Social attitudes about animals are hopelessly confused. On one hand, many people regard at least some non-humans--their "pets"--as members of their families. On the other hand, these very same people think nothing about eating animals other than "pets," wearing their skins, using them in experiments, or exploiting them for entertainment in films, circuses, zoos, and rodeos. On one hand, we all agree with the notion that it is morally wrong to inflict "unnecessary" pain and suffering on non-humans; on the other hand, we routinely use animals in all sorts of contexts that could never be considered as involving any coherent notion of necessity. [FN1]

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

One thing, however, is clear: the law and legal systems of most Western nations have been primary culprits in facilitating the exploitation of non-humans. Common-law and civil-law traditions are dualistic in that there are two primary normative entities in these systems: persons and things. Animals are treated as things, and, more specifically, as the property of persons. As Professor Reinold Noyes has observed, "legal relations in our law exist only between persons. There cannot be a legal relation between a person and a thing or between two things."[FN2] More recently, Professor Jeremy Waldron has stated that property "cannot have rights or duties or be bound by or recognize rules."[FN3]

The status of animals as property has severely limited the type of legal protection that we extend to non-humans. [FN4] As a general matter, whenever we seek to resolve a perceived human-animal conflict,[FN5] we balance our assessments of the human benefits to be derived from the animal use against the interests of the animal(s) that will be "sacrificed" in the process. The limiting principle of this balancing process is that we treat animals "humanely" and that we not subject them to "unnecessary" suffering.

The problem is that the balancing process is nothing more than an illusion in which the outcome has been predetermined in light of the very different status of the supposedly competing parties. It is simply not possible to balance meaningfully human interests, which are protected by claims of right in general and of a right to own property in particular, against the interests of property, which exists only as a means to the ends of persons. This balancing is particularly unrealistic where, as here, the assessment is almost
always sought to be made in the context of a human property owner seeking to act upon
her animal property. [FN6]

The result of the property status of animals is that notions of "humane" treatment and
"necessary" suffering or death are not interpreted by reference to some abstract standard
of treatment. The law generally has consistently prohibited only that conduct that cannot
be justified in light of the practices that develop within particular institutions of
exploitation. As Lord Chief Justice Coleridge stated, any procedure "without which an
animal cannot attain its full development or be fitted for its ordinary use may fairly come
within the term 'necessary.'" [FN7] Not "every treatment of an animal which inflicts pain,
even the great pain of mutilation, and which is cruel in the ordinary sense of the word is
necessarily"[FN08] cruelty proscribed by law, which is only that pain inflicted for "no
legitimate purpose."[FN09] But only those who act "for the glorification of a malignant
or vindictive temper"[FN10] and who impose suffering and death outside of some form
of accepted institutionalized animal exploitation, will be said to act without "legitimate
purpose."

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

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

Any significant improvement in animal treatment will be most difficult to achieve as long
as animals are regarded by the law as nothing more than property. The owners of animal
property will always insist that the level of treatment that they are providing is
appropriate given the particular use of the animal. For example, scientists frequently
argue that animals used in laboratories are accorded appropriate treatment because if they
were not, these animals would not provide valid scientific data. Scientists point to what
they regard as the high quality of their research (from a scientific perspective), and conclude that the level of care is acceptable given that use. Food producers argue that the level of care provided to animals raised intensively is appropriate because, animals who are "abused" would not produce the volume of high-quality meat claimed by modern agribusiness. For the most part, disputes about animal protection focus on whether, as an empirical matter, particular practices are or are not really "gratuitous." But no one challenges the institutions of exploitation themselves for the reason that there is simply no legal mechanism available to do so.

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

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

If the law regarding animals is to change, it is necessary to eradicate the property status of non-humans. But it is folly to look to the legal system as playing a leading role in any such change. The principles of the common law and the process of common-law adjudication, both of which protect property interests, are scarcely candidates for effecting basic change. The extent of dependence by federal and state legislators on those involved directly and indirectly with animal exploitation is such that it is similarly unrealistic to look to the legislative process to lead in eradicating in any significant way the property status of animals.

This is not to say that there are no alternatives to anti-cruelty laws and other statutes of dubious value, such as the federal Animal Welfare Act. The primary problem with such measures is that they fail completely to recognize that animals have any non-tradable
interests--other than the interest in being free from completely gratuitous suffering or death.[FN14] Anti-cruelty laws and most other laws assume the legitimacy of animal exploitation as a general matter, and seek only to identify those instances in which animal suffering or death is gratuitous, or not required to facilitate a socially approved form of animal exploitation. Many animal advocates believe that such laws will eventually lead to the abolition of various forms of animal use. But there is no empirical evidence that such laws lead to anything more than the irony of reassuring society that animals we exploit are really treated well after all, and there is no need for further moral concern. Moreover, the property status of animals renders structurally unsound any process that requires a comparative assessment of human and animal interests.

A more progressive approach to using the legal system to effect change in the property status of non-humans would involve the recognition that animals have at least some non-tradable interests. For example, a prohibition on particular scientific procedures or experiments would not mean an end to vivisection, but it would mean a recognition that animals have an interest in not being subjected to certain treatment irrespective of the beneficial consequences for human beings. That recognition is at least the beginning of a repudiation of the property status of animals. Laws that seek to prohibit certain forms of exploitation will generally reinforce the status of non-humans as holding at some non-tradable interests. Laws that merely regulate exploitation, such as laws that make laboratory cages bigger, generally reinforce the property status of animals whose only interest is in not being a "resource" wasted through the wholly gratuitous infliction of pain, suffering, or death.[FN15]

Laws that prohibit forms of exploitation and that recognize that at least some non-humans have some non-tradable interests will, of course, be more difficult to obtain precisely because they will impose greater costs on animal owners who will object vociferously. The passage of more progressive laws will require well-organized and planned campaigns to educate people about the need for a radical rethinking of the human/animal relationship. For example, a planned effort that was directed against the use of animals in the testing of military weapons or in drug addiction studies, and that sought the abolition of these animal uses through funding prohibitions or other mechanisms, would represent a recognition of the existence of non-tradable interests in a context that many people would support. Although there is certainly not yet broad social support for an end to all animal exploitation, there is an enormous amount of concern about the issue as a general matter, and support for more radical measures than have yet been proposed by major animal groups in this country.[FN16]

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

This observation brings me back to the beginning. Our attitudes about animals are both
complicated and the result of complex causes. Anyone who wants to change the status of
non-humans must recognize the need to confront entrenched economic interests, as well
as religious and philosophical views that purport to justify our instrumental treatment of
animals. Such confrontation is necessary for true social change, and, as Frederick
Douglass, former slave, stated in the context of social reform, those who desire change
without confrontation are as unrealistic as those who want "rain without thunder."[FN17]

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FN1. For example, not even the very conservative federal health authorities maintain that
eating meat and dairy products is necessary for a healthy diet, and many health care
professionals now maintain that eating meat and dairy can have an adverse impact on
human health. Despite this lack of necessity to eat animals, we nevertheless kill over
eight billion animals in this country every year for no better reason other than that we
enjoy the taste of flesh or ice cream.

FN2. C. Reinold Noyes, The Institution of Private Property 290 n. 13 (1936) (quoting
Restatement of the Law of Property).


FN4. For a general discussion of the status of animals as property, including a discussion
of a number of the matters treated in this essay, see Gary L. Francione, Animals,

FN5. I use the expression "perceived human-animal conflict" to highlight my view that
whether conflict exists in a particular situation is often a matter of social construction as
to what can legitimately constitute a "conflict."

FN6. See generally Francione, supra note 6; see also Gary L. Francione, Animal Rights
and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals,


FN11. This term was first coined by British psychologist and author Richard Ryder.

FN12. Humans who were slaves in America had a de jure status as persons and property, but were treated de facto as property, with no interests that were not ultimately subservient to the interests of the property owner. The status of human beings as slaves is generally condemned by a world community that tolerates a great deal of exploitation as a general matter. Slavery is seen as qualitatively different from these other forms of exploitation precisely because it does not recognize that any interests of the slave are entitled to the sort of protection accorded to at least some basic interests of non-slaves.

FN13. There has been some discussion among some lawyers as to the advisability of a law suit seeking by judicial decision a declaration that at least some animals (e.g., chimpanzees) have personhood status. Although I believe that it is wrong to deny personhood status to chimpanzees and other animals, I also regard it as unrealistic to believe that there is any real possibility that a court will terminate property status in animals even in a limited way.

FN14. Animal welfare laws have nothing to with rights for animals. As Bernard Rollins has noted, rights are "moral notions that grow out of respect for the individual. They build protective fences around the individual. They establish areas where the individual is entitled to be protected against the state and majority even where a price is paid by the general welfare." Bernard E. Rollin, The Legal and Moral Bases of Animal Rights, in Ethics and Animals 106, 106 (Harlan B. Williams & William H. Williams, eds., 1983). For a discussion of the differences between animal rights and animal welfare, see Gary L. Francione, Rain Without Thunder: The Ideology of the Animal Rights Movement (forthcoming); Gary L. Francione, Animal Rights and Animal Welfare, 48 Rutgers L. Rev -- (1996) (forthcoming).


FN16. In the fifteen or so years in which I have been involved in this area, I have been told by legislators at the state and federal levels that animal issues generate the most significant amount of constituency concern. For a discussion of the way in which the modern animal protection movement has rejected the notion of animal rights in favor of a conservative notion of animal welfare, see Gary L. Francione, Rain Without Thunder: The Ideology of the Animal Rights Movement (forthcoming).

FN17. See Frederick Douglass, "Letter to an Abolitionist Associate" (1853).