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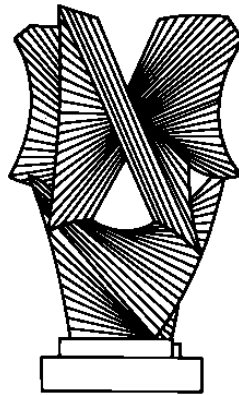
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## Animals as Objects, or Subjects, of Rights

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## Animals as Objects, or Subjects, of Rights

Richard A. Epstein\*

### Abstract:

From the earliest times, animals were understood as object of human rights. That result did not depend on some limited understanding of their capabilities for cognition and sensation, but rather rested on the strong sense that without domestication human beings could not secure their own advancement. The modern claims for animal rights cannot therefore be justified by an appeal to some newer and deeper understanding of the subject, but must rest on the claim that what they share with human beings is more important than what separates them. Those common elements do justify some level of animal protection but does not justify the radical transformation of social institutions that would flow from the recognition, as Steven Wise has advocated, of the basic libertarian rights of freedom from human domination and exploitation.

### Introduction: Two Conceptions of Animals

One of the more persistent and impassioned struggles of our time is now being waged over the legal status of animals. Should they be treated as objects of human ownership, or as bearers of independent rights. Many modern writers, most notably Steven Wise and Gary Francione, have championed the latter position. In this paper I shall offer a tempered version of the original position that in the eyes of many will convict me of the new offense of specieism. In order to evaluate this choice, it is necessary to examine first the historical rules that comprised the law of animals in order to set the backdrop for the modern

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reforms. Part I of this article will set these out in brief compass. Its mission is to show that the historical accounts of animals did not rest on any fundamental misconception as to their capacities, but on the simple but powerful proposition that the survival and advancement of human civilization depended on the domestication and use of animals. Part II of this Article then explores the moral status of animals, and their relationship to women, children and slaves, under the traditional synthesis of legal rights. Part III then notes the benefits to animals that arise from the system of human ownership. Part IV relates these historical to the modern debates over the legal status of animals, and rejects the proposition that the creation of rights for animals is a logical extension of the creation of full rights for women and slaves. Part V discusses efforts to create animal rights based on their cognitive or sentient capacity, and concludes that these help justify many past initiatives for the protection of animals, but not the more aggressive claims for animal rights.

### I. Animals as Objects

Under traditional conceptions of law, animals were typically regarded as objects of rights vested in their human owners but not as the holders of rights against human beings. Even as objects, animals historically occupied a large place in the overall system of legal rights and social relations. Animals in a bygone age represented a larger fraction of social wealth than they do today. As Jared Diamond reminds us, there were “many ways in which big domestic animals were crucial to those human societies possessing them. Most notably, they provided meat, milk products, fertilizer, land transport, leather, military assault vehicles, plow traction, and wool, as well as germs that killed previously

unexposed people.”<sup>1</sup> Smaller animals, such as birds were likewise domesticated for their “meat, egg and feathers.”<sup>2</sup>

In order to frame the modern debate, it is useful to give some brief outline of the basic legal rights and duties *among* people *over* animals. These rules are subject to small but unimportant local variations over both time and place, largely on matters of detail and formality. The classical Biblical and Roman Law, however, applies in its original form today in both civil and common law countries, except where specific protective legislation intrudes.<sup>3</sup> As with other objects of ownership, these rules are conveniently divided into three areas: acquisition transfer and protection.<sup>4</sup>

*Acquisition.* Animals count as assets with positive economic value, and as such are important objects of a system of property law. In the state of nature, every animal was a *res nullius*, that is a thing owned by no person. In contrast to a *res commune* (such as air or water) a *res nullius* could be reduced to private ownership by capture.<sup>5</sup> The rule was followed under Roman and English law, subject to one fine difference, which went not to the question of whether animals could be owned, but only to the question of who owned a particular animal. Under Roman Law if A captured land on the property of B, he could keep it;<sup>6</sup> under English law the animal became the property of the owner of the locus in quo.<sup>7</sup> Once captured, an animal remained the property of its owner until it was

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<sup>1</sup>Jared Diamond, *Guns, Germs, and Steel: The Fates of Human Societies* 158 (1997). The entire book offers a rich and powerful explanation of the patterns of domestication that is required reading for anyone interested in this subject.

<sup>2</sup>*Id.*

<sup>3</sup>Barry Nicholas, *An Introduction to Roman Law* 131 (1962).

<sup>4</sup>For a general discussion of these principles, see Richard A. Epstein, *Simple Rules for a Complex World* 59-111 (1995); for an earlier philosophical version of the same theme, see Robert Nozick, *Anarchy, State, and Utopia* 150-53 (1974)..

<sup>5</sup>Gaius, *Institutes*, II, 66.

<sup>6</sup>Justinian Digest, 41:

<sup>7</sup>See, *Blade v. Higgs*, 11 H.L. Cases 521, 11 Eng. Rep. 1474 (1865) (adopting the rule of ownership *ratione soli*, or by reason of the land) .

abandoned. An owner did not abandon possession even by sending out animals, unsupervised, to graze in the hills or fields,<sup>8</sup> so long as the animals had the “intention to return” (the so-called *animus revertendi*) to their original owner, which in turn was evidenced by their “habitual” return.<sup>9</sup> But if that pattern was broken, then the animals were regarded as abandoned and subject to capture by another.

Universally, the owner of the female animal also owned its offspring.<sup>10</sup> That practice follows from the manifest inconvenience of the alternatives. To treat the offspring as a *res nullius* raised the specter that some interloper could snatch the newborn from its mother, which could not happen under the dominant rule, which eliminated any dangerous gaps in ownership. Nor did it make any sense to give the newborn animal to the owner of the land on which the birth took place, for that rule would only induce the owner of an animal to keep in an animal against its natural inclination, perhaps reducing its changes of reproductive success. Nor did it make sense to allocate ownership of the offspring jointly to the owners of both the male and female parents, assuming that the former was in captivity. It is never easy to identify the father, and even if he is known with certainty, a rule of joint ownership rule forces to neighbors into an unwanted partnership between relative strangers. Anyone who wants joint ownership can contract for it voluntarily. The rule that assigned offspring to the mother was treated as a universal proposition of natural law.

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<sup>8</sup>See, e.g. Ulpian 41.2.12.1 “Property has nothing in common with possession.” for discussion, Nicholas, *Introduction* at 110–15. The rule in question has been the source of much philosophical discussion, see e.g., Immanuel Kant, *Metaphysical Elements of Justice* 56–73 and the editorial explication id. xxxiii, (ed. John Ladd, 1999).

<sup>9</sup>Gaius, *Institutes*, II, 67 (F. De Zulueta ed. 1946).

<sup>10</sup>See, e.g., 4 *Am. Jur.*, 2d., *Animals*, Sec. 10 at, p. 257: “The general rule, in the absence of an agreement to the contrary, is that the offspring or increase of tame or domestic animals belongs to the owner of the dam or mother. . . . In this respect the common law follows the civil and is founded on the maxim, ‘partus sequitur ventrem’ . . . Furthermore, the increase of the increase,

*Transfer.* Next, the law had to provide some mechanism to transfer the ownership of animals. In the absence of exchange, the value of any animal is limited to its use (or consumption) value to its owner. Once exchange is allowed, both sides could profit, when animals were sold, given away or used as security for loans. Transfers were common once young animals were weaned.

In the grand scheme of things, the methods of transfer have at most instrumental virtues. The customary mode of transfer is by way of delivery either by gift or by sale. In an economy that lacked mechanical or electrical sources of power, draught animals were regarded not solely as sources of food, but often as capital items on a par with land and slaves.<sup>11</sup> While a simple delivery might transfer ownership of small or newborn animals, higher levels of formality (such as the ritual of *mancipatio* in Roman law) were routinely used to make effective the transfer of more valuable animals.<sup>12</sup>

*Liability.* All legal systems develop elaborate liability rules that set out both an owner's responsibility for the wrongs committed by his animals, and likewise the owner's rights to recover for injuries to his animals.<sup>13</sup> The potential theories of liability spanned the gamut: one possibility was to hold owners vicariously liable for animals that they owned, much as (ancient) owners were liable for the torts of their slaves, or (modern) employers are liable for the wrongs of their employees committed within the scope of their employment. Alternatively, owners could be held liable not for the animal's act as such, but for their own antecedent failure to keep their animals in. In both cases, an extensive debate could arise over whether any liability, whether for act or omission, was

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ad infinitum, of domestic animals comes within the rule and belongs to the owner of the original stock." For application, see, *Carruth v. Easterling*, 150 So. 2d 852, 854-55 (Miss. 1963)

<sup>11</sup>See, e.g. F. H. Lawson, *Negligence in Civil Law* (1950), at 23, 24, which discusses death or injury to "slave or animal" in the same breath.

<sup>12</sup>For a description of the formalities, see, Gaius, *Institutes*, I, 119; for discussion see Nicholas, *Roman Law*, supra note 3, 103-5.

governed by negligence or strict liability principles. Under the so-called principles of noxal liability, an owner in some instances could escape further liability by surrendering the animal in question—a strategy that made sense when the value of the animal was less than the harms so caused. Special rules were developed in connection with cattle trespass. On that subject there were immense debates (a.k.a. range wars) in arid countries over whether to switch from the common law rule that required *cattleowners* to fence their cattle *in* to the alternative rule that requires *landowners*, often at enormous expense, to fence these animals *out*.<sup>14</sup> Special rules were introduced to allow, without liability, minor harm to property beside public roads on which animals traveled.

Oftentimes the mental states, both of animal and owner were key to deciding liability. It could matter whether an animal committed a deliberate or accidental harm. It could also matter whether the animal was provoked or whether it acted in self-defense against, say, the attack of other animals. Sometimes the decisive mental state was that of the owner, not of the animal. Thus in Exodus if an ox gored, then it could be put to death, but the owner was spared—a variation on the theme of noxal liability. But if the owner had been aware of the propensity of the animal to gore, then he could be held liable if he did not keep the animal under his control.<sup>15</sup> Even when animals could no longer

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<sup>13</sup>For a general discussion, see Richard A. Epstein, *Torts* §13.3 (1999).

<sup>14</sup>On which see, e.g., *Garcia v. Sumrall*, 121 P.2d 640 (Ariz. 1942), noting that the switch tends to take place on large tracts on barren land suitable only for grazing, where there is no arable land worthy of protection. Yet the presumption generally stays in favor of the common law rule of fencing see Kenneth Vogel, “The Coase Theorem and California Animal Trespass Law”, 16 *J. Legal Stud.* 149 (1987). Vogel notes that in a regime in which the landowner is required to fence out intruders he can make agricultural use of his property only by contracting with all potential interlopers; but when animals must be fenced in, a given owner can allow his land to be used for grazing by dealing with only a single individual; for a study of the evolution of these norms in Shasta County California, see Robert Ellickson, *Order without Law: How Neighbors Settle Disputes*, chs. 2 & 3 (1991).

<sup>15</sup>The relevant passages are in Exodus:

21.28: If an ox gores a man or woman to death, the ox shall be stoned to death, its flesh may not be eaten, but the owner of the ox is innocent.



be put to death, the on *damages feasant* allowed the owner of animals to hold them as security for the damage they caused—no questions asked<sup>16</sup> In this context, liability remained stubbornly strict not because farmers were oblivious to the mental states of animals, but because they understood that this entire self-help regime would collapse if a landowner could only hold for amends a stray that had escaped through its owner's negligence, which they could not infer simply from the presence of the animal.<sup>17</sup> The principle of no liability without fault made few inroads into this area, even though it received spirited philosophical defense.<sup>18</sup> The farmers whose interest were intensely practical much preferred to retain the more administrable strict liability laws.<sup>19</sup>

## II. The Moral Status of Animals under the Classical Synthesis

In shaping these theories of tort liability, neither the ancients nor their modern successors committed any obvious blunder of treating animals “just like” land or inanimate objects. Nonetheless, that claim has often been advanced. As Steven Wise puts the point:

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21.29. But if the ox was previously reputed to have had the propensity to gore, its owner having been so warned, yet he did not keep it under control, so that it then killed a man or a woman, the ox shall be stoned to death, and its owner shall be put to death as well.

21.30. Should a ransom be imposed upon him, however, he shall pay as the redemption of his life as much as is assessed upon him.

The evident sophistication of these passages could not be ignored. 21.28 speaks in terms of a strict liability, which leaves open the possibility of defenses based, for example, on provocation, but probably not the defense that the owner used all due care to keep the animal in. But once there was warning of a dangerous propensity—itself a sophisticated dispositional concept—then if the owner did not keep it under control, he could be held liable, unless of course he was able to redeem his own life by paying some assessment. One could argue with the wisdom of the rules, but cannot impute to those who authored them a lack of the permutations of legal analysis.

<sup>16</sup>See, e.g., *Marshall v. Welwood*, 38 N.J. L. 339(1876)

<sup>17</sup>*Id.* at 341.

<sup>18</sup>See Glanville Williams, *Liability for Animals* (1939).

<sup>19</sup>Report of the Committee on the Law of Civil Liability for Damage Done by Animals, CMD 8746 ¶3 (1953). The explanation was: “This class of liability is of interest only to farmers and landowners and the general public are not affected thereby.” The impulse was that any deviation from the standard rules of tort law were justified by the reciprocal nature of the interactions between the parties in a closed community. See, on reciprocity in tort law generally, George

Although blinded by teleological anthropocentrism, the Greeks were not blind. They could see that nonhuman animals (and slaves) were not literally “lifeless tools.” They were alive. They had senses and could perceive. But Aristotle compared them to “automatic puppets.”

Wise’s use of the term “nonhuman animals” is a nice, but transparent, rhetorical ploy to undercut the traditional firm line between human beings (not human animals) and (some other kind of) animals. But even if we put that point aside, his position is overdrawn. Surely the early legal systems outline above, did not make this mistake, given the importance that they attached to the mental states of animals as well as people. Nor does it appear that Aristotle made that error either. Even a quick peek at his *History of Animals* shows a subtlety and appreciation on this point:

in a number of animals we observe gentleness or fierceness, mildness or cross temper, courage or timidity, fear or confidence, high spirit or low cunning, and, with regard to intelligence, something equivalent to sagacity. Some of these qualities in man, as compared with the corresponding qualities in animals, differ only quantitatively: that is to say, a man has more or less of this quality, and an animal more or less of some other; other qualities in men are represented by analogous and not identical qualities; for instance, just as in man we find knowledge, wisdom, and sagacity, so in certain animals there exists some other natural potentiality akin to these.<sup>20</sup>

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Fletcher, “Fairness and Utility in Tort Theory”, 85 *Harv. L. Rev.* 537, 547-548 (1972), with explicit reference to the rules of liability for wild animals.

<sup>20</sup>Aristotle, *The History of Animals*, Book VIII, 588a, (D’Arcy Wentworth Thompson trans. in R. McKeon, *The Basic Works of Aristotle*, 1942).

None of this sounds remotely like a flattening of animals intellectual or emotional states in the manner portrayed by Wise. Of course Aristotle's treatment of animals is marred by his unavoidable ignorance of the rudiments of reproduction: he had no microscope, and thus no clue, that sperm differs from semen (which in its primary sense still refers to the "fluid" that carries the seed), or that the female of the species produce eggs.<sup>21</sup> But it does not take a microscope to observe and exploit the rudiments of animal behavior for human survival. It is well known, for example, that the domestication of all major groups of large animals was completed at least two millennia before Aristotle wrote, that is between 8000 and 2500 B.C.<sup>22</sup> The ancients, no matter how ignorant they were of the mechanics of reproduction, knew how to use artificial selection, a.k.a. breeding, in order to modify animal and plant species for their own benefit. ". . . Darwin, in the *Origin of the Species* didn't start with an account of natural selection. His first chapter is instead a lengthy account of how our domesticated plants and animals arose through artificial selection by humans."<sup>23</sup>

On the issues that matter, then, nothing seems further from the truth than Wise's highly stilted account of how ancient peoples viewed animals. A contemporary case for animal rights cannot be premised on the dubious assumption that our new understanding of animals justifies a revision of our old legal understandings. The ancients may not have known much about the fine points of animal behavior and reproduction. Still their understanding of animal personality, their understanding dispositions and mental states, their skills in domestication, belies the belief that either farmer or jurist, ancient or modern, had some difficulty in distinguishing animals from inanimate objects, or for that

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<sup>21</sup>See Aristotle, *On the Generation of Animals* 7211-730 (Arthur Platt trans., id).

<sup>22</sup>See, Diamond, *Guns, Germs & Steel*, supra note 1, at 165. Similar strenuous efforts were made for the domestication of plants. Id. at 114-25.

<sup>23</sup>Id at 130.

matter from slaves. The key differences could never have been overlooked by any person in daily contact with those animals on which their survival depended.

“Survival” is the right word, for nothing less is stake in primitive societies that labor under conditions of scarcity when every calorie counts. Animals were a source of work in the fields; of food; of protection; and of companionship. They received the extensive protection of the law because they were valuable to the human beings that owned them. To imagine an ancient society in which animals had rights against human beings solely because they were sentient creatures is to envision a society in which human beings would be prepared to put themselves and their families at risk for sake of brute, if sentient, creatures. The ancients devoted considerable ingenuity in determining the proper status of animals, but, as far as I can tell, their speculations never denied the agency of animals. Yet at no time did they talk themselves into thinking that animals holders of legal rights. Those altruistic sentiments are the indulgence of the rich and secure. They play no part whatsoever in the formative thinking of any individual or society whose bodily or collective security are at risk. Such intellectual developments had to wait until, at the earliest the nineteenth century.

### III. The Benefits to Animals of Their Ownership by Humans

The historical backdrop invites a further inquiry: why is it that anyone assumes the human ownership of animals necessarily leads to their suffering, let alone their destruction? Often, quite the opposite is true. Animals that are left to their own devices may have no masters; nor do they have any peace. Life in the wild leaves them exposed to the elements; to attacks by other animals; to the inability to find food or shelter; to accidental injury; and to disease. The expected life of animals in the wild need not be solitary, poor, nasty, brutish and short. But it is often rugged, and rarely placid and untroubled.

Human ownership changes this natural state animals for the better as well as for the worse. Because they use and value animals, owners will spend resources for their protection. Veterinary medicine may not be at the level of human medicine, but it is only a generation or so behind. When it comes to medical care, it's better to be a sick cat in a middle-class United States household than a sick peasant in a third-world country. Private ownership of many pets (or, if one must, "companions") gives them access to food and shelter (and sometimes clothing) which creates long lives of ease and comfort. Even death can be done in more humane ways than in nature, for any slaughter that spares cattle, for example, unnecessary anxiety, tends to improve the amount and quality of the meat that is left behind. No one should claim a perfect concurrence between the interests of humans and animals: ownership is not tantamount to partnership. But by the same token there is no necessary conflict between owners and their animals. Over broad areas of human endeavor, the ownership for animals worked to their advantage, and not to their detriment.

#### IV. Animals as Holders of Rights

The modern debates over animals go beyond the earlier historical arguments by asking whether animals are, or should be treated, as the holders of rights against their would-be human masters. In dealing with this debate one common move is to exploit the close connection, already noted, between slaves and animals in the ancient world. The injustices of owing slaves is said to be paralleled by the injustices done to animals. Thus in *Rattling the Cage*, Steven Wise starts with the observation that Aristotle lumped animals with slaves and women as beings that were lower than (Greek) males in explicit hierarchy found

in Arthur Lovejoy's *Great Chain of Being*.<sup>24</sup> He notes that Aristotle observed that "the ox is the poor man's slave."<sup>25</sup> The Romans in his view did no better insofar as by lumping animals with slaves, women, and insane persons. Now that we have repented our errors with slaves and women, let us, Wise urges redress human injustices to animals.

I have several responses to this line of argument. The first rejects the asserted, if elusive, historical equation among women, slaves, and animals. Of course animals were lumped with (some) human beings for limited purposes. If only some human beings had full legal rights, then others had either fewer or none, and to that extent were "like" animal. But this gross oversimplification does not capture, for example, the full subtleties of the law of "persons" in Roman Law or any other ancient legal system. Given the divisions among human beings, the law of persons was always more complex in ancient legal systems than in modern ones. The Roman rules for men within the power of their fathers and for women, and for insane persons all differed from each other in important particulars. Men within the power of their father could become heads of their own families at the death of their father; they had full rights to participate in political life even while consigned to a subordinate position within the family.<sup>26</sup> That subordinate status in turn was softened by the social recognition of the separate property—the so-called *peculium*—with which the paterfamilias would not interfere.<sup>27</sup> In addition, the manumission of sons during the life of their father was commonplace. Marriage for its part was a consensual union, in which formalities were evidentiary and thus not strictly required.<sup>28</sup> Animals did not

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<sup>24</sup>Steven Wise, *Rattling the Cage: Toward Legal Rights for Animals* 9 . The reference here is to Arthur Lovejoy, *The Great Chain of Being: A Study of the History of an Idea* (1960).

<sup>25</sup>Aristotle *Politics*, Bk. I, Ch. 2, 1252b 10.

<sup>26</sup>See, Nicholas, *Introduction* at 65, 66 (1962).

<sup>27</sup>*Id.* at 66.

<sup>28</sup>*Id.* 80-82

marry. With a nod toward modernity, the woman, as well as the man, was free to renounce the marriage at any time.<sup>29</sup> Women, slaves (not to mention sons) and animals were each subject to distinct rules tailored to its own distinctive status.

More to the point, it is critical to note *why* the older classification of persons slowly broke down over time. From Justinian on forward, the basic philosophical position held that all men (by which they meant people) by nature were born free.<sup>30</sup> The use of the words “by nature” carried vital intellectual freight about the pre-social status of human beings. Even before Locke, the clear implication was that social arrangements should be organized to preserve, not undermine, the natural freedom of human beings. Therefore any limitation on human freedom within civil society was an evident embarrassment to this normative view. But Roman jurists were not reformers. Rather, they were mainly chroniclers of their own system, often in the pay of the leaders of a slave society. They confined their philosophical reflections to a few grand introductory observations. But they never entered into open warfare with the operative rules of their own legal system.

Others of course could appeal to natural law principles to advance reformist as well as conservative causes. Faced with sharp rebuke, the defense of the status quo ante on slaves and women slowly crumbled precisely because they were human beings and not animals. Any defender of full legal capacity for some but not all humans had to find some independent reason to justify the differential legal status. It is hard to do this with slaves, many of whom were acquired by conquest. Is there any one with a straight face who could deny that an ingenious slave was smarter than his or her indolent master.

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<sup>29</sup>Id at 81.

<sup>30</sup>See Justinian’s *Institute*, Book I, ch. 2, 2.

It is, in a sense, easier to maintain the line against women because of the prominence of sex differences. But in the end this has to fail as well. Aristotle, for example, imputed to women a set of inferior characteristics justify their second-class legal status. But it rings hollow in face of the obvious objection that every man is not better than any woman on every (male) dimension that matters. Some women are taller than men, stronger than men, smarter than men. Depending on your fondness for stereotypes, a majority of women may be more empathetic and cooperative than men. Indeed with the passage of time and the progress of civilization, warlike skills and brute strength diminish in relative importance, so the balance of social advantage shifts to traits in which women have in relative abundance. (After all, the grand social contract whereby everyone renounces force against everyone else works more to the advantage of women than men.) In this environment, no one could defend the strict rank order judgments needed to prop up the sharp differences in legal status between men and women.

None of these categorical differences then work. But there is another approach that does make sense, and which in the end prevailed. One great task of any legal system is to set out the basic relationships between strangers. Such is the function of the “keep off” rules generated by the recognition of universal rights to individual autonomy and private property. One does not have to endorse either property or autonomy in their entirety to understand their basic logic. Coordinating the rights and duties of countless pairs of unrelated individuals cannot rest on subtle sliding scales with uncertain substantive content. It depends on clear classifications known and observable by all—which helps explain why the clear, if unprincipled, classifications based on sex, race and slavery were able to function as long as they did. But once the dichotomous view of the world—all Xs are better under some metric than all Ys—is rejected, then only one social approach makes sense. We adopt the central proposition of



modern liberalism, namely, that all natural persons, that is all human beings, should be treated as legal persons, with the full rights to own property, to make and enforce contracts, to give legal evidence, to participate in political life, to marry and raise families, to engage in common occupations, to worship God, and to enjoy the protection of the state when they participate in any of these activities.<sup>31</sup>

On this view, the great impetus of the reform movement lay in the simple fact that the individuals who were consigned to subordinate status had roughly the same natural, that is human, capacities as those individuals in a privileged legal position. We still think in categories, but now all human beings are in one category; animals fall into another. The use of the single word “capacities” carries two different meanings and in so doing reflects a profound empirical truth. With time, most of the personal limitations on individual capacity disappeared, but not without epic struggles over the abolition of slavery, and the extension of civil capacity and suffrage to women. But even before the change in formal legal status it would be a mistake to assume that slaves were treated like women, or that animals were treated like either. The variations in social status was just too great.

The defenders of animal rights place a slightly different twist on this history, which seizes on the fact that equal legal capacities are conferred on individuals with known differences in talents and abilities. The point requires a response. The movement for equal rights of all human beings must take into account the fact that all people do not have anything remotely like the same cognitive abilities. The phrase ordinary intelligence itself conceals a multitude of differences. But even that range does not capture the full extent of the problem,

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<sup>31</sup>For that list, see, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (speaking of liberty as used in the context of substantive due process analysis).

even if we put aside the case of children: what fate lies for adult human beings whose mental disabilities *in fact* preclude them from taking advantage of many of the rights they are afforded? Our standard position is to give them extra protection, not to exterminate them, and to do so because they are human beings, entitled to protection as such.

It follows therefore we should resist any effort to bootstrap legal rights for animals on the change in legal rights of women and slaves. There is no next logical step to restore parity between animals on the one hand and women and slaves on the other. Historically, the elimination, first of slavery and then civil disabilities to women occurred long before the current agitation for animal rights. What is more, the natural cognitive and emotional limitations of animals, even the higher animals, preclude any creation of full parity. What animal can be given the right to contract? To testify in court? To vote? To participate in political deliberation? To worship?

None of these make any sense owing to the lack of intrinsic animal abilities. The claim for animal rights thus tends to boil down to a singular claim. Protection against physical attack, or, perhaps, as Gary Francione as urged a somewhat broader right whereby animals cannot be used as resources subject to the control of human beings, or, more generally, “the right not to be treated as things” or resources, owned by other human beings, even, it appears, when done for their benefit.<sup>32</sup> The most that can be offered is protection against physical attack by human beings, and perhaps by other animals, and perhaps some recognition of the limited ownership that animals can acquire over certain external things from territories to acorns. A change in legal position yes, but a restoration of some imagined parity no.

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<sup>32</sup>Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* xxix, (2000), and at 50-80.

## V. Partial Parity for Animals: Sensation or Cognition?

So the question now arises, on what grounds ought animals be accorded these limited, but real legal, protections against human beings. In essence, there are two ways to go. The first emphasis sensation, and the second cognition. Both in my view fail to sustain the claim for the new wave of animal rights.

Start with sensation. Animals experience pleasure and pain and should not be made to suffer as the instruments of human satisfaction. The nature of this claim exposes at the very least one of the fundamental soft spots in any kind of libertarian or utilitarian theory. It is therefore no accident that Robert Nozick, for example devotes much thought to the question of animals. His mode of argument runs as follows. He first develops the theme that the “moral side constraints” that reflect our “separate existences” make it utterly in appropriate to conclude that “[t]here is no justified sacrifice of some of us for others.”<sup>33</sup> This insight leads quickly to the libertarian side-constraint against aggression. To probe just how powerful that constraint is, Nozick then turns to the moral side constraints that should be established in virtue that animals are sentient creatures.<sup>34</sup> As befitted his darting intelligence, Nozick never quite came down in favor of the proposition that animals should be treated with the same respect as people, but he was quite emphatic in concluding that they could not be treated as mere things either. He thought that a total ban on hunting for pleasure was in order, and was doubtful that the case could be made out for eating meat given that “*eating* animals is not necessary for *health*.”<sup>35</sup> But this statement over the concern for animal welfare is not a plea for moral parity. The side-constraints may exist, but they are not the same side-constraints that apply to human beings.

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<sup>33</sup>Nozick, *Anarchy, State, and Utopia*, supra note at 33.

<sup>34</sup>Id at 35–42.

<sup>35</sup>Id at 36.

The exact same issues arises within the utilitarian framework. Once again start with the view that what ultimately matters are gains and losses, such that rights are just a means to secure those social arrangements that maximizes social gains (or pleasures) over social losses (or pains). One obvious question is how to measure these pleasures and pains. A number of different approaches can be taken. The easy way to avoid a comparison across persons is to insist that everyone has to be better off in one state of the world than in another. But that test for social welfare is so restrictive that it has little use in evaluating ordinary arrangements. Alternatively, one could argue that one state of the world is better than another if the winners in that state could (in principle, but not in fact) compensate the losers for their pain and still come out ahead of where they would otherwise be. There are enormous administrative difficulties in sorting all this out in setting out human arrangements. But when the dust settles the ultimate challenge to the utilitarian is the same as it is to the libertarian. In determining the excess of pleasure over pain, who or what deserves a place in the overall social utility function? The great challenge for utilitarian theory is who ought be counted in the felicific calculus.

Do animals then deserve a place in the social utility function, whether it is constructed on aggregate or individual basis. The test for this right is the capacity to suffer and enjoy. Such is the point of Jeremy Bentham's blunt assertion: "the question is not, Can they *reason*? Nor, Can they *talk*? but, Can they *suffer*?"<sup>36</sup> Our intervention to prevent suffering is, however, usually confined to questions of how human beings ought to interact with animals, and there the problems are difficult enough. Does one increase or reduce the suffering of animals by domestication? How would we know and what would we do with that

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<sup>36</sup>Jeremy Bentham, *The Principles of Morals and Legislation*, ch XVII, ¶ UV [1781] (1988), at 310, quoted in Francione, *Animal Rights*, at 5.

information if we had it? And if there are any increases in longevity do those justify or excuse putting animals to death, after a happy life, for food or medical experimentation? As Nozick observes, one common justification for eating animals is that human ingenuity brought them into the world in the first place. But think of how that argument plays out with human beings. Surely parents are not allowed to kill its children at three hours, days, months or years just because they gave them the initial gift of life. “[O]nce a person exists, not everything compatible with his overall existence, not everything compatible with his overall existence being a net plus can done, even by those who created him.”<sup>37</sup> Stated otherwise, we think of parents as guardians, not owners of their children. The parity argument would insist that animals, once brought into this same world, receive this same protection.

Even if we could answer these conundrums, we still face a greater challenge: do we have it within our power to arbitrate the differences among animals? Do we train the lion to lie down with the lamb, or do we let the lion consume the lamb in order to maintain his traditional folkways? Do we ask chimpanzees to forgo eating monkeys. It is odd to intervene in nature to forestall some deadly encounters, especially if our enforced nonaggression could lead to extermination of predator species. But, if animals have rights, then how do we avoid making these second-tier judgments? We could argue that animals should not be restrained because are not moral agents because they do not have the deliberative capacity to tell right from wrong, and therefore cannot be bound by rules that they can neither articulate nor criticize nor defend. But at this point we must ask whether we could use force in self-defense against such wayward creatures or must let them have their way with us, just as they do with other animals. In answer to this question, it could be said that animals cannot be held

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<sup>37</sup>Nozick, *Anarchy, State, and Utopia*, at 38

responsible by human standards because of their evident lack of capacity to conform.

Yet there's the rub! Once that concession is made, then the next question is whether we really think that suffering is the only criterion by which rights are awarded after all? It does seem troublesome—nothing is fatal in this counterintuitive metaphysics—to assume that animals are entitled to limited rights on a par with humans while denying that they are moral agents because they are incapable of following any universal dictates. And do we attach any weight to the unhappy fact that these animals are themselves imprinted “specieists,” in that they have instinctively different relationships with members of their own kind than they do with members of prey or predator populations? The test of sensation cannot generate a clean account of legal rights for animals.

So what about cognition? In his recent book, *Drawing the Line*.<sup>38</sup> Steven Wise advances the claim that limited cognitive capacity supports the claims for negative rights—that is, for rights not be used as objects for human advantage. These preconditions run as follows. The animal

1. can desire
2. can intentionally try to fulfill her desires and
3. possesses a sense of self sufficiency to allow her to understand, even dimly, that it is she who wants something and it is she who wants to get it.<sup>39</sup>

He then shows how to greater or lesser extent these criterion are satisfied by young children, chimps, bonobos, gorillas, orangutans, dogs, and even honeybees. It is no surprise that by these tests, all these animals do fairly well, as of course would rats, hyenas and raccoons. Unless an animal has some sense of self, he cannot hunt, and he cannot either defend himself or flee when subject to

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<sup>38</sup>Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* (2002).

<sup>39</sup>Id. at 32.

attack. Unless he has a desire to live, he will surely die. And unless it has some awareness of means and connections, it will fail in all it does. We do not need experts to make judgments under these standards. It is quite enough that the mother senses danger when a stranger comes between her and her young. That happens all the time, and meets, with room to spare, each of the ostensible criterion that Wise sets out in his campaign for animal rights.

But why follow these tests on the questions of entitlements? At one level the entire discussion gets creepy when we make these comparisons organism by organism: how do we compare an intelligent chimp with a profoundly retarded child? It seems clear that even Wise has to engage in species-like comparisons to frame his general inquiry, and to proceed in that matter means that we do not draw any real distinctions within any particular animal or human grouping however defined. Indeed to move in the other direction invites scorn from all quarters: are dumb chimps entitled to no protection? May retarded children be killed at will because they will always flunk Wise's three tests? Or that infants may be killed with impunity because they do not yet have higher cognitive powers? These variations have little to do with the rights of species. The question is how matters fare when we look at humans and chimps of ordinary intelligence: show me the chimp that can learn her multiplication tables or do crossword puzzles at any age. The actual differences in the higher capacities are enormous on a species-to-species comparison. After all, no chimp could ever utter a word in defense of its own rights. The individual variations do not matter. So long as retarded children have human parents and siblings, they will never be regarded as appropriate fodder for indiscriminate slaughter. So with the rules and regulations that humans develop to protect chimps, where variations in cognitive abilities among chimps would in the end play little role in deciding the care treatment that they receive.

The subject provokes still deeper ironies. In part, Steven Wise undertook his newer venture because in his earlier work, *Rattling the Cage: Towards Legal Rights for Animals* he sought to establish limited legal rights for chimpanzees, only to face the same boundary question among species as everyone else. What about lions, tigers, alley cats and jelly fish? None of these can be excluded if the capacity for suffering is decisive. Nor ironically can once they are excluded on grounds of a (more) limited cognitive capacity under Wise's new tests. In the end, even the proponents of animal rights must adopt an explicit speciesist approach, complete with arbitrary distinctions. The line between humans and chimps is no longer decisive, but then some other line has to be. Perhaps it is the line between chimps and great apes, or between both and horses and cows, or between horses and cows and snails and fish. Which of these lines are decisive and why?. The continuum problem continues to plague any response to the universalist claim that suffering of (some) animals counts as much as the suffering as a human being—at least to the human beings who are calling the shots. It turns out that Lovejoy's idea of a great chain of being influences not only the traditional attitude toward animals but also the revisionists beliefs of Steven Wise.

There is still another easy way to test the asserted parity between human beings and animals, even the chimps. Instead of looking at the duties of noninterference (by force) with animals, consider the opposite side of the coin—the affirmative duties that the state owes to animals. It is fashionable today to argue that all human beings are entitled to some minimum level of support in order to flourish as human beings able to develop their varied capacities. That desire for certain minimum rights is intended to impose on some individuals the correlative duties to support other people, so as to build a profound and enduring set of economic cross-subsidies into the system.



My simple question is this: do we as human beings owe the same level of minimum support to chimps, or other animals, that we do to other people? If we give Medicare to persons do we have to supply it to chimps in the wild, at least if they are in our territory? Or suppose that we manufacture limited supplies of a new pill that is a cure for some disease that is ravaging both human and chimpanzee populations. There is not enough to go around for both man and beast. Is there some kind of affirmative duty to assist chimps to the same extent that we assist other human beings? I should be stunned if any real world scenario would ever produce any result other than humans first, chimps second. The blunt point is that we have, and will continue to have different moral obligations to our own conspecifics than we do to chimps or members of any other species.

This point is in some degree challenged by Gary Francione who asks whether “we cannot prefer human over animals in situations of true emergencies or conflicts.”<sup>40</sup> As the subtitle of his recent book indicates, “Your Child or the Dog?”, the moment of truth comes when an individual should choose to save his child or his dog if both are trapped inside a burning house? The child, darn it, even if the child is unrelated and the dog is one’s own. Francione waffles about this point, by noting that rescuers have to make similar choices among human beings. Should the rescuer save the infant who has yet to live his life over the very old adult who is near death? But this does not preclude a judgment that saves any human being over any animal. Nor would the reluctance to prefer the old and infirm over the young and healthy make it proper to treat old people as slaves, or unwilling objects of medical experimentation. The same of course can be said of animals. It seems preferable to rescue a trapped animal than to remove a chair or a bush. But a priceless painting? All these comparisons only show that

rankings are possible, with more or less precision. Animals are not treated just as though they were inanimate objects. Yet that hardly establishes that they are entitled to (limited) treatment as human beings.

## VI. Where Now?

At this point, the question does arise, what ought to be the correct legal regimes with respect to animals? Here it would be simply insane to insist that animals should be treated like inanimate objects. The level of human concern for animals, in the abstract, makes this position morally abhorrent to most people, even those who have no truck whatsoever with the animal rights movement. That concern, moreover, can manifest itself in perfectly sensible ways short of the animal rights position which don't go quite as far as Nozick's anxious concern. It is of course pretty straightforward to pass and enforce a general statute that forbids cruelty to animals. Even if cruelty is narrowly defined so as to exclude, as it routinely does, the killing of animals for human consumption, at least it blocks some truly egregious practices without any real human gain, gory lust to one side. We can also engage in humane (note the choice of word) practices for the killing of animals so as to reduce their anxiety and fear. There are doubtless many ways to reduce animal suffering without compromising human satisfactions, or indeed improving the human condition, and adopting those should count as important priorities. Who can oppose measures that benefit humans and animals alike?

The harder question arises when there is a trade-off between human gain and animal suffering. But actions that fit that description are, and have long been, staples of human society. Taking the first easy steps to protect animals still allows for the domestication and ownership of animals, and their use as human

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<sup>40</sup>Francione, *Animal Rights*, at xxx.

food. Nor do these address what is perhaps the hottest topic of controversy, the use of animals for medical experimentation. But that practice, with some important caveats, continue. It goes without saying that the use of animals for medical experimentation counts as a *prima facie* bad. We should not choose to inflict it lightly on any animals for some ephemeral gain. But that is a far cry from saying that no human benefit will *ever* justify in human terms the killing of animals, given their right to bodily integrity. That *per se* approach will not succeed; nor should it.

Examples are easy to state. Let it be shown that the only way to develop an AIDS vaccine that would save thousands of lives is through painful or lethal tests on chimpanzees. People will clamor for that test (if they had the certainty announced here). Other cases are even easier. Suppose that the shortage of human kidneys could be at long last eliminated by the genetic engineering of pig kidneys so as to overcome the risk of human rejection? Does anyone think that we would impose a *per se* ban on the use of those organs in human beings because of the devotion to animal rights? Right now we have enormous safeguards, excessive in my view, on the use of human organs for transplantation.<sup>41</sup> Even after death the practice is hard to implement. Efforts to persuade a reluctant nation to allow for voluntary transfers of organs for cash have fallen largely on deaf ears. Systems of voluntary donations have not picked up the slack. The use of animal organs represents the hope of thousands of individuals for future salvation. An animal right to bodily integrity would stop that movement in its tracks. It will not happen, and it should not happen.

So what then should be done once we, as humans, decide not to extend something akin to Mill's categorical harm principle to animals, so as to leave them outside the orbit of any and all human uses. Lots, I suspect. For starters, we

can recognize that in dealing with animals, there are two dimensions in which it is necessary to strive for the appropriate balance. The first of these is with the hierarchy of animals. The blunt truth, as Wise's own work shows, is that the more animals look and act like human beings, the greater the level of protection that we as humans are willing to afford them. Rights of bodily integrity do not have much of a future for mosquitoes. Second, the higher the species ranks on own tree of life, the stronger the justifications that must be advanced in order to harm members of that species. Cost aside, we would be wholly inappropriate to think that we should capture or breed chimpanzees for food, whatever our views on their use for medical experimentation. Conversely, it would be wholly inappropriate to think that we could only justify the sacrifice of cattle for medical experimentation, given their common use as food.

All that said, human beings have to think hard about the proper treatment of animals and to regulate, as we have long done, our interactions with animals. In sensing our way to the proper balance, we should take into account improvements in technology that lessen our dependence on particular uses of animals, and we should be alert for ways in which we could improve their lot without damaging our own (at least very much). It is all too the good if we could check the irritations that shampoo causes to the eye without animal experimentation. But here we have to fight and refight a thousand small skirmishes without the benefit of any categorical rules for guidance. Yet notwithstanding the mushiness of the method, we will probably do better as a human society than we would do by invoking any categorical rule that says that animals, or some animals, rank so high that we can do nothing to compromise their bodily integrity for human ends. I am tempted to call this a Kantian like absolutism, but such would be false to Kant whose own views on animals (or

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<sup>41</sup>See, Richard A. Epstein, *Mortal Peril: Our Inalienable Right to Health Care?* (1997).

Vieh, i.e. dumb animals) were wholly dismissive of their position in the legal firmament given their inability to act as rational agents capable of acting in accordance with some universal law. Nonetheless, the animal rights advocates show the same stubborn insistence about the inviolable position of animals that Kant defended in dealing with human beings. I do not think that the Kantian counsel of perfection is capable of being consistently followed in human affairs, however lofty the ideal. But for animals, my fear is that this borrowed, if Kantian-like, absolute cannot be maintained against the objections to it. Yet mounting this heroic campaign is likely to divert our attention from the smaller improvements that can and should be made in our dealing with animals: just how do we deal with foot and mouth disease? With exponential growth in alligator or deer populations? With hunting and the common pool?

No matter what adjustments we make, this enterprise that will always touch an raw nerve. The root of our discontent is that in the end we have to separate ourselves from (the rest of) nature from which we evolved. Unhappily but insistently, the "collective" we is prepared to do just that. Such is our lot, and perhaps our desire, as human beings.

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