleasure, amusement, and convenience.<sup>119</sup> Any suffering that we impose on animals incidental to these uses is “unnecessary” and “indefensible.”

Sunstein does not agree with my position that we should all adopt a vegan lifestyle and stop eating or using all animal products. Rather, he argues that we should not inflict more suffering than is necessary given the unnecessary uses of animals. It is difficult to understand how this can mean anything more than that we ought not to inflict *gratuitous* suffering on animals. But no one would disagree with that position; indeed, generally this is all that is required under animal-welfare laws. Sunstein appears to believe that the law presently gives animals “rights” because it prohibits the infliction of “unnecessary” suffering

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118. Robert Garner argues that the welfarist approach is

not trying to show that the use of animals is morally wrong regardless of the benefits to humans. Rather, the movement is trying to show that most, if not all, of the cruel and harmful techniques currently employed on animals are unnecessary in the sense that they do not produce human benefits or that such benefits can be achieved in other ways.

Robert Garner, *Animal Welfare: A Political Defense*, 1 J. ANIMAL L. & ETHICS 161, 167 (2006). Garner claims that I accept this analysis, *id.*, and that it is “somewhat ironic” that I do so given my criticism of Garner’s defense of welfarism. GARNER, *supra* note 7, at 41 n.2. Garner fails to understand that my discussion of necessity concerns animal use per se and not the treatment of animals, which, as Garner correctly notes, is the focus of the welfarist approach. See FRANCIONE, *supra* note 2, at 1–49.

119. It may be argued that the use of nonhumans in experiments to find cures for serious human illnesses is not trivial in the same way as our other uses of animals. Necessity claims are suspect in this context as well, and I maintain that animal use cannot be justified morally even if it is necessary in some sense. See Gary L. Francione, *The Use of Nonhuman Animals in Biomedical Research: Necessity and Justification*, 35 J.L. MED. & ETHICS 241 (2007).

and requires “humane” treatment.<sup>120</sup> A right to “humane” treatment and to be free from “unnecessary” suffering is no “right” at all in that it prohibits only those actions that do not benefit humans and would, in any event, not be committed by rational property owners.<sup>121</sup>

To the extent that Sunstein wants to go beyond prohibiting gratuitous suffering, which no one defends, it is difficult to understand how he can regard suffering incidental to efficient exploitation as “unnecessary” or “indefensible.” Indeed, animal exploiters routinely argue that the practices identified as objectionable by welfarists actually do provide a sufficient level of animal welfare. For example, the National Pork Producers Council maintains that although a number of different production systems are used in the pork industry, intensive confinement systems, such as gestation crates, are actually beneficial to the pigs and that producers would not use them if they were not consistent with the welfare of the animals: “Producers’ livelihoods depend on the well being and performance of their livestock. To do anything short of providing the best, humane care possible would be self-defeating.”<sup>122</sup> Those involved in the ranch-raising of animals used to make fur coats claim that if the animals were not properly cared for they would not produce top-quality fur.<sup>123</sup> Indeed, animal exploiters claim that these sorts of performance measures are the only, or at least the primary, way of measuring welfare in an objective and non-anthropomorphic manner. If all that Sunstein is saying is that forms of exploitation that are not efficient should be replaced by more efficient forms of exploitation, then he is merely promoting the traditional welfarist position that

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120. See Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 389–90 (2003). Sunstein argues that the primary problem is a lack of standing to enforce these “rights.” *Id.* at 391–92.

121. British lawyer Mike Radford maintains that, at least as far as English and Scottish law are concerned, I am wrong to maintain that when human and nonhuman interests are balanced, the animal loses whenever the human has a commercial interest. See RADFORD, *supra* note 7, at 249. According to Radford, *Ford v. Wiley*, 23 Q.B.D. 203 (1889), a case in which a British court held that dehorning older cattle with saws violated the anticruelty law because it caused unnecessary suffering, establishes the application of a two-stage process to determine necessity. “First, it must be shown that the animal’s treatment was to effect an ‘adequate and reasonable object’; secondly, ‘There must be proportion between the object and the means’.” RADFORD, *supra* note 7, at 248 (quoting 23 Q.B.D. at 210, 215). A closer examination of *Ford v. Wiley*, including other painful procedures discussed approvingly by the court, such as castration of animals and the severity used in the breaking of horses, provides a context for the meaning of the test that Radford regards as refuting my notion about the general interpretation of necessity. Moreover, *Ford v. Wiley* actually reinforces my view that suffering for economic reasons is generally considered as necessary as long as the practice in question is commonly accepted by those involved in animal agriculture. The opinions of both Lord Chief Justice Coleridge and Justice Hawkins noted that the practice of the dehorning older cattle had been discontinued in England, Wales, and most of Scotland, and was no longer an accepted agricultural practice. For a further discussion of *Ford v. Wiley* and subsequent British case law holding that if an agricultural practice is commonly accepted there is no violation of the anticruelty law even if there are less painful alternatives, see FRANCIONE, *supra* note 2, at 61–62.

122. National Pork Producers Council, *Gestation Stalls: The Facts*, [http://www.nppc.org/public\\_policy/gestation\\_stalls.html](http://www.nppc.org/public_policy/gestation_stalls.html) (last visited Mar. 19, 2007). Some welfarists argue that gestation crates are not as economically beneficial as alternative production systems. See *supra* notes 56 and 65 and accompanying text.

123. See, e.g., FUR COMMISSION USA, *FUR FACTS 5* (2005), available at <http://www.furcommission.com/resource/Resources/FAF.pdf>.

treats animals as nothing more than commodities with only extrinsic value, and again, no animal exploiter would disagree with him.

Sunstein may be claiming that certain practices are unnecessary for the production of animal products under a different system. He may, for instance, be saying that intensive confinement would not be necessary if we were to raise animals on family farms, which, of course, would cause the price of animal products to rise dramatically. Such an alternative form of animal agriculture may very well improve animal welfare, but animals would still suffer a great deal and that suffering would be no more defensible or necessary given that it is not necessary to eat animal products at all. Once we acknowledge that most of our uses of nonhumans—however “humane” we may treat those involved—are not necessary in any meaningful sense of that term, then the notion that we ought to prohibit “unnecessary” suffering becomes unprincipled and reflective only of subjective and often elitist preferences.

### C. Animal Property and Inherent Value

Sunstein agrees that “sentient animals have intrinsic value, and that animal well-being is a good in itself,”<sup>124</sup> but he maintains that it is possible to recognize that intrinsic value even if animals remain the property of humans. Although we certainly could treat animals better even if they remain our property, Sunstein fails to recognize the limitations that exist as the result of our regarding them as our property, as things that we own. Property has only extrinsic or conditional value. When we say that a person has inherent or intrinsic value, what we mean is that she has value that is not solely extrinsic and conditional. We recognize that she has value because she values herself, even if no one else values her. We may use other humans as means to our ends, but we cannot use them exclusively as means to our ends.<sup>125</sup>

As a legal matter, we do not regard animals as having any value apart from the value we accord them. For the most part, that valuation is tied to their status

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124. Sunstein, *supra* note 7, at 45. Owners of companion animals may regard those animals as having more than market value, and one might say that the owner regards the animal as having “intrinsic” or “inherent” value. That sense of intrinsic value, which concerns sentimental or idiosyncratic valuation by particular animal owners, is, however, different from the notion of moral value that Sunstein uses when he talks about intrinsic value.

125. See FRANCIONE, *supra* note 2, at 90–98. Sunstein maintains that “[i]n many domains human beings seem to be ‘used,’ and the relevant practices are not objectionable for that reason.” Sunstein, *supra* note 7, at 45. He argues that “[w]hen you hire a plumber, a lawyer, an architect, or someone to clean your house, you are treating them as means, not as ends.” *Id.* Although it is true that we use others as means to our ends, we are not allowed to treat them exclusively as means to ends. We can, for instance, value our plumber as a means to the end of repairing a leak. But if we do not think that the plumber is competent, we are not allowed to treat her solely as an economic commodity all of whose interests may be ignored if it benefits us to do so. We cannot enslave the incompetent plumber in a forced-labor camp; we cannot use her as a nonconsenting subject in a biomedical experiment or as an unwilling organ donor. Even if we do not value the plumber as a plumber, she still has residual value that prevents us from valuing her fundamental interests at zero. In the book that Sunstein was reviewing in the context of making these comments, I use the plumber example and distinguish between treating the plumber as a means to an end and treating her exclusively as a means to an end. See FRANCIONE, *supra* note 2, at 90–91.

as property. We treat animals exclusively as means to our ends. Sunstein may be correct that we can do a better job of taking animal interests seriously, but that is much easier said than done. Consider the situation of human slavery in North America.<sup>126</sup> This institution was structurally identical to the institution of animal ownership. The slave was regarded as property, and the slave owner was able to disregard almost all of the slave's interests if it was economically beneficial to do so. The law generally deferred to the slave owner's judgment as to the value of the slave. There was no meaningful balancing of interests, as the owner's property interest in the slave almost always trumped any interest of the slave who was ostensibly protected under the law. Slave-welfare laws failed to establish any meaningful limit on the use of slaves, just as animal-welfare laws fail to establish any meaningful limit on our use of nonhumans. There are powerful economic, legal, political, and social forces that militate against treating property as anything other than property. We should, of course, provide as much animal welfare as can be economically justified; for instance, we ought to substitute group housing for the gestation crate if that, in fact, reduces production costs and increases productivity. But this use of "ought" is related to economic rationality and not to any recognition of the inherent value of animals.

Sunstein claims that "the language of property does not necessarily signify that animals will be treated as means."<sup>127</sup> It is not clear what Sunstein means by distinguishing between the language of property discourse and the fact of property status. In any event, we talk about animals as property because animals *are* property. To the extent that Sunstein is suggesting that animal welfare is consistent with recognizing that animals have inherent value, I do not think that Sunstein appreciates that welfarist measures rarely, if ever, require that we protect animal interests in the absence of an identifiable—usually economic—human benefit, and even when they do, they are not related to inherent value. Sunstein frequently uses the example of dogs and cats—the nonhumans who most often serve as companions of humans—as beings to whom we can and do accord inherent value despite their property status. Certainly, many of us regard our nonhuman companions as having inherent value. But those of us who do so do not really regard our nonhumans primarily as our property or as anything remotely similar to our televisions, cars or the like. Indeed, we regard those nonhumans as members of our families. As far as the law is concerned, however, companion animals have no inherent value except in an idiosyncratic sense.<sup>128</sup> The law protects the ability of property owners to treat property *as if* it had inherent value.

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126. See ALAN WATSON, *SLAVE LAW IN THE AMERICAS* (1989); FRANCIONE, *supra* note 2, at 86–90.

127. Sunstein, *supra* note 7, at 44.

128. See *supra* note 124 and accompanying text.

#### D. Animal Property and Equal Consideration

Finally, the property status of animals effectively and as a very practical matter precludes our giving *serious* consideration to their interests, even though it certainly is possible, at least in theory, to do better than we presently do. It is, however, not possible to accord nonhuman animals *equal* consideration if they are the property of humans.<sup>129</sup> Although we do not and cannot protect humans from all suffering, the laws of virtually every nation and customary international law recognize that all humans have the right not to be chattel and not to suffer at all from their use exclusively as resources of others—however “humane” that use may be. It is not possible to accord equal consideration to animal interests if animals are property because their very status as property means that they will be used in ways that we would regard as inappropriate to use any humans.

I have argued elsewhere that there is a compelling argument that utilitarian philosopher Jeremy Bentham (1748-1832) rejected human slavery not only because he thought that slavery had social disutility, but because he recognized that the interests of slaves would never count for as much as the similar interests of slave owners.<sup>130</sup> Therefore, even though Bentham rejected moral rights as a general matter, it is certainly arguable that he recognized that every human had to have at least a right not to be the property of others in order to be a member of the moral community in the first place. Bentham and others who have sought to apply the principle of equal consideration to nonhuman property have erred in not recognizing that the same analysis applies to animals. The principle of equal consideration cannot be applied meaningfully to animals who are property any more than it can be applied to humans who are property.<sup>131</sup> In short, the equal consideration of animal interests necessarily requires the recognition that nonhumans have a right not to be treated as the property of humans.

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129. See FRANCIONE, *supra* note 2, at 81–102.; see also Francione, *supra* note 116, at 239–45 (discussing equal consideration, property status, and the interests of animals in continued existence).

130. See FRANCIONE, *supra* note 2, at 130–50. Bentham, who is regarded as an act-utilitarian (one for whom the right act is that which maximizes net welfare in the particular situation) was, at the very least, a rule-utilitarian (one for whom the right act is that which, when followed as a general matter, will maximize net welfare even if it does not do so in the particular situation) when it came to slavery in that he rejected the morality of slavery as an institution.

131. See *id.* Both Bentham and Peter Singer seek to apply the principle of equal consideration to animal interests. Although both reject human slavery, neither rejects the property status of animals, in part because both believe that animals do not have an interest in their lives and only have an interest in not suffering. As a result, neither sees a problem *per se* with using animals for human purposes. I argue that sentience implies an interest in continued life and that Bentham and Singer err by linking an interest in life with reflective self-awareness or humanlike self-consciousness. The view that animals do not have an interest in continued existence also appears to be the basis of Sunstein’s position that animal use *per se* does not raise a serious moral issue. See Francione, *supra* note 116.

## IV

## NEW WELFARISM: A FALSE DILEMMA AND AN INCORRECT ASSUMPTION

Many animal advocates recognize that the property status of animals is problematic, and they claim to seek, as a long-term objective at least, the modification of the legal status of animals and perhaps even the eradication of property status and the abolition of animal exploitation. Nevertheless, these advocates, to whom I refer as “new welfarists,”<sup>132</sup> maintain that at this time we do not really have a choice. We must pursue welfarist change or do nothing. They maintain that the abolition of exploitation is “idealistic” or “utopian” because it cannot be achieved immediately and that animal-welfare reform is the only way to reduce the suffering of animals now. Moreover, many claim that incremental welfarist change will eventually bring about the abolition of animal exploitation. Both tenets of new welfarism are wrong.

## A. The Rights Position Provides Normative Guidance

First, new welfarism establishes a false dilemma: pursue traditional animal welfare or do nothing to help nonhumans who are suffering now. The dilemma is false because, in addition to the general failure of traditional animal welfare to alleviate animal suffering, the rights position does provide meaningful normative guidance and is not “idealistic” or “utopian.” Although the rights position is often misrepresented,<sup>133</sup> it does not maintain that there is any possibility of the immediate abolition of all institutionalized exploitation or reject incremental change as a means of achieving abolition.<sup>134</sup> Rather, the rights position seeks change that incrementally eradicates the property status of nonhumans and recognizes that nonhumans have inherent value.

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132. See generally FRANCIONE, *supra* note 3 (discussing the phenomenon of “new welfarism” or the view that animal rights offers no normative guidance in the short-term and animal-welfare regulation will lead to the abolition of exploitation, or to some significant recognition of the inherent value of nonhumans, in the long term). All of my critics promote a version of new welfarism. See *supra* note 7. Modern “animal law” is also based on new welfarism and assumes that the alternative to traditional welfare is to forsake the welfare of animals now and that welfare regulation will lead to the recognition of the inherent value of nonhumans. See *infra* note 160 and accompanying text.

133. For example, Robert Garner incorrectly states that my position is “that reforms to the treatment of animals short of abolition are not worth having.” GARNER, *supra* note 7, at 221.

134. See, e.g., Favre, *supra* note 7, at 90. Favre, commenting on what he understands to be my position, states that those who criticize welfarist incremental change “possess an incorrect understanding of property law” and that “[i]t is highly unlikely that the elimination of property status will occur in the foreseeable future.” Favre misses the point on a number of levels. No one maintains that property status is going to be eliminated anytime soon. The point is whether we should pursue its elimination incrementally through regulations that diminish property rights in nonhumans rather than pursue welfarist regulations that, for the most part, merely reinforce the property paradigm. For a discussion of this issue, see FRANCIONE, *supra* note 3, at 160–62. For a discussion about how incremental change as steps toward an identifiable goal has worked in another context (the victims’ rights movement), and why the incremental approach that I propose is preferable to the approach urged by others to seek change in the status of nonhumans through common-law adjudication, see Douglas E. Beloof, *Crime Victims’ Rights: Critical Concepts for Animal Rights*, 7 ANIMAL L. 19, 25–29 (2001).

The rights position provides definite normative guidance for incremental change on an individual level, as well as on the level of social and legal change.<sup>135</sup> On the individual level, rights theory prescribes incremental change in the form of veganism.<sup>136</sup> Veganism is not merely a matter of diet; it is a moral and political commitment to abolition on the individual level and extends not only to matters of food, but to clothing and other products. Many animal advocates claim to favor animal rights and to want to abolish animal exploitation but continue to eat animal products. That is no different from someone who claims to be in favor of the abolition of slavery but who continues to own slaves. Moreover, there is no meaningful distinction between eating meat and eating dairy or other animal products. Nonhumans exploited in the dairy industry live longer than those used for meat, but they are treated worse during that life, and they end up in the same slaughterhouse after which we consume their flesh anyway. There is probably more suffering in a glass of milk or an ice cream cone than there is in a steak.

Some animal advocates claim that veganism is a matter of personal philosophy and should not be identified as a baseline principle of the rights movement. But that claim is incoherent. It is not necessary in any sense to eat meat or dairy products. If the animal-rights movement cannot take a principled position on an activity that results in the suffering and death of billions of animals for no reason other than that we enjoy the taste of meat and dairy, then the movement can take no principled stand on any institutional exploitation.

Rather than embrace veganism as a clear moral baseline, the animal-advocacy movement has instead adopted the notion that we can “consume with conscience.” For example, Peter Singer maintains that we can be “conscientious omnivores” and exploit animals ethically if, for example, we choose to eat only animals who have been well-cared-for and then killed without pain or distress.<sup>137</sup> Singer praises purveyors of “humanely” exploited animal products, such as Whole Foods Markets, Inc. and its CEO, John Mackey, as “ethically responsible.”<sup>138</sup> Animal advocate Tom Regan featured Mackey as a keynote speaker for a 2005 conference entitled “The Power of One,”<sup>139</sup> which focused on the ability of individuals to make meaningful changes for nonhumans. PETA gave Whole Foods an award in 2004, claiming that the company “has

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135. See FRANCIONE, *supra* note 3, at 147–219. Indeed, it is the welfarist position, which maintains that we ought to pursue any measure that reduces suffering, that fails to provide normative guidance because almost any measure can be said to reduce suffering. *See id.* at 156–62.

136. *See, e.g., id.* at 152.

137. PETER SINGER & JIM MASON, *THE WAY WE EAT: WHY OUR FOOD CHOICES MATTER* 81–183 (2006).

138. *See id.* at 177–83.

139. *See* Promotional Brochure from The Culture and Animals Foundation and The Institute for Animals and Society, *The Power of One: The Twentieth Annual International Compassionate Living Festival*, available at <http://www.animalsandsociety.org/documents/PowerofOnebrochure.pdf> (last visited Mar. 19, 2007). Regan is the author of *THE CASE FOR ANIMAL RIGHTS* (1983).

consistently done more for animal welfare than any retailer in the industry, requiring that its producers adhere to strict standards.”<sup>140</sup>

Putting aside whether these supposedly “strict standards” make any real difference to the nonhumans involved,<sup>141</sup> it is, as a general matter, always better to do less harm than more once we have decided to inflict harm. But the notion that the animal movement actively promotes doing less harm as a morally acceptable solution to the problem of animal exploitation is troubling. That is, if X is going to rape Y, it is “better” that X not beat Y as well. It would, however, be morally repugnant to maintain that we can be “conscientious rapists” by ensuring that we not beat rape victims. Similarly, it is disturbing that animal advocates are promoting the notion that we can be morally “conscientious omnivores” if we eat the supposedly “humanely” produced products of Whole Foods and other purveyors. Not only is such a position in conflict with the notion that animal lives have moral significance, but it strongly encourages those concerned about nonhumans to see continued consumption as a morally acceptable alternative to adopting a vegan lifestyle.

In any event, any claim to embrace the rights or abolitionist position without accepting that veganism is the only morally consistent way to take immediate action to make that happen at least in one’s own life makes no sense. Veganism represents a rejection of the commodity status of nonhumans and a recognition of their inherent value.

On the social and legal level, there needs to be a paradigm shift as a social matter before the legal system will respond in a meaningful way. I disagree with those who maintain that the legal system will lead in the struggle for animal rights or that significant legal change will occur in the absence of the development of a political and social movement in support of animal rights and the abolition of animal exploitation.<sup>142</sup>

The most important form of incremental change on a social level is education about veganism and the need to abolish, not merely to regulate, the institutionalized exploitation of animals.<sup>143</sup> The animal-advocacy movement in

140. PETA, 2004 PETA Progress Awards, <http://www.peta.org/feat/proggy/2004/winners.html#retailer> (last visited Mar. 19, 2007).

141. Professor Ibrahim maintains that the “strict standards” of Whole Foods do not provide much protection for animals. See Darian M. Ibrahim, *A Return to Descartes: Property, Profit, and the Corporate Ownership of Animals*, 70 LAW & CONTEMP. PROBS. 89, 109–11 (Winter 2007).

142. See, e.g., STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000).

143. See, e.g., FRANCIONE, *supra* note 3, at 177–89. I am bewildered by those critics who claim that I emphasize the importance of legislation over non-legal social changes, such as education and the activities of grassroots activists. See, e.g., Matthew Pamental, *Pragmatism and Pets: Best Friends Animal Sanctuary, Maddie’s Fund<sup>™</sup>, and No More Homeless Pets in Utah*, in ANIMAL PRAGMATISM: RETHINKING HUMAN-NONHUMAN RELATIONSHIPS 210, 211 (Erin McKenna & Andrew Light eds., 2004) (“[B]y focusing solely on animal rights legislation Francione overlooks two crucial components in any reconstruction of social conditions: community support and education. He therefore ignores the successes of local, grassroots, volunteer activities in improving the treatment of animals.”). In addition to being critical of legislation and emphasizing education as the primary means of social change, I have also emphasized the importance of grassroots activities. See, e.g., FRANCIONE, *supra* note 3, at 71–74.

the United States has seriously failed to educate the public about the need for the abolition of animal exploitation. Although there are many reasons for this failure, a primary one is that animal-advocacy groups find it easier to promote welfarist campaigns aimed at reducing “unnecessary” suffering that have little practical effect and are often endorsed by the industry involved. Such campaigns are easy for advocates to package and sell and they do not offend anyone. It is easier to tell people that they can be morally “conscientious omnivores” than it is to take the position that veganism is a moral baseline. That, however, is precisely the problem. No one disagrees with the principle that it is wrong to inflict “unnecessary” suffering and that we ought to treat animals “humanely.” But, as 200 years of animal welfare have made plain, these are merely platitudes in light of the property status of animals.

To the extent that national organizations promote abolition, they do so simultaneously with promoting welfarist campaigns, and the result is a confusing message that provides no clear direction for social change. For example, PETA claims to promote the abolition of animal exploitation while giving awards to various animal exploiters, such as Temple Grandin and Whole Foods, Inc. On one hand, PETA claims to support veganism; on the other hand, it encourages the notion that “humane” animal exploitation is morally acceptable and praiseworthy.

Veganism and abolitionist education provide practical and incremental strategies both in terms of reducing animal suffering now and in terms of building a movement in the future that will be able to obtain legislation more meaningful than regulations (mischaracterized as “bans”) on the use of gestation crates in states that do not even have producers who use gestation crates, or the establishment of “sanctuaries” where “retired” animals can be used for experiments if there is a “public health need.” If, in the late 1980s—when the animal-advocacy community in the United States decided very deliberately to pursue a welfarist agenda—a substantial portion of movement resources had been invested in vegan and abolitionist education, there would likely be hundreds of thousands more vegans than there are today. This is a very conservative estimate given the hundreds of millions of dollars that have been expended by animal-advocacy groups to promote welfarist legislation and initiatives. I maintain that having the increased number of vegans would reduce suffering more by decreasing demand for animal products than all of the welfarist “successes” put together and multiplied ten-fold.<sup>144</sup> Increasing the number of vegans would also help to build a political and economic base required for the social change that is a necessary predicate for significant legal

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144. An average omnivore in the United States is responsible for at least thirty-two nonhuman deaths per year. This number is based on an estimate of 9.5 billion animals killed in the United States and consumed by a population of 300 million. The number of animals killed does not include fish or other sea animals, and only reflects animal use for food and not for other purposes.

change.<sup>145</sup> Given limited time and limited financial resources, it is not clear how anyone who seeks abolition as a long-term goal, or who at least accepts that the property status of animals is a most serious impediment to any significant change and must at least be radically modified, could believe that expansion of traditional animal welfare is a rational and efficient choice, putting aside any considerations about inconsistencies in moral theory.

There are “compelling reasons for animal rights advocates to spend their limited time and resources on incremental changes achieved through various forms of education, protest, and boycotts,” rather than legislative or administrative regulation.<sup>146</sup> The primary reason is that regulation cannot succeed unless it has at least the tacit support of institutional animal exploiters. The price of this support is compromise that generally eviscerates the regulation and limits it to measures that make exploitation more economically beneficial to exploiters.<sup>147</sup> This is why education and social change are so important and must precede legal change. There is simply no political base to support any radical legal change at this time. Although many people have vague sympathies toward animals, most eat animals and there is no abolitionist movement to support measures that would challenge the property status of animals in any serious way. Indeed, the leaders of the animal-advocacy movement actively encourage the public to believe that being a “conscientious omnivore” is morally acceptable.

If, despite these cautions, which have become more pronounced in my mind in the past dozen years, animal advocates nevertheless want to pursue change through legislation, administrative regulation, or litigation, those campaigns ought to be explicitly targeted at eradicating the property status of animals in an incremental way. On the one hand, no single incremental measure will succeed in achieving equal consideration for nonhumans because equal consideration is not possible as long as animals are property. On the other hand, most welfarist measures do nothing but require that animal exploiters act in a more rational way and do a more efficient job exploiting their animal property.

The problem is that it is tempting for animal advocates who need successful campaigns for fundraising purposes to portray any measure that protects an animal interest and that is arguably not required to be protected for economic reasons as a meaningful step away from property status. For example, a

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145. Robert Garner defends the welfarist strategy because he views it as earning the respect of decisionmakers and making possible short-term improvements, although he admits they often do not amount to much. GARNER, *supra* note 7, at 220–30. Garner apparently believes that minimal change is all we can expect given the lack of public support for more. But he concedes defeat on the root cause of the problem—the lack of public support for more significant change—and instead focuses on masking its symptoms. Garner discusses the importance of unification of the movement but fails to consider that if animal advocates were to unify behind the abolitionist position, and not the welfarist position, this might lead to the formation of a political movement that would be able to obtain more significant change.

146. See FRANZIONE, *supra* note 3, at 163.

147. See William A. Reppy, Jr., *Broad Exemptions in Animal-Cruelty Statutes Unconstitutionally Deny Equal Protection of the Law*, 70 LAW & CONTEMP. PROBS. 255, 256–60 (Winter 2007).

proposal not based on meat quality or similar concerns to give battery hens additional cage space may be regarded as not treating the hen exclusively as property. But such a measure obviously does little, if anything, to relieve suffering and any good that such a measure does is probably more than offset by the public perception that animal use has been made more “humane” and is, therefore, more acceptable. Moreover, such a measure does nothing to eradicate property status in the long term in any meaningful sense and may even reinforce that status.

In order for incremental change to be a step in the direction of abolition rather than marching in place within the property paradigm, it is necessary to identify measures that explicitly and progressively recognize that nonhumans have more than extrinsic or conditional value alone. Since no one incremental step will achieve abolition, identifying criteria for incremental steps in diminishing the property status of nonhumans will necessarily be imprecise. In *Rain Without Thunder*, I recognized this necessary lack of precision and I presented my preliminary thoughts on five conjunctive criteria that might be used to identify incremental measures that would necessarily fall short of abolishing the property status of nonhumans but that would nevertheless represent significant steps away from property status.<sup>148</sup> The idea was to identify regulations that, although not abolishing property status altogether, went well beyond the efficient exploitation of traditional welfare and rejected the status of animals as commodities through the explicit recognition that nonhumans have inherent value and interests that must be protected irrespective of economic consequences. Given that these incremental measures do not abolish property status, their primary value is as stepping stones on the path toward abolition. Incremental measures cannot lead to more incremental measures without reflecting a progressive recognition of the inherent value of animals.

Briefly summarized, these criteria involve prohibitions<sup>149</sup> of significant institutional activities,<sup>150</sup> as opposed to traditional welfarist regulation requiring “humane” treatment or relatively minor prohibitions. For example, a prohibition on the use of any leghold trap is to be preferred over a requirement that any trapping be done “humanely,” or with the use of a “padded” leghold trap. A prohibition on the use of any animals in a particular type of experiment is to be preferred over a requirement of an animal-care committee to monitor

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148. See FRANCIONE, *supra* note 3, at 190–219. Critics who claim that I propose no incremental legal change have apparently overlooked this aspect of my work. See, e.g., Andrew Light & Erin McKenna, *Introduction: Pragmatism and the Future of Human-Nonhuman Relationships*, in ANIMAL PRAGMATISM, *supra* note 143, at 7–8. I accept, however, that this portion of *Rain Without Thunder*, which I presented explicitly as a preliminary analysis, was not as clear as it could have been and I plan to clarify my views on incremental regulatory change in future writing.

149. See FRANCIONE, *supra* note 3, at 192–96 (“Criterion 1: An Incremental Change Must Constitute a Prohibition”).

150. See *id.* at 196–98 (“Criterion 2: The Prohibited Activity Must Be Constitutive of the Exploitative Institution”).

the treatment of animals used in experiments. A prohibition on the production of any veal is to be preferred to promoting non-crated veal.

Moreover, the incremental change must protect interests beyond those necessary in order to exploit the animal in an efficient way (the limiting principle of most animal welfare)<sup>151</sup> and should be explicitly promoted as recognizing that nonhumans have interests that are not tradable or able to be ignored merely because humans will benefit from doing so.<sup>152</sup> These criteria together involve the recognition that animals have interests apart from those necessary to protect in order to exploit them, and value that is not exclusively extrinsic or conditional. Finally, animal advocates should never be in a position of promoting an alternative, more “humane” or “better” form of exploitation, or substituting one species for another. Any incremental legislative or regulatory measure ought to be accompanied by an unrelenting and clear call for the abolition of all institutionalized exploitation.<sup>153</sup>

An example of a measure satisfying these conjunctive criteria would be a prohibition on the use of animals for a particular sort of experiment, such as a ban on the use of all animals in psychological experiments, based on the recognition that animals have morally significant interests in not being used for such experiments irrespective of human benefits. A ban on the use of one species of animal might be acceptable if it were not based on any supposed moral superiority of that particular species and if no other species were proposed as an alternative. Any ban should be presented explicitly as part of an agenda that rejects all vivisection.

A prohibition that satisfied all these criteria would not have any significant chance of succeeding at the present time, but the process of promoting such a prohibition would at least have the effect of educating the legal and political system, as well as society in general, about the need for radical change.<sup>154</sup> In any event, advocates are better advised to put their time and resources into incremental change through vegan and abolitionist education and to engage in hands-on work involving the care of individual animals. Advocates should avoid campaigns that seek incremental change through legislation or regulation, for any measure that might help to eradicate the property status of animals cannot succeed as a practical matter and any campaign that can succeed will, in all likelihood, merely reinforce the property status of animals. Advocates should also avoid campaigns that seek to get industry to make voluntary changes as these efforts are usually futile at best and are often counterproductive.

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151. *See id.* at 199–203 (“Criterion 3: The Prohibition Must Recognize and Respect a Noninstitutional Animal Interest”).

152. *See id.* at 203–07 (“Criterion 4: Animal interests Cannot Be Tradable”).

153. *See id.* at 207–11 (“Criterion 5: The Prohibition Shall Not Substitute an Alternative, and Supposedly More ‘Humane,’ Form of Exploitation”).

154. *See, e.g., id.* at 187. Given that traditional welfarist regulation does little if anything to help animals and merely reinforces the property paradigm, such regulation does not even provide a useful educational vehicle for more sustained change.

## B. Welfare and Abolition

Second, new welfarism maintains that traditional incremental changes in animal welfare will eventually lead to abolition or to a significant change in the property status of animals, and it is neither necessary nor desirable to have a strategy focused explicitly on veganism and eradication of that property status. There is, however, absolutely no historical evidence for the position that welfarist regulation today will lead to abolition or to greater protection tomorrow. Indeed, the empirical evidence shows that the opposite is true. Animal welfare seems to lead only to continued and increased use.

The CHIMP Act is a good example of how animal welfare facilitates animal exploitation.<sup>155</sup> Those sponsoring the legislation recognized the view shared by many that research involving chimpanzees was morally problematic and that, if the public were to be expected to continue to support such research, it would be necessary to create a more “humane” environment for the chimpanzees. It must be remembered that the most significant form of animal exploitation in history—intensive agriculture—developed during the latter part of the twentieth century, when concern about animal welfare was at a high point. Moreover, recent supposed reform of some aspects of intensive agriculture is not leading toward veganism. If anything, it is encouraging the notion that animal consumption can be a morally acceptable if we are “conscientious omnivores” and eat animals who have been raised more “humanely.”

In any event, we have had animal welfare in most western nations for the better part of 200 years, and we are inflicting pain, suffering, and death on more nonhumans today than at any time in human history. There is no empirical reason to believe that animal welfare will lead to abolition or to any significant change in the property status of nonhumans.

## V

### THE EMERGENCE OF “ANIMAL LAW”

In the past decade, a significant number of American law schools have begun to offer courses on “animal law.”<sup>156</sup> There is also a growing body of legal scholarship focused on animals.<sup>157</sup> These developments, together with an

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155. See *supra* notes 26–52 and accompanying text. An interesting example of the false dilemma of welfarist change or no change is illustrated in this context by one animal advocate who criticizes those who did not support the CHIMP Act. See Favre, *supra* note 7, at 90. Favre claims that the CHIMP Act “provided positive alternatives for many chimpanzees” and animal advocates should support such laws as a “next step . . . because otherwise next steps will not happen.” *Id.* Favre assumes not only that the choice is between the CHIMP Act or nothing but also that the CHIMP Act is itself a desirable piece of legislation.

156. For the most part, these courses are taught by adjunct instructors, not full-time faculty members.

157. Much of the increase in scholarship is as the result of *Animal Law*, a journal that was begun by the Animal Legal Defense Fund (ALDF) and existed as an independent journal housed at the Lewis and Clark Law School. The journal is now an official publication of Lewis and Clark. Given the origin of *Animal Law*, many of the authors of articles in *Animal Law* have been officers, directors, or employees of ALDF. It remains to be seen whether *Animal Law* will continue to focus on ALDF

increase in the number of practicing attorneys concerned with issues involving animals, have led the media to conclude that “[a]nimal law is a specialty whose time has come”<sup>158</sup> and that “animal rights law has begun to blossom into a viable career path for a new generation of attorneys.”<sup>159</sup>

Although there can be no doubt that animal issues have become more prominent both in the legal academy and in law practice, it is important to understand that, for the most part, what is meant by “animal law” has little to do with animal rights and abolition and very much embraces the false dichotomy that we can choose either to pursue traditional animal-welfare measures or we can “sacrifice the welfare of existing animals.”<sup>160</sup> Modern animal law, for the most part, promotes traditional welfarist change as a way of modifying the property status of animals. “Pet custody, wrongful death cases, veterinary malpractice suits, pet cruelty cases, and even pet trusts in which people set aside money in their wills to care for their companion animals are slowly reaching a critical mass in lower courts.”<sup>161</sup> Animal advocates claim that these cases are “laying the legal foundation establishing that pets have intrinsic worth” that will serve eventually to “support a ruling that animals are not property but have rights of their own and thus legal standing.”<sup>162</sup>

These sorts of cases and legal issues may, indeed, provide career opportunities for lawyers, but they will also reinforce the property paradigm rather than challenge it. For example, because nonhumans are property, the fair market value of an animal or the actual economic value of the animal to the owner are the predominant measures of damages used when one person tortiously injures or kills an animal belonging to another.<sup>163</sup> This has effectively prevented owners from obtaining redress for injury to their animals because many companion animals do not have a significant market or actual economic value.

The traditional approach is being changed by case law and statute in some states in favor of recognizing the emotional bond between humans and their animal property, and this is claimed by some animal advocates to be a significant step in the direction of eroding the property status of animals.<sup>164</sup> Such

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authors and practitioner-oriented articles. There are, however, other publications starting to appear. For example, students at the University of Pennsylvania Law School launched an annual publication in 2006, the *Journal of Animal Law and Ethics*, which purports to be a more traditional law review with an interdisciplinary focus. In addition, there is the *Journal of Animal Law*, produced by David Favre.

158. Zay N. Smith, *She's Raising Bar in Fight for Animal Rights*, CHI. SUN-TIMES, Mar. 18, 2004, at 24.

159. Douglas Belkin, *Animal Rights Gains Foothold as Law Career Harvard Hosts Court Competition for 50 Students*, BOSTON GLOBE, Mar. 6, 2005, at 6.

160. Favre, *supra* note 7, at 90.

161. Belkin, *supra* note 159. These traditional welfarist topics are the primary focus of the casebook used in a number of courses. See SONIA S. WAISMAN, BRUCE A. WAGMAN, & PAMELA D. FRASCH, ANIMAL LAW (3d ed. 2006).

162. Belkin, *supra* note 159.

163. See, e.g., *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 560 (Tex. Ct. App. 2004) (limiting recovery to economic value of the animal).

164. See Belkin, *supra* note 159.

a claim, however, is not justified. Courts have long recognized that there can be instances in which fair-market value is an inadequate measure of damages for property that does not have a market value, such as photographs and heirlooms, and they have allowed alternative measures.<sup>165</sup> That some courts are analogizing dogs to heirlooms and photographs that lack market value is, of course, a good thing for the owners of animals just as it is a good thing for owners of otherwise worthless heirlooms and photographs. It does not, however, amount to change—or a step toward a change—in the legal status of the animal any more than it means that heirlooms and photographs are regarded less as property because courts have recognized that fair-market value may not be an adequate measure of damages in a particular case.

Even if animal advocates persuade courts or legislatures to accept that nonhuman companions injured or killed by another are “special property” and similar to heirlooms, or permit damages for loss of companionship or emotional distress, that is not going to change the legal status of the nonhumans as property or represent a recognition that the animal has inherent or intrinsic worth. It will recognize only that some people value their animal property more than do others and that, in certain instances, the law will respect that valuation and not limit the property owner to a measure of damages that does not compensate the loss suffered.

Moreover, looking to the emotional reaction of an owner to determine the value of a nonhuman may have anomalous results. In *Fredeen v. Stride*, the owner took her injured dog, who had been shot in the right hind leg, to a veterinarian and decided to have the dog euthanized because she could not afford the cost of treatment.<sup>166</sup> The veterinarian agreed to do so but instead nursed the animal back to health, and the dog was ultimately placed in another home. The owner saw the dog six months later and claimed to suffer mental anguish because she feared that her children would encounter the dog and attempt to reunite with him. She sued the veterinarian and was awarded \$500 for conversion, \$4000 for mental anguish, and \$700 in punitive damages, and the Oregon Supreme Court affirmed. *Fredeen* involves one of the largest awards for the emotional distress suffered by a human in connection with the treatment of her nonhuman companion, and the damages were awarded because the human was deprived of the death of her dog.<sup>167</sup>

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165. See, e.g., *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084 (Ill. App. Ct. 1987). For a discussion of the inadequacy of the fair-market measure of damages, see FRANCIONE, *supra* note 1, at 57–63.

166. 525 P.2d 166 (Or. 1974).

167. An increase in litigation against veterinarians will most likely cause malpractice insurance to become more expensive and this will result in higher costs being charged for veterinary services. Although health insurance is available for companion animals, it is limited, often does not apply to older animals, and is costly. In any event, increased veterinary costs will invariably result in less veterinary care for some nonhumans.

Similarly, that some states now permit trusts for pets<sup>168</sup> is not likely to lead to a change in the legal status of animals or to the recognition that nonhumans have inherent value as a general matter. It is certainly desirable to allow the owners of animals to provide for their animals after their deaths, but again, all this amounts to as a legal matter is a recognition that property owners should be able to decide how to devise and bequeath their property as they see fit, including to benefit other property that they own. In many respects, allowing pet owners to establish trusts for their pets is no different from allowing them to establish trusts to maintain a historical building that they own. Pet trusts cannot credibly be characterized as “a conceptual breakthrough for the United States legal system” on the theory that “[a]nimals have been granted legal personhood for purposes of trust enforcement” and that for probate and trust purposes “animals are juristic persons with equal rights before the court.”<sup>169</sup>

Some animal advocates claim that cases involving the custody of animals indicate that “[c]ourts across the country have begun to adopt the more enlightened view that companion animals are more than mere chattels”<sup>170</sup> or that these cases represent ““one way of taking down the wall””<sup>171</sup> between humans and nonhumans. Again, such a claim is unfounded, although it is clear that at least some animal lawyers are developing lucrative practices with these sorts of cases.<sup>172</sup> When couples separate, they often have disputes about all sorts of property, including nonhuman animals. That a court enforces a custody agreement involving a nonhuman is no different from the court enforcing an agreement about the shared use of a car. Although some courts may have focused on the “best interest” of the nonhuman involved in a custody matter, this is not an indication of any shift—even an attenuated or indirect one—in the property status of nonhumans. The animals involved are still chattels.<sup>173</sup> Moreover, the law has through anticruelty laws explicitly recognized for the better part of 200 years that animals have interests in the way that inanimate property does not. The problem is that this recognition has had no significant

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168. See, e.g., ARIZ. REV. STAT. § 14-2907(B) (2006).

169. Favre, *supra* note 7, at 94.

170. Barbara Newell, *Animal Custody Disputes: A Growing Crack in the “Legal Thinghood” of Nonhuman Animals*, 6 ANIMAL L. 179, 180 (2000).

171. Sanjiv Bhattacharya, *To Love, Honor and Belly-Scratch; Marriages Come and Go. Judging by the Rising Number of Pet-Custody Disputes, Though, Some Passions Endure*, L.A. TIMES MAG., Jan. 9, 2005, at 20 (quoting Bruce Wagman).

172. See *id.* (discussing attorney Sandra Toye, who has earned “fees in excess of \$100,000” doing pet-custody cases).

173. For example, Barbara Newell cites *Raymond v. Lachmann*, 695 N.Y.S.2d 308 (N.Y. App. Div. 1999) as an example of a custody case in which the court recognizes a nonhuman as being more than a chattel. Newell, *supra* note 170, at 180 n.6. In *Raymond*, the trial court awarded ownership and possession of a cat to the plaintiff conditioned on plaintiff’s payment of certain veterinary costs. The appellate court reversed and awarded ownership and possession to defendant claiming that was “best for all concerned.” 695 N.Y.S.2d at 309. Although Newell supplies facts about this case from the unpublished lower court decision, the published opinion, which is very brief, did not discuss the nature of the dispute over the cat or any competing property interests. But most significantly, the decision did not affect the cat’s status as property.

impact on the property status of animals, and it is unclear why anyone believes that it will have a different effect as the result of custody cases involving animals.

Finally, many animal advocates maintain that anticruelty statutes and prosecutions brought under those statutes will improve our treatment of nonhuman animals and help to erode the property status of animals.<sup>174</sup> As I have argued, anticruelty laws were originally at least in part a response to changing social attitudes and a recognition that humans had moral and legal obligations that they owed to nonhumans.<sup>175</sup> However, the notion of having direct moral and legal obligations is inconsistent with the property status of nonhumans, and, as a result, anticruelty statutes have been largely ineffective in providing significant protection to nonhumans.<sup>176</sup> Many anticruelty laws contain explicit exemptions for most forms of institutionalized exploitation. In those situations in which they do apply, courts have interpreted the concept to prohibit only those activities that are not customary or usual given the particular use.<sup>177</sup> Moreover, anticruelty laws are criminal laws and require proof of intent. Intent is difficult to show as a general matter, and it becomes even more difficult in anticruelty cases, in which the alleged crime occurs in a societal context in which the killing of billions of animals is routine. Finally, violation of an anticruelty statute has generally been a misdemeanor or summary offense and has carried an insignificant penalty, although in recent years a considerable number of states have made felonies of at least some violations.<sup>178</sup>

In any event, state anticruelty laws do not even apply to the overwhelming number of instances in which we impose suffering or death on nonhumans either because the laws include explicit exemptions or because courts effectively read exemptions into them. It is not accurate to say that these laws apply to “cruel” behavior because much of what is regarded as legal animal use is “cruel” as that term is normally used in moral discourse. It is not even accurate

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174. See Belkin, *supra* note 159.

175. See FRANCIONE, *supra* note 2, at 7–9.

176. For a discussion of the inadequacies of anticruelty laws, see FRANCIONE, *supra* note 1, at 121–60; FRANCIONE, *supra* note 2, at 54–73; see also Reppy, *supra* note 147; Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 1 J. ANIMAL L. & ETHICS 175 (2006).

177. For a discussion of the difficulties involved in applying anticruelty laws to conduct that conforms to the customs and norms of various animal uses, see Ibrahim, *supra* note 176. A review of the *McDonald's Corp. v. Steel* case in Great Britain indicates that when judgments about what constitutes “cruel” treatment or “necessary” suffering are not connected to what is customary, they become very arbitrary and idiosyncratic and could never be used in a context involving criminal liability. See *McDonald's Corp. v. Steel*, No. 1990-M-NO. 5724 (Q.B. 1997) (summary of the judgment), available at [http://www.hmcourts-service.gov.uk/judgmentsfiles/j379/mcdonalds\\_190697.htm](http://www.hmcourts-service.gov.uk/judgmentsfiles/j379/mcdonalds_190697.htm). This case, commonly referred to as “*McLibel*,” is to date the most lengthy case in the history of the English legal system. McDonald's sued two defendants for, *inter alia*, allegations that McDonald's was culpably responsible for farming practices that the defendants characterized as cruel and inhumane. Justice Bell refused to apply the standard of the industry to determine whether the statements were defamatory and held that he must judge for himself, based on expert testimony, whether particular farming practices were cruel. Justice Bell's ad hoc analysis makes clear that such a standard could never suffice to support a criminal conviction.

178. See *supra* note 89 and accompanying text.

to say that these laws are limited to situations in which humans inflict suffering or death on animals merely for “fun” as many forms of animal-based “entertainment,” such as rodeos, circuses, and pigeon shoots, are legal. Rather, anticruelty laws apply only to the miniscule portion of animal uses that fall completely outside the considerably broad scope of permissible institutionalized animal exploitation. And, given that animals are property, virtually any use that generates some sort of economic benefit is permissible.

There is, however, an alternative to the dominant paradigm of “animal law,” and it is the one that guided our work in the Rutgers Animal Rights Clinic<sup>179</sup> over the decade of its existence and that we owed in part to wise advice from a mentor, the late civil rights attorney, William M. Kunstler.<sup>180</sup> Kunstler believed that the primary role of a progressive lawyer was to protect the rights of those in society who were trying to cause a paradigm shift in thinking. That is, he did not see the lawyer as the primary engine for social change; rather, it was the social activist, the person who sought to educate, persuade, and change fundamental thinking about particular issues. Such activists would invariably be vulnerable to attack by a political and legal system that was not amenable to the change, and it was the job of the attorney to use every tool available to her to protect that activist. Kunstler’s advice fit in with our general view that the first task of the animal-rights movement was to educate society about why such a movement was necessary in the first place and to shift the paradigm away from the commodity status of nonhumans.

As a result, we concentrated our efforts on assisting animal advocates in their efforts to educate about the need to abolish and not merely to regulate particular instances of animal exploitation. They included students in high schools, universities, medical schools, and veterinary schools who did not want to vivisect or dissect any animals in their courses; those who wanted to engage in peaceful demonstration to try to educate others about animal rights, veganism, and abolition; prisoners who wanted vegan food; those who were trying to develop “no kill” options to the problem of the companion animal population; those who sought to stop the round-up and removal of wild horses from federal lands and to prohibit the killing of deer in suburban areas; and those who wanted to organize lawful boycotts to stop particular forms of animal exploitation.

We advised animal advocates how to design legislation and regulations that were abolitionist rather than regulationist. We sued to get information about experiments at federally funded institutions, not because we wanted to achieve

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179. I began to teach animal rights and the law in 1985 as part of my jurisprudence course at the University of Pennsylvania Law School. In 1989, I moved to Rutgers University School of Law—Newark and, with Anna E. Charlton, started the Rutgers Animal Rights Law Clinic in 1990. Students enrolled in the Clinic received six academic credits per semester for working with us on actual animal-rights cases while also learning animal-rights theory in a weekly seminar. We closed the Clinic in 2000, but we continue to teach regular courses on animal rights and the law.

180. Kunstler wrote the Foreword to *Animals, Property, and the Law*. See FRANCIONE, *supra* note 1, at ix–xii.

better regulation of vivisection, but because we wanted to help to provide the information that advocates could use to build a consensus against vivisection and to make clear that the public was watching what went on behind the laboratory doors. When we represented the owners of Taro, a dog that was scheduled to be killed under New Jersey's "dangerous dog" law, we used the opportunity to focus attention on the irony of the worldwide response to Taro's plight at the same time that most of us were eating animals who were in no morally relevant way different from Taro. And, most importantly, we spent a good deal of our time trying to empower animal advocates by teaching them about how they could use the law to become more effective educators about the need for abolition. Not a single pet trust was ever drafted in our offices. But that may have been because no client was ever charged for our services, and because we were free of business considerations.

Modern animal law as it has developed in the past decade or so is not focused on the efforts of the animal advocate to effect fundamental changes in the political and social system; it is more focused on the lawyer as the primary force for social change within the existing legal system. The past 200 years of animal welfare are compelling proof that this latter approach will not advance things further in the next decade than it has in the past one.

## VI

### SIMILAR-MINDS THEORY

*Rain Without Thunder* expressed concern that the animal-rights movement was moving toward welfarism and away from rights. In the past decade, the animal-advocacy movement in the United States has, for the most part, gone further in the welfarist direction than even I had contemplated when I wrote that book. The one area in which animal advocates still talk about rights is in the context of great apes and other animals, such as dolphins, who are thought to have human-like intelligence.<sup>181</sup> According to this view, if animals are cognitively like us—if they have similar minds—then we must rethink the human–nonhuman relationship and, perhaps, even grant certain rights to those animals.

What I have called "similar-minds theory"<sup>182</sup> became popular among animal advocates as the result of *The Great Ape Project: Equality Beyond Humanity* in 1993.<sup>183</sup> Although I certainly support prohibiting any exploitation of the great apes, dolphins, and any other nonhuman, the similar-minds theory reinforces the very paradigm that has resulted in excluding nonhumans from the moral

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181. See, e.g., *The Evolving Legal Status of Chimpanzees*, 9 ANIMAL L. 1 (2003) (remarks at a symposium linking moral status with humanlike cognitive characteristics).

182. See Gary L. Francione, *Our Hypocrisy*, NEW SCIENTIST, June 4-10, 2005, at 51; see also Gary L. Francione, *Taking Sentience Seriously*, 1 J. ANIMAL L. & ETHICS 1 (2006).

183. THE GREAT APE PROJECT: EQUALITY BEYOND HUMANITY (Paola Cavalieri & Peter Singer eds., 1993).

community.<sup>184</sup> We have historically justified our exploitation of nonhumans on the ground that there is a qualitative distinction between humans and other animals. The latter may be sentient, but they are not intelligent, or rational, or emotional, or self-conscious. The similar-minds approach claims that, as an empirical matter, we may have been wrong in the past and at least some nonhumans may have some of these cognitive characteristics. But this approach does not question the underlying—and fundamental—moral question: Why is anything more than sentience necessary?<sup>185</sup> The similar-minds approach threatens to perpetuate a speciesist hierarchy in which we treat some animals as “special” and continue to exploit the rest. There are at least two reasons to reject the similar-minds theory.<sup>186</sup>

First, the similar-minds theory is a prescription to engage in more research, which will ironically involve a good deal of vivisection, so that we can determine how much like humans nonhumans really are. And at the end of the day, no matter how similar human minds are to those of nonhumans, there will always be differences that will allow us to justify exploitation if personhood is based on possession of these cognitive characteristics. After all, we have known about the cognitive and genetic similarities between human and nonhuman great apes for a long while, yet we continue to use the latter in biomedical experiments and to imprison them in zoos.

Second, the similar-minds theory is arbitrary. We identify some characteristic, such as humanlike self-awareness or rationality, and we maintain that any nonhuman without the characteristic is not a member of the moral community. There is, however, no reason to conclude that being able to do calculus is better than being able to fly with only your wings, or to breathe underwater with only your gills. These characteristics may be relevant for some purposes, but they are not relevant to whether we make a being suffer or kill that being.

This notion is clear where humans are involved. Consider two humans, one of whom is a gifted mathematician and one who is severely mentally disabled. Their relative cognitive capacities may be relevant for purposes of determining

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184. I was a contributor to *The Great Ape Project* and was one of the original signers of A Declaration on Great Apes. See Gary L. Francione, *Personhood, Property and Legal Competence*, in *id.* at 248. In my chapter in *The Great Ape Project*, I argued that sentience was the only characteristic necessary for full membership in the moral community. See *id.* at 253. Nevertheless, I regard *The Great Ape Project* as ill-conceived and I regret my participation.

185. Although Professor Taimie Bryant rejects the similar-minds approach and does not believe that particular humanlike cognitive characteristics are necessary for moral status or legal protection, she also argues that arguments based on sentience alone are similarly misguided. See generally Taimie L. Bryant, *Similarity or Difference as a Basis for Justice: Must Animals Be Like Humans to Be Legally Protected from Humans?*, 70 *LAW & CONTEMP. PROBS.* 207 (Winter 2007). I disagree in part with Bryant's analysis because I do not accept that a being that is not sentient can have interests.

186. For a further discussion of the difficulties involved in relying on similarities beyond sentience between humans and nonhumans to justify the moral significance of nonhumans, see FRANCIONE, *supra* note 2, at 116–27. For an excellent general discussion of the moral status of nonhumans, including the significance of their cognitive characteristics, see GARY STEINER, *ANTHROPOCENTRISM AND ITS DISCONTENTS: THE MORAL STATUS OF ANIMALS IN THE HISTORY OF WESTERN PHILOSOPHY* (2005).

how to allocate a particular resource, such as a university scholarship. But for the purposes of determining whether it is permissible to subject either or both to painful experiments or to kill them to harvest their organs for the benefit of others, nearly all of us would regard these two humans as similarly situated and as having an equal interest in not being treated as a resource for others. Indeed, we may regard our moral obligation to the disabled human as even greater precisely because of her vulnerability.

## VII

### CONCLUSION

The property status of nonhumans remains a substantial impediment to the meaningful protection of nonhuman interests. Although animal advocates claim that traditional welfarist strategies can protect animal interests without any significant modification of the property status of nonhumans, or that welfarist strategies will lead to modification of the property status of nonhumans, the past dozen years offers no proof of either of these claims. There have been no notable improvements in animal welfare and most changes that have occurred have been linked explicitly to making animal exploitation more beneficial for humans. Making exploitation more efficient may reduce suffering in minimal ways, but it is clear that the welfarist approach is rooted in the property paradigm and perpetuates the view that nonhumans are commodities with only extrinsic value.

Moreover, animal advocates have lost ground in a number of areas. Discourse about animal welfare as connected to economic efficiency is no less prevalent than it was a decade ago and, indeed, is arguably more prevalent. The animal movement has drifted in a more traditional welfarist direction in that most of the animal organizations have openly embraced a program of efficient exploitation. PETA and Peter Singer praise McDonald's, Wendy's, and Burger King for adopting slaughter standards that keep the meat industry operating "safely, efficiently and profitably."<sup>187</sup> HSUS and Farm Sanctuary campaign against gestation crates, arguing that alternative production systems will reduce production costs, increase productivity, and increase demand for pork.<sup>188</sup> HSUS urges that gassing poultry is preferable to electrical stunning because it will mean less carcass damage, better meat quality, and reduced labor costs.<sup>189</sup>

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187. *Supra* note 18; *see also supra* notes 11–25 and accompanying text.

188. *See supra* notes 56 and 65 and accompanying text.

189. *See supra* note 107.

Humane Farm Animal Care,<sup>190</sup> with its partners HSUS, American Society for the Prevention of Cruelty to Animals, Animal People, World Society for the Protection of Animals, and others,<sup>191</sup> promotes the “Certified Humane Raised & Handled Label,” which it describes as “a consumer certification and labeling program” to give consumers assurance that a labeled “egg, dairy, meat or poultry product has been produced with the welfare of the farm animal in mind.”<sup>192</sup> Humane Farm Animal Care emphasizes that “[i]n ‘food animals, stress can affect meat quality . . . and general [animal] health,’”<sup>193</sup> and that the label “creates a win-win-win situation for retailers and restaurants, producers, and consumers. For farmers, the win means they can achieve differentiation, increase market share and increase profitability for choosing more sustainable practices.”<sup>194</sup> These approaches merely reinforce the notion that animals are commodities and that animal interests should be protected if and only if there is an economic benefit for humans in doing so. Linking animal welfare with efficient exploitation is inconsistent with the recognition of the inherent value of nonhumans. Moreover, the animal movement has explicitly embraced the notion that being a “conscientious omnivore” is a morally acceptable solution to the problem of animal exploitation.<sup>195</sup>

The emerging field of “animal law” has collapsed into nothing more than an attempt to apply traditional property doctrines to nonhumans. There is no attempt to challenge the property paradigm through laws or regulations that recognize that animals have fundamental interests that cannot be disregarded irrespective of human benefit.

A movement’s ends should define its means. If the goal is abolition, animal welfare is a means not fitted to that goal either as a matter of moral theory or of practical strategy. As a moral matter, animal welfare assumes and reinforces the notion that animals are commodities with only extrinsic or conditional value. As a practical matter, animal welfare provides almost no benefit to animals and only makes exploitation more efficient for producers at the same time that it makes animal users more comfortable about exploiting nonhumans.

The choice is not between doing nothing or pursuing traditional welfare. The choice is between reinforcing the property paradigm or challenging it. We can pursue the incremental eradication of the property status—and we can do

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190. The Executive Director of Humane Farm Animal Care, Adele Douglass, “serves as an invited participant on numerous industry animal welfare committees including for the Food Marketing Institute, National Council of Chain Restaurants, and Burger King,” and in 2003, “was a keynote speaker at the Animal Welfare Conference of the American Meat Institute.” Humane Farm Animal Care, The Staff, <http://www.certifiedhumane.com/people.html> (last visited Mar. 19, 2007). Temple Grandin is a member of the Scientific Committee of Humane Farm Animal Care. *Id.*

191. The partners of Humane Farm Animal Care are listed on the homepage of the organization’s website. *See* Humane Farm Animal Care, <http://www.certifiedhumane.com/default.html> (see pull-down menu “Other Organizations”) (last visited Mar. 19, 2007).

192. *Id.* at <http://www.certifiedhumane.com/whatis.html>.

193. *Id.* (quoting unspecified article in *Agricultural Research*).

194. *Id.* at <http://www.certifiedhumane.com/whyproduce.html>.

195. *See supra* notes 137–41 and accompanying text.

so now—in a variety of ways starting with our own veganism and with our educational efforts directed toward building an abolitionist movement with veganism as its moral baseline. To the extent that we choose to pursue laws, administrative regulations, or litigation, those efforts should be consistent with the abolitionist goal of the progressive recognition of the inherent value of nonhumans.

Property status and the animal-welfare laws based upon it “benefit” nonhumans<sup>196</sup> in the same way that property status and slave-welfare laws “benefited” human slaves. Any use of “benefit” in either context is perverse. There is, of course, at least one very significant difference between the abolition of human slavery and the abolition of the property status of nonhumans. Our accepting that we have no moral justification to continue to treat nonhumans as commodities would not entail letting domesticated nonhumans run free in the streets. It would, however, entail that we stop bringing animals into existence for the purpose of human exploitation.<sup>197</sup> We should care for those who are here now, but we should stop causing more to come into existence. We would still have to work through what equal consideration would mean in our dealings with non-domesticated animals. But even that would be much easier to do if we accepted that the property status of nonhumans has no justification other than as a result of a speciesist hierarchy that we created and that we perpetuate.

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196. This position is presented by a number of welfare advocates. See *supra* note 114 and accompanying text.

197. For a further discussion of the consequences of accepting that nonhumans have a right not to be treated as property, see FRANCIONE, *supra* note 2, at 153–60.