

## A RESPONSE TO ADAM ROBERTS†

Although Adam Roberts agrees with much of the analysis in my book, *Animals, Property, and the Law*,<sup>1</sup> he is critical of several significant aspects of my thesis.<sup>2</sup> Mr. Roberts's criticisms are not surprising. Mr. Roberts is an employee of the Animal Welfare Institute ("AWI") in Washington D.C.—an organization that I explicitly criticize throughout my book as representing views that I regard as logically, legally, and morally problematic. Unfortunately, Mr. Roberts chose not to disclose his employment with AWI.<sup>3</sup> In any event, Mr. Roberts's review highlights the very real theoretical disagreements between my view, which supports the notion of animal rights, and Mr. Roberts's view, which defends the view known as animal welfare.

In *Animals, Property, and the Law*, I argue that although animals are regarded as property, the law reflects the moral reality that animals are relevantly different from other sorts of property. Dogs can feel pain; tables and chairs cannot. In recognition of animal sentience, the law developed certain restrictions on the use humans may make of their animal property. For the most part, the law reflects the moral theory of animal welfare,

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† Editor's note: The *Houston Journal of International Law* would like to make the following correction to Mr. Adam Roberts's review of Professor Gary L. Francione's book *Animals, Property, and the Law*, appearing at 18 HOUS. J. INT'L L. 595:

Mr. Roberts works as a Research Associate for the Animal Welfare Institute in Washington, D.C. Mr. Roberts represented to HJIL that he wanted his professional affiliations withheld in order to protect his individual intellectual freedom to review Professor Francione's book from outside the institutional perspective of his employer. Mr. Roberts's notes that the views presented in the review are exclusively his own and should in no way reflect upon the above-named organization.

The *Houston Journal of International Law* respectfully apologizes for the omission of Mr. Roberts's complete biographical data.

1. GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* (1995) [hereinafter FRANCIONE, *ANIMALS, PROPERTY*].

2. Adam M. Roberts, *Animals, Property, and the Law*, 18 HOUS. J. INT'L L. 595 (1996) (book review).

3. In the biographical footnote, Mr. Roberts describes himself as a "lobbyist and researcher for animal protection issues." Roberts, *supra* note 2, at 606 n.\* Mr. Roberts's affiliation with AWI was originally contained in his biographical footnote, but this information was subsequently deleted at Mr. Roberts's request.

which requires that humans treat animals "humanely" and that they not impose "unnecessary" suffering on animals. An example of animal welfare regulation would be a state anti-cruelty law that prohibits the infliction of "unnecessary" pain, or a federal regulatory statute, such as the federal Animal Welfare Act,<sup>4</sup> which allows the imposition of pain on animals if it is "scientifically necessary."

I characterize as *legal welfarism* the version of animal welfare theory embodied in current law. Legal welfarism requires that we balance human and animal interest in order to determine whether particular conduct is "humane," or whether particular suffering is "necessary." The problem is that human beings are rightholders as a general matter. Moreover, humans take very seriously their right to own and use their property. Animals *are* property, and consequently, they are the object of claims of human property rights. When the law purports to "balance" the human and animal interest required under animal welfare laws, the standard of "humane" treatment or "unnecessary" suffering is not determined by reference to some abstract moral notion. The law does not look to the allegedly cruel act and then perform a "balancing test" in order to determine its legality. Rather, if the act is *causally* necessary to a legally sanctioned activity, then the act is regarded as *legally* "necessary." We also examine whether it is customarily regarded as part of the activity by the animal-property owners who engage in the activity. After all, rational property owners would not generally engage in actions that *diminished* the value of their animal property.

Animal protection laws do not prohibit "cruelty" as the term is used in ordinary language. Instead, cruelty "must refer to something done for no legitimate purpose."<sup>5</sup> This understanding of the meaning of cruelty explains why it is permissible for a farmer to castrate, brand, and dehorn animals without anesthesia. Such actions, although extremely painful, facilitate the socially-approved use of the animal as "food." It is not permissible, however, if the same farmer allows these same animals to starve to death for no good reason. Such conduct has inflicted pain and death outside socially recognized practices and the

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4. Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (1994).

5. See, e.g., *Lewis v. Femor*, 18 Q.B. 532, 534 (1887).

conduct results in the gratuitous wasting of animal resources and the diminution in overall social wealth.

Legal welfarism helps to account for our rather hopelessly conflicted social attitude about non-humans. Most of us agree that it is morally wrong to treat animals "inhumanely," but animals are nevertheless exploited for virtually every conceivable purpose, including (and especially for) human amusement. As long as we are willing to regard animals as property and tolerate their institutionalized exploitation for food, research, clothing, or entertainment, there is no ready way to interpret regulation on animal use as anything more than a prohibition of conduct that goes beyond what is required to facilitate the activity. The only conduct that is proscribed is the infliction of *gratuitous* suffering and death because that would result in a "waste" of animal property and an overall diminution of social wealth.

Mr. Roberts accepts the distinction between the rights and welfare approaches, but he claims that I "inaccurately depict animal welfare advocates (Legal Welfarists) generally as individuals who explicitly accept animal use but wish to minimize the overt suffering that results from such use."<sup>6</sup> According to Roberts, the "true Legal Welfarist supports the moral imperative requiring abolition of animal use, while recognizing the limitations of reforming the current legal framework and, therefore, simultaneously pursuing the politically prudent and realistic goal of ensuring that the worst cruelty is prohibited immediately."<sup>7</sup>

Mr. Roberts's assertion that the "true" welfarist favors the abolition of animal exploitation as an end, but regards animal welfare reforms as a morally acceptable and practical means to that end, finds absolutely *no* support in the writings or positions of those historically identified as animal welfarist. Indeed, Mr. Roberts's own organization—AWI—has publicly taken the position that it does *not* support the abolition of animal use; indeed, AWI has actually taken positions in support of continued

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6. Roberts, *supra* note 2, at 597.

7. *Id.*

animal use.<sup>8</sup> Welfarists may differ as to how much weight should be accorded animal interests. For example, the position that I identify as legal welfarism accords little or no weight to animal interests whenever human property interests are at stake; the position taken by philosopher Peter Singer in *Animal Liberation*<sup>9</sup> or by biologist Andrew Rowan in *Of Mice, Models, and Men*<sup>10</sup> would accord greater weight to animal interest. But *all* welfarist positions share the common view that *any* animal interest—including fundamental interests in life and liberty—can be sacrificed if sufficient “benefit” will result.<sup>11</sup> This view is in stark contrast to the rights position, which holds that at least some animals have interests that cannot be sacrificed merely because it would benefit humans to do so.

Mr. Roberts is correct that some modern animal advocates (apparently this group includes Mr. Roberts) claim to support the abolition of animal use that is required under the animal rights perspective, but argue that animal welfare reforms will lead to the abolition of animal use. This viewpoint may be stated succinctly as the belief that making laboratory cages larger today will eventually lead to empty cages tomorrow. Despite Mr. Roberts’s claim to the contrary, I explicitly considered this position in my book and rejected it as problematic because there is no theoretical or empirical support for the notion that welfarist reforms will lead to any abolition of animal use.<sup>12</sup>

Indeed, the main point of my book is that as long as animals are regarded as property, the balancing required under animal welfare laws will invariable tip in favor of the owners of animal property. I argue at length that animal welfare is structurally defective because it requires that we balance animal interests unprotected by claims of rights against the rights-protected

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8. See GARY L. FRANCIONE, *RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT* 70–71, 98, 100 (1996) [hereinafter FRANCIONE, *RAIN WITHOUT THUNDER*].

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

10. ANDREW N. ROWAN, *OF MICE, MODELS, AND MEN* (1984).

11. Interestingly, Mr. Roberts claims that the “true Legal Welfarist” is really supportive of the abolition of animal use. Roberts, *supra* note 2, at 597. Mr. Roberts apparently failed to understand that legal welfarism is the *least* generous of the various welfarist positions.

12. See FRANCIONE, *ANIMALS, PROPERTY*, *supra* note 1, at 256–58; see also FRANCIONE, *RAIN WITHOUT THUNDER*, *supra* note 8, *passim*.

claims of animal owners. I also argue that there is absolutely *no* empirical evidence to suggest that welfarist reforms have led or will lead to the abolition of animal use, and that animal welfare reforms often have the ironic effect of exacerbating animal exploitation through the public's erroneous belief that we treat animals "humanely" when we slaughter them or use them in biomedical experiments. Mr. Roberts simply ignores all of this, and claims that welfarist reform prohibits the "worst cruelty" and does so "immediately."<sup>13</sup>

Mr. Roberts is simply wrong, or at the very least, he has failed to provide a scintilla of theoretical or empirical support for his views. The first animal welfare law was enacted in the Massachusetts Bay Colony in 1641. Now, over 300 years later, we are using *more* animals, and in more horrific ways, than ever before. Despite a ubiquitously accepted animal welfare ethic that requires the "humane" treatment of nonhumans, there is no evidence that animal welfare laws have eliminated *any* cruelties, much less the "worst" ones. To call any change made to date "immediate," is to use the word in a most bizarre manner.

Even the most minor welfarist changes are usually met with extraordinary resistance. For example, in 1985, Congress amended the federal Animal Welfare Act and directed the United States Department of Agriculture (USDA) to establish standards for the exercise of dogs kept in laboratories, and for the psychological well being of primates used in experiments. The USDA proposed specific standards pursuant to the congressional directive. Although these standards represented relatively minor changes, the scientific community opposed them vociferously, and, after a rulemaking period of *six years*, the USDA finally capitulated to demands of the research community. The USDA deferred to an *ad hoc* determination of the attending veterinarian, effectively eviscerating whatever minimal improvement that Congress enacted in 1985.<sup>14</sup>

Mr. Roberts claims that my book concerns only administrative regulation and does not address legal prohibitions on animal use.<sup>15</sup> This claim is perplexing, particularly in light of the rather extensive discussion that occurs throughout my book on the

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13. See Roberts, *supra* note 2, at 597.

14. See FRANCIONE, ANIMALS, PROPERTY, *supra* note 1, at 225-29.

15. See Roberts, *supra* note 2, at 597.

difference between regulation and prohibition.<sup>16</sup> A main thesis of my book is that because the law regards essentially *all* animal interests as able to be "sacrificed" as long as the aggregation of consequences amounts to human "benefit," the law virtually never prohibits particular animal use. Mr. Roberts claims that my thesis is contradicted by certain environmental laws, such as the Endangered Species Act,<sup>17</sup> which, according to Mr. Roberts, demonstrate that the law recognizes that animals have "inherent value"<sup>18</sup> and prohibits certain conduct. Mr. Roberts fails to recognize that such laws merely protect animals (and plants) for a *temporary* period in order to ensure biological integrity for *human* purposes. As soon as the numbers of whales, or seals, or whatever, exceeds what is needed for species viability, members of the group can then be "harvested." I would not call this "rights" protection, and Mr. Roberts's willingness to do so is somewhat mystifying.

Mr. Roberts is critical of my analysis of the federal Animal Welfare Act. The organization for which Mr. Roberts works—AWI—was the primary force behind the original Act and all of its subsequent amendments. It is, therefore, understandable that Mr. Roberts would be less than pleased with my view that the Animal Welfare Act has done little, if anything, to ameliorate the condition of laboratory animals. Although Mr. Roberts acknowledges that the Act has been less than satisfactory, he argues that the problem is that the Act is not "vigorously enforce[d]" by the USDA.<sup>19</sup> That the Act is not "vigorously enforced" by the USDA is something of an understatement. Even if the USDA became more interested in enforcing the Act, the structural defects of the Act, which allow those who *use* animals to determine whether pain, suffering, or death is "scientifically necessary," would remain. Despite the amendments of 1985, the Animal Welfare Act makes it clear that the USDA can only address issues of animal husbandry, and the USDA is explicitly *not* empowered to make any substantive judgments on the content of research in which live animals are used. It is difficult

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16. See FRANCIONE, ANIMALS, PROPERTY, *supra* note 1, at 9–10, 14, 18, 46, 92–93, 260–61.

17. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (1994).

18. Roberts, *supra* note 2, at 599.

19. See *id.* at 604.

to understand how increased regulatory fervor on the part of the USDA would be effective under the circumstances. Similarly, Mr. Roberts claims that “[i]f the present laws were more strictly worded and those who enforced them more humane, the situation might be drastically different for animals.”<sup>20</sup> The problem is that if things are going to reasonably (let alone *drastically*) improve for animals, then at least some activities involving animals must be ruled out—or prohibited—from the start. The alternative is a notion that we ought to perform the most horrendous action on animals in a “humane” manner, and no amount of tighter wording or better enforcement will suffice.

Mr. Roberts argues that the even if the amount of protection provided to animals under the animal welfare laws is minimal, we should continue to support such reforms rather than pursue more rights-oriented protection for animals because animals will be better off with these minimal protections than without them. He states: “[A]lthough the status quo is clearly imperfect, one must always consider, which Francione does not, what legal future animals would face if not for this admittedly minimum protection.”<sup>21</sup> Even if animal welfare reforms have provided some amount of relief for some animals—an amount of relief Mr. Roberts admits to be minimal—that hardly justifies the *continued* pursuit of these reforms. This is especially true if we take seriously the obligation to eventually abolish or substantially minimize our morally unjustifiable exploitation of non-human animals.

*Whatever* contribution has been made up to this point by animal welfarism has simply failed to keep up with the increasing numbers of animals exploited throughout the world, and has failed to effect any limitation on the barbaric ways in which these enormous numbers of animals are treated. Bioengineering promises even more frightful futures for the billions of animals raised in the already torturous conditions of intensive agriculture—“factory farming.”<sup>22</sup> The present system of animal welfare

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20. *Id.*

21. *Id.* at 601. Roberts also suggests that the animals used in laboratories are better off with the Animal Welfare Act, but he acknowledges that the Act provides little meaningful protection for animals. *See id.* at 604–05.

22. For a description of intensive agriculture, see JIM MASON & PETER SINGER, *ANIMAL FACTORIES* (1990).

laws and regulations, laws that merely require "humane" treatment and prohibit no particular actions beyond the infliction of wholly gratuitous suffering and death, may be a noble gesture. However, to say that these welfarist reforms will lead to the abolition of animal use is like saying that if the sun is cooled one degree at a time, it will eventually become a large planetary snow ball. In any event, Mr. Roberts again fails to offer any reason—theoretical or empirical—to indicate that animal welfare reforms have in the past, or will in the future, lead anywhere in the direction of abolishing animal use. The precise problem with animal welfare is that it *excludes* the discourse needed even to consider abolishing animal exploitation because it limits our moral consideration to identifying some human interest—virtually *any* human interest—that will suffice to abrogate an animal's interest in life or in having a life that is normal for the species.

Finally, Mr. Roberts claims that I acknowledge that society no longer accepts the Cartesian notion that animals are not sentient, and that society recognizes in theory that there should be some limit on animal exploitation.<sup>23</sup> He suggests these social "advances" are proof that animal welfare can improve the well-being of animals as long as animal welfare is taken seriously.<sup>24</sup> The problem is that if we accord *any* significant weight to animal interests, we would not have laws such as the Animal Welfare Act in the first place. It simply makes no sense to say that researchers may, as they did in one experiment, blowtorch an unanaesthetized pig, as long as they do so "humanely."

Gary L. Francione\*

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23. Roberts, *supra* note 2, at 604.

24. See *id.* at 604–05.

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