BOOK REVIEWS

ANIMAL LAW—THE CASEBOOK

BY
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I. INTRODUCTION

In the year since the publication of Volume 5 of *Animal Law*, a new legal discipline, involving law and nonhuman animals, has coalesced in the halls of academia and in the minds of the legal profession, media and the public. Newspaper and magazine articles and book reviews about animal law regularly appear in the legal and lay press.[1] Radio and television airwaves sizzle with scuffles over whether nonhuman animals should have legal rights and are alive with interviews of leading lights in this emerging discipline. Classes have sprung up at some of nation's leading law schools, Harvard, Yale, Georgetown, Northwestern, and others. The number of American law schools offering a course in animal law, animal protection law, or animal rights law is nearing twenty. At least one course exists in the United Kingdom, at the University of East Anglia, and another in Holland at the Universiteit Utrecht. Legal academics, prominent in property law or constitutional law, and respected judges publicly discuss and debate whether

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[1] See, e.g., David J. Wolfson, *Power to the Primates*, THE AMERICAN LAWYER, Apr. 2000, at 51; Richard A. Epstein and The Honorable Richard A. Posner, Debate at Northwestern Law School, Apr. 4, 2000 (videotape on file with author); Cass R. Sunstein, *The Chimps' Day in Court*, THE NEW YORK TIMES BOOK REVIEW, Feb. 20, 2000, at 26. Laurence H. Tribe, Presentation at Faneuil Hall, Boston, Massachusetts, Feb. 8, 2000, at 48:40 (videotape on file with author); Richard A. Epstein, *The Next Rights Revolution?*, NATIONAL REVIEW, Nov. 8, 1999, at 44.

nonhuman animals already have legal rights and, if they do not, whether they should and, if they should, what the best way is to attain them. Into these roiling waters has been thrown ANIMAL LAW.[2] Talk about perfect timing.

Until this year, every law school course that concerned nonhuman animals had at least this in common: no casebook. This made it more difficult to find qualified instructors, for only the exceedingly well-informed and those with time enough to conceptualize an entire course, then stitch it from scratch could hope to teach. When there is no casebook, students may be deluged with photocopies of book excerpts, articles, and cases they snap into binders. This gives the impression of experiment and transience, of insubstantiality and ephemerality, when compared to the permanence, weight, and gravity that the bound heftiness of a regular casebook suggests. A student might even fear that a stiff breeze might scatter the intellectual content of her loose-leaf course along with its pages. ANIMAL LAW remedies these problems.

II. AN OVERVIEW OF THE CASEBOOK

In the "Preface," the four admirable authors of ANIMAL LAW,[3] each of whom has taught at least one animal-related course, define "animal law . . . in its simplest (and broadest) sense [as] statutory and decisional law in which the nature—legal, social or biological—of nonhuman animals is an important factor."[4] It is the authors' "hope" that ANIMAL LAW "and any corresponding course would be as stimulating and pertinent to the meat-eating hunter as to the ethical vegan or vegetarian."[5] Their hope is fulfilled.

ANIMAL LAW is divided into eight chapters, each of which discusses the present place of nonhuman animals within a familiar legal arena. An early chapter, entitled "Property Law," explains how nonhuman animals came to be regarded as property and implicitly compares them to humans who once were property or who at least occupied some inferior legal position.[6] In "Contract Law," the authors examine contractual disputes that concern nonhuman animals, usually companion animals, such as landlord/tenant, condominium issues, custody, bailment, and the sale of nonhuman animals as goods and products.[7] Cases and notes that concern the mounting attempts by human companions to obtain compensatory damages that go beyond the mere economic value of a companion animal wrongly killed, as well as claims against the owners of nonhuman animals who have injured human beings, highlight the

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[2] PAMELA D. FRASCH ET AL., ANIMAL LAW (Carolina Academic Press 2000). For more information on ANIMAL LAW, contact Carolina Academic Press, 700 Kent Street, Durham, NC 27701, (919) 489-7486.

[3] The authors of ANIMAL LAW are Pamela D. Frasch, Sonia S. Waisman, Bruce A. Wagman, and Scott Beckstead.

[4] ANIMAL LAW, *supra* note 2, at xvii.

[5] *Id.* at xviii.

[6] *Id.* at 67-107.

[7] *Id.* at 109-74.

chapter on "Tort Law."[8] The severe problem of attaining "standing" to litigate on behalf of nonhuman animals is emphasized in a chapter on "Constitutional Law," along with how the First Amendment and the Due Process Clause of the United States Constitution provide both barriers to and opportunities for litigation.[9] The scope of anti-cruelty statutes is the centerpiece of the chapter on "Criminal Law,"[10] while the evolving place of companion animals in wills and trusts is discussed in an eponymous chapter.[11] Another chapter contains a potpourri of federal and state statutes, such as the Animal Welfare Act,[12] the Endangered Species Act,[13] Marine Mammal Protection Act,[14] Humane Slaughter Act,[15] as well as state open meeting laws, that have an impact upon our treatment of nonhuman animals.[16]

Perhaps the greatest compliment that I can give ANIMAL LAW is to say that, although I have practiced animal protection law for more than twenty years, ANIMAL LAW has already taught me much and proven its worth and mettle as an invaluable resource in the real and difficult world of animal protection litigation. I strongly recommend it as a resource book for every nuts-and-bolts practitioner of animal protection law. I also used it in this spring's class, "Animal Rights Law," that I taught at the Harvard Law School, and I intend to continue to use it in the classroom.

III. THE MEANING OF "ANIMAL LAW"

I agree with the authors that "animal law" incorporates "statutory and decisional law in which the nature—legal, social or biological—of nonhuman animals is an important factor."[17] The term is neutral. "Animal law" can be wielded by those working either for or against the interests of nonhuman animals. In a lawsuit brought to stop an abuse of nonhuman animals, both sides are practicing animal law. "Animal protection law" I define as the law that lawyers can bring to bear in the interests of nonhuman animals within a legal system that characterizes nonhuman animals as legal things. In a lawsuit, usually only one side is practicing animal protection law; the other is practicing animal law. "Animal rights law" is the new discipline to which I referred in the first paragraph. This law, the object of which is to have judges recognize that at least some nonhuman animals possess at least some basic legal rights, does not yet exist. However, the groundwork for its emergence is rapidly being laid.

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8 *Id.* at 175-276.
9 *Id.* at 277-454.
10 *Id.* at 601-714.
11 *Id.* at 715-46.
12 7 U.S.C. §§ 2131-58 (1994).
13 16 U.S.C. §§ 1531-43 (1994).
14 16 U.S.C. §§ 1361-1407 (1994).
15 7 U.S.C. §§ 1901-04 (1994).
16 ANIMAL LAW, *supra* note 2, *at* 455-600.
17 *Id.* at xvii.

The authors of ANIMAL LAW offer an important note. "This is affirmatively *not* a book about animal rights law. Since we take the prerogative of definition, our version of animal law is not synonymous with 'animal rights' activism or with any particular political, moral, or ethical agenda. Rather it is an objective and logical specialization of a challenging area . . . ."[18]

Since I am confident that we can look forward to future editions of ANIMAL LAW, discussion of this disclaimer is needed. By not being a book about animal rights law, it implicitly is. Therefore, I think it fair, if perhaps unusual, to criticize a casebook precisely for not being what it says it is not.

In her three page "Epilogue," entitled "Toward Legal Rights for Animals,"[19] Joyce Tischler, Executive Director of the Animal Legal Defense Fund (of which I was president for a decade) notes that:

> Each year in the United States, we slaughter nine billion animals for food, many of them having been raised in conditions that are abhorrent. Additionally, we hunt 200 million animals annually, kill 20 million in research and testing, another 18 million for dissection, 4-5 million die for the fur industry and 5 million dogs and cats die each year in shelters, because we view them as disposable.[20]

She might have catalogued the horrors of circuses and roadside zoos, trapping and rodeos, and much more.

Not only do we view nonhuman animals as disposable, in law they actually are. They are property, legal things, and the authors of ANIMAL LAW are acutely aware of this fact. Their chapter on "Property Law" begins with "Animals are property" and continues:

> These three words—and their legal implications and practical ramifications—define the most significant doctrines and cases in this book and the realities for current practitioners of animal law . . . [A]NIMAL LAW is not just for attorneys and others who wish to increase the moral and financial value of animals and to deconstruct [and reconstruct] the human-nonhuman paradigm to provide greater protection to the nonhuman species. ANIMAL LAW is probably even more important in terms of personal and financial interest to those who depend on and use nonhuman animals for their livelihood, nutrition, and clothing. It is again those three words—"Animals are property"—that empower the latter group to continue their use of nonhumans, and that effectively preclude most legal efforts to upset the dominant paradigm.[21]

Why would the authors, all members of the Animal Legal Defense Fund, so vigorously omit discussion of the complicated arguments both for and against the legal rights of nonhuman animals and focus their attention instead on "animal law"? We receive a hint in the "Preface" where "animal law" is defined as "an objective and logical specializa-

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[18] *Id.* at xviii (emphasis in original).

[19] *Id.* at 747-49.

[20] *Id.* at 747.

[21] *Id.* at 67.

tion of a challenging area."[22] Being uncertain as to what this meant, I tried two ways to dispel my uncertainty.

First, I suspected that it meant that the casebook was intended to report as astringently as possible on cases in which "the nature—legal, social or biological—of nonhuman animals is an important factor,"[23] that is on "animal law," without becoming involved in the thorny moral and legal questions that necessarily surround the question of whether nonhuman animals should, or should no longer be, legal things. If my suspicion is correct, side-stepping these questions is both impossible and undesirable.

I began a recent book on why at least such nonhuman animals as chimpanzees and bonobos are entitled to basic legal rights with the story of Jerom,[24] a chimpanzee youngster whom biomedical investigators had injected with multiple strains of HIV viruses, beginning when Jerom was just two years old. They were hoping to kill him. To that end they imprisoned him, along with a dozen other chimpanzee youngsters, first in a small, windowless, cinderblock building, then in a large windowless grey concrete and steel box, 9 feet by 11 feet by 8.5 feet. For over a decade,

> [t]he front and ceiling of each cell were a checkerboard of steel bars, crisscrossed in three-inch squares. The rear wall was the same grey concrete. A sliding door was set into the eight-inch-thick concrete side walls. Each door was punctured by a one-half-inch hole through which a chimpanzee could catch glimpses of his neighbors. Each cell was flushed by a red rubber fire hose twice a day and was regularly scrubbed with deck brushes and disinfected with chemicals. Incandescent bulbs hanging from the dropped ceiling provided the only light. Sometimes the cold overstrained the box's inadequate heating units and the temperature would drop below 50 degrees F . . . no one had any regular sense of changes in weather or the turn of the seasons. None of them knew whether it was day or night.[25]

Just shy of Jerom's fourteenth birthday he died.[26]

On February 8, 2000, at Faneuil Hall in Boston, the eminent Harvard Law School constitutional law professor Laurence Tribe observed that "[c]learly Jerom was enslaved." As we enslave vast numbers of nonhuman animals, treat them in unspeakable and painful ways, and kill them, and because their legal thinghood is what allows us to do it, whether they should be legal things or legal persons is one of the great moral and legal issues of this, or any, time. An animal's legal thinghood either implicitly or explicitly permeates every case, statute, and regulation that affects them. One may be for or against any change in their legal status as thing, but the danger of implicit acceptance of this status lies embedded within silence. A quarter cen-

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22 *Id.* at xviii.

23 *Id.* at xvii.

24 STEVEN M. WISE, RATTLING THE CAGE—TOWARD LEGAL RIGHTS FOR ANIMALS (2000).

25 *Id.* at 2.

26 *Id.* at 1.

tury ago, Professor Tribe warned environmentalists against "helping to legitimate a system of discourse which so structures human thought and feeling as to erode, over the long run, the very sense of obligation which provided the initial impetus for his own protective efforts." More recently Professor Gary Francione worried that animal rights activist's use of anti-cruelty statutes may "reinforce and support the status of animals as property." I concur. Even the failure to air thoroughly the questions and presuppositions that swirl about the legal thinghood of nonhuman animals may accomplish an undesired result.

As is often the case with nonhuman animal slavery, we can learn from the lessons of human slavery. How strange it seems to browse a Roman legal text, say the Institutes of Gaius or Justinian, in which human slaves are matter-of-factly grouped with horses and cows as legal things. No hint of legal ferment or moral outrage brews beneath the bare words. Of course, casebooks, even law schools, were not a part of the fledgling lawyer's education when our nation was cursed with human slavery. Abraham Lincoln tersely explained his legal education in 1860: "He studied with nobody."[27] In 1834 he simply purchased Blackstone's commentaries at auction and "went at it in good earnest."[28] By then, the fight over human slavery had long been raging around the globe.

I own the eighteenth London, and first American, edition of Blackstone's commentaries, published in 1832. Leafing through its battered and stained pages, I find Blackstone harking to natural law, writing that "the law of England abhors, and will not endure the existence of, slavery . . . And now it is laid down, that a slave or negro, the instant he lands in England, becomes a freeman; that is the law will protect him in the enjoyment of his person and his property."[29] Two major legal treatises on slavery took up cudgels in one year, 1858. T.R.R. Cobb's, *The Law of Negro Slavery*, hundreds of pages in length, carefully argued and thoroughly supported the argument that, contrary to the Blackstonian view of natural law and slavery, which had found its way into numerous decisions, human bondage was legal and securely grounded in natural law. Further, Cobb presented medical and biological evidence that blacks were natural slaves. At almost the same time, in his *The Law of Freedom and Bondage in the United States*, John Codman Hurd tried to demolish natural law itself as a ground for slave jurisprudence. Not only was this struggle reflected within various legal treatises, but the treatises themselves became part of the argument.

The second way in which I sought to dispel my uncertainty was to ask the authors. They were kind enough to reply. A majority noted that casebooks generally concentrate on cases, while citing to other sorts of materials in the "Notes." Accordingly, if a student reads the "Notes" in ANIMAL LAW and the suggested readings, she will get

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27 ROY P. BASLER—COLLECTED WORKS OF ABRAHAM LINCOLN (1955).

28 *Id.*

29 1 WILLIAM BLACKSTONE (1832).

"animal rights law" aplenty. Moreover, law schools can be conservative places and casebooks for novel courses might have a greater chance of acceptance if they at least appear like regular casebooks. The authors also noted that most law students are not involved with the animal rights movement, yet might take a course in "animal law" if they think that it will be an objective survey of the field, rather than a place where they might expect to be ridiculed for their beliefs. Of course, a good casebook should respectfully and even-handedly present all viewpoints.

Undoubtedly, if a student reads all, or even a lot, of the referenced articles in ANIMAL LAW, she will get a healthy dose of "animal rights law." However, most students struggle to keep up with the assigned major readings and only the singular student will bother to go to the library to search out briefly noted or merely cited sources. This is not to say that any animal-related casebook should be presented as an "animal rights law" book. However, any animal-related law class should prominently feature the question of whether nonhuman animals should be treated as property or persons and every possible argument on that issue, pro and con, should be presented and thoroughly aired. If it does not, the class and the book risk becoming just a simple compendium of "animal law" cases that one can study in property, torts, constitutional law, contracts, wills and trusts, environmental law, and criminal law.

IV. CONCLUSION

In the end, any attempt to present the law regarding nonhuman animals "objectively," that is in a way that ignores the mounting ferment around the moral and legal status of nonhuman animals, may end up as self-defeating. While a major value of ANIMAL LAW rests in its use as a resource for the animal protection law practitioner, one of its purposes is certainly that of a casebook. However, law schools tend to offer animal-related courses only after sufficient students demand the course, loudly and persistently. In my experience, these students are usually those committed, however vaguely, to the idea of "animal rights law." The course they seek is precisely one that grapples with the difficult moral and legal questions that surround the legal personhood of nonhuman animals and whether we should be able to use and abuse them as we do. Those who would prefer to see the law remain as it is rarely seek an animal-related class; they would prefer that it never be offered or that it wither away. Without an emphasis in a course and in a course book on the important question of "animal rights law," few courses may spring up or be sustained.

STEVEN M. WISE: RATTLING THE CAGE— TOWARD LEGAL RIGHTS FOR ANIMALS

By
David J. Wolfson*

On a cold Boston night earlier this year, nearly 100 people crammed into Faneuil Hall to watch two Harvard Law School academics, Steven Wise and Laurence Tribe, engage in a discussion about legal rights. Wise began his presentation by acknowledging that he was speaking from the "cradle of liberty," the very building where Samuel Adams rallied the citizens of Boston in support of independence from Great Britain and George Washington toasted the nation on its first birthday. Given these historic surroundings, Wise felt that the subject of his presentation was particularly appropriate because he intended to focus on "liberty;" specifically, the right of an individual to be free from capture, imprisonment and experimentation. On this particular night, the individuals in question were animals.[1]

Wise, who teaches Harvard Law School's first animal rights law class, explained to the audience, as he passionately does in his book, *Rattling the Cage—Toward Legal Rights For Animals*, why he believes chimpanzees and bonobos (or "pygmy chimpanzees") should be viewed as "persons" rather than "things" under the common law so as to entitle such animals to fundamental legal rights.[2]

Following Wise's remarks, Professor Tribe stated that he shared Wise's "outrage" at the "grotesque" way animals are treated today. While Tribe did not agree with some of Wise's arguments, he did believe that many laws protecting animals were "pathetically inadequate," and that animals *could* be granted legal rights; indeed, it was a "myth" to state that legal rights had never been accorded to nonhuman beings. Professor Tribe also stated that he felt uncomfortable with the concept that he "owned" his dogs, and that it was not unreasonable to argue that certain animals are entitled to the Eighth Amendment protection from cruel and unusual punishment, or even

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1 Steven M. Wise, Address at The Great Hall, Faneuil Hall, Boston, MA (Feb. 8, 2000) (videotape on file with *Animal Law*).

2 *Id.*

the Thirteenth Amendment protection from slavery and involuntary servitude![3]

In case you missed it, the debate on whether animals should be legally classified as "property," as they are today, and whether they should have "legal rights," has gone mainstream. Animal law is now taught in a number of law schools, has its own casebook and law journal, and was recently the subject of a front page article in The New York Times. Professor Tribe is only one of a number of notable legal academics who are currently addressing the issue: Professor Bruce Ackerman, Yale Law School, is the faculty advisor for an accredited student-led Animal Law Reading Group at Yale; Professor Cass R. Sunstein, University of Chicago, recently published an article entitled "Standing For Animals" in which he stated that animals have legal rights and that, "the cruel treatment of animals seems to me one of the great unaddressed legal problems of our time";[4] and Professor John Hart Ely, Miami Law School, and former Dean of Stanford Law School, has declared his concern about "the heedless abuse of animals to fulfill what are more often than not human 'needs' (for a steak or a shampoo) that pale by comparison to the torture inflicted by factory farming, unnecessary 'testing', and the like."[5]

If, as John Stuart Mill declared, "every great movement must experience three stages: ridicule, discussion and adoption," the animal legal movement has progressed from the stage of ridicule to the stage of discussion. Steven Wise (who also teaches animal rights law at Vermont Law School, and the John Marshall Law School), former President of the Animal Legal Defense Fund, is in large part responsible for this profound shift in legal thinking, although credit must also go to Professor Gary Francione of Rutgers University School of Law – Newark. *Rattling the Cage* is an emotional yet scholarly work, exhaustively researched and documented. In an articulate and, at times, humorous survey of law, history, science and philosophy, Wise argues for change in the common law's treatment of animals. He believes that the common law should recognize the "legal personhood" of chimpanzees and bonobos so that they will receive protection from "serious infringements upon their bodily integrity and bodily liberty" before they are, in Wise's terms, hunted, kidnapped, eaten and experimented into extinction.[6]

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[3] *Id.*

[4] Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000).

[5] Professor John Hart Ely, Statement read at the Conference on the Legal Status of Non-Human Animals, Association of the Bar of the City of New York (Sept. 25, 1999).

[6] STEVEN M. WISE, RATTLING THE CAGE 7 (2000). Wise seems to argue that, at this time, animals do not possess legal rights either under the common law or pursuant to statute. It is also his position that legal "personhood," rather than "thinghood," is a prerequisite for legal rights, and that the common law should evolve to move animals from the category of property to persons; Wise believes that, if this occurred, certain animals would be entitled to certain *common law* legal rights, such as the right to bodily integrity. Despite this position, Wise (and both Professors Francione and Sunstein)

In the eyes of a judge in the year 2000, under the common law a chimpanzee (or dolphin, elephant, dog or whale) is a legal "thing," an item of "property," to be owned and treated as an owner wishes. While extreme and gratuitous cruelty to most animals is prohibited, at least in part, by state criminal anti-cruelty statutes (and certain limited federal laws), these statutes are rarely enforced and contain only minor penalties.[7] Most importantly, these statutes are riddled with exceptions: for example, any "common farming practice" or medical experiment is exempted from the statutory definition of cruelty.[8] Considering that ninety-five percent of all animals killed annually in the United States are animals raised for

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recognize that animals can exist in a hybrid state: as property with some limited form of legal rights, or, perhaps, partial legal persons. Francione does not believe that this hybrid legal status can lead to worthwhile or viable legal rights for animals. GARY FRANCIONE, ANIMALS, PROPERTY AND THE LAW 14 (1995) ("I do not maintain that characterizing sentient beings as property *necessarily* means that those beings will be treated exactly the same as inanimate objects or that property can never have rights as a matter of formal jurisprudential theory. For example, although slaves were, for some purposes, considered 'persons' who technically held certain rights, those rights were not particularly effective in providing any real protection for slaves. We *could* decide to grant certain rights to animals while continuing to regard them as property. The problem is that as long as property is, as a matter of legal theory, regarded as that which cannot have interests or cannot have interests that transcend the rights of property owners to use their property, then there will probably always be a gap between what the law permits people to do with animals and what any acceptable moral theory and basic decency tell us is appropriate."). By contrast, Wise believes that, although current statutes do not provide legal rights for animals, a hybrid legal status would be beneficial so long as animals possessed worthwhile legal rights (such as the right to bodily integrity), even though animals may remain classified as property while possessing such rights. Sunstein, however, believes that current statutes already provide viable legal rights; thus, he agrees with Wise that animals can enjoy viable legal rights despite their property status. *See* Sunstein, *supra* note 4, at 1336-37 ("Indeed, it would not be too much to say that federal and state law now guarantees a robust set of animal rights, at least nominally. Some people believe that while animals lack rights, human beings have duties toward them. It is not clear what turns on this distinction, a point to which I will return. But it is clear that as a matter of positive law, animals have rights in the same sense that people do, at least under the many statutes that are enforceable only by public officials. . . ."); *Id.* at 167 ("We can imagine a situation in which animals are owned, but in which the right of ownership does not include the right to inflict suffering"); *Id.* at 165 ("But the rhetoric does matter. In the long term, it would indeed make sense to think of animals as something other than property, partly in order to clarify their status as being with rights of their own."). *See also* Jerold Tannenbaum, *Animals and the Law, Property, Cruelty, Rights, in* HUMANS AND OTHER ANIMALS 125, 167-68 (1995) ("[C]ruelty laws today clearly are intended at the very least to protect animals. They create legal duties to animals. They therefore afford legal rights for animals. . . . [T]here is nothing in the legal status of animals as property, or in cruelty laws, that precludes the ascription of legal rights to animals.").

[7] Pamela Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69 (1999).

[8] *Id.* at 76-77. Sunstein, *supra* note 4, at 1339 ("[S]tate law protections do not apply to the use of animals for medical or scientific purposes, to cruelty to farm animals, and to the production and use of animals as food; here, cruel and abusive practices are generally unregulated at the state level.").

food[9] (approximately 8 billion in 1999),[10] and that a large number of common intensive confinement farming practices in this country, while legally sanctioned, are demonstrably cruel (as recognized by the recent English McLibel judgment and European Union law),[11] it is fair to state that the vast majority of animals in the United States have no legal protection from a staggering number of egregious cruel practices.

As Wise recognizes, to a great extent the common law is borrowed from the past. In the case of animals, today's common law is identical to Roman law set down in Emperor Justinian's Digests and Institutes. The law was essentially copied *verbatim* by Bracton in the Middle Ages, Coke, and then Blackstone,[12] and in turn imported into the United States when James Kent, former chancellor of New York, set the common law out in a manner that "would have tempted Justinian, Bracton, and Blackstone to sue for plagiarism."[13] But as Wise points out:

> [W]hen we borrow the law, we borrow the past. The law of a modern society often springs from a different time and place, perhaps even from a culture that may have believed in an entirely different cosmology or belief about how the universe works. Legal rules that may have made very good sense when fashioned may make little sense when transplanted to a vastly different time, place and culture. Raised by age to the status of self-evident truths, ancient legal rules mindlessly borrowed may perpetrate ancient injustices that may once have been less unjust because we knew no better. But they may no longer reflect shared values and often constitute little more than evidence for the extraordinary respect that lawmakers have for the past.[14]

The Romans classified animals as "things" or property because they believed (in large part based on Greek philosophy) that animals were non-rational beings that existed in this world solely to serve humankind. For similar reasons, the Romans classified women, slaves, children and the insane as "things." But, Wise argues we no longer live in Roman times. Surely, "it is time that judges consider that as ancient foundations have begun to rot away, so the law of animals that rest upon them should be changed."[15]

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[9] David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 133 (1996) (calculations based on numbers set forth in this article).

[10] Public Education Network, *Farm Animals Slaughtered in the U.S. during 1998* (visited May 24, 2000) <http://pen-online.reshall.berkeley.edu/PEN185.htm>.

[11] David J. Wolfson, *McLibel*, 5 ANIMAL L. 21 (1999). *See* Sunstein, *supra* note 4, at 165 ["It is possible to imagine a regime of animal welfare in which the permissible justifications for intrusions are so numerous and so undemanding, that animals are hardly protected at all. (This now appears to be true with respect to animals raised for food, a situation in which protections against cruelty are extremely weak.")].

[12] RATTLING THE CAGE, *supra* note 6, at 42.

[13] *Id.*

[14] *Id.* at 24.

[15] *Id.* at 47.

Wise's criticism of the belief that "animals are non-rational beings existing solely to serve humans"[16] is hard to refute. We know, thanks to Darwin, that animals do not exist solely for the sake of humans; that there is no sharp dichotomy between humans and other animals. In fact, chimpanzees are more closely related to humans than to gorillas. We also know, as Wise documents, that modern science demonstrates that chimpanzees and bonobos are conscious and self-conscious; understand cause and effect, relationships among objects, and even relationships among relationships; use and make tools; live in societies so complex and fluid that they have been dubbed Machiavellian; deceive and empathize; count simple numbers and add fractions; treat their illnesses with medicinal plants; communicate with symbols; understand English and can now use or sign lexigram languages.[17]

Consider the behavior of Lucy, who was taught sign language by Roger Fouts, and who would greet her teacher in the following manner:

> Lucy would greet me at the door, give me a hug, and show me into the house. While I sat in the kitchen, six-year-old Lucy would go to the stove, grab the teakettle, and fill it with water from the kitchen sink. She did all this chimpanzee style, by jumping from counter to counter. After getting two cups and two tea bags out of the cupboard, she would brew the tea and serve it like the perfect hostess. Then her American Sign Language lesson would begin.[18]

Unfortunately for Lucy, a mere piece of property, her ultimate fate was to be shipped to a chimpanzee rehabilitation center in Senegal, then flown to Gambia, where poachers shot and skinned her, and hacked of her feet and hands for sale as trophies.[19]

The problem, according to Wise, is that whenever an argument is made to a judge that Lucy should not be classified as a legal "thing," without viable legal rights, the judge simply reaches back to precedent that declares animals are property, without making any attempt to justify the precedent itself, and that is that. The Minnesota Court of Appeals recently ruled an individual could not recover more than the fair market value of his dog ("Mack") when Mack was shot and killed by the police: "[The owner of the dog] persuasively argues that pets have a special place in society. Unlike other personal property, pets provide companionship to their owners . . . [b]ut Minnesota law treats pets as property. This court has an obligation to decide cases in a manner consistent with existing law."[20] While the occasional dissenting voice can be heard, such as a New York Supreme Court Judge who held in 1979 that "this court now overrules prior precedent and holds

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16 *Id.* at 17.

17 *Id.* at 6.

18 *Id.* at 106.

19 *Id.* at 239.

20 Soucek v. Banham, 524 N.W.2d 478, 481 (Minn. Ct. App. 1994).

that a pet is not just a thing but occupies a special place somewhere between a person and a piece of property,"[21] such opinions are typically viewed by other courts as "aberrations flying in the face of overwhelming authority to the contrary."[22]

In response to this dilemma, many animal rights attorneys abandon the courts for the legislature in the hope that laws can be enacted to grant legal rights and greater protection to animals. This approach has achieved some success: for example, New Zealand recently banned experimentation on great apes.[23] Wise, however, believes that worthwhile legal rights for animals will originate from the interpretation of common law by judges rather than from statutes generated by politicians. This is because of the common law's flexibility, as well as its adherence to performing justice and its reliance on rationality. In Wise's opinion, once a judge, through the application of scientific evidence and reasoned judgment, realizes that precedent in relation to animals is based on faulty reasoning, she will overrule it and declare certain animals legal persons who are, consequently, entitled to certain fundamental legal rights. For, as Lord Mansfield declared in 1772, when he reworked precedent in setting free the slave James Somerset, the strength of the common law is its ability "to work itself pure."[24]

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21 Corso v. Crawford Dog and Cat Hosp., Inc., 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct., 1979). *See also*, Morgan v. Kroupa, 702 A.2d 630, 633 (Vt. 1997), in which the Supreme Court of Vermont cited the Corso holding with approval and stated that "modern courts have recognized that pets generally do not fit neatly within traditional property law principles."

22 Gluckman v. American Airlines, 844 F. Supp. 151, 158 (S.D.N.Y. 1994).

23 Dr. Peter Singer, *New Zealand Takes the First Step*, BRIDGING THE GAP (Great Ape Project International) Autumn/Winter 1999, at 1, *available at* Great Ape Project International, *Bridging the Gap* (visited May 24, 2000) <http://www.greatapeproject.org/newsletters/btg991.html>.

24 RATTLING THE CAGE, *supra* note 6, at 103. Wise is unclear as to whether the recognition of common law legal personhood would entitle animals to legal rights under current legislation, such as anti-cruelty statutes. *See*, Steven Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 912 (1998) ["In some jurisdictions, however, anti-cruelty statutes are recognized as protecting the interests of nonhuman animals . . . The refusal of the courts of these jurisdictions to recognize that at least some nonhuman animals may have a claim-right (or a power-right to have suit brought by a representative) against cruel treatment under a statute enacted to benefit them and to protect their interests, underscores the arbitrariness and injustice of their continued legal thinghood."]. And while Wise does not believe that a legislature must formally declare animals to be legal persons in order to bestow legal rights, he does believe that only persons can possess legal rights and that a legislative grant of legal rights would, in effect, implicitly recognize the legal personhood of those animals who received such rights. It is unclear, however, to this author at least, how the use of the term "personhood" should be applied in the context of statutory legal rights. Sunstein, for example, believes that animals already have statutory legal rights, that legislatures could grant animals standing, and that the grant of standing would entitle such animals to directly assert such legal rights. But Sunstein believes that such viable statutory legal rights exist in the absence of personhood. Sunstein, *supra* note 4, at 1365. ("I do not believe it is necessary to consider animals to be persons, or to insist on certain cognitive powers in order to say that, by virtue of their capacity to suffer, they deserve legal rights against cruelty, abuse or neglect."). Still,

While Wise spends considerable time analogizing the legal treatment of animals to slaves and fetuses, he does not argue that nonhuman animals are identical to humans. Instead, he analogizes that the common law has, in the past, classified slaves and fetuses as legal things due to faulty reasoning. But, when judges recognized such faulty reasoning, they overruled bad precedent. Thus, in 1941, a court ruled that a fetus was a person because "the law must keep pace with science."[25] In the same context, a New York Court recognized that it was bringing "the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.'"[26] For "when the ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course is for the judge to pass through them undeterred."[27] For similar reasons, Wise believes the outdated legal treatment of animals should be discarded.

An inevitable criticism of *Rattling the Cage* runs from the author's reliance on the benchmark of "autonomy" for the granting of fundamental legal rights to animals. According to Wise, the common law's rationale for granting personhood and, consequently, fundamental legal rights, to humans is based on the fact that humans posses a "dignity produced by autonomy."[28] While Wise is somewhat unclear on what the common law's definition of "autonomy" actually is (because, I assume, it is far from clearly defined in the common law itself), the level of autonomy necessary for common law legal rights seems to be a certain level of consciousness, the ability to desire and act intentionally, and an awareness of self sufficient to feel that one is living one's own life. For example, it has been argued that an individual has a form of autonomy if she has preferences and the ability to act to satisfy them, or if she has desires or beliefs, and communicates such desires or beliefs.

Wise correctly notes that not only does the common law grant legal personhood and, consequently, viable legal rights, to humans who

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even though Sunstein seems to believe that, in the statutory context, personhood and viable legal rights (through the grant of standing) are not necessarily concomitant, how, in practice, would Sunstein's grant of viable legal rights (through standing) differ from statutory personhood? Surely, once such standing existed, animals would have everything they needed in relation to statutory legal rights. Or to put in another way, what would such animals receive as a result of an explicit grant of statutory personhood that they did not already have? Interestingly, Sunstein also states that a legislative grant of standing to animals would be a "far more limited" step than the common law recognition of legal personhood urged by Wise. Sunstein, *supra* note 4, at 1359. Presumably, this is because a legislative grant of standing for animals would not necessarily result in judges viewing animals as legal "persons" under the common law with respect to fundamental common law legal rights. This begs the question of whether a legislature could take the next step and provide for an explicit declaration of legal personhood for animals so as to entitle such animals to common law fundamental legal rights, thus obviating the need for judges to reach the conclusion that Wise so cogently argues for.

25 RATTLING THE CAGE, *supra* note 6, at 111.

26 *Id.*

27 *Id.*

28 *Id.* at 243-44.

possess various levels of autonomy, but judges have created legal fictions to grant legal personhood to humans with no autonomy at all (e.g., a baby with just a brain stem). Wise argues that since chimpanzees and bonobos clearly possess some autonomy, the common law principle of equality, whereby likes are treated alike, demands that chimpanzees and bonobos should be similarly recognized as legal persons and granted certain legal rights; at a minimum, these legal rights should be similar to legal rights granted to non-autonomous humans. In Wise's opinion, no relevant difference exists between humans, on the one hand, and chimpanzees and bonobos, on the other, to halt this legal evolution.

The obvious limitation to this theory is the lack of clarity as to which animals possess the level of autonomy necessary for personhood and the resultant legal rights. Wise states that "[j]udges must determine the entitlement to dignity-rights of any nonhuman animal the same way they determine the entitlements of chimpanzees, bonobos and human beings—according to autonomy. Autonomy, of course, arises from minds."[29] But while organgutans, rhesus monkeys, dolphins and dogs may demonstrate the level of autonomy necessary to meet this "standard" for legal rights, Wise recognizes that is unknown whether all monkeys will.[30] And while parrots might, who knows about ferrets, mice, badgers, seals, and so on.

Consequently, Wise may be fairly criticized for championing a standard for legal rights for animals that is too stingy. As Professor Cass Sunstein recently stated in his review of *Rattling the Cage* in *The New York Times Book Review* (in paraphrasing Bentham), "why isn't the capacity to suffer a sufficient grounds for legal rights of some kind?"[31] Similarly, Sunstein posits in his recent article on standing and animal rights, "[N]o one seriously urges that animals should lack legally enforceable claims against egregious cruelty, and animals have long had a wide range of rights against cruelty and mistreatment under state law . . . . The capacity to suffer is, in this sense, a sufficient basis for legal rights."[32]

It is certainly hard to ignore the fact that if Wise's position was adopted a number of animals that are sentient (and that can suffer pain and distress) would not be granted legal rights. And many may be understandably uncomfortable with the linkage of rights to what may seem like intelligence, rather than sentience. Still, it should be recognized that Wise can only work with what the common law provides him. The common law does not tie legal rights to sentience or suffering; instead, it ties legal rights to personhood, and, in turn, personhood to dignity and autonomy. In this context, Wise has molded a persua-

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[29] *Id.* at 268.

[30] *Id.* at 269.

[31] Cass R. Sunstein, *The Chimps' Day in Court*, N.Y. TIMES BOOK REVIEW, Feb. 20, 2000, at 26.

[32] Sunstein, *supra* note 4 at 1363.

sive and revolutionary argument that the common law possesses the necessary tools to grant *certain* non-human animals *certain* legal rights. This is a huge step and should be recognized as such. It is also impossible to predict the ramifications of Wise's position. The recognition of legal rights for chimpanzees and bonobos would cause a profound change in society's view of animals which could, in turn, lead to the embrace of a more generous standard for the grant of legal rights to animals.[33]

Wise could be criticized for relying on the common law in the first place. At the outset, the common law limits the grant of legal rights to legal personhood, and the grant of legal personhood to autonomy. By contrast, the legislature is free to justify the grant of legal rights to animals on suffering or sentience (or any other relevant characteristic), if it chooses. Furthermore, although Professor Gary Francione agrees with Wise that the legal personhood of animals should be recognized so as to create legal rights for animals, Francione does not think it realistic to believe that a judge interpreting the common law will grant legal personhood to animals. Instead, he believes it is far more likely viable legal rights will be granted by the legislature. For the interpretation of the common law relies on judges, who tend to be older, privileged, notably conservative and unlikely to challenge the profitable paradigm of animals as a property. These are unlikely leaders of the most radical social change movement in history! Certainly, social change in the United States has often not been driven by the courts; for example, the abolition of slavery, and the granting of civil rights and women's rights, occurred through legislative reform. Why should Wise place his faith in the common law process when it failed to prohibit the enslavement of African-Americans in the United States?

One possible response is that, despite this valid criticism, the common law has proven itself to be an agent of significant social change: for example, as Wise documents, the freeing of slaves in England (it could be argued that Lord Mansfield was old, conservative and commercially focused) and the recognition of legal personhood and fundamental legal rights for fetuses. Moreover, judges in the near future (many of whom may have studied animal law with Professors Wise, Francione, or others) will be far more racially and gender diverse than

33 While the limitations of the common law may restrict legal personhood and legal rights to the benchmark of autonomy, this is not the case with respect to the grant of legal rights through legislation. And, as Sunstein suggests, it could be argued that the foundation for the current statutory protection of animals is grounded in the recognition that animals are sentient beings that suffer. *See* Sunstein, *supra* note 4 at 1363. *See also*, Wise, *Hardly a Revolution*, *supra* note 24, at 912. Consequently, it would be a natural evolution for legislatures to base any future grant of legal rights on the principles of sentience and suffering. This broader "benchmark" for legal rights for animals supports Francione's and Sunstein's focus on the legislature as a positive source of progressive change in the context of legal rights for animals. Indeed, it is unclear what value the term "legal personhood" has in the context of statutory legal rights despite its undoubted importance as a conduit for common law legal rights; instead, the issue of standing seems to be the key prerequisite for effective legal rights. *See supra* note 24.

today. It could also be argued that the treatment of animals in the United States today can be distinguished from the historical treatment of slaves by American judges. In the past, when natural law and fundamental common law legal rights were not acknowledged to the extent they are today, many jurists were circumscribed by the fact that the United States Constitution recognized the institution of slavery.[34] This positive constitutional "stamp of approval" effectively restrained judges from interpreting the common law to prohibit slavery. By contrast, given the rise of natural law and fundamental legal rights in the post-Nuremberg world, a judge may now be free to interpret the common law to grant the legal rights of bodily integrity and bodily liberty to animals, even in the face of statutes that, it could be argued, specifically sanction the "enslavement" of animals or invade the bodily integrity and bodily liberty of animals.

In addition, while the judiciary can be accused of conservatism, the legislature may not be the best institution to challenge the economic model of animal use; any change for animals raised for food is certainly unlikely given the power and control of agricultural interests over legislative committees that continually veto statutes aimed at humane treatment (although an eye should be kept on the ballot initiative, a truly exciting and powerful tool for change). Perhaps judges may be less susceptible to economic pressure from industries that profit from animal abuse. It was a judge, the late Charles R. Richey, who stated in a lawsuit regarding the Animal Welfare Act, "This case involves animals, a subject that should be of great importance to all humankind . . . furthermore, this case illustrates the need for Congressional reform . . . and also illustrates that Congress, in large measure, is beholden to special interest groups who are unknown to the general public."[35]

While Wise's arguments may seem extremely optimistic, consider the concurring opinion of Justice Eric Andell of the Texas Court of Appeals in the 1994 case *Bueckner v. Hamel*:

> Scientific research has provided a wealth of understanding to us that we cannot rightly ignore. We now know that mammals share with us a great many emotive and cognitive characteristics, and that higher primates are very similar to humans neurologically and genetically. It is not simplistic, ill-informed sentiment that has led our society to observe with compassion the occasionally televised plights of stranded whales and dolphins. It is, on the contrary, a recognition of a kinship that reaches across species boundaries. The law must be informed by evolving knowledge and attitudes. Otherwise, it risks becoming irrelevant as a means of revolving conflicts. Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, property. The law should reflect society's recognition that animals are sentient and emotive beings . . . .[36]

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[34] ROBERT COVER, JUSTICE ACCUSED 151-52 (1975).

[35] Animal Legal Defense Fund v. Glickman, 943 F. Supp 44, 50-51 (D.D.C., 1996).

[36] Bueckner v. Hamel, 886 S.W.2d 368, 377 (Tex. Ct. App. 1994).

Or consider the High Court of India's recent opinion:

> It is not only our fundamental duty to show compassion to our animal friends, but also to recognize and protect their rights. In this context, we may ask why shouldn't our educational institutions offer a course on "Animal Rights Law" with an emphasis on fundamental rights as has been done by Harvard Law School recently. If humans are entitled to fundamental rights, why not animals? In our considered opinion, legal rights should not be the exclusive preserve of the human, and have to be extended beyond people thereby dismantling the thick legal wall with humans all on the one side and all non-humans on the other side. While the law currently protects wild life and endangered species from extinction, animals are denied rights, an anachronism which must necessarily change.[37]

Ultimately, *Rattling the Cage* is an important and groundbreaking book. Regardless of whether chimpanzees or bonobos should (or will) be recognized as legal persons and granted fundamental legal rights under the common law, Wise's arguments demand that we stop bowing to ghosts, and justifying the legal classification of animals as property, without viable legal rights, by repeating precedent without question. As Oliver Wendell Holmes stated, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry V."[38] Those who wish to continue the status quo should be prepared to provide better reasoning than past justifications that, as Wise persuasively demonstrates, are based on ancient cultural or religious beliefs, faulty science or human prejudice. If the current legal status of animals as property should be maintained, better justifications are needed.[39]

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37 N.R. Nair v. UOI, (Kerala High Court of India, June 6, 2000), slip op. at 38.

38 RATTLING THE CAGE, *supra* note 6, at 98.

39 But *See* Francione, *supra* note 6, at 14. ["We *could* decide to grant certain rights to animals while continuing to regard them as property. The problem is that as long as property is, as a matter of legal theory, regarded as that which cannot have interests or cannot have interests that transcend the rights of property owners to use their property, then there will probably always be a gap between what the law permits people to do with animals and what any acceptable moral theory and basic decency tell us is appropriate. 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. . ."]. Contra Sunstein *supra* note 4, at 165 ["It is possible to imagine a regime of animal welfare in which the interest in avoiding pain and suffering is taken extremely seriously, so much so that it overcomes significant human interests. (We could imagine protections against cruelty in connection with raising animals for food that would be so stringent, and so expensive, as to reduce both the supply of animals to eat and the demand for eating animals). . . . We can imagine a situation in which animals are owned, but in which the right of ownership does not include the right to inflict suffering; indeed, that is very much the law as it now stands. The rights of ownership is significantly qualified by restrictions on what can be done with that right. There is nothing unusual about this; rights of ownership are always qualified in one way or another. I do not believe it is necessary to consider animals to be persons, or to insist on certain cognitive powers in order to say that, by virtue of their capacity to suffer, they deserve legal rights against cruelty, abuse or neglect. But the rhetoric does matter. In the long term, it would indeed make sense to think of animals as something other than property, partly in order to clarify their status as being with

Finally, even if Wise's arguments do not persuade judges or lawyers of the present generation, they will have a profound impact on lawyers and judges who practice in twenty or thirty years. For, "in the face of attacks upon core beliefs," knowledge tends to advance, in the words of the economist Paul Samuelson, "funeral by funeral."[40] Or as physician Max Planck has stated "a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it."[41] After all, it was only in 1992, 359 years after condemning Galileo as a heretic for observing that the world did not revolve around the earth, that the Vatican apologized and admitted the astronomer had a point. We can hope it won't take an equally long time for courts to realize that, in the words of Wise, "animals are trapped in a legal universe that no longer exists."[42]

rights of their own."]. This author seriously questions Sunstein's statement that, as the law now stands, the right of ownership is significantly qualified and generally does not include the right to inflict suffering. In fact, according to the law as it "now stands," a common or normal or customary farming practice, no matter how cruel and no matter how much suffering occurs, *cannot* be found to be a violation of the majority of state anti-cruelty statutes. As a result, owners (or the farming community) can currently inflict an egregious amount of suffering on animals who represent over ninety-five percent (approximately 8 *billion*) of the animals killed annually in the United States. Thus, the farming community determines what is or is not cruelty (under the criminal law) to animals in their care. It is hard to argue that, in this context, the right of ownership is significantly qualified and does not include the right to inflict suffering. *See* David J. Wolfson, *Beyond the Law*, supra note 9; David J. Wolfson, *McLibel*, *supra* note 11.

40 RATTLING THE CAGE, *supra* note 6, at 72.

41 *Id.*

42 *Id.* at 9.