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Equal Consideration and the Interest of Nonhuman Animals in Continued Existence: A Response to Professor Sunstein

Gary L. Francione

INTRODUCTION

The topic of this symposium—Law and Life: Definitions and Decisionmaking—provides an excellent opportunity to address some of the comments made by Professor Cass R. Sunstein in his review of my book, Introduction to Animal Rights: Your Child or the Dog? A central argument in the book is that we cannot justify treating nonhumans as our property and using them for our purposes irrespective of how "humanely" we do so. Sunstein, on the other hand, maintains that it is morally permissible to use animals for human purposes, including uses that cannot be regarded as necessary, provided that we do not make animals suffer unduly in the process. The focus of animal advocacy, Sunstein argues, should be on prohibiting "the most indefensible practices" rather than abolishing animal use, as I propose.

My difference with Sunstein over the proper focus for animal advocacy stems from our fundamental disagreement over whether animals have an interest in their lives—in other words, in their continued existence—distinct from, and in addition to, their interest in not suffering, which virtually no one disputes. If nonhumans do have an interest in their lives, then our use of animals as well.

©2006 Gary L. Francione. All rights reserved. "Nonhuman" and "animal" are used interchangeably throughout the article but it should be remembered that humans are animals as well.

Distinguished Professor of Law and Nicholas deB. Katzenbach Scholar of Law and Philosophy, Rutgers University School of Law—Newark. I wish to thank Anna E. Charlton for her comments on an earlier draft. Also, I am grateful for comments from Taimie Bryant, Darian Ibrahim, Jeff Leslie, Bonnie Steinbock, and the other participants at the Legal Forum Symposium at the University of Chicago on October 28-29, 2005. I acknowledge research support from the Dean's Research Fund of the Rutgers University School of Law—Newark.


2 Sunstein, Slaughterhouse Jive, New Republic at 43 (cited in note 1).
them, and not just our treatment of them incidental to those uses, raises the primary moral issue. In this article I explore our disagreement.

In the following section, I describe in summary fashion the central ideas of my book and Sunstein's particular criticisms. I then discuss the view that animals do not have an interest in continued existence and other aspects of Sunstein's critique.

I. A BRIEF OUTLINE OF INTRODUCTION TO ANIMAL RIGHTS

In Introduction to Animal Rights, I argue that almost everyone agrees that it is morally wrong to inflict "unnecessary" suffering on nonhuman animals. Indeed, this moral rule is so uncontroversial that it is embodied in anticruelty laws and other laws that purport to regulate our treatment of nonhumans. If a prohibition on unnecessary suffering is to be meaningful, then it must at the very least rule out the infliction of animal suffering for purposes of mere human pleasure, amusement, or convenience. Nevertheless, the overwhelming amount of the suffering that we inflict on animals can be justified only by trivial human interests. We not only use animals for purposes that cannot be considered as necessary, but we inflict significant pain and suffering on them in the process and accord them treatment that would be regarded as torture if we inflicted it on humans.

The use of animals for entertainment in circuses, movies, or rodeos, and in sport hunting cannot, by definition, be considered as necessary. The largest number of animals that we use—approximately 10 billion annually in the United States alone—is for food purposes. Not only is it not necessary to eat meat or dairy products for optimal health, the evidence points increasingly to animal foods being detrimental to human health. More-

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3 Francione, Introduction to Animal Rights at xxii-xxiii (cited in note 1).
4 Id at 7-9.
5 For a discussion of the necessity of animal use, see id at 9-49.
6 Courts have explicitly recognized that prohibitions against "unnecessary" suffering or "needless" killing must be interpreted by reference to institutional uses that are not necessary, such as the use of animals for food:

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).

7 See Francione, Introduction to Animal Rights at 14 (cited in note 1).
over, animal agriculture is unquestionably an environmental disaster in terms of the resources consumed by animals, as well as resulting air and water pollution, and erosion of topsoil. We eat animals because we have traditionally done so and because we enjoy it; there is, however, no necessity involved. Our only use of nonhumans that is not transparently frivolous involves biomedical research intended to produce data that will be useful for important issues of human health. But even in this single context, claims of necessity are suspect.

We suffer from a sort of “moral schizophrenia” where animals are concerned. We claim to take animal interests seriously, but we do not. I argue that our moral schizophrenia is in large part related to the property status of animals. Although we purport to accord moral significance to animal interests, the reality is that animals are nothing more than commodities with extrinsic value alone, and we regard them exclusively as means to our ends.

Because animals are property, we do not even question whether it is necessary to use animals in the first place and we focus exclusively on treatment, purporting to “balance” human and nonhuman interests to determine whether treatment is “humane.” The property status of animals, however, prevents us from balancing interests in a meaningful way because the interests of property owners, even when trivial, will almost always outweigh the interests of animals. The prohibition on unnecessary suffering turns out to be nothing more than a prohibition on inflicting more suffering than is needed to use animals in an economically efficient manner for purposes that are, for the most part, justified by nothing more compelling than human pleasure, amusement, or convenience. This generally means as a practical matter that we ignore animal interests whenever it produces an economic benefit for humans.

By treating animals as property, we necessarily fail to accord moral significance to animal interests. Moral significance

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8 See id at 14-17.
9 See id at 31-49 (discussing necessity claims concerning the use of animals in experiments). See also Gary L. Francione, The Use of Nonhuman Animals in Biomedical Research: Necessity and Justification, 35 J L Med & Ethics (forthcoming 2007) (same). I maintain even if there are some uses of animals in this context that may be described as “necessary,” these uses cannot be justified morally.
10 See Francione, Introduction to Animal Rights at 50-80 (cited in note 1) (discussing the property status of animals). For a general discussion of the problems created by the property status of nonhumans, see Gary L. Francione, Animals, Property, and the Law (Temple 1995).
requires that we apply the principle of equal consideration—the requirement that like cases be treated alike—to animals.\textsuperscript{11} Although there may be significant differences between humans and nonhumans, we recognize the important similarity that both are sentient and are unlike everything else in the universe that is not. We may not know whether insects are sentient, and we may not understand exactly how the minds of nonhumans work, but there is no serious doubt that most of the nonhumans whom we routinely exploit—the cows, pigs, chickens, rodents, fish, etc.—are capable of experiencing pain and suffering. All sentient beings are, by definition, similar in that they all have an interest in not suffering.

We do not protect humans from all suffering, but we prohibit treating humans exclusively as means to the ends of others, and we accord everyone a basic, pre-legal right not to be treated exclusively as a resource.\textsuperscript{12} It is because we recognize this basic right that we regard human slavery as unacceptable even if it is "humane." So the question becomes: why do we not also extend this one right to nonhumans? Why do we not treat the interest of animals in not being used as resources as protected by a right, or, in other words, as not able to be compromised irrespective of consequential considerations? We cannot, I argue, provide an answer that does not beg the question and constitute \textit{speciesism}, or the exclusion of nonhumans from the moral community based solely on species.\textsuperscript{13}

Recognition that we cannot legitimately justify the institutionalized exploitation of nonhumans, which is based upon the property status of animals, requires that we \textit{abolish} and not merely \textit{regulate} that exploitation. We should care for those nonhumans whom we have caused to come into existence as our resources, but we should stop bringing domestic animals into existence because that practice simply creates false conflicts between humans and nonhumans and cannot be morally justified.\textsuperscript{14}

\textsuperscript{11} See Francione, \textit{Introduction to Animal Rights} at 81-86, 98-100 (cited in note 1) (discussing the application of the principle of equal consideration to animals).

\textsuperscript{12} See id at 90-96. Another way of expressing the same idea is to say that we recognize that all humans have "equal inherent value." See id at 96-98. By this, I mean only that any being whose interests are going to count in a meaningful way must have more than extrinsic value. To have only extrinsic value is to be a thing, a commodity. See also note 61 (discussing intrinsic value).

\textsuperscript{13} See Francione, \textit{Introduction to Animal Rights} at 103-29 (cited in note 1) (discussing reasons advanced for denying animals the basic right not to be treated as things).

\textsuperscript{14} See id at 151-66 (exploring the implications of extending to nonhumans the right not to be resources).
The theory that I present in *Introduction to Animal Rights* requires only that animals be sentient in order to be members of the moral community. No other cognitive characteristic is required; indeed, it is precisely because we have erroneously linked moral significance with human-like characteristics that we treat animals as resources that exist solely for our use. Finally, I argue that the abolition of institutionalized exploitation, rather than better regulation, is required by any theory—deontological or consequential—that regards animal interests as morally significant because animal interests will necessarily be discounted or ignored if animals are property.

II. SUNSTEIN’S ARGUMENTS AND MY RESPONSES

In his review of my book, Sunstein makes three primary arguments. First, he maintains that I have not demonstrated that the use per se of nonhumans—as opposed to their ill-treatment—is morally objectionable, or that property status is inconsistent with according animals better treatment or recognizing their moral value. Indeed, he maintains that property status “protects animals in important ways.”

Second, Sunstein expresses doubt that we can base a theory of animal rights on sentience alone. He maintains that theories that focus on sentience are consequential and not deontological, and that rights theories ostensibly require that animals be moral agents in some relevant sense.

Third, he argues that even if nonhumans have rights, these rights may be overridden when the benefits of doing so are considerable just as human rights are subject to consequential limitations.

In the following sections, I explore and respond to Sunstein’s arguments.

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15 See id at 116-29, 133-42 (discussing the relevance of cognitive characteristics beyond sentience to the moral status of nonhumans). See also notes 50-51 and accompanying text (discussing the view that nonhumans must have minds similar to those of humans in order to be morally significant).

16 See Francione, *Introduction to Animal Rights* at xxxiv, 146-48 (cited in note 1) (arguing that utilitarian theory, like rights theory, requires not treating animals as property).


18 Id at 44.

19 See id at 44-45.

20 See id at 45.
A. Animals as Property and Equal Consideration

1. Sunstein and the Utilitarians.

Sunstein does not believe that we have a moral obligation to stop using animals for human purposes even if these uses are not necessary. For example, he asks whether, if "steps can be taken to ensure that animals raised for food are given decent lives[,]... would it be so clear that meat-eating is indefensible?" He states that with respect to animal use generally, I have "not shown that human use of animals is morally unacceptable if the relevant animals are treated as well as possible and allowed, to the extent possible, to live decent lives." Sunstein provides no detail on what he means by "to the extent possible" and does not address the fact that most exploiters claim that they already provide their animals "decent lives" consistent with their having the status of property and the economic realities entailed by that status.

Sunstein observes that Jeremy Bentham and Peter Singer, "strong advocates for animals and also utilitarians, do not object to meat-eating." He recognizes that Bentham and Singer claim that nonhumans, unlike humans, are not self-aware, and, therefore, "what is important is their pains and pleasures while they are alive—not that they continue to live." Sunstein accepts this view, claiming that "Bentham was entirely right. Because animals can suffer, they should be protected, much more than they are now, against pain and distress."

Sunstein agrees that the property status of animals "does violence to people's most reflective understandings of their relationships with other living creatures," but claims that property status "does not necessarily signify that animals will be treated as means or that their legal rights will amount to little in the
He argues that equal consideration and the recognition of the intrinsic value of animal property are possible, even if difficult, and that any problems created by property status are contingent and not necessary. At several points in his review, Sunstein argues that although I am correct to point out the way in which we systematically ignore animal interests, I fail to recognize that we could treat animals better than we do even if they remain our property and that better regulation of institutionalized exploitation, rather than its abolition, ought to be our "current priority." 29

Sunstein is correct to attribute the distinction between use and treatment, and the view that use per se does not raise a moral issue, to Bentham and Singer. The utilitarian position as articulated by Bentham and Singer is that the principle of equal consideration ought to apply to animals and that similar interests—and particularly the interest of animals in not suffering—ought to be treated similarly. 30 The utilitarians purport to reject the notion that animal suffering is not morally significant because animals lack some human-like characteristic, such as self-consciousness, rationality, or the ability to communicate in a symbolic language. 31 For instance, according to Bentham, animals had been "degraded into the class of things" because they lacked certain human-like characteristics, such as the ability to think rationally or to use human language. He noted that:

a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they reason? nor, Can they talk? but, Can they suffer? 33

This is not to say that Bentham denied that there were empirical differences between humans and animals, or denied the relevance of these differences to our moral and legal obligations.
to animals. He discussed this in the context of why it is morally permissible to eat animals. Bentham was certainly aware that it is not necessary for humans to eat nonhumans, but he did not think that a moral issue is raised per se by the eating of meat because he believed that animals are not self-aware and have no sense of the future. Therefore, nonhumans have no interest in not being used for food. According to Bentham,

[i]f the being eaten were all, there is very good reason why we should be suffered to eat such of them as we like to eat: we are the better for it, and they are never the worse. They have none of those long-protracted anticipations of future misery which we have.

He maintained that animals are “never the worse for being dead” but that we have a moral obligation not to “torment them.” Therefore, because Bentham did not believe that animals have an interest in their lives, he did not challenge our use of animals per se, but only our treatment of them.

Singer, who further articulates Bentham’s position, argues that we must treat similar interests in a similar way, but he maintains that most animals are not self-aware and have neither a “continuous mental existence” nor desires for the future. An animal can have an interest in not suffering, but because “it cannot grasp that it has ‘a life’ in the sense that requires an understanding of what it is to exist over a period of time,” the animal has no interest in continuing to live or in not being used as the resource or property of humans. Animals do not care whether we raise and slaughter them for food, use them for experiments, or exploit them as our resources in any other way, as long as they have a reasonably pleasant life. According to Singer, because animals do not possess any interest in their lives per se, “it is not easy to explain why the loss to the animal killed is not, from an impartial point of view, made good by the creation of a new animal who will lead an equally pleasant life.”

Singer strongly condemns the practices of intensive agriculture because he believes that the amount of pain and suffering

34 Id.
35 Id.
38 Id at 228-29.
39 Id at 229.
that animals experience under such conditions outweighs whatever benefits accrue to humans.\textsuperscript{40} He claims to reject the notion that animals have value only as economic commodities, but he does not conclude that eating animals per se is morally unacceptable; rather, he maintains that it may be morally justifiable to eat animals "who have a pleasant existence in a social group suited to their behavioral needs, and are then killed quickly and without pain."\textsuperscript{41} He states that he "can respect conscientious people who take care to eat only meat that comes from such animals."\textsuperscript{42}

Although Sunstein purports to accept that sentence is the only characteristic required for the moral significance of animals, he, like Bentham and Singer, accepts that animal use per se is not morally objectionable. Sunstein does not explicitly endorse the view that animals do not have an interest in life. He does, however, maintain that Bentham was "entirely right"\textsuperscript{43} in his analysis, and he acknowledges the view that animals do not have an interest in continued existence as central to Bentham's view that animal use per se is not morally objectionable. More important, however, it is not possible to make sense of Sunstein's overall approach without attributing this view to him.


The notion that animal use is not per se morally objectionable because animals do not have an interest in continued existence is problematic. Indeed, as I argue at length in \textit{Introduction to Animal Rights}, it would seem that merely being sentient logically implies an interest in continued existence.\textsuperscript{44} To be a sen-

\textsuperscript{40} Singer's argument against intensive agriculture works only if one agrees with Singer's necessarily imprecise and subjective assessments of relative utilities. See Francione, \textit{Introduction to Animal Rights} at 144-45 (cited in note 1).
\textsuperscript{41} Singer, \textit{Animal Liberation} at 229-30 (cited in note 37).
\textsuperscript{42} Id at 230. For a further discussion of the view of Bentham and Singer that animals do not have an interest in life, see Francione, 1 J Animal L & Ethics 1 (cited in note 31). Other theorists, focusing particularly on the use of nonhumans for food, endorse the utilitarian view that it is the treatment and not the use per se of nonhumans that raises the primary moral question. See Martha C. Nussbaum, \textit{Beyond "Compassion and Humanity": Justice for Nonhuman Animals}, in Cass R. Sunstein and Martha C. Nussbaum, eds, \textit{Animal Rights: Current Debates and New Directions} 299, 314-15 (Oxford 2004).
\textsuperscript{43} Sunstein, \textit{Slaughterhouse Jive}, New Republic at 45 (cited in note 1). Sunstein acknowledges that I "strongly disagree[ ]" with the view of Bentham and Singer about sentience and the interest in continued existence, or the self-awareness of animals. See id at 42. But he does not address the arguments about continued existence that I make in \textit{Introduction to Animal Rights}. Therefore, it is not clear in what respects he may feel that I have failed to address the utilitarian position.
\textsuperscript{44} See Francione, \textit{Introduction to Animal Rights} at 137-42 (cited in note 1).
tient being means to have an experiential welfare. In this sense, all sentient beings have an interest not only in the quality of their lives but also in the quantity of their lives. Animals may not have thoughts about the number of years they will live, but by virtue of having an interest in not suffering and in experiencing pleasure, they have an interest in remaining alive. They prefer or desire or want to remain alive.

Sentience is not an end in itself; it is a means to the end of staying alive. Sentient beings use sensations of pain and suffering to escape situations that threaten their lives and sensations of pleasure to pursue situations that enhance their lives. Just as humans will often endure excruciating pain in order to remain alive, animals will often not only endure but inflict on themselves excruciating pain in order to live. For example, animals caught in traps have been known to gnaw off a limb to escape. Sentience is what evolution has produced in order to ensure the survival of certain complex organisms. To deny that a being who has evolved to develop a consciousness of pain and pleasure has no interest in remaining alive is to say that conscious beings have no interest in remaining conscious.

Moreover, and as I also discuss in Introduction to Animal Rights, even if we cannot know the precise nature of animal self-awareness, it appears that any being that is aware on a perceptual level must be self-aware and have a continuous mental existence.\(^45\) Donald Griffin has observed that if animals are conscious of anything, "the animal’s own body and its own actions must fall within the scope of its perceptual consciousness."\(^46\) But we deny that animals are self-aware because we maintain that they cannot “think such thoughts as ‘It is I who am running, or climbing this tree, or chasing that moth.’”\(^47\) Griffin maintains that

when an animal consciously perceives the running, climbing, or moth-chasing of another animal, it must also be aware of who is doing these things. And if the animal is perceptually conscious of its own body, it is difficult to rule out similar recognition that it, itself, is doing the running, climbing, or chasing.\(^48\)

\(^{45}\) See id at 114-15.
\(^{46}\) Donald R. Griffin, Animal Minds: Beyond Cognition to Consciousness 274 (Chicago 2001).
\(^{47}\) Id.
\(^{48}\) Id.
Griffin concludes that “[i]f animals are capable of perceptual awareness, denying them some level of self-awareness would seem to be an arbitrary and unjustified restriction.”

Although it is clear both as the result of evolution and confirming work by cognitive ethologists that animals other than humans possess cognitive characteristics that are at least equivalent to those thought to be unique to humans, I am unwilling to require that animals have minds that are similar to humans—beyond having the quality of being sentient—in order to be full members of the moral community. As a practical matter, that is a game that animals can never win. However close their minds are to ours, the similarity will be insufficient to make them “like us.” After all, we have for some time now recognized the remarkable similarity between humans and chimpanzees yet we still use them for experiments and display them at zoos.

As a theoretical matter, I object to what I have called “similar-minds” theory, or the view that the moral status of nonhumans is dependent on their having human-like cognitive characteristics. I am content to acknowledge that even if nonhuman minds are similar to human minds, there will still be differences because cognition in humans is very much a function of human language and nonhumans may not have intentional states that are predicative in the same way. Even if nonhumans are self-aware, that does not mean that they can recognize themselves in mirrors or keep diaries or anticipate the future by looking at clocks and calendars. Even if nonhumans have the ability to reason or think abstractly, that does not mean that they can do algebra.

There are, however, at least two related reasons why the lack of human-like varieties of cognitive characteristics cannot serve to provide a morally sound, nonarbitrary basis for justifying our continued use of nonhumans as human resources. First, any attempt to justify treating animals as resources based on their lack of human-like cognitive characteristics begs the question from the outset by assuming that these characteristics are special and justify differential treatment. My dog may not be

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49 Id.
50 See Francione, Introduction to Animal Rights at 116-19 (cited in note 1).
able to recognize herself in a mirror, but she can recognize her scent on a patch of lawn that she regularly visits, and she can distinguish that patch from the ones used by my other canine companions. What makes recognition in a mirror better in a moral sense than recognition through scent? The answer, of course, is that we say so, but that is not a good argument for our treating animals as resources.

Second, even if all nonhumans lack a particular cognitive characteristic beyond sentience, or possess it to a different degree or in a different way from humans, there is no logical relationship between that lack or difference and our treatment of animals as resources. Differences between humans and nonhumans are undoubtedly relevant for some purposes, as are differences between humans. For example, a human who experiences transient global amnesia has no sense of the past or future but does have a sense of self with respect to the present. Such a person has an interest in her life and in not being treated exclusively as a means to the ends of others even if she does not have the same level of self-consciousness that is possessed by normal adults. In this sense, a person with this sort of amnesia is similarly situated to all other sentient humans who have an interest in being treated as ends in themselves irrespective of their particular characteristics. This disability may be relevant for some purposes, but it is irrelevant as to whether we treat her exclusively as a resource and disregard her fundamental interests, including her interests in not suffering and in continued existence, if it benefits us to do so.

Although some may be comfortable in saying that such humans count for less than do normal humans when it comes to deciding whether to take the liver from someone with amnesia to transplant into someone without amnesia, most are not. We recognize that apart from any other moral consideration, such reasoning leads to a sort of elitism that would justify our attaching greater moral value to the fundamental interests of the more intelligent, or to those who have whatever characteristic that we declare to be special. If we can use someone with amnesia as a forced organ donor to help someone without amnesia, why can’t we kill and use the organs of someone who is less intelligent to save the life of someone more intelligent?

If nonhumans have an interest in life, we cannot apply the principle of equal consideration to animals who have the status of property because they have an interest in not being treated as resources just as humans have an interest in not being treated as slaves. More brutal forms of slavery are worse than less brutal
forms, but we prohibit human slavery in general because all forms of slavery more or less allow the interests of slaves to be ignored if it provides a benefit to slave owners. Humans have an interest in not suffering the deprivation of their fundamental interests, including their interest in continued existence, merely because it benefits someone else, however "humanely" they are treated.\textsuperscript{52} To the extent that we protect humans from being used exclusively as means to human ends and accord to all humans a right not to be treated as the property of others, and we do not accord this similar nonhuman interest the same sort of protection, we necessarily fail to apply the principle of equal consideration to animals.\textsuperscript{53}


As far as issues of treatment—as opposed to use per se—are concerned, Sunstein maintains that the property status of animals is not a necessary impediment to our according animals better treatment and to our recognition that animals have "intrinsic value, and that animal well-being is a good in itself."\textsuperscript{54} I certainly agree with Sunstein that we could give animals more consideration than we presently do even though they are our property, and I have never suggested otherwise. I do, however, think that he greatly underestimates how difficult this is to achieve in the real world. Indeed, in the decade since I first proposed in \textit{Animals, Property, and the Law} that the property status of animals results in their receiving little or no protection under animal welfare laws,\textsuperscript{55} there have been no significant improvements in animal welfare laws at least in the United States.\textsuperscript{56} Moreover, as I argued in \textit{Rain Without Thunder: The Ideology of the Animal Rights Movement}, there is no empirical evidence to support the suggestion that better regulation of ani-

\textsuperscript{52} See Francione, \textit{Introduction to Animal Rights} at 89-90 (cited in note 1).

\textsuperscript{53} See id at 146. Others have recognized that the use of animals as resources is inconsistent with the principle of equal consideration. See, for example, David DeGrazia, \textit{Taking Animals Seriously: Mental Life and Moral Status} 47 (Cambridge 1996) ("While equal consideration is compatible with different ethical theories, it is incompatible—if extended to animals—with all views that see animals as essentially resources for our use."). It is, however, not clear that DeGrazia grasps the implication of this view as he does not argue that we are obligated to abolish all animal exploitation rather than to better regulate it.

\textsuperscript{54} Sunstein, \textit{Slaughterhouse Jive}, New Republic at 45 (cited in note 1).

\textsuperscript{55} Consider Francione, \textit{Animals, Property, and the Law} (cited in note 10).

mal exploitation leads eventually to the abolition of animal exploitation.\footnote{See generally Gary L. Francione, \textit{Rain Without Thunder: The Ideology of the Animal Rights Movement} (Temple 1996) (arguing that animal rights and animal welfare are very different approaches to the human-nonhuman relationship and that animal welfare understood as the regulation of animal use will not lead incrementally to the recognition of animal rights understood as the abolition of institutionalized animal exploitation).}

Although we may accord animals better treatment, it is difficult to understand how we can comply with utilitarian theory and accord equal consideration to nonhumans that are property. The problems involved in making interspecies comparisons to determine whether interests are similar, for instance, would, as a practical matter and for a number of reasons, be insurmountable and would be present even if we focused only on the interest of animals in not suffering, and did not consider their interest in continued existence.\footnote{See Francione, \textit{Introduction to Animal Rights} at 143-44 (cited in note 1). Indeed, there is a tendency within utilitarian theory to accord the intellectual pleasures of humans a higher value than the cognitions of nonhumans. For example, according to John Stuart Mill, "[i]t is better to be a human being dissatisfied than a pig satisfied." John Stuart Mill, \textit{Utilitarianism}, in \textit{The Basic Writings of John Stuart Mill} 233, 242 (Modern Library 2002).} These problems are greatly exacerbated by the property status of animals, which acts as a blinder that effectively blocks even our perception of their interests as similar to ours because any limitation on property owners is understood to represent significant human "suffering." And even in those instances in which human and animal interests are recognized as similar, animals will lose in any balancing of interests because the property status of animals is always a good reason not to accord similar treatment unless to do so would benefit property owners.\footnote{See Francione, \textit{Animals—Property or Persons?} at 122 (cited in note 51). See generally Francione, \textit{Animals, Property, and the Law} (cited in note 10) (further discussing the difficulty in balancing the interests of humans and animals with one another).} The interests of slaves will never be viewed as similar to the interests of slave owners. The interests of animals that are property will never be viewed as similar to those of human property owners.

Although Sunstein claims that we can treat animal interests as morally significant even if animals remain human property, it would seem that any recognition that animals have "intrinsic value" and that respect for animal interests is a "good in itself" would necessarily require a departure from property status because we regard property as having only an extrinsic value. Our recognition of the intrinsic value of animals would require certain limitations on treatment that are not related to the instru-
mental value that such limitations would have to us as property owners.

4. Property status: a benefit?

Sunstein claims that not only is the property status of animals not a necessary impediment to recognizing the intrinsic value of nonhumans, but that property status actually benefits nonhumans. Sunstein claims that the owners of “pets are unlikely to think that their animals are mere commodities” and that these owners will likely regard themselves as having “the sorts of rights and duties that make sense for human beings entrusted with the care of living creatures.” Sunstein goes further and claims that “[t]he fact of ownership even protects animals in important ways” because owners are morally and legally obligated to protect their animals. Non-owners are also obligated to refrain from damaging the animal property of others, and “this makes it less likely that such harm will occur.” He argues that the well-being of domestic animals, and not benefit to humans, requires that we have the legal right and the duty to control the lives of these animals.

There are three responses to Sunstein’s claims about these supposedly beneficial aspects of property ownership. First, Sunstein makes these observations with respect to only one aspect of the human-nonhuman relationship: the keeping by humans of nonhuman companions. Our relationship with our nonhuman companions is the one area in which at least some of us do not regard nonhumans as “mere commodities.” Indeed, it is precisely because many of us regard our nonhuman companions as members of our families while sticking forks into other nonhumans, such as pigs, cows, chickens, etc., who are no different from our companions, that I regard our attitudes about animals as exhibiting moral schizophrenia.

Second, even in this limited context, which involves a small number of nonhumans relative to the number that we exploit, we cannot regard property status as beneficial to animals. We can

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60 Sunstein, Slaughterhouse Jive, New Republic at 44 (cited in note 1).
61 Id. To the extent that owners of animals regard those animals as having a greater-than-market value, one might say that the owner regards the animal as having “intrinsic” value. That sense of “intrinsic” value, which concerns sentimental or idiosyncratic valuation by particular animal owners, is, however, different from the moral value that Sunstein refers to when he talks about our recognition as a general matter that animals have “intrinsic value, and that animal well-being is a good in itself.” Id at 45.
62 Id at 44.
certainly choose to treat our nonhuman companions well, but if we do not, their property status protects our decision. If we choose to keep our dog chained up in the backyard and ignore her except to bring her food or water, that is permissible. If we pain-
fully discipline the dog to make her a more effective guard dog, that is also permissible. We can choose to take our healthy ani-
mal to our veterinarian and have her killed because she is no longer convenient to our lifestyle.

Although some of us treat our nonhuman companions well, more of us treat them poorly. In the United States, for instance, many dogs are dumped at a pound, transferred to a new owner, or abandoned. Some who claim to love their companion animals mutilate them senselessly by having their ears cropped, their tails docked, or their claws ripped out, which involves the painful partial removal of digits, in order to protect sofas and tables. The bottom line is that because animals are property, we are given great latitude as owners regarding how we value their interests.

Third, in arguing that property status is beneficial for non-
humans, Sunstein fails to address a central argument in Intro-
duction to Animal Rights. If we took animal interests seriously, we would stop bringing domestic animals into existence in the first place. We see every human use of nonhumans as present-
ing a choice similar to the one that we are confronted with in the hypothetical of whom to save in the burning house—the child or the dog? Our moral discourse about the human-nonhuman rela-
tionship seeks to resolve conflicts between humans and animals. But we create these conflicts in the first place by bringing ani-
mals into existence for the sole purpose of killing them or other-
wise using them exclusively as means to our ends. Moreover, the overwhelming proportion of our animal use involves human in-
terests that are trivial relative to the animal interests at stake. If

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63 See Francione, Introduction to Animal Rights at 153-54 (cited in note 1).
64 Sunstein claims that the subtitle of my book, Your Child or the Dog?, "is misleading and more than a little ridiculous; this is really not the kind of conflict that concerns Francione." Sunstein, Slaughterhouse Jive, New Republic at 42 (cited in note 1). I disagree with Sunstein in two respects. First, the hypothetical, which obviously invites the response that we would save the child over the dog, is often used to support the position that it is morally acceptable to use nonhumans for human purposes because the response shows that we accept that humans have greater moral value than nonhumans. A central argument of my book is that choosing the child over the dog does not entitle us to con-
clude anything about moral value or the legitimacy of our treatment of nonhumans as resources. See Francione, Introduction to Animal Rights at 157-60 (cited in note 1). Sec-
ond, I maintain that because animals are property, we treat all questions involving ani-
mal use as involving a "conflict" between property owners and their property, and we thereby treat all situations as analogous to the example involving the burning house. See id at 153-54.
we recognize that animals have an interest in continued existence that is necessarily ignored by their status as our property and that there is no moral justification for our continued treatment of nonhumans as our property, we will abolish institutionalized animal exploitation and stop producing nonhumans for human purposes. We will thereby eliminate the overwhelming number of these false conflicts in which we are supposed to “balance” human and nonhuman interests—an act that is made impossible by the property status of nonhumans.

We should, of course, care for those domestic nonhumans who are here now as the result of our commodification of animals, but we should stop causing more, including dogs, cats, and other animals used as companions, to come into existence. Our remaining conflicts with nonhumans would involve wild animals, and the moral imperative would require that we apply the principle of equal consideration to resolve these conflicts. Difficult practical questions would remain, but the number of such questions would be substantially reduced.

B. The Role of Sentience in Animal Rights Theory

Sunstein also claims that I take the “complicated and unusual step” of “merging the idea of animal welfare with the idea of animal rights, through the claim that animals have rights because they can suffer.” He doubts that this effort can succeed because “[t]he importance of suffering, under the utilitarian framework, is inextricably intertwined with the insistence on the overriding importance of consequences” and he is “not sure that [I] can insist on the centrality of suffering, and the right not to suffer, while also arguing that overall consequences do not matter.” Sunstein maintains that under the rights framework, “the insistence that consequences do not matter is inextricably intertwined with the claim that human beings are moral agents.” He concludes that he cannot see how I “can insist that consequences do not matter while refusing to say whether and in what sense animals are moral agents.”

I certainly agree with Sunstein that rights theories are usually based on moral agency. Immanuel Kant and John Rawls come to mind as prominent examples, and I discuss them and

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66 Id.
67 Id.
68 Id at 44-45.
other rights theorists in *Introduction to Animal Rights* where I reject the notion that rights protection ought to be linked to moral agency. Moral agency, like particular types of self-awareness, may be relevant for some purposes, but it is irrelevant as to whether the interest of a human or nonhuman in not being treated as a resource ought to be protected with a right. Again, we recognize this where humans are concerned. If a human cannot be considered as a moral agent, that characteristic may be relevant to whether we allow her to make binding contracts, but has absolutely no relevance to whether we use her as a coerced performer in a circus or enslave her for the benefit of moral agents.

I also recognize that Singer and other utilitarians who purport to link moral significance with sentience alone reject rights. There is, however, no conceptual or logical connection between sentience and consequentialist theory. Moreover, as argued above, the equal consideration of the interests of animals that is sought by utilitarian theorists as the goal of animal welfare is impossible as long as animals are property. This is so both because animals have an interest in continued existence that is necessarily ignored as a consequence of property status, and because the interests of animals in avoiding suffering are almost certain not to receive equal consideration if animals are property. Therefore, if animal interests are to be morally significant—if the principle of equal consideration is going to apply to animals—then we must stop treating them as property even within the utilitarian framework. This would commit the utilitarian to the abolition of the property status of nonhumans, and not merely to the better treatment of our animal property, and would mean that both the utilitarian and the rights theorist are both committed to abolition of institutionalized exploitation. This is less a merger of animal rights and animal welfare than it is a recognition that any theory that subscribes to the moral signifi-

69 See Francione, *Introduction to Animal Rights* at 122-25 (cited in note 1). In this sense, I agree with Tom Regan, who also argues that moral patients can be rightholders. See Tom Regan, *The Case for Animal Rights* 279-80 (California 1983). I disagree with Regan, however, to the extent that he rejects sentience alone as sufficient for status as a rightholder. I also disagree with Regan that death is a greater harm for humans than for nonhumans. Id at 324-25. See Francione, *Introduction to Animal Rights* at 215 n 61 (cited in note 1).

70 Interestingly, Bentham rejected property status or slavery for humans, and Singer rejects the notion that we should treat normal humans as replaceable resources. That is, both arguably recognize that treating humans exclusively as resources precludes according them equal consideration. See note 77 and accompanying text.
cance of animal interests requires the abolition of institutional-
ized animal exploitation, which necessarily precludes the equal
consideration of interests. 71

C. The Exploitation of Nonhuman Animals

Finally, Sunstein maintains that even if animals have in-
herent value and are entitled to moral consideration, it does not
follow that we cannot exploit them. For example, Sunstein claims
that I do not recognize that we regard it as acceptable to treat
humans as means to ends in certain situations. Sunstein notes
that “[w]hen you hire a plumber, a lawyer, an architect, or some-
one to clean your house, you are treating them as means, not as
ends.” 72 Sunstein fails to recognize a distinction that I drew ex-
plicitly in Introduction to Animal Rights—the distinction be-
tween treating another as a means to an end and treating an-
other exclusively as a means to an end. I argued that although
we can treat other humans as means to ends,

[t]here is a “red light” that . . . limits our use and treat-
ment of humans. We can value our plumber as a means to
the end of repairing our faucet, and it is all right to compen-
sate a good plumber more highly than we do a lesser
plumber. But if we no longer value the plumber as a
plumber and moreover do not like her or value in any
other way, we cannot treat her solely as an economic
commodity; we cannot enslave her in a forced labor camp;
we cannot eat her, use her in experiments, or turn her
into a pair of shoes. 73

Our use of animals for food, clothing, entertainment, experi-
ments, and the like goes qualitatively beyond the use the exploi-
tation that most of us regard as permissible where humans are
concerned.

Similarly, Sunstein maintains that even if nonhumans have
rights, it does not follow that their rights cannot be overridden
because it may be in their interests to override any rights that
they have, as it is in the case of children, and because:

[w]hen the stakes are sufficiently high, government is
permitted to override what would otherwise be rights,

71 See Francione, Introduction to Animal Rights at xxxiv, 148 (cited in note 1).
72 Sunstein, Slaughterhouse Jive, New Republic at 45 (cited in note 1).
73 Francione, Introduction to Animal Rights at 90 (cited in note 1).
even constitutional rights. Free speech and freedom of movement can be restricted in times of war. In fact, an emergency is not required; you can be banned from writing graffiti on national monuments and even from trespassing on certain areas to carry your views to government officials. If consequences are relevant in the case of human beings, then they matter for animals, too.\textsuperscript{74}

Sunstein maintains that I make too much of our moral intuition that we should not compel some humans to serve as nonconsenting subjects in biomedical experiments even if there were significant collective benefits.

As to Sunstein's analogy to our control of children, I do not believe that children or nonhuman companions have rights to make choices that would endanger them. As to Sunstein's general point that rights may be overridden by consequences, I certainly agree that human rights are not absolute, and it is sometimes difficult to determine the scope of interests protected by a right. As a general matter, however, the defining characteristic of a respect-based right is that the interest that it protects cannot be compromised for consequential considerations alone.\textsuperscript{75}

In \textit{Introduction to Animal Rights}, I argue that there is a great deal of controversy about which interests should be protected by rights, but that the fundamental interest in not being treated as a resource must be protected by a right if the being in question is to be considered as a member of the moral community.\textsuperscript{76} Indeed, although utilitarians generally reject moral rights, some have recognized a right to equal consideration, which may account for Bentham's rejection of human slavery and Singer's notion that normal humans should not be regarded as replaceable resources.\textsuperscript{77} I maintain that the status of being a resource is inconsistent with equal consideration. A right to equal consideration must preclude being treated exclusively as a means to the

\textsuperscript{74} Sunstein, \textit{Slaughterhouse Jive}, New Republic at 45 (cited in note 1).

\textsuperscript{75} For a discussion of the distinction between respect-based and policy-based rights, see Francione, \textit{Introduction to Animal Rights} at 190 n 17 (cited in note 1).

\textsuperscript{76} See id at 92-96.

\textsuperscript{77} See id at 132-37. I maintain that with respect to the institution of human slavery, Bentham and Singer, who are normally regarded as act-utilitarians, adopt at least a rule-utilitarian position and possibly recognize a right to equal consideration that is necessarily violated by treatment exclusively as a resource. Neither Bentham nor Singer maintains that we should inquire on a case-by-case basis whether utility will be increased if we enslave a particular person or treat a particular normal adult as a replaceable resource. Rather, both assume that the treatment of humans as resources is prohibited as a prima facie matter.
ends of others and having one's fundamental interests in physical security, including and most importantly an interest in continued existence, subject to compromise for consequential reasons.

Sunstein fails to distinguish between the basic, pre-legal moral right not to be a resource and legal rights, which may be policy-based and subject to consequential limitation, or respect-based and less amenable to consequential limitation. For example, even if the prohibition on writing graffiti on national monuments is a consequential limitation on the right of free expression rather than a reflection of the speech/conduct distinction that concerns the scope of the right, this is not a situation in which consequences are thought to justify treating the individual exclusively as a resource. Indeed, for Sunstein to regard such an example as relevant in this context indicates a certain distance on his part from the realities of animal exploitation.

The only situation in which consequences are offered to justify the treatment of humans exclusively as means to the ends of others and is thus analogous to the use of humans as nonconsenting subjects in biomedical experiments involves conscription, a practice that is rejected by many precisely because it involves treating the individual exclusively as a resource. Our deontological moral intuition is similar in both cases for precisely the same reason.

CONCLUSION

Ultimately, Sunstein maintains that our moral obligations are limited to ensuring that we ought to treat animals "as well as possible" and allow them "to the extent possible, to live decent lives." He does not, however, explain what informs our understanding of what it means to treat our animal property "as well as possible" or what constitutes a "decent" life. His principle gives little direction that limits present use of animals and it does not pave a road to future reform. Indeed, Sunstein would not find a vivisector, factory farmer, or rodeo operator who would disagree with him on this point. They would and do argue that they treat their animals "as well as possible" and that their animals have "decent lives."

We have for the better part of 200 years accepted that we should treat animals "as well as possible," but, as the reality of

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78 Sunstein, Slaughterhouse Jive, New Republic at 45 (cited in note 1).
animal use makes clear, that is a moral principle that lacks even a scintilla of meaningful content. As long as animals are property, we will be unable to recognize their intrinsic value. As long as we deny that nonhumans, like humans, have an interest in their lives, we will continue to focus our discussion about our moral obligations to animals in ways that very much miss the point and that will not result in any significant change in the prevailing paradigm.