# WILL THE HEAVENS FALL? DE-RADICALIZING THE PRECEDENT-BREAKING DECISION

BY
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*This article offers an extended analogy for the purpose of posing basic questions about proposals for granting legal rights to some nonhuman animals. The analogy is drawn from the precedent-breaking eighteenth century English case* Somerset v. Stewart*, which liberated an African slave. The article argues that one can identify features of the eighteenth century debate which illuminate features of today's debate over proposed uses of centrally important legal concepts for some nonhuman animals. Using the comparison for the limited task of highlighting the complex cultural backdrop in each situation, the article suggests that the comparison helps one see the nature and possibilities of precedent-breaking decisions that rely on various non-legal resources available to judges who, because of conscience, principle, or policy considerations, choose not to follow established precedent.*



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## I. INTRODUCTION

*Much madness is divinest sense*
*To a discerning eye;*
*Much sense the starkest madness.*
*'Tis the majority*
*In this, as all, prevails.*
*Assent, and you are sane;*
*Demur,—you're straightaway dangerous,*
*And handled with a chain.*[1]

Emily Dickinson's startling but lovely lines say much about social consensus and majority opinion. We all know in our bones, as the saying goes, that some widely accepted opinions are not as "sane" as their proponents facilely assume. In the legal world, occasionally an established position is successfully challenged by *a discerning eye*. Features of this problem are explored in this article. First, a portrait is drawn of an important legal precedent, *Somerset v. Stewart*,[2] decided in 1772 by Lord Mansfield.[3] I then use that portrait to ask questions about, and hopefully illuminate, some features of the *contemporary* debate about the status of nonhuman animals in the United States legal system. To illustrate the contemporary discussion, I concentrate especially on *Rattling the Cage* by Steven Wise.[4]

[1] Emily Dickinson, *Poems by Emily Dickinson* 7 (Martha Dickinson Bianche & Alfred Leete Hampson eds., Little Brown & Co. 1957).

[2] *Somerset v. Stuart*, 98 Eng. Rep. 499 (K.B. 1772). The case goes by various spellings, including *Somersett v. Stuart*. Mansfield's personal name was William Murray. He was the First Earl of Mansfield.

[3] *Id.*

[4] Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Merloyd Lawrence/Perseus 2000).

As individuals, we are intimately familiar with the fragility of our own claims to possess "knowledge." Beyond individual frailties, however, may be the *starkest madness*, namely, the ignorance-dominated and arrogance-driven opinions of crowds and majorities passed along as certain knowledge from generation to generation and variously labeled as "tradition," "the wisdom of the elders," "precedent," and other weighty appellations.[5] We often find that the claimed knowledge is, upon examination, only cultural construction masquerading as the order of the universe. Such views may enable us, of course, but they can also mislead.

One familiar application of Dickinson's insight is retrospective—when looking at historical developments long after the fact, we are often surprised by the resistance and ridicule that first greeted claims we now take to be *divinest sense*. For example, it was once regularly asserted with the utmost confidence that women were failed men. Plato, for example, said in his extraordinarily influential Timaeus, "Of the men who came into the world, those who were cowards or led unrighteous lives may with reason be supposed to have changed into the nature of women in the second generation . . . . Thus were created women and the female sex in general."[6] Those who opposed the crowd's belief that this claim was bedrock truth, claiming instead that women are men's equals in every sense relevant to morality and politics, were likely deemed mad and, to use Dickinson's phrase, *straightaway dangerous*.

Looking across time and place, we see easily the humbling of humankind by the metamorphosis of some madness into a widely accepted view, even *divinest sense*. Such metamorphoses occur slowly, however. Such radical changes in valuation and perspective alert us to an important and humbling possibility. The problem of foolish claims dominating a culture may not reside only in our past. It is not at all unlikely that some of today's widely accepted claims may, upon examination by our cultural sucessors, reflect poorly on our ability to think clearly, fairly, morally, and beyond the boundaries of tradition. That many still are affected by certain relics of the past, such as the Cartesian view denying mentation to any nonhuman animal, suggests the need for continuing humility about our collective judgments.[7] Consider the ongoing struggles of anti-racist, anti-sexist, and other social justice activists, as well as our continuing inability to rectify our tendency to environmental destruction. Because of these struggles, we all are vaguely aware that some of those who challenge our accepted opinions

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[5] Charles Mackay, *Extraordinary Popular Delusions and the Madness of Crowds* (L.C. Page & Co. 1932) (an early and very interesting collection of stories about the foibles of crowd psychology in 1852).

[6] Plato, *The Dialogues of Plato*, vol. 1-2, ¶¶ 90-91, 67, ¶ 42, 23 (B. Jowett trans., Random House 1937). Aristotle, and after him Thomas Aquinas, held comparable views.

[7] *See generally*, Donald R. Griffin, *From Cognition to Consciousness*, Animal Cognition 3, 3-16 (1998) (for a revealing analysis of how such an approach still lingers in some of our most sophisticated sciences; see comments about "paralytic perfectionism").

and practices may not be as mad as protectors of the status quo publicly proclaim. Such challengers may, instead, be speaking tomorrow's *divinest sense*.

## II. Legal Rights for Some Nonhuman Animals: *Starkest Madness* or *Divinest Sense*?

The portrait drawn below of the eighteenth century Somerset case offers an interesting opportunity to see decisively important features of Mansfield's circumstances. This portrait helps one see parallel features of the claims advanced by those now seeking legal rights for some nonhuman animals. This comparison, in turn, enables one to see that contemporary demands for legal rights for some nonhuman animals are by no means foolish, immoral or even a sign of *starkest madness*; indeed, they may be fully justifiable, even *divinest sense*.[8]

Mansfield's intellectual, cultural and social milieu was dominated by deprecatory views of, and claims about, black Africans as inferior to European whites and thus rightfully enslaved.[9] The arguments offered by various counsel in *Somerset*, and ultimately Mansfield's opinion, were framed in the face of this dominant tradition. The tradition formed a kind of backdrop against which individuals made various arguments and observations. Today, a similar backdrop of dominant images of any and all nonhuman animals operates as our intellectual, cultural and social heritage. This heritage backs mainline moral authorities' resistance to inclusion of any nonhuman beings in our moral circle.[10]

Once one identifies the dominant tradition in each of these cases, one sees that certain individuals and groups who received the same cultural heritage as did the majority nonetheless found additional and far more inclusivist interpretations of and values in that heritage. Liberation groups used these inclusive interpretations to advance their

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[8] As noted below, the comparison must be drawn carefully and be expressly limited in very important ways, because each situation has some very unique features that are not in any way relevant to the other situation. In this article, the comparison is given the highly particularized task of highlighting what can be called the "cultural backdrop" or "deep background" in, first, Mansfield's context and, second, today's developing debate over what legal concepts should apply to nonhuman animals.

[9] These issues have been the subject of much scholarship. *See e.g.* F.O. Shyllon, *Black Slaves in Britain* (Oxford U. Press for the Inst. of Race Rel. 1974); David Brion Davis, *The Problem of Slavery in Western Culture* (Cornell U. Press 1966) [hereinafter Davis, *Slavery in Western Culture*]; David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823* (Cornell U. Press 1975) [hereinafter Davis, *Age of Revolution*]; David Brion Davis, *Slavery and Human Progress* (Oxford U. Press 1984) [hereinafter Davis, *Human Progress*]; A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (Oxford U. Press 1978); John B. Boles, *Black Southerners 1619-1869* (The U. Press of Ky. 1984).

[10] Hans Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age* 4 (U. of Chi. Press 1984); James M. Gustafson, *Theology and Christian Ethics* 96 f. (Blackwell 1981) (each making the argument that traditional moral philosophies have been radically anthropocentric).

platforms.[11] These alternative or minority views arguably form distinctive subtraditions that compete against the dominant tradition by criticizing its central assumptions.[12] Operating as tension-creating alternatives, such subtraditions are often characterized by a distinctive moral vision, as well as different concepts and vocabularies used by a motivated minority working for changes in the dominant tradition's practices and value system.

Using *Rattling the Cage* by Steven Wise as the representative of the contemporary debate about the feasibility of according legal rights to some nonhuman animals affords several important opportunities. First, the book mentions Mansfield and the *Somerset* case in its sweeping discussion of judicial decision-making patterns.[13] In this central part of the argument in *Rattling the Cage*, Wise profiles four different kinds of judges to illustrate basic patterns in the ways judges use, abuse, ignore, or override precedent, policy, and principle when developing what we know as the common law. Second, the book's overall argument is a well-articulated position that accurately reflects several important features of the current ferment in thinking about nonhuman animals. While using core principles of the common law to support an expansion of fundamental rights for two species of nonhuman animals, chimpanzees and bonobos, *Rattling the Cage* is intensely interdisciplinary and features many references to primatology, other life sciences, and various fields of philosophy.

So the task at hand is to frame the general features of the slavery issues facing Mansfield, and then see if a limited analogy to what Wise is doing currently will illuminate what some proponents of "rights" for nonhuman animals are now advocating. One benefit of attempting this parallel is that it prompts us as judges, lawyers, scholars, pro-research advocates, anti-research activists, or just plain inquiring citizens to place in historical context various contemporary calls for using the valuable terminology and conceptuality of "rights" for some living beings outside our own species. A comparison of the Mansfield context with that of today's complex debate provides an additional benefit. This comparison allows one to see more clearly the relevance to the legal system of the extraordinary ferment in our society on the topic of nonhuman animals. For example, some people in various circles outside of the United States' legal tradition currently employ words such as "per-

[11] *See* Andrew Linzey, *Animal Theology* (SCM Press 1994 & U. of Ill. Press 1994) (arguing that Christianity leads to concern for nonhuman animals).

[12] Alternative terms for what here are called subtraditions might be "minority opinions," "competing paradigms," "subcultural diversity," "substitute worldviews," or "alternative moral visions."

[13] Wise, *supra* n. 4, at 89-118.

son"[14] and "culture"[15] when referring to nonhuman animals while the western intellectual tradition reserves these words for humans alone. This trend and many other developments in contemporary society raise the issue of whether "legal person" and "legal rights" might also be employed for nonhuman animals as suggested by Wise and others. In sum, after seeing the many different spheres in which developments regarding nonhuman animals are occurring, one can understand better why debates rage. And, seeing this better, one can then assess what is at issue in such debates and draw far more sound conclusions about whether "we," that is, humans, will or should use certain cherished notions for any of "them," that is, other living beings.

### *A. A Brief Sketch of the Precedent*

Mansfield's decision in *Somerset* has had a central place in legal and cultural history, for it has been "looked upon as the opening act of the antislavery drama."[16] It liberated James Somerset, a black man who had been kidnapped in 1749 from Africa, taken to Virginia, and sold to Charles Stewart. There are detailed scholarly accounts of the underlying story, the rich set of arguments by counsel, and the peculiar relationship of the ruling to then-existing precedent. Because the Mansfield decision as ground-breaking precedent is cited heavily in subsequent decisions on both sides of the Atlantic, the pre- and post-history need not be rehashed here.[17]

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[14] There have been many human cultures that have viewed some nonhuman biological individuals as persons. For example, Malaysian and Dayak views of orangutans as "old person of the forest." Gisela Kaplan & Lesley Rogers, *Orangutans in Borneo* (U. of New England Press 1994); Biruté M. F. Galdikas, *Reflections of Eden: My Life with the Orangutans of Borneo* (Victor Gollancz 1995). Ojibwa (Amerindian) view other animals as persons. A. I. Hallowell, *Ojibwa Ontology, Behaviour and World View*, in *Culture in History: Essays in Honor of Paul Radin* 19, 40 (S. Diamond, Columbia U. Press 1960). It is now commonly suggested that humans *can* treat some other animals as "persons" who must not be used as means to ends. *See* Francine Patterson & Wendy Gordon, *The Case for the Personhood of Gorilla*s, in Paola Cavalieri & Peter Singer, *The Great Ape Project: Equality Beyond Humanity* 58 (St. Martin's Griffin 1993); H. Lyn White Miles, *Language and the Orang-utan: The Old "Person" of the Forest*, in Cavalieri and Singer, *The Great Ape Project: Equality Beyond Humanity* at 42; Harlan B. Miller, *The Wahokies*, in Cavalieri and Singer, *The Great Ape Project: Equality Beyond Humanity* at 230; Gary L. Francione, *Personhood, Property and Legal Competence*, in Cavalieri and Singer, *The Great Ape Project: Equality Beyond Humanity*, at 248; Thomas I. White, *Discovering Philosophy* ch. 14, 441 (Prentice Hall 1991) (Is a Dolphin a Person?). Peter Singer, *Practical Ethics* chs. 4-5 (2d ed., Cambridge U. Press 1993) (Singer makes perhaps the best known contemporary arguments).

[15] ""Culture" is now a widely used term for describing chimpanzees. *See* Richard W. Wrangham, W.C. McGrew, Frans B. M. de Waal & Paul G. Heltne, *Chimpanzee Cultures* (Harvard U. Press 1994).

[16] Davis, *Age of Revolution*, *supra* n. 9, at 377.

[17] Three thorough analyses offering a range of opinions are Davis, *Age of Revolution*, *supra* n. 9, at ch. 10; William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. Chi. L. Rev. 86 (1974); and Higginbotham, *supra* n. 9, at pt. 3.

The facts before Mansfield presented not only issues of slavery and morality, but also profoundly important mercantile, political, jurisdictional, comity-related, and choice of law issues. On the eve of the American revolution in a time of great political tension, an English court addressed the interaction of an American colonist's rights with those of his African slave. In 1769, Stewart traveled to England with his slave, Somerset. Somerset was the legal property of Stewart under the law of Virginia, and subject to the jurisdiction of English courts. In September of 1771, while still in England, Somerset ran away, setting the stage for the drama to follow.

In November 1771, Stewart's agents recaptured Somerset. Stewart had the agents chain Somerset in the hold of a Jamaica-bound ship commanded by Captain Knowles. Stewart's goal was, quite simply, to re-sell his chattel in Jamaica. The abolitionist Granville Sharp legally challenged what he viewed to be the abduction of Somerset. Before the ship could sail, he arranged to have three English citizens file affidavits with the King's Bench, the highest common law court in England, in support of a petition for the writ of habeas corpus. The effect of this filing was to challenge Stewart's ability to treat Somerset like any other piece of property. Captain Knowles, as the person now in direct control of the chained Somerset, was the party who technically had to reply to the writ of habeas corpus issued by the court, of which Mansfield was the Chief Justice. Knowles responded by delivering "the body of Somerset" with a reply "which appealed to the acknowledged legality of the slave trade and British colonial slavery."[18] Sharp hired very prominent lawyers, as well as an inexperienced advocate named Hargrave, to argue the case before Mansfield. Distinguished counsel also represented Stewart.

A peculiar complex of attitudes and rationalizations supported slavery in the British Empire. The home country had, in the decades before this controversy, developed into the foremost slave trader in the world through active participation in the enslavement of African blacks.[19] This trade had in fact become "a key factor in the mercantile wealth of eighteenth century England."[20] One should not be surprised to find that British monarchs and Parliaments had consistently backed the right of English slaving interests when it came to trading African blacks. However, the British government would have frowned on any overture to permit trade in white, Christian souls.

What causes this to stand out in retrospect is that English and other European societies had displayed for hundreds of years an important cultural tradition of moving away from the ancient practice of human chattel slavery. This trajectory in the cultural tradition was

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18 Davis, *Age of Revolution*, *supra* n. 9, at 481 (Davis gives additional particulars of Knowles' return, and quotes it in part).

19 Higginbotham, *supra* n. 9, at 316.

20 *Id*. at 316-17. "This traffic in humans clearly became the most lucrative form of commercial activity in Liverpool." *Id*. at 317.

not, however, powerful enough to curtail the British appetite for wealth and power created at the expense of non-Christian, non-white folks. With regard to these outsiders, the British government and merchants had no scruples whatsoever when it came to making money by trafficking in their flesh as a commodity to be sold in their colonies.

Colonials and merchants inevitably brought the enslaved individuals to England for one reason or another. This practice was a by-product of the heavy British involvement in the slave trade. In 1764, it was estimated that in London, where black slaves were openly bought and sold, the number exceeded twenty thousand.[21] The obvious tension between slavery's radical curtailment of some individuals' freedom and the English preoccupation with liberty resulted in some protests. However, none of these challenges had sufficient cultural, moral or political authority to curtail the extraordinary extent to which the English pursued their commerce in slaves. Two noteworthy reactions to the inconsistencies were the abolitionist movement of the late 1700s and several legal precedents that Mansfield had before him as he faced the question of how to handle Somerset's predicament. What might Mansfield do with a being who had, despite legal status as a piece of property, exhibited peculiar traits for a chattel, such as autonomy, a persistent desire for freedom, and a mind manifested in unproperty-like acts of running away?

The legal precedents facing Mansfield were ambivalent,[22] and they generally evaded the central issue by relying on technical matters of pleading and the like. Because earlier courts had frequently stuck their heads in the sand of legal technicality, direct statements about the validity of slavery under the legal system were scarce despite the existence of many slaves.

Mansfield thus faced a complex problem with very little help, and he must have known that he walked difficult and untraversed terrain when reaching his decision. Mansfield repeatedly tried to persuade the parties to settle, but failed. His reported 1772 decision, the text of which is short, belies the complexity of the arguments made during the many hearings before him.[23]

### *B. Mansfield's Decision*

Mansfield ultimately ruled that, absent what he called "positive law," the English common law did not recognize property rights in en-

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[21] *Id*. at 319.

[22] *See e.g.* Davis, *Age of Revolution*, *supra* n. 9; Wiecek, *supra* n. 17; Higginbotham, *supra* n. 9. Wise also discusses some of the these precedents in *Rattling the Cage*. Wise, *supra* n. 4, at 100-05.

[23] Because the case was handed down at a time when there were no "official" reports as we now know them, there is no way of being certain of what was said by Mansfield. Wiecek, *supra* n. 17, at 141-46, includes a description of the debate over which report of Mansfield's words in rendering the decision is more accurate. *See also* Davis, *Age of Revolution*, *supra* n. 9, at 472 n. 5.

slaved human beings. His reasoning is, in part, set forth in this famous passage:

> The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law . . . . It is so odious, that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say that this case is allowed or approved by the law of England: and therefore the black must be discharged.[24]

A common portrayal of the case is that of a courageous judge making a precedent-breaking decision, and the radicality of the departure is often summed up by reference to Mansfield's famous saying, "Fiat justicia, ruat coelumtet" (Let justice be done though the heavens fall).[25] Interestingly, Mansfield said this not in the final decision, but in the last hearing with counsel. Perhaps Mansfield spoke out of exasperation at being pushed by uncompromising litigants toward a decision he had tried to avoid because the universe of choices was limited to unpalatable options.[26]

### *C. Traditions and Subtraditions: Working with Legal and Cultural "Precedents"*

The above description of this complicated case is by no means exhaustive, but it is sufficient for the limited use which follows. Without resolving the continuing debates about the technical holding in *Somerset*[27] or Mansfield's intent,[28] one may consider the relationship of Mansfield's decision to the complex cultural situation confronting him, for which the existing legal precedent was inadequate.

Concluding with the unambiguous "therefore the black must be discharged," the ruling resulted in immediate freedom for Somerset. Not unexpectedly, other jurists relied on this obviously important decision. Mansfield was, in fact, a highly respected jurist. He could be flexible, as when incorporating mercantile custom into common law, and yet he could also exhibit the traditionalist's reverence for the past, rather than the rationalist's contempt for it. He was known to be, on at least some occasions, averse to innovation because he trusted unbro-

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[24] Wise, *supra* n. 4, at 50.

[25] *Somerset*, 98 Eng. Rep. at 509.

[26] *Compare*, Wiecek, *supra* n. 17, at 102, *with* Higginbotham, *supra* n. 9, at 332.

[27] Wiecek, *supra* n. 17, at 87 (describing the holding in this way: "Technically considered, the judgment in *Somerset* settled only two narrow points of English law: a master could not seize a slave and remove him from the realm against the slave's will, and a slave could secure a writ of habeas corpus to prevent that removal.").

[28] It is not easy to tell precisely what Mansfield intended. As noted, there is no official report. Mansfield later commented on his reasoning in *Rex v. Inhabitants of Thames Ditton*, 4 Doug. 300, 99 Eng. Rep. 891 (K.B. 1785), described by Wiecek, *supra* n. 17, at 109. These later comments suggest strongly that Mansfield wished to limit the scope of the ruling in ways in which later commentators refused to countenance.

ken historical continuity as a way of taming human nature.[29] He clearly did not approve the wide-ranging use of his decision in Somerset. Yet, the great historian of English law, William Holdsworth, proclaimed some of the broadest uses "substantially correct," because Mansfield's "decision involved the consequence [of court sanctioned protection of] . . . the enjoyment of [Somerset's] person and property."[30]

Generally, Mansfield has been lionized for this decision. Higginbotham's language is not unrepresentative: "Mansfield had the vision to rise above the rationalizations of his time, reconcile ambiguous and seemingly contradictory holdings of English common law, and forge a more humane path for English society."[31] Whatever one's appraisal of what Mansfield did and why, it is clear that his decision freed a slave and has been hailed as a harbinger of the abolitionist movement.

At the time of delivery, the decision was widely anticipated, and its weight was widely appreciated. For example, John Wesley, the founder of Methodism, "closely followed the arguments in the Somerset case."[32] The unequivocal last line, "therefore the black must be discharged," was broadly understood to overrule pro-slavery precedent, supplanting it with a far-reaching alternative.[33]

Consider, though, certain features of the ruling. Assuming that the reports of Manfield's words are correct, he reasoned that, since 1) the common law lacked binding precedent on the point, and 2) there was no positive law that controlled, the conclusion followed that Somerset's predicament was not "allowed or approved by the law of England."[34] To be sure, Mansfield might have held that either precedent or positive law controlled. In fact, John Dunning, counsel for Stewart, had alleged that controlling precedent *did* exist, and he further argued that various statutes enacted by the Parliament to regulate aspects of

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[29] *See* Theodore F. T. Plucknett, *A Concise History of the Common Law* 249, 350 (5th ed., Little, Brown 1956).

[30] William Searle Holdsworth, *A History of English Law* 247 n. 1 (1938), which includes a reference to Blackstone's well-known opinion of 1765. *See* Blackstone, *infra* n. 37.

[31] Higginbotham, *supra* n. 9, at 315.

[32] Reginald Coupland, *The British Anti-Slavery Movement* 57 (2d ed., Frank Cass 1964).

[33] For example, six years later a Scottish judge extended the rationale of Mansfield's holding and found slavery per se inconsistent with local law in *Knight v. Wedderburn*, 33 Dict. of Dec. 14545 (1778). Higginbotham, *supra* n. 9. The *Knight* case has also been cited as 8 Fac. Dec. 5, Mor. 14545 (Scot. Ct. Sess. 1778). Wiecek, *supra* n. 17.

[34] Interestingly, Mansfield invited the slaveholding establishment to seek a Parliamentary act expressly validating slavery, thus confirming that he felt that positive law establishing slavery would have been valid. At the time, precedent existed to support the argument that foundational principles of the common law could be invoked to invalidate legislation. This doctrine was first proclaimed by Sir Edward Coke in *Dr. Bonham's Case*, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610). Generally, however, orthodox English legal opinion in the eighteenth and nineteenth centuries was that Acts of Parliament always trumped judge-made law.

the slave trade confirmed the legal incidents of slavery.[35] Obviously, Mansfield chose not to accept these arguments. But if no common law precedent or positive law controlled, how did Mansfield find his answer?

### *D. Cultural Resources*

Unbound by specific precedent or positive law, Mansfield nonetheless had many other resources for resolving the problem before him. These resources were intellectual, political, moral, and religious, some of which were well developed even if they were not yet cultural norms. For example, although major social institutions in England at the time of the decision clearly approved of black slavery and, indeed, "both crown and Parliament had given open encouragement to the African slave trade,"[36] not everyone was enthusiastic. In fact, the eminent Blackstone in 1765 wrote in his *Commentaries*, "a slave or negro, the moment he lands in England, falls under the protection of the laws and with regard to all natural rights becomes *eo instanti* a freeman."[37]

Blackstone's comment, even if later qualified, reflected a developing subtradition that opposed slavery. In fact, even Dunning, the respected counsel arguing for the slaveholder Stewart, reflected again and again in the argument he made to Mansfield his recognition that there was indeed an anti-slavery point of view that commanded respect:

> 'Tis my misfortune to address an audience, the greater part of which, I fear, are prejudiced the other way [that is, against the slaveholder] . . . . For myself, I would not be understood to wish in favour of slavery, by any means . . . . I hope, therefore, [by arguing for the slaveholder] I shall not suffer in the opinion of those whose honest passions are fired at the name of slavery. I hope I have not transgressed my duty to humanity.[38]

These and many other comments during the hearing reveal that anti-slavery sentiment was both widespread and intellectually respectable. Mansfield's opinion, then, that slavery was incapable of being introduced for any reasons, even moral or political, was consonant with broad cultural ferment not only in Mansfield's England, but also in the European intellectual tradition and cultural sphere generally.

One sphere in which this ferment was well-developed was late eighteenth century secular social philosophy. Sharp, Somerset's lawyer, published *A Representation of the Injustice and Dangerous Ten-*

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[35] Davis, *Age of Revolution*, *supra* n. 9, at 475 (refers to an argument in Parliament in 1791 that included the claim that no less than twenty-six acts of Parliament had sanctioned slavery). Wiecek, *supra* n. 17, at 104, 106.

[36] Davis, *Age of Revolution*, *supra* n. 9, at 475.

[37] William Blackstone, *Commentaries on the Laws of England I*, 123 (Oxford 1765). Blackstone, however, revised this statement in the third edition (1768-1769) to include the important qualification, "though the master's right to his service may probably still continue." Davis, *Age of Revolution*, *supra* n. 9, at 485; Wiecek, *supra* n. 17, at 86 (provides the specifics of Blackstone's changing opinion on this point).

[38] *Somerset*, 98 Eng. Rep. 499, at 504, 507.

*dency of Tolerating Slavery* only three years before the decision.[39] The Enlightenment critique of the traditional justifications of slavery provided the basis for this attack,[40] and thus added to an already developed and ever burgeoning anti-slavery subtradition. In 1748, more than twenty years earlier, Montesquieu's *L'Esprit des lois* attacked the traditional justifications for slavery. In 1755, Rousseau published his *Discours sur l'inégalité* (*Discourse on the Origin of Inequality*).[41] As early as 1764, students in important centers of learning participated in Enlightenment-style debates and essay contests that focused directly on the rational and legal bases of slavery.[42] Davis summarizes the effect of this subtradition that attacked the dominant tradition's acceptance of slavery as a legitimate practice: "[B]y the 1760s the arguments of Montesquieu and Francis Hutcheson were being repeated, developed, and propagated by cognoscenti of the enlightened world."[43]

Thomas Hobbes (1588-1679) and John Locke (1632-1704), the preeminent figures in English political philosophy during the previous century, had, admittedly, accommodated slavery within their political visions of society. Nonetheless, three or four decades *before* Mansfield's decision in 1772, their views on that subject became suspect. This view is evidenced by Davis' comment that, "[e]ven by the 1730s such arguments were beginning to appear as absurd to a generation of English and French writers who had learned from Locke to take an irreverent view of past authority and to subject all questions to the test of reason."[44]

Further, the Christian tradition was undergoing radical ferment. Christianity had, on the whole, rationalized slavery. This was a byproduct of the fact that early Christianity grew out of two cultural traditions (the Hebrew and the Hellenistic-Roman) that accepted the practice. Early Christianity, encountering institutionalized slavery wherever it first went and having no power to overcome it, accommodated itself to the political realities of Greek and Roman culture. When fourth century Christians finally succeeded in dominating these cultures, they did not abolish slavery. Instead, as the new powerbrokers,

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[39] Granville Sharp, *A Representation of the Injustice and Dangerous Tendency of Tolerating Slavery; or of Admitting the Least Claim of Private Property in the Persons of Men in England* (Benjamin White & Robert Horsefield 1769).

[40] The term "Enlightenment" is "primarily a cultural historian's broad designation for a historical period, roughly the eighteenth century, in Western society . . . . Three key clusters of ideas form . . . the world view of the Enlightenment: Reason, Nature, Progress." Paul Edwards, 2 *The Encyclopedia of Philosophy* 519-25 (Macmillan & The Free Press 1967).

[41] Jean-Jacques Rousseau, *The Social Contract and Discourse on the Origin of Inequality* (Lester G. Crocker ed., Wash. Square Press 1967).

[42] Davis, *Age of Revolution*, *supra* n. 9, at 408 (notes that debates occupied students in Edinburgh (1764), the College of Philadelphia (1768), and Harvard (1773)).

[43] *Id*.

[44] *Id*.

they continued to accept it on the basis of newly stated rationalizations justifying the legal ownership of one human by another.[45]

It is a commonplace among those who study religion, however, that Christianity and other religious traditions are internally diverse,[46] and hardly ever harbor only one position on matters of major import. But even if there were some Christians who opposed all slavery, they were either individuals without influence or marginalized groups, notably millennialist and perfectionist sects.[47]

It is not uncommon to read arguments like that of Hargrave before Mansfield that slavery was "incompatible with the mild and humane precepts of Christianity."[48] However, such arguments are positively misleading if held to be representative of the mainline Christian tradition's attitude toward slavery. That the mainline Christian tradition was not bothered by slavery can be seen in the attitude of Pope Innocent VIII. In 1488, Ferdinand, the Christian king of Spain, gave the Pope one hundred black slaves. The Pope's response was to give the slaves away in turn "as presents to his cardinals and the nobility."[49] Only sixty-three years earlier, Pope Martin V (1368-1431) spoke out against slavery, but that condemnation only applied to the enslavement of people from Christian countries.[50] "[S]uch rules of the game were suspended when it came to enslaving either 'infidels' or 'pagans' from black Africa and other non-Christian cultures."[51] The black historian Robert Hood summarizes:

> Thus, the church legitimized slavery in three ways: (1) Its hierarchy, parishes, and monasteries were permitted to own slaves, ownership that was justified as a benefit to the ministry of the church. (2) Slaves could not be ordained; only free men could be ordained. (3) Bishops, abbots, and monks were forbidden to emancipate slaves owned by a church or an order unless they made up the loss from their own goods, for it was argued that sin necessitated the church to overlook practices in civil law that were not explicitly prohibited by canon law.[52]

The effects of the Christian establishment's rationalization of race-based slavery as a moral institution had extraordinary conse-

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[45] *Id*. at 42-43 (summarizing the earliest Christians' accommodations to the slavery institutions they encountered); *id*. at 43-44 (regarding the continuing tendency of later Christianity during the Middle Ages and the Reformation to accept slavery rather than challenge it).

[46] In the sense "subtradition" is being used in this argument, it could be said that religious traditions themselves are characteristically composed of many different subtraditions.

[47] Davis, *Age of Revolution*, *supra* n. 9, at 44.

[48] *Somerset*, 98 Eng. Rep. at 500.

[49] Robert Hood, *Begrimed and Black: Christian Traditions on Blacks and Blackness* 115 (Fortress 1994) (citing Genoiono Caravaglios, *The American Catholic Church and the Negro Problem in the XVIII-XIX Centuries* 98-101 (Ernest L. Unterkoefler ed., 1974)).

[50] *Id*. at 116.

[51] *Id*.

[52] *Id*. at 118.

quences in some cases. A telling example is the refusal of some Christians to extend their own religion by denying the essential act of baptism to black slaves because they feared that baptism would be interpreted as emancipation from slavery.[53]

Nonetheless, there was a Christian voice that challenged this accommodation in the English world as early as the first decades of the eighteenth century. The Quakers, "the only sect to become deeply involved with Negro slavery,"[54] are the best known group.[55] Opposition by Christians to slavery was by no means confined to the Quakers. Only two years after Mansfield ruled that Somerset was a free man in England, John Wesley asserted that every slaveholder, slave merchant, and investor in slave property was deeply stained with blood and guilt.[56] Granville Sharp wrote in August of 1772, only months after Mansfield's decision, that while his earlier abolitionist work was based on "the laws of England," his "present work is for the most part founded on Scripture . . . ."[57]

Other reflections of the deep ferment within Mansfield's society regarding the morality of enslaving another human were 1) the tendency in the second half of the eighteenth century toward benevolence favoring other humans,[58] and 2) the literary convention which hailed the "noble savage." The benefits of the former are obvious, but the latter, a mythological characterization that conflated the diverse realities of indigenous peoples into an amalgam that met European intellectuals' aesthetic needs, also had one benefit. The "noble savage" literary convention moderated, however slightly, the European tendency to view European culture as superior in *every* way to the lifeways of the people in the newly conquered lands.[59] Davis thus notes that "[b]y the

[53] This issue was the subject of one of the "precedents" cited in arguments before Mansfield. In 1729, the Attorney General Sir Phillip Yorke (later Lord Hardwicke) and the Solicitor General Talbot were invited to a dinner in Lincoln's Inn Hall for the purpose of informal comments to merchants. After dinner, both reportedly assured the traders and plantation owners present that "baptism doth not bestow freedom" on a slave. This opinion was cited by Mr. Wallace, counsel for Stewart, at which point Mansfield is reported to have commented that after-dinner comments of the British might not be "taken with much accuracy." *Somerset* 1, 98 Eng. Rep. at 503. Higginbotham, *supra* n. 9, at 327, 468 (includes the following cite for the report of the Yorke-Talbot "opinion": 33 Dict. of Dec. 14547 (1729)). As an Oxford graduate, I can assure you that Mansfield's comment was not unjustified.

[54] Davis, *Age of Revolution*, *supra* n. 9, at 44.

[55] *Id*. at ch. 10. (Davis discusses this group's odyssey from accommodation of slavery to profoundly influential opposition).

[56] *Id*. at 47.

[57] *Id*. at 393.

[58] This development was, at least in part, related to the dynamics of religion in English culture. James Turner, *Reckoning with the Beast: Animals, Pain and Humanity in the Victorian Mind* 4-6 (The Johns Hopkins U. Press 1980); Davis, *Age of Revolution*, *supra* n. 9, at ch. 11.

[59] Davis, *Age of Revolution*, *supra* n. 9, at 47.

early 1770s . . . writers [such as Abbé Raynal and Wesley] portrayed the Negro slave as a man of natural virtue and sensitivity . . . ."[60]

In summary, profound ferment in views of slavery's acceptability developed in England and change was being driven by diverse sources. Critiques of the dominant tradition's facile rationalizations fed Mansfield's statement that slavery was "so odious, that nothing can be suffered to support it."[61] Not even the current acts of legislatures that implicitly sanctioned slavery nor the ongoing practice of selling black persons in London were enough to support it. Mansfield's reported words in *Somerset* implied that explicit positive law could have authorized Somerset's slavery.[62] However, such laws would have been anathema to much of English society, who drew objections from the philosophical, religious, philanthropic, and aesthetic trends and values discussed above. Indeed, legislation introduced two years later in Parliament "to legitimate the slave relation" came to nothing.[63] Mansfield's holding in *Somerset* was not a solitary stand, but an opinion consonant with well-articulated subtraditions in his society.

### *E. Summarizing and Measuring Radicalities: Traditions and Subtraditions*

Mansfield's decision was certainly radical, for it cut against prevailing practice. But how radical? In critical respects, Mansfield's break with the dominant tradition was authorized, so to speak, by certain powerful subtraditions mentioned above. These collectively provided intellectual integrity and, in effect, moral authority for the decision favoring Somerset over the slaveholder Stewart.

When measuring the nature of Mansfield's use or abuse, changing or deepening, overruling or following, of the legal precedent he inherited, it is important to recognize what might have caused the heavens to fall, as it were. The novelty of his decision legally was considerably greater than its intellectual, cultural, and moral novelty. We can, with the benefit of hindsight, see that the decision was not responsible for any turmoil not already widespread in the society. It also did not involve any great risk of the most-feared consequences of radical judicial decisions, namely, the corrosion of judicial authority and defiance of judicial decrees.

Mansfield was, in effect, walking between old and new paradigms. Because a decision against Stewart and for Somerset's freedom clearly entailed contradicting the dominant tradition and the widely-accepted rationalizations for race-based slavery, one can argue forcefully that upholding Stewart's right to sell Somerset in Jamaica would have been

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60 *Id*. at 48.

61 Wise, *supra* n. 4, at 50.

62 Davis notes that "[w]hat alarmed Sharp the most was Mansfield's advice that the West Indian merchants appeal to Parliament for a legislative remedy." Davis, *Age of Revolution*, *supra* n. 9, at 393.

63 Wiecek, *supra* n. 17, at 106.

an easier choice for Mansfield. As Dickinson reminds us, *'Tis the majority/In this, as all, prevails./Assent, and you are sane*.[64] The counterargument is, of course, that upholding Stewart's dominance over Somerset was not without potential costs, given the developing anti-slavery tradition.

But did Mansfield, if he took the path of repudiating slavery, really risk being, as Dickinson says in her closing lines, *straightaway dangerous,/And handled with a chain*?[65] Mansfield had the distinct advantage of the developed subtradition critiques that were not only ready-to-hand but also remarkably pervasive and respectable. In fact, they even appeared in the comments of the *slaveholder*'s counsel who had argued before Mansfield. Given these circumstances, there was little risk that a decision against slavery would make Mansfield *straightaway dangerous*.

Was there, then, any real risk that the heavens might fall? Admittedly, in earlier times not so thoroughly prepared by the subtraditions' multifaceted critiques, such a decision might have been seen by the English establishment as a form of madness. But by 1772, those with a discerning eye might have seen Mansfield's decision as common or even *divinest* sense. This is reasonable given the context of increasing acceptance of the well-developed arguments of the anti-slavery movement. One thing is clear about Mansfield's decision in retrospect, however—*the heavens did not fall*—post-*Somerset* society held together politically, economically, socially, religiously, and culturally.

## III. From Mansfield's Intact Heavens to the Modern Animal Rights Debate

Consider whether Mansfield's milieu resembles our own, insofar as some now advocate that legal rights and remedies can operate for the benefit of some nonhuman animals. It is argued below that the predicament in which Mansfield found himself provides a pattern or template that assists us in seeing crucial features of contemporary rights advocacy for nonhumans animals in the United States' legal system. More particularly, it is argued that Wise's work in *Rattling the Cage* can be seen better if understood in terms of the same "tradition/subtradition" dynamic found in Mansfield's dilemma.

The comparison to be drawn prompts several questions. What chance is there that a judge in the future will, in the tradition of Mansfield and on behalf of some particular nonhuman animals, challenge a traditional, harmful practice? Could a judge conclude that some practice is, even if legitimized by culturally dominant rationalizations and specific laws, contrary to fundamental values of the legal system, such as commitments to "treat like alike" and distribute justice fairly? Might well-articulated, culturally significant subtraditions that derive

64 Dickinson, *supra* n. 1, at 7.

65 *Id*.

their strength in part from extra-legal sources support decisions to expand legal protections for some nonhuman animals?

### *A. Respecting Limits: What is Not Being Analogized*

This comparison, to be valuable, must be narrowly drawn. It can be asked to do only a very limited kind of work that is focused and, in particular, restricted in its implications. In fact, the potential of any analogy between a late eighteenth century decision affecting slavery in England and the current debate over rights for nonhuman animals is circumscribed by sensitive issues, given the long history of using comparisons between humans and other animals for purposes of demeaning marginalized humans.

The potential uses of such an analogy are restricted for several other reasons as well. First, Mansfield's holding rested on his finding that there was an absence of dispositive "positive law." Wise's argument is not in any way linked to a claim that there is no explicit positive law authorizing challenged practices. While slave law was, as Wiecek notes, equivocal,[66] this is clearly not the case with laws affecting nonhuman animals. The subordination of nonhuman animals to humans is, within the United States' legal system, universal, explicit, and uncompromising. It is attested to again and again by specific positive law.

Second, anti-slavery sentiments, and eventually laws abolishing slavery, were premised on a set of concepts that were either explicitly speciesist or, at the very least, implicitly so. In other words, the challenges to the practice that Mansfield was scrutinizing assumed that the moral circle included all humans, but *only humans*. Practices of the kind Wise is scrutinizing, such as the biomedical experimentation that resulted in the death of the chimpanzee Jerom,[67] may have been seen as the epitome of morality under the Mansfield value system, rather than violation of it. Under that value system, such experimentation goes forward on the rationale that it will benefit each and every human.

Third, Mansfield was, as noted above, conservative in some very important ways, something which is not true of Wise. True, there are some lines of arguments justifying use of the term "conservative" for Wise's work since, after all, he is foregrounding, and thus honoring traditional core values in the common law. However, the implications of his arguments are, in the main, radical. This difference is epitomized by the fact that Mansfield's suggestion in *Somerset* that proslavery advocates seek positive law authorizing slavery in England is very much at odds with Wise's entire project. Wise's analysis foregrounds what he considers the bedrock values of the common law tradition, such as the commitment to equality. Even if he admits that legislatures not bound by constitutional limits might well have the

66 Wiecek, *supra* n. 17, at 87.

67 Wise, *supra* n. 4, at ch. 1.

power to enact laws contrary to such core values, to do so would, in Wise's view, be morally problematic. This contradiction would violate the very principles on which the legal system stakes its claim to being morally respectable.

While there are important disanalogies between Mansfield's decision and Wise's advocacy with regard to nonhuman animals,[68] the comparison reveals similarities in the ways in which one can challenge a dominant tradition. These similar avenues include challenges through a legal system, as well as on the basis of well-formed, intellectually sophisticated, and morally grounded subtraditions that draw their sustenance from outside the legal system.

### *B. Finding the Mansfield Pattern*

How plausible is the suggestion that "the Mansfield pattern" identified above, that is dominant tradition/controversial practice/courageous judge/respected subtradition(s), can be used to help understand features of the current debate and important claims like those being advanced by Wise in *Rattling the Cage*? The comparison has possibilities because the current debate over legal rights for some nonhuman animals evidences a ferment comparable to that engendered by critics of slavery in late-eighteenth century England. Additionally, a carefully-framed analogy based on the Mansfield pattern illuminates why we may see in our lifetime a precedent-breaking decision de-legitimizing some portion of the doctrine that it is not morally problematic to view all nonhuman animals as mere property.

## IV. The Existence of a Dominant Tradition regarding the Status of Nonhuman Animals

The first component of the Mansfield pattern, namely a dominant tradition, clearly exists in the area of values and views regarding nonhuman animals. This is the entrenched set of perspectives in our culture that support current practices of treating all nonhuman animals as property to be acquired and owned by "legal persons" (that is, by humans, whether as individuals or in some collective form recognized legally). This dominant tradition has been called many different things, including speciesism, anthropocentrism, homocentrism, human chauvinism, human imperialism, human solipsism, absolute dismissal

[68] Further, recognizing the analogy as valid in any way is not meant to suggest that the historical enterprise regarding Mansfield's decision is complete. It clearly is not, given the extraordinary disagreement over what happened. *See e.g.* Shyllon, *supra* n. 9, at 176; Coupland, *supra* n. 32, at 55-56; and Stiv Jakobsson, *Am I Not a Man and a Brother? British Mission and the Abolition of the Slave Trade and Slavery in West Africa and the West Indies 1786-1838* 47 (Gleerup 1972) (see in particular the references in n. 8). In many ways, the analogy used here brings us to the threshold of scholarly work to be done, not only on what is happening today, but also what happened in the late eighteenth century.

(of nonhuman animals), and exclusive humanism.[69] These descriptions, which on the whole come from critics of the practices being described, have focused on features of current attitudes and practices that legitimize the use of any and all nonhuman animals for exclusively human purposes.

Wise's book reflects this anti-speciesism critique in many different ways. It is especially evident in his challenge to judges' tendencies to justify this dominance by reference to "a universe that no longer exists."[70] The work of some other legal scholars also draws upon, and at times leads, this trenchant cultural critique. Gary Francione, for example, argues that the United States legal system is "inclined to consider any use [of nonhuman animals] 'humane' or any level of pain 'necessary' as long as there is some human benefit to be gained."[71] Note precisely what is being claimed here: contemporary practices that would seem inherently cruel, such as the overcrowding that defines factory farming, are held "humane" or "necessary" because they produce net benefits for the human community. The same practices might, when viewed by eyes not conditioned to those practices, be seen as violations of the anti-cruelty ethic that some say offers rights to nonhuman animals.[72]

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[69] Speciesism, a word coined in 1970 by Richard Ryder, is now used widely by philosophers. *See* Paul Waldau, *The Specter of Speciesism: Buddhist and Christian Views of Animals* (Am. Acad. of Religion/Oxford U. Press forthcoming in 2001). "Homocentrism" is used by Roberta Kalechofsky and Evelyn Pluhar. Roberta Kalechofsky, *Autobiography of a Revolutionary: Essays on Animal and Human Rights* 55, 79 (Micah Publications 1991); Evelyn Pluhar, *Beyond Prejudice: The Moral Significance of Human and Nonhuman Animals* (Duke U. Press 1995). Carl Sagan and Steve Sapontzis use "human chauvinism" to designate exclusivist attitudes centered on human species membership. Carl Sagan, *Dragons of Eden* 121 (Random House 1977); Steve F. Sapontzis, *Morals, Reason and Animals* 85 (Temple U. Press 1987). Warwick Fox referred to "human imperialism." Warwick Fox, *Towards a Transpersonal Ecology: Developing New Foundations for Environmentalism* 21 (Shambhala 1990). Robinson Jeffers spoke of "human solipsism" (cited in Bill Devall and George Sessions, *Deep Ecology: Living as if Nature Mattered* 101 (G. M. Smith 1985)). Mary Midgley's influential *Animals and Why They Matter* opens with a discussion of the western tradition's absolute dismissal of other animals, that is, the belief that only human beings matter. Mary Midgley, *Animals and Why They Matter* (U. of Georgia Press 1984). The respected historian of ideas, Arthur O. Lovejoy, used the term "anthropocentric teleology" to describe and criticize the claim that the physical world, including other animals, had been designed by a Creator to serve humanity, a view which he called "one of the most curious monuments of human imbecility." Arthur O. Lovejoy, *The Great Chain of Being* 186, 188 (Harvard U. Press 1970).

[70] A common theme in *Rattling the Cage* and the title of ch. 2. Wise, *supra* n. 4.

[71] Gary L. Francione, *Animals, Property, and the Law* 13 (Temple U. Press 1995).

[72] Jerrold Tannenbaum is an articulate advocate of this position. Jerrold Tannenbaum, *Veterinary Ethics: Animal Welfare, Client Relations, Competition and Collegiality* 142 (2d ed., Mosby - Y. B., Inc. 1995). He relies on both the philosopher Joel Feinberg and various case law (*see supra* n. 37-39). Tannenbaum argues that anti-cruelty provisions in state laws "create legal duties to animals. They therefore afford legal rights to animals." Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, in *Humans and Other Animals* 167 (Arien Mack ed., Ohio St. U. Press 1995). At least one California trial court judge has said that a specific municipal statute granted the af-

### *A. We Are What We Speak*

The dominant cultural perspective is most strikingly exemplified in an ostensibly innocuous phrase that dominates our ordinary language. We use the phrase "humans and animals" (or variations) casually and without reflection upon the extraordinary implications of the phrase. When confronted with the unscientific and illogical character of the distinction drawn between humans on the one hand, and nonhuman animals on the other,[73] virtually everyone continues to insist that speaking in this manner is a valuable part of our daily discourse. In fact, attempts to use scientifically accurate language devoid of the logical problem inevitably appear awkward in the face of present practice. Eliminating this deeply-ingrained habit is nothing short of extraordinarily difficult.

Historically, the phrase arises out of a pre-scientific dualism that is an integral part of the religious and cultural values that we have inherited from the Greek and Christian cultural traditions. This heritage is so central in our culture that the alternative phrases I have used in this article, such as "humans and other animals," "human animals," or "nonhuman animals," can grate. Indeed, anyone who uses alternatives to the standard "humans and animals" sounds aggressive and dominated by a political agenda far beyond that of a fastidious insistence on scientifically accurate terminology.

While those who employ phrases like "humans and other animals" virtually always have an ethics-driven agenda that seeks to have nonhuman animals seen more sympathetically in this culture, there is some irony in viewing only this use as agenda-driven. In fact, either option is unavoidably agenda-laden. The alternative "humans and animals" prevails because the agenda behind that usage is that of the dominant tradition, which characteristically remains unnoticed and

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fected nonhuman animals "rights." *Smith v. Avanzino*, No. 225698 (Cal. Super. Ct., San Francisco County, June 17, 1980) ("[n]ow, stray dogs, abandoned dogs, have rights under our statute which must be carefully followed."). Pamela D. Frasch, Sonia S. Waisman, Bruce A. Wagman & Scott Beckstead, *Animal Law* 726 (Carolina Acad. Press 2000). But Tannenbaum's analysis needs to be expanded. In its present form, it fails to explain why, if the anti-cruelty protections are in fact legal rights, there exist profound and pervasive limitations on standing and the recovery of damages, laxity of enforcement, and the trend to exempt many practices from the anti-cruelty laws. For example, "[s]eventeen states in the last ten years have amended their statutes to exempt 'accepted,' 'common,' 'customary,' or 'normal' farming practices . . . ." David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 Animal L. 123, 124 (1996).

[73] The phrase is unscientific because humans are, scientifically speaking, animals. The phrase is illogical because, in a technical sense, the two components are not logically equivalent to one another. The problem is a simple one—the second component ("animals") encompasses the first ("humans"), while those who employ such phrases subtly imply that the categories are exclusive of each other. Consider the obvious shortcomings, and the implicit agenda, of logically equivalent phrases: "prisoners and people" or "whites and ordinary people." The separation, of course, is made for the psychological purpose of implying a value-laden distinction.

unnamed. Since, as Emily Dickinson notes, *'Tis the majority / In this, as all, prevails*,[74] the dominant tradition's usage, deemed to be reflective of the order of nature, becomes a measure of sanity.

### *B. Ferment on the "Animal Issue"*

Despite the dominance of the anthropocentric tradition in our culture, there is now great ferment concerning the issue of nonhuman animals. That ferment suggests that the second element of "the Mansfield pattern," namely a controversial practice, also exists. The ferment is related to, but by no means exhausted by, the upheavals in the last four centuries promoted by the shift from an explicitly religious worldview to one dominated by different assumptions and values. Due to the shift in worldviews, much scientific terminology has supplanted religious terminology. But many pre-scientific values have merely gone underground, lingering on in common rationalizations and sloppy speaking habits such as "humans and animals." This phrase signals a dualism-dominated mentality—heaven versus earth, being versus becoming, man versus woman, human versus animal—that has dominated many religious, economic, cultural, intellectual, political, social, and ecological perspectives. However, a brief survey reveals that contemporary appraisals regarding nonhuman animals are, in important ways, undergoing profound metamorphoses that are wide-ranging and astonishingly diverse.

#### *1. Increasing Interest Generally*

There has been an increase in general interest about the specific realities of nonhuman animals. A plethora of science programs and books explore the specific, verifiable realities of other animals' day-to-day lives.

#### *2. Widespread Media Coverage*

The sheer number and range of non-utilitarian references to nonhuman animals in television, radio, print media, films, and electronic sources are astounding. The spectrum of coverage runs from the lighthearted to the profound. There are very detailed engagements in prime media sources, commercial and artistic films, documentaries and internet websites. Particularly prominent are accounts about the nonhuman animals known as "pets" or "companion animals."[75] Such

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74 Dickinson, *supra* n. 1, at 7.

75 The scholarship regarding companion human bonds with nonhuman animals, particularly those known as pets or companion animals, has exploded in the last two decades. *See e.g.* Harriet Ritvo, *The Animal Estate: The English and Other Creatures in the Victorian Age*, Cambridge (Harvard U. Press 1987); Andrew Rowan, *Animals and People Sharing the World* (U. Press of New England 1988); Aubrey Manning & James Serpell, *Animals and Human Society: Changing Perspectives* (Routledge 1994); James Serpell, *In the Company of Animals: A Study in Human-Animal Relationships* (rev. ed., Cambridge U. Press 1996).

accounts often have positive, "member of the family" overtones or reflect the ominous problem of gratuitous cruelty. Other kinds of "human interest" stories also abound. One example was the national coverage given Binti Jua's 1996 rescue of a three-year-old boy who had fallen into her gorilla enclosure at Chicago's Brookfield Zoo. Other examples include national magazine covers and lead stories on issues such as whether nonhuman animals can think.[76]

Even a cursory review of these reports suggests that this extraordinary interest in nonhuman animals is spread unevenly in very significant respects. For example, even though focused heavily on the pets or companion animals that form integral parts of so many families today, the media ignores those same kinds of animals when used in laboratories.[77] Across cultural spheres there are also important differences in media coverage. Domestic food animals are largely ignored by media outside certain countries in northern Europe. In northern Europe, protections afforded to these animals (held to be "sentient" under European accords),[78] considerably outdistance those offered in the North American cultural sphere. But within Europe, media coverage varies just as legal protections do. In the United Kingdom, Switzerland, Holland, and Sweden, concerns expressed in both legal and academic language call ethical issues into play. These concerns often appear in these countries' mass media in a way that is quite alien to the portrayals found in journalistic, legal and academic circles in most southern European countries.[79] The latter's Roman Catholic culture is especially unreceptive. This is not surprising given that the Catholic Church recently promulgated a new Catechism that explicitly declares: "Animals, like plants and inanimate things, are by nature destined for the common good of past, present and future humanity."[80]

### *3. Proliferation of Popular and Scholarly Publications*

These include not only best-selling books (such as those by James Herriot regarding veterinary work), but also ethics-motivated works in

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[76] Eugene Linden, *Can Animals Think?*, 141 Time Mag. 54 (Mar. 22, 1993); *Animals in the Media*, 16 Animals' Agenda (Jan./Feb. 1996).

[77] Cecil E. Edwards, *The Pound Seizure Controversy: A Suggested Compromise in the Use of Impounded Animals for Research and Education*, 11 J. of Energy, Nat. Resources & Envtl. L. 241 (1991).

[78] The European Union, at its 1997 Inter-Governmental Conference, accepted a reference to nonhuman animals as "sentient" beings in the prologue to one of the group's binding protocols.

[79] *See e.g.* Glen H. Schmidt & Beverly A. Schmidt, *Animal Welfare Legislation in Northern European Countries: A Study Tour* (unpublished report, Am. Farm Bureau Found. for Agric. 1995); Mark Gold, *Animal Rights: Extending the Circle of Compassion* (Jon Carpenter Publg. 1995); Robert Garner, *Political Animals: Animal Protection Politics in Britain and the United States* (St. Martin's Press 1998).

[80] Catholic Church, *Catechism of the Catholic Church* ¶ 2415 (Geoffrey Chapman 1994).

the popular or "trade" press that tread the balance between very serious science and more popular writing.[81]

### *4. Organizations and Public Opinion*

The sheer number of groups formed to address nonhuman animal issues,[82] the volume of their publications, and the resources channeled into these groups show a shift in public attitude.[83] *Scientific American* reported that its own poll of readers taken in January of 1997 (described in the February 1997 volume in which alternative points of view were presented) revealed that a majority (52%) said "no" to the proposition that "[h]umans have a fundamental right to experiment on animals."[84] The British Broadcasting Corporation published the results of a popular poll taken in late 1998 on the question "Do animals have rights?" The results were 58% affirmative and 42% negative.[85] The Gallup poll from April 2000 suggests that 72% of the United States public agree with the goals of the "animal rights" movement.[86]

### *5. Zoos in Transition*

In 1998, the president of the American Zoological and Aquarium Association commented that contemporary zoos are "a work in progress."[87] This view is widely reflected in comments made by members of the zoo establishment.[88]

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[81] *E.g*. Roger Fouts, *Next of Kin* (William Morrow 1997); Roger Payne, *Among Whales* (Scribner 1995).

[82] *World Animal Net Directory* (Wim de Kok ed., World Animal Net 1999) (lists almost 10,000 organizations in 130 countries and includes an alphabetical list of approximately 6000 United States organizations).

[83] *E.g.* The National Animal Interest Alliance reported in 1999 that David Duffield Family Foundation had pledged $200 million to oppose the killing of nonhuman animals by animal shelters. Patti L. Strand, National Animal Interest Alliance, *Redefining Pet Overpopulation: The No-Kill Movement and the New Jet Setters* <http://www.naiaonline.org/redefining.html> (accessed Oct. 10, 2000).

[84] Scientific American, *The Benefits and Ethis of Animal Research, Here's Where Scientific American's Readers Stand on Animal Research* <http://www.sciam.com/polls/animalpoll.html> (accessed Oct. 10, 2000).

[85] BBC*, Talking Point, Do Animals Have Rights?* <http://newsvote.bbc.co.uk/hi/english/talking_point/newsid_236000/236152.aspt> (accessed Jan. 13, 2001).

[86] The Gallup Organization, *Gallup Poll, Poll Release* <http://www.gallup.com/poll/releases> (accessed Jan. 13, 2001) (reported by Dr. Riley E. Dunlap, Gallup Scholar for the Environment and Boeing Distinguished Professor of Environmental Sociology at Washington State University. Of the people surveyed, 29% were in the "Agreed Strongly" category, while 43% were in the "Somewhat Agreed" category. A caveat: the nature of the "goals" was not specified).

[87] Terry Maple, Conference, *Humans and Great Apes at an Ethical Frontier* (Disney Institute, June 1998) (the papers from this conference will comprise the forthcoming (2001) book entitled *Humans and Great Apes at an Ethical Frontier* to be published by The Smithsonian Institution Press, General Science Editor Peter Cannell).

[88] *See e.g.* Bryan G. Norton et al., *Ethics on the Ark: Zoos, Animal Welfare and Wildlife Conservation* (Smithsonian Institution Press 1995).

*6. Environmental and Consumption Concerns*

A shift in public perception is reflected in the growing interest in the interconnectedness of webs of life, biodiversity, the survival of species, and reintroduction of species into ecosystems. While the interest of the environmental movement in nonhuman life is obvious, that interest has not historically manifested itself as an interest in other animals as individuals.[89] In some quarters, "environmentalism" remains very anthropocentric, while in others there is explicit, even if somewhat abstract, concern for biodiversity.[90] The latter has led to attempts to save certain species from extinction and to the reintroduction of some species into the wild.[91] Reintroduction of individuals has also occurred, most notably the orca Keiko to Icelandic waters in 1998.

Changing consumption patterns also indicate a positive shift in public perception of nonhuman animals. There are many causes for this phenomenon unrelated to ethical concerns (such as consumer fears and health concerns). However, the emergence of vegetarianism and veganism (the more rigorous practice of abstaining from nonhuman animal products altogether) as a public phenomenon and concern of some religious traditions is of particular relevance.[92]

*7. Biomedical Experimentation*

There have also been real debates, both inside and outside the science establishment, regarding the use of nonhuman animals in biomedical experimentation.[93] There are many critiques of modern

[89] An oft-cited example is the 1980 essay by Callicott that draws bright line distinctions between holistic environmental ethics on the one hand, and individualistic "moral humanism" and "humane moralism" on the other. Callicott clearly favored the former. *See* J. Baird Callicott, *Animal Liberation*: *A Triangular Affair*, in 2 *Environmental Ethics* 311-38 (John Muir Inst. for Envtl. Stud. & the U. of N.M. 1995).

[90] Interest in biodiversity can be anthropocentric, as when the principal reason for "protecting" biodiversity is "our children's inheritance." Religious traditions' interest in ecological matters is increasingly well-documented (*see infra* n. 135). On environmental education, literacy and identity, *see*, respectively, David Orr, *Ecological Literacy*: *Education and the Transition to a Postmodern World* (St. U. of N.Y. Press 1992); David Orr, *Earth in Mind: On Education, Environment, and the Human Prospect* (Island Press 1994); Mitchell Thomashow, *Ecological Identity: Becoming a Reflective Environmentalist* (MIT Press 1996).

[91] Examples include: the black footed ferret, the California condor, North American bison, and wolves in various ecosystems throughout the world.

[92] *See e.g.* Rynn Berry, *Food for the Gods: Vegetarianism & the World's Religions* (Pythagorean Publishers 1998); Kristin Aronson, *To Eat Flesh They are Willing: Are Their Spirits Weak? Vegetarians Who Return to Meat* (Pythagorean Publishers 1996); Seyforth D. Ruegg, *Ahimsa and Vegetarianism in the History of Buddhism*, in *Buddhist Studies in Honour of Walpola Rahula* 234-41 (Somaratna Balasooriya, et al., eds., Gordon Fraser 1980); Richard H. Schwartz, *Judaism and Vegetarianism* (Micah Publications 1988).

[93] *E.g.* Andrew Rowan & Franklin M. Loew, *The Animal Research Controversy: Protest, Process, and Pubic Policy—An Analysis of Strategic Issues* (Ctr. for Animals & Pub. Policy, Tufts U. Sch. of Veterinary Med. 1995); Barbara F. Orlans, *In The Name of Sci-*

science and its inability to recognize the values that drive its contemporary practices.[94] However, several prominent journals, some even within the science establishment, have addressed issues like the propriety of experiments on nonhuman animals.[95] Changes in values are also evidenced by the implementation of the "three Rs"—replacement, reduction and refinement—which were first promoted by a movement begun in 1954 by Charles Hume in Britain.[96] In the 1980s and 1990s, this approach enabled researchers and some animal advocates to share the common goal of finding scientifically valid alternatives to tests using nonhuman animals.

In addition, the United States' IACUC (Institutional Animal Care and Use Committee) system has emerged under federal guidelines mandated by the *Improved Standards for Laboratory Animals Act of 1985*.[97] Moreover, discussions regarding biotechnology sometimes reflect concerns for the welfare of genetically-engineered animals, although this is by no means the only or even principal concern.[98]

### *8. Legislative Developments*

There has been a flurry of legislative activity since the 1960s in some countries, although, importantly, these are most typically the countries in which the worst abuses have developed and continue.[99] Much of this legislation affirms the validity of many existing practices even as the specific laws impose new, though most typically not funda-

*ence* (Oxford U. Press 1993); Deborah Blum, *The Monkey Wars* (Oxford U. Press 1994); Alix Fano, *Lethal Laws: Animal Testing, Human Health and Environmental Policy* (Zed Books 1997); Kenneth Joel Shapiro, *Animal Models of Human Psychology: Critique of Science, Ethics and Policy* (Hogrefe & Huber Publishers 1998). For positions advanced by scientist-backed and university-backed lobbyists who promote research on any and all nonhuman animals, see the materials of the National Association of Biomedical Research.

[94] *E*.g. Bernard E. Rollin, *The Unheeded Cry: Animal Consciousness, Animal Pain and Science* (Oxford U. Press 1989); Ian Barbour, *Religion and Science: Historical and Contemporary Issues* (Harper Collins Publishers 1997).

[95] Neal D. Barnard & Stephen R. Kaufman, *Animal Research is Wasteful and Misleading*, 276 Scientific American 80 (Feb. 1997); Jack H. Botting & Adrian R. Morrison, *Animal Research is Vital to Medicine*, 276 Scientific American 83 (Feb. 1997); Madhusree Mukerjee, *Trends in Animal Research*, Scientific American 86 (Feb. 1997); David O. Wiebers, Jennifer Leaning & Roger D. White, *Animal Protection and Medical Research*, 101 Harvard Mag. 49 (Jan./Feb. 1999).

[96] The proposal was first detailed by British researchers William M. S. Russell & Rex L. Burch, *Principles of Humane Experimental Technique* (Methuen 1959).

[97] 9 C.F.R. §§ 1.1-4.11 (1985).

[98] Bernard E. Rollins, *The Frankenstein Syndrome: Ethical and Social Issues in the Genetic Engineering of Animals* (Cambridge U. Press 1995) (discussing other factors such as fear, religion, and risk calculus).

[99] F. Barbara Orlans, *History and Ethical Regulation of Animal Experimentation: An International Perspective*, in *A Companion to Bioethics* 399-410 (Helga Kuhse & Peter Singer eds., Blackwell 1998); F. Barbara Orlans, *Ethical Themes of National Regulations Governing Animal Experiments: An International Perspective*, in John P. Gluck, Tony Dipasquale & F. Barbara Orlans, *Applied Ethics in Animal Research: Philosophy, Regulation and Laboratory Applications* (Purdue U. Press 2000).

mental, impediments on using nonhuman animals as if they were "mere things." Only a few countries include protection of nonhuman animals in their most basic legal documents, as does the Constitution of modern India.[100] In the United States, the oft-amended and, some say, even more often violated, Animal Welfare Act of 1966 has language which appears to be strong, but is not generally enforced except in egregious circumstances.[101]

The move from misdemeanor to felony penalties for violations of the state-level anti-cruelty laws,[102] and state-level initiatives regarding nonhuman animal issues[103] are developing trends of significance. Rollin, a respected philosopher and leading veterinary ethicist, argues that newly imposed standards for dealing with laboratory animals betoken a new social consensus regarding nonhuman animals.[104] He adds, "I believe that the model of research animal welfare is a weathervane assuring future changes in animal use in other areas . . . ."[105]

### *9. Paradigm Shifts in Research*

There has also been a shift in the paradigm governing scientific studies of nonhuman animals' mental abilities, often referred to as the "cognitive revolution."[106] Under the new paradigm, information processing has been emphasized and the behaviorists' exclusive focus on conditioning through stimulus-response models has been de-emphasized. Because of this revolution, there is a much richer evaluation

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[100] Section 51A(g) of the Constitution of India states, "It shall be the duty of every citizen of India . . . (g) to have compassion for living creatures . . . ."

[101] *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (discussion of a government agency's power to thwart animal-protective legislation, specifically the mandate in the 1985 amendments to the Animal Welfare Act, P.L. 99-198, for the psychological well-being of primates in federally funded biomedical institutions, and the United States Dept. of Agriculture's decade long failure to adopt specific, minimum standards to protect primates' psychological well-being). Note also how limited the word "animal" is under the interpretation of this statute. In 1971, the Secretary of Agriculture excluded "birds, aquatic animals, rats and mice" from the definition of "animal." 36 Fed. Reg. 24917, 24919 (1971); *Animal Legal Defense Fund v. Espy*, 23 F.3d 496 (D.C. Cir. 1994) (discussion of the Animal Welfare Act's definition of animal).

[102] Thirty-one states now have felony anti-cruelty statutes. Humane Society of the United States, *State Animal Anti-Cruelty Laws with Felony Provisions* <http://www.hsus.org/firststrike/factsheets/felonylegis.html> (accessed Jan. 13, 2001). *See* Pamela D. Frasch, Stephen K. Otto, Kristen M. Olsen & Paul A. Arnest, *State Animal Anti-Cruelty Statutes: An Overview*, 5 Animal L. 69 (1999) (for a discussion on anti-cruelty statutes). *See also* Wolfson, *supra* n. 72 (regarding the contemporary movement of states to limit the application of these laws to food animal practice—in other words, if food is at issue, then practices otherwise deemed to be cruel are not legally deemed so).

[103] *See e.g.* Nancy Perry, *The Oregon Bear and Cougar Initiative: A Look at the Initiative Process* 2 Animal L. 203 (1996); Aaron Lake, *1998 Legislative Review* 5 Animal L. 89 (1999) (regarding specific initiatives).

[104] Bernard E. Rollin, *An Introduction to Veterinary Medical Ethics: Theory and Cases* 48-50 (Iowa St. U. Press 1999).

[105] *Id*. at 50.

[106] *See* Howard Gardner, *The Mind's New Science: A History of the Cognitive Revolution* (Basic Books, Inc. 1985); Donald R. Griffin, *Animal Minds* (U. of Chi. Press 1992).

of the mental mechanisms of any animal, human or otherwise, involved in modification of behavior during growth and after experience, as well as the interrelation of cognition, learning and development, information processing, representation, imitation, and problem solving generally.[107]

*10. Changes in the Academy*

The emergence of professional, academic, scientific and public policy programs and journals that focus on nonhuman animals also reflect a shift in public perception. The American Academy of Religion formed a "Religion and Animals" caucus in 1999, and Psychologists for the Ethical Treatment of Animals (PSYETA) proposed formation of a Division on Human-Animal Relationships within the American Psychological Association.[108] These efforts remain far less developed than panels presented at the divisional meetings of the American Philosophical Association by the now long-standing Society for the Study of Ethics and Animals. The role of scholars and philosophers in setting the agenda for debate has been important. Indeed, it has been observed that the animal protection movement "is somewhat distinct in being initially animated by serious consideration of ideas by scholars."[109] Just as Mansfield could call on the eminent authority Blackstone, proponents of fundamental protections and even legal rights for nonhuman animals can call upon respected philosophical and scientific work.[110] There are now various institutes that study "human/animal" relationships. Good examples are the Master of Science Program at the Center for Animals and Public Policy at Tufts University School of Veterinary Medicine, and The Center for the Interactions of Animals & Society at the University of Pennsylvania. Related is the emergence within the academy of courses, organizations and journals dedicated to studying how human ethical abilities relate to nonhuman animals. One example is the American Philosophical Association's Society for the Study of Ethics and Animals, founded in 1980. Prominent journals include *Between the Species*, *Society and Animals*, and *Anthrozöos*. Colleges have offered ethics courses addressing "animal rights" or "animal welfare" since the 1970s.[111]

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107 *See* Donald R. Griffin, *From Cognition to Consciousness*, 1 Animal Cognition 3-16 (1998) (for a description of both the work under this paradigm and continuing resistance to it).

108 PSYETA, *Proposed APA Division Human-Animal Relations*, 18 PSYETA News (newsletter) (Spring 1998) <http://www.psyeta.org/newsltr/98spr1.html> (accessed Oct. 10, 2000).

109 Lawrence Finsen & Susan Finsen, *The Animal Rights Movement in America: From Compassion to Respect* ch. 6 (Twayne 1994).

110 *See* Singer, *supra* n. 14; Midley, *supra* n. 69; Sapontzis, *supra* n. 69; and Wise, *supra* n. 4.

111 The Humane Society of the United States, *Animals & Society: A List of Courses* available at <http://www.hsus.org/programs/research/courses.html> (accessed Oct. 10, 2000).

Of relevance here are the programs which include the term "bioethics" in their title. The word, which etymologically refers to all life and not merely human life, was coined in a 1971 book by Van Rensselaer Potter,[112] where it was used in a relentlessly anthropocentric sense. While some bioethics institutes still use the term in Potter's classically speciesist sense (that is, as a reference to human issues alone), others use it in a more inclusivist sense.[113]

*11. Recognition of the Interlocking Nature of Oppressions*

Oppression of both human and nonhuman animals comes in many forms, and they are often linked.[114] These interlocked phenomena, now well-documented, come in diverse forms that fit into at least the following three categories.

The first identifies links between the specific harms perpetrated against nonhuman individuals and those committed against human individuals. Recent research has repeatedly confirmed this problem. Indeed, these interlocked problems can at times be correlated, such that the occurrence of child abuse, domestic violence, or abuse of nonhuman animals is seen as a helpful diagnostic tool for detecting other forms of violence.[115]

Second, cultural imperialism affecting both humans and nonhuman animals comes in many forms. The well-known examples of human/human imperialism in the Americas, Australia, Asia, and Africa are punctuated by many instances where the domination was put into effect by limiting the subordinated culture's access to nonhuman animals. For example, just as the European colonizers limited the access of native Namibians in southwest Africa to resources and land, they also outlawed and ridiculed as cruel and unnecessary the native hunting traditions so important in the Namibian peoples' lives. Ironically, the white settlers prohibited the natives from hunting the very species that the white settlers had depleted through trophy hunting, land use, and trade development.[116]

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112 Van Rensslelaer Potter, *Bioethics: Bridge to the Future* (Prentice Hall 1971).

113 Compare, for example, the completely different senses of the term (the first being speciesist, the second inclusivist) used by 1) *The National Catholic Bioethics Center* <http://www.ncbcenter.org> (accessed Nov. 14, 2000), and 2) *The Iowa State University National Bioethics Institute* <http://www.biotech.iastate.edu/bioethics.html> (accessed Nov. 14, 2000).

114 *Child Abuse, Domestic Violence, and Animal Abuse: Linking the Circles of Compassion for Prevention and Intervention* (Frank R. Ascione & Phil Arkow eds., Purdue U. Press 1999) [hereinafter *Child Abuse, Domestic Violence, and Animal Abuse*]; *see Cruelty to Animals and Interpersonal Violence: Readings in Research and Application* (Randall Lockwood & Frank R. Ascione eds., Purdue U. Press 1998) [hereinafter *Cruelty to Animals and Interpersonal Violence*].

115 *Child Abuse, Domestic Violence, and Animal Abuse*, *supra* n. 114; *Cruelty to Animals and Interpersonal Violence*, *supra* n. 114.

116 *See* Jonathon S. Adams & Thomas O. McShane, *The Myth of Wild Africa: Conservation Without Illusion* (W. W. Norton 1992); John M. MacKenzie, *The Empire of Nature: Hunting, Conservation and British Imperialism* (Manchester U. Press 1998).

Third, modern production processes for food animals obviously disadvantage the nonhuman animals involved;[117] they also have extraordinarily debilitating effects on humans as well.[118] Beyond the direct effects on those who work in the slaughter industry, indirect effects include environmental risks and hunger. Environmental risks are now commonly identified with certain factory farm operations. Hunger is ironically produced by an insatiable appetite for meat and milk, since people relying on legumes and cereals for protein needs consume far less grain than people eating creatures fed by these same plants. Countless tragic stories from North, South and Central America and from Africa and Asia testify to the displacement of native peoples and the attendant environmental degradation resulting from promotion of large scale cattle farming. This practice virtually eliminated classic pastoralists who used traditional grazing systems closely adapted to varying environments.[119]

The trends identified above are only some of the social, political, and cultural manifestations of ferment in contemporary society regarding the status of nonhuman animals. Predictably, there have been protests. While it remains overwhelmingly true that most challenges to harmful practices take the classic forms of constructive and nonviolent protest, incidents of violence have occurred. These violent acts receive far more media attention than the more constructive challenges. The violence, even though repudiated by the vast majority of the animal protection movement as morally contradictory, marks the intensity of the ferment in a distressing way.

### *C. Does Ferment Equate to, or Signal, Change?*

In each of the areas listed above, extremely important qualifications could be cited that would challenge a facile conclusion that because there is so much ferment, therefore fundamental change must be taking place or is near at hand. Perhaps this is so, but in countless ways the dominant tradition remains entrenched. Evident in a myriad of ways, the developed world continues to assume that human animals, on the one hand, and nonhuman animals, on the other, are *separate* categories. Such binary, "either/or" thinking facilitates the many ways in which contemporary laws, practices, and values elevate even

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117 Apart from the obvious problem of being killed before the end of their natural life span, most food animals today exist in conditions that are, relative to the traditional image of free range living, radically impoverished. *McDonald's Corporation v. Steel* (The Royal Courts of Justice, Queen's Bench Division, June 19, 1997) (Chief Justice Bell expressly found that many different industry conditions and practices met the legal definition of "cruel"). *See* Wolfson, *supra* n. 72. This is a recurring theme within the animal protection movement; *e.g.* Peter Singer, *Animal Liberation* (2d ed., Avon 1990); Jim Mason & Peter Singer, *Animal Factories* (Crown 1993).

118 *See* Gail Eisnitz, *Slaughterhouse: The Shocking Story of Greed, Neglect, and Inhumane Treatment Inside the United States Meat Industry* (Prometheus 1997).

119 Jeremy Rifkin, *Beyond Beef: The Rise and Fall of the Cattle Culture* (Dutton 1992).

trivial human interests over the most fundamental interests of any and all nonhuman animals.

This is where Wise's *Rattling the Cage* re-enters the discussion. Wise's interdisciplinary approach reflects well the overall trend to more and better information about other animals, and the many ways in which traditional morality has been a realm of serious prejudices and myopia. The improved ability to see other animals afforded by such information has, in some circles at least, raised hopes that challenges to the dominant, anthropocentric paradigm can be mounted using the language and concepts of justice, empirical inquiry, intellectual rigor, and humility.

## V. Wise's Place in the Ferment: Creating and Sustaining a Viable Subtradition Within Legal Philosophy

In effect, Wise's work generally, as well as *Rattling the Cage* in particular, advances a subtradition akin to the subtraditions that held up the heavens when Mansfield pronounced his decision in Somerset. Wise's strategy is in some ways quite simple. He asks that basic common law values be consistently applied in light of available information. He then argues that consistency will lead to an expansion that includes, at the very least, a few beings (chimpanzees and bonobos) now excluded by the dominant tradition from the prized "legal persons" category encompassing those deemed to hold rights recognized and enforced by the legal system.[120] By working within the terms of the common law, Wise might be seen to have, in effect, created a subtradition *within the law itself*. This legal subtradition can be used to challenge the speciesism of the now dominant tradition that refuses to recognize any nonhuman animals as legal persons. Wise's approach will seem to some entirely new, and that assessment is partly right. But consider a fascinating passage written in 1892:

> The object of the following essay is to set the principle of animals' rights on a consistent and intelligible footing, to show that this principle underlies the various efforts of humanitarian reformers, and to make a clearance of the comfortable fallacies which the apologists of the present system have industriously accumulated.[121]

Henry Salt's announced intention, or at least its first clause, would serve as a good description of *Rattling the Cage*. This suggests that Wise's work has antecedents and is effectively drawing from a subtradition within western ethical reflection that has been addressing the issue of nonhuman animals' status and "rights" since 1892 at least.[122] However, Wise's book represents something new. For exam-

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120 Wise, *supra* n. 4, at 4.

121 Henry S. Salt, *Animals' Rights Considered in Relation to Social Progress* xi (3d ed., Socy. for Animal Rights 1980).

122 How one interprets subtraditions is a matter of some personal choice. The tradition could easily be pushed back much further in western intellectual and cultural history. Forebears include Humphrey Primatt, author of *A Dissertation on the Duty of*

ple, in 1900 when J. H. Ingham published *The Law of Animals*, he did not mention legal rights at all. And relative to Salt's early comments, Wise's work is an altogether more complete and legally sophisticated attempt "to set the principle of animals' rights on a consistent and intelligible footing." Wise's arguments focus directly and in detail on the issue of *legal* rights, as opposed to the more generic concept moral rights. Wise's arguments are framed not only in specifically legal terms applied directly to specific nonhuman individuals whose abilities are backed by reputable science, but also in the intellectually sophisticated terms of modern primatology, applied ethics, and philosophy of mind.[123]

This interdisciplinary approach allows Wise to provide extraordinarily detailed information about specific real world animals when presenting his case. It also suggests that values within the current legal system not only permit, but indeed call forth, the challenge he identifies. In sum, Wise is using well-researched and empirically-sophisticated subtraditions in science and philosophy to challenge the dominant legal tradition's outdated refusal to countenance any animals other than humans as legal persons.

The principal feature of Wise's argument is that it is work done within the parameters of the existing legal system. In fact, he is at its heart with his emphasis on basic common law principles. Working with such fundamental and accepted concepts means, of course, that Wise employs the familiar vocabulary of the dominant tradition. In a simple sense, Wise is merely extending the principles of common law, and he uses specific, very complex nonhuman animals to show how a logical extension of the core principles of the common law take us beyond the species line.

Wise's relationship with the existing tradition is further manifested by his recurring arguments in *Rattling the Cage* to the effect that bonobos and chimpanzees can be compared to human children.[124] Wise is surely aware from his own visits to various bonobos and chimpanzees that these nonhuman animals are, in some ways, not at all like human children. However, in legally relevant respects, chimpanzees and bonobos are like children, to whom we accord rights even when they cannot carry out duties. Further, the reference to children calls to mind our biological relatedness to bonobos and chimpanzees. It also serves to remind us of the innocence of chimpanzees and bonobos. There is, then, in present legal terms and in biological and psychological terms, something to be gained from the comparison to children. Without these important connections, the comparison would otherwise

*Mercy and Sin of Cruelty to Brute Animals* (London 1776), Francis of Assisi (1181-1226), and Latin and Greek forbears such as Porphyry and Theophrastus (Aristotle's successor). The early history is set out in Richard Sorabji, *Animals Minds and Human Morals: The Origins of the Western Debate* (Cornell U. Press 1993).

123 Wise, *supra* n. 4.

124 *Id*. at chs. 8-10.

be, like former comparisons of indigenous peoples to children that need our help, quite controversial and potentially problematic.

Given that Wise's primary concern is to make legal arguments to judges, it is natural that he talk primarily in terms of legal vocabulary, concepts, and argument. With legal terminology, contemporary judges can recognize the issues as within their universe. Chosen for obvious reasons, this approach has consequences of some import, as would *any* tactic or strategy. Those consequences are the price of admission to the courts that are an integral part of a society that condones an altogether speciesist version of power over other beings.[125]

In *Somerset*, a choice had to be made by the anti-slavery advocates regarding which aspects of slavery and the dominant tradition they would challenge. Consider the roles and uses of one of the tactics adopted by Somerset's counsel to increase the likelihood of success before Mansfield. Here is part of the argument: "By an unhappy concurrence of circumstances, the slavery of negroes is thought to have become necessary in America; and therefore in America our legislature has permitted slavery of negroes. But the slavery of negroes is unnecessary in England."[126] This argument not only ignores the slavery of the colonies; it goes further in hinting that American slavery had a certain legitimacy.

The refusal to attack all slavery was an attempt to increase the possibility of Mansfield ruling that Somerset should go free, for it reduced the breadth of any anti-slavery ruling he might hand down. Was the tactic a success? In retrospect, one might say that the tactic "sold down the river" those slaves not in England in the late eighteenth century. But one might also conclude that this extraordinary concession had far-reaching effects for slaves not only in England but in America as well, since Mansfield's decision proved to be a remarkably important support for American abolitionists in the following century.[127]

Consider, in turn, Wise's appeal to the core values of the common law—dignity, liberty, equality, and justice. Speaking in this familiar way, Wise can argue that the prized moral protections or rights offered to human individuals by the dominant tradition (namely, legally recognized rights for those individuals held to be legal persons and not legal

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125 It could be said that *every* society condones power over other beings; the issue is the quality and extent of that power. What is at issue in these comments is the validity of a strictly speciesist version of power over other beings.

126 Davis, *Age of Revolution*, *supra* n. 9, at 488-89, n. 32 (citing the following versions: 20 How. St. Tr. 1, at 59-60; Somerset transcript, NYHS, 60, 65, 82, 91-92). A slightly different version appears in 98 Eng. Rep. at 501 (the argument was made by Hargrave, among others. Not only are there several versions of what was said by Mansfield (*see supra*, n. 23), there are also several versions of what was said by counsel during the many hearings before Mansfield. Higginbotham's appraisal of Hargrave's strategy (as well as Dunning's) was that it structured the pro-Somerset position "in the most limited but forceful fashion, marshaling arguments from moral philosophy, public policy, but most of all from judicial precedent, so as to maximize the probabilities of a favorable outcome." Higginbotham, *supra* n. 9, at 334-35.

127 Wiecek, *supra* n. 17; Higginbotham, *supra* n. 9.

things) should apply, by extrapolation, to some nonhuman individuals. The argument logically supports the conclusion that some nonhuman individuals fit the all important category and model of a legal person. Wise thus makes a case that the very principles, values, and concepts central to the common law's framing of who really matters can support legal protections for bonobos and chimpanzees.

It would be disingenuous to deny that these tactics have potential risks, for just as the *Somerset* tactics had, and indeed any choice among alternatives must have, advantages and disadvantages, so does the approach chosen by Wise. For example, the use of the concepts "legal person" and "legal rights holder" might, if successful, be seen by some animal activists as falling short. These categories clearly fit complex beings who are recognizably intelligent and individualized; however, they might *not* fit many nonhuman animals. Factory-farmed chickens, for example, may not fit within the person/rights paradigm that applies so well to the unique, complex, brainy, and even Machiavellian individuals in the chimpanzee and bonobo species.

Once common law extends beyond its present speciesism, the "humans only" paradigm that traps judges in a universe that no longer exists will no longer control. Being nonhuman will no longer, per se, disqualify one from legal personhood. Instead, the qualities of individual candidates will be important. And other animals beyond the humans, bonobos and chimpanzees that qualify under Wise's analysis might be protected by some variation of the approach. *Rattling the Cage*, Wise's first book, is not the last word in getting the existing legal system to respond to the realities of nonhuman animals as we are now coming to know them.

One of the reasons Wise's gambit is so complex is the simple fact that working with the tools of the very worldview that one wants to enlarge is an intellectually and morally challenging task. The intellectual challenge comes in identifying the useful portions of the framework previously deployed to exclude the beings to which new protection is to be extended. The moral challenge comes in stating arguments in a way that does not compromise future extensions unnecessarily. Advocates of social justice know well that those who hold power are not easily persuaded that they exercised it erroneously. They also know that the political compromises needed to accomplish change in a democratic, "checks and balance" system often involve very serious risks of compromising basic principles. Indeed, persuading power holders to relinquish what traditional moral authorities have repeatedly assured them was properly their private property will likely never be an easy task. The power to own and make property available for their own economic gain and that of their families and communities will not be relinquished lightly.

But *if* one wants to work within the legal system, these challenges must be met. One remarkable virtue of the whole approach is that Wise affirms the rule of law by arguing that common law's own bedrock principles call for it to be responsive to new findings about some

nonhuman animals. Assuming that the legislative arena is not available for some reason (such as the slow speed at which legislatures, institutionalized moral authorities, and/or popular culture take up scientifically valid information), work in the common law system may be the most viable choice for employing the discoveries and knowledge about bonobos, chimpanzees, and some other animals.

Historically, major changes have occurred in the United States because of litigation efforts. Therefore, it is reasonable for a justice movement to look closely at this potential route for effecting change. Wise's suggestion for work within the litigation system rather than the legislative arena includes two additional factors that give it credibility. First, he frames systematically a map or plan that is both conceptual and political in nature, providing the steps for working within the common law system on behalf of nonhuman animals. Second, he displays a deep conviction that the foundational values of the common law system will be applied by judges and others in an evenhanded manner and not according to a speciesist paradigm. Wise can make a very plausible argument, then, that there are unrealized possibilities in the legal world for some nonhuman animals. The critical issue will be whether judges and lawyers agree that calling on the existing bedrock values within the common law system is a valid approach to overturning outdated prejudices, myopia, and the debilitating effects of human self-interest.

### *A. The Implications of Interdisciplinary Work*

It is implicit in all that has been said above that Wise does not work only within the law. Because it is necessary to handle his subject matter in an inherently interdisciplinary manner, Wise calls upon many extra-legal sources shot through with the concerns, concepts, and vocabulary of other subtraditions.

It is obvious why Wise would choose primatology, ethics and philosophy of mind, given that his goal is to lure the legal system beyond the speciesism-dominated tradition that claims only human animals should be in the "legal persons" category.[128] These are well-developed disciplines that engage fascinating aspects of our world. As Wise points out, our current knowledge regarding the actual lives of chimpanzees and bonobos is remarkably well-developed. In fact, the science is so fascinating that it can produce an almost irresistible momentum for change in perspective. The need for change cannot be denied when appealingly conveyed through real-life stories and the actual consequences of the speciesist paradigm, such as Jerom's agony in the world of biomedical experimentation. Above all, science can be used to invite judges to free themselves from a universe that no longer exists. Wise's approach may indeed provide an answer to Cardozo's fundamental question, "What are the principles that guide the choice of paths when

[128] There are, of course, nonhuman "persons" in many legal systems, such as corporations and ships, a point which *Rattling the Cage* fully engages. Wise, *supra* n. 4.

the judge, without controlling precedent, finds himself standing uncertain at the parting of the ways?"[129]

Wise's synthesis does not, of course, exhaust all of the resources available in this culture for exploring other animals. Review of the present state of human awareness of other animals reveals many additional perspectives and subtraditions that are helpful in seeing the shortcomings of the dominant speciesist paradigm. This review also offers helpful insights, concepts, and vocabulary for establishing a more integrated vision of life on earth. As these are developed and made known to the legal community, they may provide contemporary judges with support for decisions regarding the status of some nonhuman animals. It can provide this support in the same way that the anti-slavery subtraditions provided support for Mansfield's decision.

The availability of new and broader perspectives will, no doubt, disturb some who are heavily invested in our dominant tradition's dismissal of all nonhuman animals from the law's regard. Fear of change may, for some, make any proposal of "rights" for bonobos and chimpanzee seem *starkest madness*. Yet when considered in light cast by new information now available, broader visions may indeed be seen ultimately as *divinest sense*.

### *B. Examining the Potential of the Wise and other Legal Subtraditions*

The four elements I have called "the Mansfield pattern" are 1) dominant tradition, 2) controversial practice, 3) courageous judge, and 4) respected subtradition(s). Most inscrutable of these is the "courageous judge" element, for it is difficult to estimate a contemporary decision maker in today's legal system doing what Mansfield did in 1772. The element most clearly identified is respected subtraditions. Wise, fostering an existing subtradition flowing through people like Henry Salt or creating a new and explicitly legal subtradition, directly joins issue with the dominant speciesist tradition on its legal home turf. In doing so, he can rely on extra-legal subtraditions that are respected, thoroughly developed, and well-articulated. It is a virtue of Wise's book that he makes these subtraditions available to the judge who wants to challenge the standard claim that bonobos and chimpanzees are not properly described as a "person" or "autonomous agent." Additionally, it would also be hard to contend that these nonhuman individuals are not sufficiently complicated, intelligent, or capable of mental and physical suffering to merit legal minds considering the justice aspects of their treatment by human society. Because the current legal system continues to go forward on the assumption that bonobos and chimpanzees could not possibly be legal persons holding legal rights, it can hardly be surprising that that the system is subject to the challenge

[129] Benjamin N. Cardozo, *The Growth of the Law* 27 (Yale U. Press 1924).

that bias and ignorance are keeping its decisions under-determined by scientifically verifiable factual realities.

### *C. Other Relevant Cultural Subtraditions*

In addition to the disciplines mentioned by Wise, there are other potentially relevant fields or subtraditions, many of which draw on well-established moral authorities. These are important when assessing the resources available to a courageous judge who is concerned with the threat of "falling heavens." Just as Mansfield's decision could not be explained solely by reference to antecedent legal authorities, likewise judicial innovation in favor of nonhuman animals will draw on sources beyond the law library.

Other important subtraditions will likely have a role in the creation of a legal system that is more compassionate and consistent with justice, equality, liberty and dignity. Each of these reflects the ways in which our society is developing care, concern, intellectual interest, and protections for nonhuman animals, all of which is relevant to the common law as it evolves in relation to movements in broad social values.[130] These other important subtraditions include at least the following:

1) Religious traditions have much more to offer than will appear from cursory consideration of contemporary American Christianity or Judaism. The nonviolence approaches of the religious traditions from the Indian subcontinent also have much to offer.[131]

2) Philosophy's contributions will continue by way of developments in philosophy of mind, ethics, philosophy of science, and philosophy of biology. Additionally, it will continue through comparative value analyses which highlight the impoverished nature of our intellectual heritage on the issue of nonhuman animals.

3) Anthropology offers the opportunity to see the ways in which any account of nonhuman animals has socially constructed features that are radically under-determined by the facts of the animals themselves. This includes the part of the dominant tradition challenged by Wise. Anthropological studies also illuminate other cultures' embrace of far fuller relations with nonhuman animals.

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[130] In many ways, the *primary* feature of the common law tradition is not its adherence to precedent, but rather its dialectical balancing of precedent *and* new conditions. This point is repeatedly stressed by the scholars who have written about the common law. For example, Cardozo noted, "The law, like the traveler, must be ready for the morrow. It must have a principle of growth." Cardozo, *supra* n. 129, at 20. Holmes on the opening page of *The Common Law* reflected the role of changeable values when he noted, "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Oliver Wendell Holmes, Jr., *The Common Law* 1 (Little, Brown 1881). Similarly, the first chapter of Arthur R. Hogue, *The Origins of the Common Law*, is entitled "Social Change and the Growth of the Common Law." *See generally* Plucknett, *supra* n. 29.

[131] *See e.g.* Paul Waldau, 50 *Philosophy East and West* 3 (July 2000) (the comments on breadth and exclusion in concepts of nonviolence).

4) Psychology is said to be "myopically anthropocentric"[132] and characterized by an "inability to free itself from a fixation on human pathologies and abilities, to the detriment of general scientific issues."[133] However, psychology can contribute broadly as "the study of intelligence, of adaptive and complex behavior, wherever it is to be found . . . ."[134]

5) Universities, through their unique concentration and combination of modern life sciences and other disciplines that contribute to awareness of other life patterns on this planet, will generally continue to critique the ways in which inherited traditions, concepts, and prejudices over-determine our interpretation of the world, even as the actual realities of nonhuman animals under-determine our views of them. The academic world will play a major role in more accurate and responsive views regarding nonhuman animals. Fields such as ecology and environmental studies, as well as sub-disciplines like the burgeoning fields of religion and ecology, can provide detailed information about the realities of other animals. These realities will include the context of their societies, cultures, broader populations, and econiches.[135]

A combination of these interests, and the relevant concepts, insights, and vocabulary that constitute them, will very likely be involved in the expansion of ethical awareness generally, and thereby shed light on humans' remarkable abilities to care about others. They will combine to direct our concern for important ecological, social, and individual dimensions of existence.

### *D. Multiple Disciplines and the "Rights" of Multidimensional Individuals*

Consider the relevance of these and other traditions to a profoundly important feature of Wise's approach to the question of nonhuman animals and their status in common law legal systems. This

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132 John E. R. Staddon, *Animal Psychology: The Tyranny of Anthropocentrism*, in *Whither Ethology? Perspectives in Ethology* 133 (Pat Bateson & Peter Klopfer eds., Plenum 1989).

133 *Id*. at 123.

134 *Id*. at 133.

135 For example, there is a series of publications resulting from conferences on religion and ecology convened by Mary Evelyn Tucker and John Grim at Harvard University's Center for the Study of World Religions (CSWR). The series included separate conferences on ten different religious traditions from 1997-1999. Six volumes of conference proceedings have been, or are scheduled to be, published as of the writing of this article. These are 1) *Buddhism and Ecology: The Interconnection of Dharma and Deeds* (Mary Evelyn Tucker & Duncan Ryuken Williams eds., CSWR 1997); 2) *Confucianism and Ecology: The Interrelation of Heaven, Earth, and Humans* (Mary Evelyn Tucker & John Berthrong eds., CSWR 1998); 3) *Christianity and Ecology: Seeking the Well-Being of Earth and Humans* (Dieter T. Hessel & Rosemary Radford Ruether eds., CSWR 2000); 4) *Hinduism and Ecology: The Intersection of Earth, Sky, and Water* (Christopher Chapple & Mary Evelyn Tucker eds., CSWR Sept. 2000); 5) John Grim ed., *Indigenous Traditions and Ecology: The Interbeing of Cosmology and Community* (CSWR 2001); 6) *Daoism and Ecology* (Norman Girardot, James Miller & Liu Xiaogan eds., CSWR forthcoming Spring 2001). Updated information on this series and the significant follow-up effort is available on the website. *Forum on Religion and Ecology* <http://environment.harvard.edu/religion> (accessed Oct. 10, 2000).

feature appears in the opening lines of *Rattling the Cage*, which relate the story of Jerom.[136] Though the circumstances related by Wise are profoundly disturbing, the focus on an individual is telling, for in the end we, as individuals, cannot solve the ethical dilemmas forced on us by our culture's anthropocentrism unless we look at other individuals, human or not, as Wise repeatedly does. Indeed, as individuals, we are peculiarly well equipped to empathize with other individuals. This is not to say that ecological and social insights are not relevant, for individuals are only individual in social and ecological contexts. If one does not understand the latter, one cannot understand the former. For example, one cannot visit a chimpanzee isolated in a circus or entertainment setting, or a troupe of bonobos in a zoo, and feel confident that all of their individuality and its possibilities have been encountered. The social and ecological dimensions of free living animals are essential to understanding them well. The personality, uniquenesses, and finitudes of complex nonhuman individuals that one encounters are equally important.

Of course, concern for recognition of legal "rights," which has the virtue of foregrounding the focus on individuals as the rights holders, is only one way to talk about the relevant issues. In fact, "rights talk" needs to go forward in a way that ensures that the discussion is not dominated by a focus on the individual rights holder alone, but rather on the whole picture of her connections and allegiances. Restricting the focus to individuals alone entails serious risks that the very realities one is concerned to protect will be seen poorly. These risks are likely because those complex, intertwined realities are atomized or broken up into unrealistic categories. The "rights" of any individual, human or otherwise, do not concern only her body and self, but are integrally linked with her family, larger community, and entire econiche. Effective use of rights terminology and conceptuality has as a precondition, then, a multi-dimensional approach to individuals in all of their personal, social and ecological dimensions.

This said, one must nonetheless always see at least the individual-level realities if we want to see our subject well. This is as much a practical point as it is a theoretical point. It has been rightly said that our ethics will be determined by the entities we are willing to notice and take seriously.[137] Note the practical aspects of this as it plays out with regard to our own choices in the world. Individual to individual concerns (that is, my concerns and how they affect other individuals as individuals) are the cutting edge of our lives. This is so fundamental that one can say that ethics is about nothing if it is not about day-to-day behavior. In the spirit of Gandhi's telling observation that "[t]he act will speak unerringly,"[138] we see ourselves most fully and ecologically when we are aware of how each of us treats and impacts other

136 Wise, *supra* n. 4, at 1.

137 Stephen R. L. Clark, *The Moral Status of Animals* 7 (Clarendon 1977).

138 Mahadev Desai, *Day to Day with Gandhi* vol. 7, 111-12 (Seva Sangh 1972).

individuals. This is, as Gandhi's observation suggests, the index to what we truly believe.

## VI. CONCLUSION

A combination of subtraditions and disciplines like that listed above, as well as many others, will likely be involved in learning to see the detailed realities of nonhuman animals. Above all, such an interdisciplinary approach will be necessary if we wish to take nonhuman animals seriously. The central question posed by the Mansfield/Wise comparison is whether the law can be used as a vehicle to deal with some of the extraordinary tensions created by the now dominant "humans are persons, animals are things" paradigm that controls so much current legal thinking. Under this paradigm, for example, *one can buy a weeks-old infant chimpanzee* in the United States, separating it from its mother, *and in no way violate the law*.[139] Regarding such practices, as well as so many other harsh realities affecting nonhuman animals, a wide range of subtraditions already challenges the morality of the dominant paradigm.[140]

Returning to Dickinson's insightful lines, we can ask, is it *the starkest madness* to suggest that the basic values undergirding the common law should lead to an extension of the legal concepts of "rights" and "legal person" to include some nonhuman animals? Is the majority's current opinion denying this extension *divinest sense*? The prominent primatologist Frans de Waal, commenting on Wise's approach, recently noted how much the approach troubles him because "rights are part of a social contract that makes no sense without responsibilities. This is the reason that the animal rights movement's outrageous parallel with the abolition of slavery—apart from being insulting—is morally flawed: slaves can and should become full members of society; animals cannot and will not."[141]

Is de Waal's challenge convincing? One can forgive de Waal, a nonlawyer, for advancing the naïve notion that all legal rights require correlative responsibilities on the part of the rights holder, which some rights clearly do not.[142] But what of de Waal's suggestion that it is

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[139] While it is true that chimpanzees living in the wild are an "endangered" species under The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (2000), *captive* chimpanzees (more specifically, those living in the United States since 1976 or progeny of those individuals) do not qualify as "endangered." Chimpanzees are, thus, what is generally referred to as "split-listed." Further, although captive chimpanzees are technically listed as "threatened," since 1978 they have been included on a "Special Rules" list that explicitly exempts them from fundamental protections afforded by the "threatened" designation. 50 C.F.R., Subchapter B, Part 17, Subpart D, § 17.40(c)(1)(2).

[140] *E.g.* The Great Ape Project challenge presented in Cavalieri & Singer, *supra* n. 14.

[141] Frans de Waal, *We the People (and Other Animals)*, N.Y. Times A21 (Aug. 20, 1999).

[142] Consider, for example, that a number of the rights listed in Hohfeld's typology, described by Wise simply have no correlative duty. Wise, *supra* n. 4, at 53-61; *see* Rom Harré & Daniel N. Robinson, *On the Primacy of Duties*, 70 *Philosophy* 513-32 (1995).

"outrageous" and "morally flawed" to consider, say, the imprisonment of Jerom or the sale of a weeks-old infant chimpanzee as "unjust"? Is it insulting to illuminate this injustice by parallels to the dominant tradition of slavery in England, Europe and the American colonies? Would only mad men and women avail themselves of the prized categories "legal rights holder," "person," and "justice" to protect Jerom or the infant chimpanzees now sold openly in the United States and elsewhere?[143]

As noted above, other cultures have found many ways to extend the prized notions of "person" and "culture" to some nonhuman animals. Similarly, the important set of concerns we group under our notion of "justice" can be, and often have been, extended out beyond the human sphere. This is particularly true for those concerns centered on impartiality and a negation of arbitrary inequality. There is, for example, no conceptual bar that prohibits bonobos, chimpanzees, or other nonhuman animals from being considered under notions of distributive and rectificatory justice. John Rawls, author of the widely respected *Theory of Justice*, returned three different times in his treatise to the notion that some senses of "justice" can reasonably be extended to other animals.[144] To be sure, the movements in our recent history commonly referred to as "justice movements" (such as the anti-slavery, women's suffrage and civil rights movements) at first were repudiated and caricatured by the vested interests they challenged. This was true even when these movements advanced the same reasoned inquiries that led ultimately to their recognition as valid challenges to entrenched exclusions. The passion of these movements' advocates, epitomized by Meister Eckhart's classic comment, "the person who understands what I say about justice understands everything I have to say,"[145] is, of course, the stuff of legends.

Given the ferment described above regarding the nonhuman animal issue generally, and given the place litigation has had in important social changes recently, it cannot be surprising that some seek to use the respected and often privileged discourse of law to protect some nonhuman animals. Consider three additional developments: 1) the ongoing debate within ethics over human/nonhuman animal interactions—Gandhi, for example, said, "the greatness of a nation and its moral progress can be judged by the way its animals are treated";[146] 2) the appeal of the internationally recognized image of justice as an im-

143 Frans de Waal advocates many protections for animals, although justified by different reasoning. *See* Frans De Waal, *Good Natured: The Origins of Right and Wrong in Humans and Other Animals* (Harvard U. Press 1996).

144 John Rawls, *A Theory of Justice* 17, 504, 512 (Oxford U. Press 1973).

145 Matthew Fox, *Creation Spirituality: Liberating Gifts for the Peoples of the Earth* 102 (Harper Collins 1991).

146 Mohandas K. Gandhi, *The Moral Basis of Vegetarianism* (Navajivan Publg. House 1959).

partial, blindfolded figure, balancing scales in hand;[147] and 3) the fact that a number of courts have used rights language for nonhuman animals.[148] It is inevitable that advocates will naturally gravitate to basic legal concepts and values when seeking to change the deeply entrenched tradition that forces any nonhuman animal interest to bow to all but the most trivial of human interests.[149]

Sometimes pro-establishment thinkers, reacting to challenges to the status quo, state things in a way that, upon careful examination, appears foolish or worse. Justice Taney in the infamous Dred Scott decision concluded that "[blacks] have no rights which the white man was bound to respect."[150] He also stated that this position was "fixed and universal in the civilized portion of the white race" when the United States Constitution was framed.[151] Those who challenged such a "fixed and universal" position no doubt have been seen by some as advocating *the starkest madness*.

It is humbling that the paradigm under which Taney's opinion held sway is now easily recognized as having been supported by facile rationalizations, ignorance, and arrogance. In retrospect, his statements seem blatantly immoral, perhaps even madness. This is, of course, because the challenge to slavery was successful and is now viewed as a kind of *divinest sense*.

Such reversals push us to ask if harsh repudiations of what Wise is attempting are convincing. Cannot people of conscience today in good faith conclude, without making an "outrageous parallel" or being "morally flawed," that there are illuminating parallels between elitist humans' power over slaves and our society's power over each and every kind of nonhuman animal? Is there no good way to conclude that our legal system's values and prized concepts are applicable to *some* nonhuman animals?

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147 Mohandas K. Gandhi, *An Autobiography: The Story of My Experiments with Truth* 145 (Mahadev Desai trans., Beacon 1957).

148 *Supra* n. 72 and accompanying text (citing various American cases). On June 6, 2000, the High Court of Kerala (one of India's states) handed down a decision which addressed the issue squarely; recalling the provision of the Indian Constitution that mandates care for nonhuman animals, the opinion of Justice K. Naryanakurup states, "It is not only our fundamental duty to show compassion to our animal friends, but also to recognise and protect their rights. . . . If humans are entitled to fundamental rights, why not animals? In our considered opinion, legal rights shall not be the exclusive preserve of the humans . . . ." *N. R. Nair v. UOI*, 2000 A.I.R. 38 (Kei.). For more on the status of animals under the legal system of India, *see* Rajeev Dhavan, *Do Animals Have Rights?*, The Hindu (July 14, 2000) (Dhavan is an attorney with the Supreme Court of India and a constitutional expert).

149 Lawyers' interest in this issue is not confined to the United States. In a new text on veterinary ethics, references are made to British organizations that combine an interest in law and nonhuman animals: Animal Welfare, Science, Ethics and Law Veterinary Association, formed in 1997; Lawyers for Animal Welfare, and Veterinary Association of Arbitration and Jurisprudence. *Veterinary Ethics: An Introduction* xvi, xviii, 47 (Giles Legood ed., Continuum 2000).

150 *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).

151 *Id*.

Tellingly, some African American leaders have *actively* used the very analogy which de Waal, a Caucasian man no doubt trying to honor African Americans, argues is demeaning.[152] Dick Gregory and Alice Walker, for example, have regularly compared the abuse of humans and the abuses of nonhuman animals. Alice Walker unambiguously endorsed the preface of Marjorie Spiegel's book that compared human and animal slavery. "The animals of the world . . . were not made for humans any more than black people were made for whites or women for men. This is the essence of Ms. Spiegel's cogent, humane, and astute argument, and it is sound."[153] The parallels drawn by Spiegel between the treatment of blacks and nonhuman animals include the recurring association of blacks and nonhuman animals in daily language, literature, and art; the use of branding, masks, collars and other binding techniques; similarity in transportation techniques; similarity in attitudes toward production of these "workers"; hunting and experimentation practices; patterns of defense and rationalization by the establishment (including appeals to God and scriptural justifications, economics, and a natural order that places the oppressing group atop a hierarchy); secrecy and propaganda regarding actual conditions; conditioned ethical blindness of those involved in daily practices; and, last but not least, negative stereotypes of the marginalized group that are used to cover up the dominant group's faults (black men said to rape white women as a way of distracting from white men's rape of black women, and "animals" said to be vicious as a way of distracting from the viciousness of human domination over and cruelty to nonhuman animals).

Perhaps the answer lies in moving away from one-sided portrayals of the analogy as inadequate or insulting. Upon closer examination, what at first may seem to some a demeaning or imperfect analogy, or even madness, may, with a more discerning eye, reveal itself as altogether more sensible or helpful than appears at first glance.[154]

Surely, to discern whether Wise and other proponents of "rights" for some nonhuman animals are mad or on to something, we must be able to see other animals well. Learning about other animals, such as chimpanzees and bonobos, requires the humility to embrace patient observation. It also requires the intellectual rigor and honesty that are the foundation of scientific discovery and any good ethical practice. Above all, "we" need a commitment to notice and then take "them" se-

[152] Marjorie Spiegel, *The Dreaded Comparison: Human and Animal Slavery* 107-13 (Mirror 1996).

[153] *Id*. at 14.

[154] Arguably, analogical thinking is valuable precisely because it can show similarities while maintaining differences. Sally McFague, addressing the use of "as" or "like" comparisons, analyzes the views of Aristotle, I. A. Richards, Max Black, and Paul Ricouer, all of which emphasize the elements of tension between similar and dissimilar aspects of that being compared. Sally McFague, *Metaphorical Theology* 15, 16, 17 (Fortress Press 1982). Analogies, then, do *not* require isomorphism to work; they require, instead, some similarities. In other words, *all* analogies are to some extent limited.

riously in terms of *their* realities, rather than in terms of the inherited paradigms of "our property" and "our inferiors."[155] If such commitments are carried out, we can then see more clearly the inherently ethical issues involved in the current exclusion of all nonhuman animals. Only then can we provide reasoned and compassionate answers to the foundational question of ethics, "who are the others, and why?" Once this is done, *a discerning eye* may indeed see that *much madness is divinest sense*.

[155] Consider, for example, that many captive chimpanzees still live in horrible conditions, hidden from public view. To remedy this, The Great Ape Project-International and its national affiliates are currently working to create an exhaustive census of chimpanzees, bonobos, orangutans, and gorillas in captivity. S*ee* The Great Ape Project International <http://www.greatapeproject.org> (last accessed Jan. 13, 2001).