

# Book Note

## Abrogating Property Status in the Fight for Animal Rights

*Rain Without Thunder: The Ideology of the Animal Rights Movement.* By Gary L. Francione.\* Philadelphia: Temple University Press, 1996. Pp. xii, 198. \$59.95 (hardcover), \$22.95 (paper).

*Rain Without Thunder* sets out to bring order to a discordant animal protection movement. Many pro-animal activists, Professor Gary Francione contends, employ methods that reinforce animals' status as property, thereby ensuring that the law will continually fail to recognize animals as rights-bearing entities. Francione presents sound evidence that current activist methods have made little progress toward animal rights. But his analysis falters when he asserts that no one who works within the property structure can secure rights for animals in the long term. Francione's own reasoning suggests that welfarist reforms, even those attained within the property regime, need not necessarily fail in achieving animal rights. Instead, they could succeed if they were absolute enough to trump human property rights.

### I

In his previous book, *Animals, Property, and the Law*,<sup>1</sup> Francione argued that, as long as animals remain legal "property," no law can truly protect any animal interest against even trivial human concerns.<sup>2</sup> Our property regime, which Francione dubbed "legal welfarism,"<sup>3</sup> proscribes only use of animal

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1. GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* (1995) For commentary on this book, see Adam M. Roberts, 18 HOUS. J. INT'L L. 595 (1996) (book review), for Professor Francione's response, see Gary L. Francione, *A Response to Adam Roberts*, 19 HOUS. J. INT'L L. 317 (1996)

2. See FRANCIONE, *supra* note 1, at 4-6

3. See *id.* at 5.

property that is inefficient from the perspective of human owners.<sup>4</sup> Nonetheless, *Animals, Property, and the Law* stopped short of concluding that animals can never have rights within a property regime<sup>5</sup> or that the animal protection movement must pursue total abolition of property status for animals.

*Rain Without Thunder* reaches those conclusions. Francione now maintains that activists will achieve no progress toward legal rights for animals so long as animals remain property (p. 177). Armed with empirical evidence attesting that animals suffer more exploitation today than ever, Francione criticizes those who fight for animal rights within a property regime. These "new welfarists" (p. 36),<sup>6</sup> he contends, actually advocate "animal welfare," a far cry from "rights" for animals.<sup>7</sup> Francione explains this difference by contrasting Peter Singer's welfarist utilitarian theory<sup>8</sup> with Tom Regan's rights-based approach<sup>9</sup> (pp. 12-20). Singer's welfarist theory requires humans to balance their needs against animals' needs, in order to prevent unnecessary animal suffering in the pursuit of human goals.<sup>10</sup> Regan's theory, on the other hand, contends that animals have certain inviolable rights.<sup>11</sup> Unless a human right is at stake, Regan asserts, ethical principles proscribe any act that deprives animals of their rights to life, to physical security, and to be regarded as ends in themselves.<sup>12</sup>

4. See FRANCIONE, *supra* note 1, at 4-6.

5. Francione first addressed the issue in his introduction: "It is my tentative conclusion that animal rights (as we commonly understand the notion of rights) are extremely difficult to achieve within a system in which animals are regarded as property, although this precise issue transcends the scope of the present work." *Id.* at 14. In his epilogue, however, Francione left open the possibility of protecting animals under a property regime. See *id.* at 260.

6. The new welfarists include People for the Ethical Treatment of Animals, the American Anti-Vivisection Society, and others commonly thought to support animal rights (pp. 32-46). For convenience, this Book Note uses the term "new welfarists" throughout to refer to the groups Francione criticizes.

7. The new welfarists differ from more traditional welfare groups, such as the American Humane Association or the Animal Welfare Institute, in where they draw the line with respect to what constitutes "necessary" or "acceptable" use of animals (e.g., pp. 20-25). See also JAMES M. JASPER & DOROTHY NELKIN, *THE ANIMAL RIGHTS CRUSADE* 8-10 (1992) (describing differences between traditional welfare groups and more radical movements); cf. RICHARD D. RYDER, *ANIMAL REVOLUTION* 188-210 (1989) (describing the move of the traditional Royal Society for Protection of Animals to more radical reforms).

8. See, e.g., PETER SINGER, *ANIMAL LIBERATION* (rev. ed. 1990) [hereinafter SINGER, *ANIMAL LIBERATION*]; PETER SINGER, *THE EXPANDING CIRCLE* (1981); PETER SINGER, *HOW ARE WE TO LIVE?* (1995).

9. See TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983); Tom Regan, *The Case for Animal Rights*, in *IN DEFENSE OF ANIMALS* 13 (Peter Singer ed., 1985).

10. As Francione recognizes, Singer's theory differs from that of traditional welfarists largely in the equation it promotes for balancing animal and human needs. Singer insists that humans must accord animal interests equal weight to their own: To assume that trivial human interests justify tremendous animal suffering, he claims, is speciesist. See SINGER, *ANIMAL LIBERATION*, *supra* note 8, at 3-6.

11. In contrast, "rights"—either human or animal—are in fact irrelevant to Singer's theory. Singer, a utilitarian, instead focuses on human and animal interests, which must be weighed against each other to determine the proper course of action in a given situation. See, e.g., *id.* at 7-9.

12. Francione sums up the difference between welfarism and rights theory: "Rights, or at least most rights, are not thought to be absolute, but at least some rights provide strong prima facie protection and cannot be compromised without the most compelling reasons" (p. 49). Under a rights-based theory, for example, medical experimentation with animals is unacceptable for the same reasons that experimentation with humans is unacceptable; whatever its perceived benefits, compare VERNON COLEMAN, *WHY ANIMAL EXPERIMENTS MUST STOP* (1991), with MICHAEL ALLEN FOX, *THE CASE FOR ANIMAL EXPERIMENTATION* (1986), experimentation violates the subject's fundamental right not to be treated as means to others' ends.

Francione writes that new welfarists, although they may adhere to a long-term philosophy of animal rights, “see no moral or logical inconsistency in promoting measures that explicitly endorse and reinforce an instrumental view of animals” (p. 37); they advocate *any* change that seems to make life better or more comfortable for animals, even if the change fails to recognize a right *per se*.<sup>13</sup>

Such welfarist reforms, Francione argues, do not and cannot translate into long-term achievement of animal rights. New welfarism, he asserts, suffers from a structural defect: It seeks to eliminate animal suffering, but at the same time it reinforces the property structure responsible for that suffering. Francione makes this point with the hypothetical example of a law requiring that cows awaiting slaughter receive water (pp. 141-48). Animal welfarists would support such a law as a “step[] in the right direction” or a “springboard into animal rights” (p. 141). Francione, however, maintains that such a law, by regulating the property regime would necessarily also legitimate the system that allows humans to treat cows as property. He agrees that cows have an interest in receiving water; yet he believes that so long as the cows remain human property, “the body of institutional exploitation produces ‘new’ types of suffering as soon as older ones are removed” (p. 145).

Francione sets down criteria for pragmatic, incremental activism that nonetheless eliminates the institutionalized exploitation engendered in the deprivation of rights.<sup>14</sup> Animal rights activists must seek legislation<sup>15</sup> that prohibits—and does not refine—activities constitutive of the exploitative institutions (pp. 192-203), without substituting any other form of exploitation in place of the prohibited activity (pp. 207-11).<sup>16</sup> Such activism, he contends, will recognize and respect noninstitutional animal interests.

## II

Francione bases his argument against new welfarism upon two claims, namely that welfarism affirms property status and that because it does so, it

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13. Thus the new welfarists supported the 1985 amendments to the Federal Animal Welfare Act, 7 U.S.C. §§ 2131-2157 (1994) (pp. 87-93), and now support proposed amendments to the Humane Slaughter Act of 1958, 7 U.S.C. §§ 1901-1906 (1988) (pp. 100-01), legislation that continues to allow animal experimentation and slaughter but purports to place more checks on the practice.

14. Francione maintains that his criteria uphold two central aspects of rights theory: (1) the abolition of institutionalized exploitation that treats animals as means to ends, and (2) refusal to sacrifice fundamental interests of some animals today in the hopes that animals in the future will receive better treatment (p. 190).

15. Although he spends few pages on nonlegislative approaches, Francione agrees that fighting for legislation is not the only way to achieve animal rights. “The rights advocate [unwilling to work within the legislative process] is left with a most important and time-consuming project: education of the public through traditional educational means—protest, demonstrations, economic boycotts, and the like—about the *need* for the abolition of institutionalized exploitation on a social and personal level” (p. 192).

16. An absolute ban on using primates in experimentation would meet these criteria, as would a ban on leg-hold traps in the fur industry. Unacceptable would be proposals to give primates more cage space, to use cats instead of primates, or to substitute padded traps for leg-hold traps (pp. 211-13).

cannot lead to rights for animals.<sup>17</sup> Inherent in these assumptions is the notion that “property is property”—be it buildings, land, or living creatures—and that our legal system places only such limits on the use of private property as will maximize its value for human use.<sup>18</sup> Francione assumes more than proves that animals share the same status as any other property. At times, he hints that the law might privilege animal property above other property. He states, for example, that “[r]egulation of the use of animals is the only property regulation that is, at least ostensibly, intended to ‘benefit’ the property and . . . not intended exclusively to maximize social wealth” (p. 131). But he dismisses any difference such privileging might reveal between animals and other property: “A close examination of anticruelty laws indicates that they have an exclusively humanocentric focus, and to the extent that they impose duties on human beings, these duties give rise to no corresponding rights for animals” (p. 133). Unfortunately, Francione fails to provide this “close examination”;<sup>19</sup> he continues, without evidence, that “[t]he rationale for anticruelty statutes is, for the most part, that cruelty to animals has a detrimental impact on the moral

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17. This Book Note assumes that animals do have some interests and takes no issue with Francione's assertion, set forth at length in FRANCIONE, *supra* note 1, and reiterated in *Rain Without Thunder* (e.g., pp. 126-39), that institutionalized exploitation of animals persists chiefly because our law unjustly treats animals as property. If animals have interests, and property status allows the deprivation of those interests for almost any human purpose, no matter how trivial, then the property system is unjust, as it fails to accord equal weight to competing interests. This is the heart of Singer's argument against speciesism. See SINGER, *ANIMAL LIBERATION*, *supra* note 8, at 213-48. The argument does not accept any division between the interests of humans and those of other animals based, for example, on the ability to possess desires as well as needs, see, e.g., R.G. FREY, *INTERESTS AND RIGHTS: THE CASE AGAINST ANIMALS* 79-100 (1980), use of language, see, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 79-80 (1980), or the capacity for moral inclinations, see, e.g., MICHAEL P.T. LEAHY, *AGAINST LIBERATION: PUTTING ANIMALS IN PERSPECTIVE* 167-207 (1980).

18. Those limits on property use that do exist generally protect the legitimate interests of the entire community of property owners: “Property owners must not use their property unreasonably in ways that substantially interfere with their neighbors’ use and enjoyment of their property.” Joseph William Singer, *The Reliance Interest in Property*, 40 *STAN. L. REV.* 614, 642 (1988).

19. Francione does validly point out that anticruelty statutes tend to exempt cruelty that occurs in the institutionalized exploitation of animals, where “institutionalized” indicates societal recognition that the activity has legitimate value for humans (p. 135). So, for example, a factory farmer may saw the beaks off unanesthetized birds, but a pet owner cannot always beat his dog. Many commentators have argued for different treatment of animals within and without institutionalized settings, see, e.g., *COMPANION ANIMALS IN SOCIETY: REPORT OF A WORKING PARTY COUNCIL FOR SCIENCE AND SOCIETY* 3-8 (1988) (stating that pets’ relations to humans distinguish them from other animals), or that the law should accord more value to pets because of their relationship to human companions, see, e.g., Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 *N.Y.U. L. REV.* 1059 (1995), much as the law values bystander suffering on behalf of a family member or close friend more than suffering on behalf of an outsider, see, e.g., *Versland v. Caron Trans.*, 671 P.2d 583, 587 (Mont. 1983) (requiring a showing of strong emotional ties for recovery for distress as a bystander to injury); *Leong v. Takasaki*, 520 P.2d 758, 766 (Wash. 1974) (allowing the plaintiff to show the “nature of his relationship to the victim” in order to recover bystander damages). Nonetheless, such arguments do nothing to advance animal rights. An animal valued solely by his relationship to a human is per se not a rights holder or an end in himself.

Anticruelty statutes’ exemption of institutionalized cruelty does support the idea that animals resemble other property. But one might remember that Francione himself perpetuates the resemblance: He argues *against* the expansion of anticruelty law to institutionalized exploitation—recall the thirsty cow legislation—thereby helping to ensure that animals remain as undifferentiated as possible from nonsentient property.

development of human beings" (pp. 133-34).<sup>20</sup>

Anticruelty statutes may in fact represent the primary manifestation of the ambiguity in our law over animals' property status that Francione wishes to avoid. Francione casually compares anticruelty law to statutes prohibiting the destruction of historical landmarks (pp. 131-32), which ensure that human enjoyment and appreciation of landmarks will continue.<sup>21</sup> Anticruelty statutes like the thirsty cow law, however, declare a moral wrong, designating certain practices intolerable even if they maximize wealth. The more proper analogy for anticruelty laws, as Francione sometimes recognizes, is to laws preventing mistreatment of human "property" during the era of slavery (pp. 179-80, 205).<sup>22</sup> Such laws sometimes made an exception to the general principle that a property owner knows best how to use his property and simply banned certain practices—not for the good of society, but for the good of the property.<sup>23</sup> The lot of slaves remained miserable, so the laws generally accomplished little. Nonetheless, whatever their empirical effect, the laws set limits on property use, indicating unwillingness to accept that slaves were like any other property.

In denying that animals can progress toward rights while remaining property,<sup>24</sup> Francione initially contends that any attempt to give animals other

20. Although it eventually resorts to hunch and reference to a "close examination," see FRANCIONE, *supra* note 1, at 124, *Animals, Property, and the Law* presents a more extensive discussion on this point. There Francione more adequately explores the fact that property law often limits the extent of anticruelty law, see *id.* at 124-32, but still he fails to account fully for the instances in which anticruelty law actually limits property law. Francione does, however, note in passing—though without citation—that the Model Penal Code identifies the purpose of anticruelty statutes to be the improvement of human character. See *id.* at 132.

21. Landmark regulations are more comparable to the Endangered Species Act of 1973, 16 U.S.C. § 1531 (1994), than to anticruelty laws. Protection of endangered species takes little regard of the individual animal's right to subsist and instead concentrates on the preservation of a certain type of animal. This disregard for the individual animal, unknown in anticruelty statutes, shifts the focus from the animal to humans. The British activist Clive Hollands makes this point: "When the last great whale is slaughtered, as it surely will be, the whales' suffering will be over. . . . I am not concerned about the wiping out of a species—this is man's folly—I have only one concern, the suffering which we deliberately inflict upon animals whilst they live." INGRID NEWKIRK, *SAVE THE ANIMALS!* 147 (1990) (quoting Clive Hollands).

22. Comparisons with human slavery and its abolition are a favorite of those in the animals rights movement. See, e.g., MARJORIE SPIEGEL, *THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY* (1988); see also Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 *BUFF. L. REV.* 765 (1995).

23. Like animal anticruelty laws, slave anticruelty laws often created conflict between property rights and limitations on those rights for the good of the property. For example, Louisiana's Black Code of 1806, see Act of June 7, 1806, Orleans Territory Acts, Crimes and Offenses § 16, at 206-08, quoted in Judith K. Schafer, "Details Are of a Most Revolting Character": Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana, 68 *CHI.-KENT L. REV.* 1283, 1284-85 (1993), claimed that slaves' subordination to their masters was "not susceptible of any modification," yet provided for court-ordered sale of slaves from owners convicted of cruelty. The Code also preserved institutional exploitation of slaves by excepting flogging for punishment from its definition of cruelty. See *id.*; see also L. Scott Stafford, *Slavery and the Arkansas Supreme Court*, 19 *U. ARK. LITTLE ROCK L.J.* 413, 416 (1997) (noting that courts in slave-holding states faced the "principal legal question" of whether to treat slaves as property or as human beings for purposes of crimes by and against slaves).

24. Francione relies on Henry Shue's concept of "basic rights"—those more valuable than other rights and without which one cannot enjoy other rights. See HENRY SHUE, *BASIC RIGHTS* 18-20 (1980).

rights while sacrificing their basic right to be treated as ends, not means, is self-defeating (pp. 141-46). Later, however, Francione wavers on this point. He admits that, if anticruelty regulations were to trump property rights when they conflicted, then the regulations would “*eliminat[e] the property right to the extent necessary to protect the interest*” (p. 205). The interests would then become “rights”—not “in the full sense, in that animals would not yet possess the basic right not to be regarded as property . . . but animals would have something approximating nonbasic rights, something that could be said to be building blocks of the basic right not to be property” (p. 205).

Francione thus sees the possibility of quasi-rights-bearing property, which represents progress toward animal rights. Yet he does not acknowledge that the “new welfarists” are following this path and want to give thirsty cows a right to water in order to destroy the owners’ right to deprive his property of water. A right to water on the way to slaughter, if the right is absolute, erodes a tiny bit of the property right, surely an acceptable goal for Francione.

### III

Francione presents strong empirical evidence that new welfarism thus far has failed. But his theoretical argument fails to show that new welfarism *must* fail. The abolition of human slavery eventually required (or at least received) an extra-legal rights-based approach: a war that ended the entire institution. But behind the successful end to slavery lay immense popular opposition to the idea that humans could be property. In the case of animals, until the law begins at least experimenting with the idea of animals as rights-holders,<sup>25</sup> not property, a war remains far-fetched at best.<sup>26</sup> Against Francione’s advice, the animal protection movement may have to settle instead for a tandem approach. Unless animal rightists bring down the animal property regime as a whole, the best chance for the movement to advance may lie with new welfarists, chipping away at property status from inside the legal regime.

—Petra Renée Wicklund

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25. A number of articles have already emerged to consider the possibility of animals as legal rights-holders. See, e.g., Joseph Mendelson III, *Should Animals Have Standing? A Review of Standing Under the Animals Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795 (1997); David R. Schmahmann & Lori J. Polachek, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747 (1995).

26. This use of “war” refers not to actual military action, but instead to massive economic or legislative action. Most direct-action animal rights groups focus their efforts on economic action and property destruction instead of violence against humans, although critics frequently imply otherwise. Compare Valerie Richardson, *Animal Activists Add Bite to Effective Bark*, WASH. TIMES, Dec. 26, 1996, at A1 (quoting a former member of the Animal Liberation Front (ALF) saying that the organization adheres to a “strict code of nonviolence”), with Jack Bley, *Animal Rights Movement Thrives on Emotions and Ignorance*, WASH. TIMES, Jan. 11, 1997, at D2 (stating that the ALF perpetrates violence against humans), and Margaret Vaughan, *Ugly Face Behind Humanity’s Mask*, HERALD (Glasgow), Apr. 29, 1997, at 15 (decrying animal rights activists who “abhor violence done to animals, but find no contradiction in meting it out to humans”). But cf. Matt Bai, *Breaking the Cages*, NEWSWEEK, Sept. 29, 1997, at 66, 67 (noting that a Canadian animal rights group has claimed responsibility for violence against humans).