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# The Evolution of Animal Law since 1950

# 7

CHAPTER

Steven M. Wise

Over the last half century, the law has assumed an increasingly important place in animal protection even as it has begun to point in the direction of true legal rights for at least some nonhuman animals. In this chapter I briefly discuss five aspects of the law: anti-cruelty statutes; the necessity of obtaining standing to litigate on behalf of the interests of nonhuman animals; evolving protections for great apes; the movement toward legal rights for at least some nonhuman animals; and the state of legal education concerning animal protection.

## Anti-cruelty Statutes

“Anti-cruelty” is not necessarily synonymous with “animal welfare.” British law professor Mike Radford notes that to

cause an animal to suffer unnecessarily, or to subject it to any other treatment which amounts to an offence of cruelty, is self-evidently detrimental to its welfare. To that extent, there is a degree of affinity between cruelty and welfare, but the two are far from being synonymous: prejudicing an animal’s welfare does not of itself amount in law to cruelty.<sup>1</sup>

“Anti-cruelty” is also not synonymous with “animal rights.” Speaking of the entire body of legislation in the area of nonhuman animal welfare in the

nineteenth century, Radford explains that “while this legislation imposed restrictions on how animals could be treated, none of it—nor, indeed, any enacted subsequently—change [*sic*] the traditional legal status accorded to animals by the courts.”<sup>2</sup> That status was as property<sup>3</sup>, and property generally lacks rights.

There is no federal anti-cruelty statute in the United States. But, according to American law professor David Favre, the anti-cruelty statutes of the fifty states “are so similar in nature and the issues so fundamental that there is very little variation in judicial outlook around the country.”<sup>4</sup> In 2002 these statutes strongly resembled not just each other, but also the anti-cruelty statutes that existed in 1950, in 1900, and, indeed, in 1850.<sup>5</sup> Radford says that, in both the United States and the United Kingdom, “(t)he gist of the offense” today is as it has been for nearly two hundred years, “the infliction of unnecessary abuse or unnecessary or unjustifiable pain and suffering upon an animal.”<sup>6</sup> In neither country, explains the leading American legal encyclopedia, has it been “the purpose of such statutes to place unreasonable restrictions upon the use, enjoyment, or possession of animals or to interfere with the necessary discipline or government of animals.”<sup>7</sup>

The last half-century has seen two significant changes in American anti-cruelty statutes, and they are rapidly trending in opposite directions. The

penalties for violating state anti-cruelty statutes have gotten tougher and tougher, but the statutes themselves apply to fewer and fewer perpetrators of nonhuman animal pain and suffering.

First, there has been a stiffening of penalties for conviction. In 1950 the barest handful of state legislatures had enacted anti-cruelty statutes that were felonies or that even provided for a maximum penalty exceeding one year of imprisonment.<sup>8</sup> The problem of low penalties, Favre says, “is the ultimate weakness of most [anti]cruelty statutes, for no matter how expansive the language, if the punishment is not sufficient, then no real deterrent against the acts exists.”<sup>9</sup> The maximum penalty that a criminal statute allows is an important benchmark. It signals to a judge how opposed legislators think a society actually is to a particular wrong, for it sets the stiffest penalty that a wrongdoer who commits a crime in the most unimaginably horrific way—or who commits it repeatedly—can suffer. Because a judge usually will not impose a penalty near the maximum for a first or “run-of-the-mill” offense, the typical penalty for cruelty will remain low so long as the maximum penalty remains low. This problem has begun to ease. While most anti-cruelty statutes continue to be misdemeanors, or lesser crimes, by 2002 thirty-four American states and the District of Columbia had enacted at least one felony anti-cruelty

statute. Felonies generally are understood to be graver crimes that carry longer sentences of imprisonment.<sup>10</sup>

The second trend has been more ominous for nonhuman animals, because many of the humans who commit forms of institutionalized cruelty have been exempted from the reach of anti-cruelty statutes. The most notorious example is that of nonhuman animals raised and killed for food. According to the U.S. Department of Agriculture's National Agricultural Statistics Service, in 1998 approximately 9,443 million nonhuman animals were killed for food in the United States; these include cows, pigs, sheep, chickens, turkeys, and ducks.<sup>11</sup> Yet twenty-five American states exempt common farming practices entirely from cruelty prosecution. Five others exempt some of them.<sup>12</sup> As of 2002 eighteen of these thirty states had amended their anti-cruelty statutes to add these exemptions within the previous thirteen years, seven in the previous eight years.<sup>13</sup> More states are likely to follow.

In the famous English "McLibel" case, two plaintiffs—McDonald's Corporation and its English subsidiary—sued for defamation for, among other things, statements that they engaged in cruelty toward the nonhuman animals whom they served for food. The corporations urged the trial judge to rule that in England, as in most American states, customary farming practices should be deemed acceptable. He refused, observing that a farming practice could be both cruel and legal, and rejected the McDonald's request, saying that not "to do so would be to hand the decision as to what is cruel to the food industry completely."<sup>14</sup>

That is precisely what the majority of American states do. Professor David Wolfson has observed that the "effect of this trend of amendments cannot be overemphasized. The trend indicates a nationwide perception that it was necessary to amend anti-cruelty statutes to avoid their possible application to animals raised for food or food production. Amendments specif-

ically exempting customary husbandry practices indicate that, but for the exemption, such practices would be determined to be cruel."<sup>15</sup>

The same problem exists for the millions of nonhuman animals forced to be subjects of biomedical research. The only American biomedical researcher convicted under an anti-cruelty statute—perhaps the only one ever charged—was Edward Taub. Even his conviction for failing to provide necessary veterinary care to a monkey named Nero was reversed on appeal, on the ground that the Maryland anti-cruelty statute under which he was charged was addressed to "unnecessary" or "unjustifiable" pain or suffering, and pain or suffering inflicted pursuant to biomedical research was not that kind.<sup>16</sup> Thirty states, along with the District of Columbia, now exempt nonhuman animals used in biomedical research from the reach of their anti-cruelty statutes.<sup>17</sup> Many of these statutes, however, condition their exemptions upon compliance with the minimal dictates of the federal Animal Welfare Act, enacted in 1966. However the Animal Welfare Act itself exempts the great majority of nonhuman animals actually used in biomedical research.<sup>18</sup>

## Standing

Lacking legal personhood and legal rights, nonhuman animals are essentially invisible to civil judges. This means that no one can file lawsuits directly on their behalf. Their interests can be protected only indirectly. This can happen when a legal person, who has legal rights (usually an adult human being) files a lawsuit either to stop an illegal act or to seek compensation for injuries already inflicted.

Not just any legal person can sue to protect animals. American courts generally prohibit a litigant from asserting the legal rights of another person.<sup>19</sup> Judges, federal and state, usually restrict those able to obtain a judicial decision to plaintiffs with a sufficient large stake in the outcome of a controversy.<sup>20</sup> This is the doctrine

of "standing." It allows persons to sue to redress an injury that they, and only they, have suffered as a result of an illegal act. Their remedy may indirectly protect nonhuman animals who are being injured at the same time. And that is all the protection that nonhuman animals ever get from the civil law.

I limit my discussion of standing to how it operates in America's federal courts and focus on common ways in which it has an impact on litigation that seeks to protect the interests of nonhuman animals. Bear in mind that the struggle of judges with what may appear to be a straightforward standard has led to a federal law of standing that has been rightly accused of "suffering from inconsistency, unreliability, and inordinate complexity."<sup>21</sup>

The source of federal judicial power is Article III, section 2 of the U.S. Constitution. Federal judges may only decide "cases" and "controversies." In order to surmount the constitutional obstacle of standing, a plaintiff in a federal court must allege and prove that he or she has suffered what has come to be called routinely an injury-in-fact. It was not until 1970 that the U.S. Supreme Court adopted this relatively lenient standard.<sup>22</sup> Before then, one could obtain standing only if one could show that one's legal right had been invaded.<sup>23</sup> An injury-in-fact must then be "fairly traceable to . . . allegedly unlawful conduct and likely to be redressed by the requested relief."<sup>24</sup>

But injury-in-fact, traceability, and redressability are just the constitutional requirements. There may be others. The most common of the so-called prudential requirements for standing is that a plaintiff's claim "must fall within the zone of interests protected by the law invoked."<sup>25</sup> This requirement arises when plaintiffs seek review of the decision of a federal agency under the federal Administrative Procedures Act.<sup>26</sup> It guides a court in deciding whether the particular plaintiff who has challenged an agency's decision should be heard.<sup>27</sup>

If the court decides that the plaintiff's interests are "so marginally related to or inconsistent with the purposes implicit in the statute or that it cannot be reasonably assumed that Congress intended to permit the suit," it will not hear the claim of the particular plaintiff.<sup>28</sup>

In the 1990s the Animal Legal Defense Fund (ALDF) brought a landmark trio of cases in the federal courts in Washington, D.C., to try to obtain standing to litigate in the interests of nonhuman animals. Three times ALDF won in the District Court and three times these victories were overturned by a three-judge panel of the Court of Appeals. On the appeal of the third decision to the full bench of that court, ALDF achieved a singular success.

In the first case, *Animal Legal Defense Fund v. Espy (I)*,<sup>29</sup> an inactive researcher and a lawyer-member of an animal oversight committee, as well as two animal protection organizations, complained that the Secretary of Agriculture had excluded 90 percent of the nonhuman animals who were used in biomedical research—rats, mice, and birds—from the definition of "animal" in the regulations he was required to issue under the federal Animal Welfare Act.<sup>30</sup> A three-judge panel of the Court of Appeals for the District of Columbia found the researcher had not suffered the required injury-in-fact because it was not immediate, while the lawyer was said to be improperly trying to compel a general executive enforcement of the law. The organizations were dismissed from the suit, for although they met the three constitutional requirements for standing, they did not fall within the zone of interest of the Animal Welfare Act.

In a second case, *Animal Legal Defense Fund v. Espy (II)*,<sup>31</sup> the same Court of Appeals turned aside for lack of standing a challenge to the sufficiency of the standards that the Secretary of Agriculture had issued for the exercise of dogs used in biomedical research and to promote a physical environment adequate to meet

the psychological well-being of primates. This time an ape language researcher was said to lack standing because it was his university, and not he, who might have suffered an injury, while a business that sold primate housing that could be used if valid standards had been issued lacked standing because it fell outside of the zone of interests.

In 1996 the ALDF tried a third time, claiming once again that the Secretary of Agriculture had failed to issue the minimum standards required to promote the psychological well-being of primates. One plaintiff, Marc Jurnove, was alleged to have visited a zoo repeatedly and seen primates kept in inhumane conditions whom he intended to continue to visit regularly. For the third time, a panel of the Court of Appeals reversed a lower court victory for the Animal Legal Defense Fund. This time a further appeal was requested before all the judges of that Appeals Court, and they ruled, 7 to 4, that Jurnove had standing.<sup>32</sup> The majority said that people have a protected aesthetic interest in observing animals free from inhumane treatment. It turned back arguments that the dissent embraced that a plaintiff could obtain standing only if he alleged that animals whom he wished to observe faced extinction, not just suffering; that causation did not exist because the Department of Agriculture had not authorized the inhumane treatment, but had just not acted to prevent it; and that one could only speculate that any changes in the treatment of the primates would actually satisfy Jurnove's aesthetic sensibilities. In 2000 other plaintiffs used this victory to obtain standing in, and finally to win, another lawsuit that complained that the Secretary of Agriculture had illegally excluded rats, mice, and birds from the definition of "animals" to be protected by the Animal Welfare Act.<sup>33</sup> Unfortunately, in 2002 Congress enacted an exemption to the definition of *animals* that nullified this win. The standing victory remains, however.

## Toward Protection for Great Apes

In *Rattling the Cage: Toward Legal Rights for Animals* (2000), I argued that, under the common law, entitlement to legal rights turns on the nature of an animal's mind; that numerous scientific investigations have demonstrated that at least two great apes, chimpanzees and bonobos, possess minds so extraordinary that they tower above the minimum sufficient for rights; and that the day has come to grant basic legal rights to these apes. In *Drawing the Line: Science and the Case for Animal Rights* (2002), I made the same argument on behalf of the other two great apes, gorillas and orangutans.

That day in which the great apes obtain legal rights will cap a long legal and political process. Among its first fruits were the 1985 amendments to the Animal Welfare Act. There the Secretary of Agriculture was directed to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors. . . [and to] include minimum requirements. . . [for] a physical environment adequate to promote the psychological well-being of primates."<sup>34</sup> This amounted to a recognition by Congress that primates had a psychology that could be in good health or poor.

Britain was next to step in the direction of legal rights for great apes. In 1997, on its own initiative, the British government's Home Secretary banned the use of all four species of great apes, not just chimpanzees and bonobos but orangutans and gorillas, too, as biomedical research subjects.<sup>35</sup> This ban on the use of great apes, he wrote, "was a matter of morality. The cognitive and behavioural characteristics and qualities of these animals mean that it is unethical to treat them as expendable for research."<sup>36</sup> Under current British legislation, there must be a weighing

of the cost to a nonhuman animal of a biomedical procedure with the benefit to human beings. Only when the human benefit outweighs the nonhuman cost may the procedure be licensed. Steve Wilkes, head of the Home Office's Animal Procedures Section, said that the benefit to a human being could never outweigh the cost to a great ape.<sup>37</sup>

In New Zealand a 1998 attempt led to formal Parliamentary hearings that were highly publicized around the world. Prominent New Zealand advocates of legal rights for great apes, including lawyers, professors, scientists, and philosophers, sought to build upon an idea that had been the focus of a powerful book, *The Great Ape Project: Equality Beyond Humanity*.<sup>38</sup> Animal Welfare Bill No. 2, which sought to streamline and modernize Kiwi animal protection law, was pending before the New Zealand Parliament. The submitters sought to have it amended as proposed by the group Great Ape Project (New Zealand) in order to grant great apes three basic legal rights. These were the rights not to be deprived of life, not to be subjected to torture or cruel treatment, and not to be subjected to medical or scientific experimentation. They also sought to provide for the appointment, when necessary, of human guardians to defend these great ape rights.<sup>39</sup>

In their Submission to Parliament, the submitters argued that

[b]eing fellow hominids, the great apes are more closely related to humans than to any other animals. They share many of our characteristics including some that we thought were uniquely ours, such as self-awareness, the ability to reason and the ability to imagine what others are thinking and feeling. In humans, these traits are often cited as a basis for ascribing basic legal rights. We believe that a strong case now exists for giving basic legal rights to the other members of the Hominidae family.

The Animal Welfare Act of 1999 that eventually cleared the New

Zealand Parliament did not grant legal rights to the great apes. Instead it prohibited research, testing, and teaching involving the use of a great ape without approval of the director-general who, in granting approval, must be satisfied that use of the ape is in his or her best interests or in the best interests of his or her species, and that the benefits to be derived are not outweighed by the likely harm to the ape.<sup>40</sup>

In the United States, at least chimpanzees, but likely all the great apes, appear to be edging toward a de facto "right" to life. If not the most expensive nonhuman animals to maintain in biomedical research, chimpanzees certainly are among the most expensive. In 1995 it was estimated that it cost between \$113,000 and \$321,000 to maintain a captive chimpanzee used in biomedical research over his or her natural lifespan.<sup>41</sup> That it would doubtless be far cheaper to kill them the way mice and rats routinely are killed when their usefulness has ceased was forcefully etched in a minority statement appended to a report of the National Research Council, an arm of the National Academy of Sciences, in 1997. The statement firmly opposed the use of public money to support chimpanzees in retirement sanctuaries, "since there is no potential return on research dollars invested in chimpanzees permanently removed from the research pool," and urged that they be euthanized.<sup>42</sup> The majority, however, rejected euthanasia as a method of population control of captive chimpanzees on the grounds that

the phylogenetic status and psychological complexity of chimpanzees indicate that they should be accorded a special status with regard to euthanasia that might not apply to other research animals, for example, rats, dogs, or some other nonhuman primates. Simply put, killing a chimpanzee currently requires more ethical and scientific justification than killing a dog, and it should continue to do so.<sup>43</sup>

In 2002 a move was afoot to have

all the countries of the world, but especially the so-called range countries, embrace an international Declaration for the Protection of Great Apes and a subsequent Convention for the Protection of Great Apes that name the great apes as "World Heritage Species." This is a new category roughly modeled on the existing treaty that allows for the designation of World Heritage Sites. If this declaration materializes, the new category of World Heritage Species would tighten the protection of great apes under international law and under the domestic law of range countries and provide special protections under international law.

## Toward Legal Rights for Animals<sup>44</sup>

The ancient Greek and Roman worlds were dominated by the belief that the universe was designed for human beings. Small wonder that from these worlds emerged the jurisprudential idea that, in the words of the early Roman jurist Hermogenianus, "All law was established for men's sake."<sup>45</sup> Why should law not have been established just for the sake of men? According to the early Greeks and Romans, everything else was. In Roman law, "persons" had legal rights, while "things" were the objects of the rights of persons. And all those beings who were believed to lack free will—women, children, slaves, the insane, and nonhuman animals—were at some time classified as property.

Roman law has had a tremendous effect upon Western law as a whole, and especially upon property law. The law of nonhuman animals in the United States at the beginning of the second millennium is nearly identical to the Roman law of nonhuman animals as it existed when the first millennium turned. While all humans are legal persons, all legal persons are not human beings. Some are artificial persons, like corporations and ships.

However, all of the more than one million species of nonhuman animals—chimpanzees, cheetahs, cats, and cockroaches—are not legal persons but are legal things.

Some may confuse being the object of legal protection with having legal personhood. They may point to the criminal anti-cruelty statutes, which I briefly discussed, that have existed for well over a century in every American jurisdiction as evidence that nonhuman animals are legal persons with legal rights. But they would probably be wrong. Criminal statutes are prohibitions enacted by legislatures. Sometimes they protect persons, as when legislatures make it a crime to assault a fellow human being. But they may also commonly protect things. For example, in Massachusetts it is a felony, punishable by imprisonment for up to five years, to destroy a cemetery shrub. It also is a crime to smash the windshield of your neighbor's automobile or set his dog afire. Violate these prohibitions and you may be charged with a crime by the state, convicted, and punished. But neither the shrub nor the automobile nor the dog has thereby been given any legal rights.

What are legal rights? Potter Stewart, a twentieth century justice of the United States Supreme Court, famously observed about pornography, "I know it when I see it."<sup>46</sup> Similarly, people have an intuitive "feel" for what legal rights are, even if they can't quite define them. Some of the most important rights, such as bodily integrity and bodily liberty, act like a suit of legal armor, shielding the bodies and personalities of natural persons from invasion and injury. These rights are so important that they usually are enshrined in the bills of rights of state and federal constitutions.

For most of the last century, legal scholars, judges, and lawyers often classified legal rights in the way that Wesley Hohfeld, a professor at Yale Law School, proposed during World War I. Hohfeld said that a legal right was any theoretical advantage conferred by recognized legal rules. He

broke legal rights into their lowest common denominators, using terms that judges commonly employ, such as *privilege*, *claim*, *duty*, *immunity*, *disability*, *power*, and *liability*, but he never formally defined them. Instead, he spelled out how the common denominators relate to each other. According to Hohfeld, legal relationships can exist only between two legal persons and one thing. One of the two persons always has a legal advantage (or right) over the other. The other person has the corresponding legal disadvantage. Just as a man can't be a husband without a wife and a woman can't be a wife without a husband, neither a legal advantage nor a disadvantage can exist all by itself.

The legal rights of nonhuman animals might first be achieved in any of three ways. Most agree that the least likely will be through the re-interpretation or amendment of state or federal constitutions, or through international treaties. For example, the Treaty of Amsterdam that came into force on May 1, 1999, formally acknowledged that nonhuman animals are "sentient beings" and not merely goods or agricultural products. The European Community and the member states signatory to the treaty are required "to pay full regard to the welfare requirements of animals." In 2002 the German Parliament amended Article 26 of the Basic Law to give nonhuman animals the right to be "respected as fellow creatures" and to be protected from "avoidable pain." Half of the sixteen German states already have some sort of animal rights provisions in their constitutions.<sup>47</sup>

In the United States, most believe that gaining personhood is much more probable through legislative enactment than through a constitutional change. But a change in the common law (which Germany does not have) may be the most likely of all. What is the common law? Lemuel Shaw, the nineteenth century chief justice of the Supreme Judicial Court of Massachusetts, provided this good definition: it "consists of a few broad

and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to all the circumstances of all the particular cases that fall within it."<sup>48</sup>

Why the common law over legislation? The common law is created by English-speaking judges while in the process of deciding cases. Unlike legislators, judges are at least formally bound to do justice. Properly interpreted, the common law is meant to be flexible, adaptable to changes in public morality, and sensitive to new scientific discoveries. Among its chief values are liberty and equality. These favor common law personhood, as a matter of liberty, at least for those nonhuman animals, such as chimpanzees, bonobos, gorillas, orangutans, dolphins, and whales, who possess such highly advanced cognitive abilities as consciousness, perhaps even self-consciousness; a sense of self; and the abilities to desire and act intentionally. In other words, they have what I call a "practical autonomy," which is, I argue, sufficient, though not necessary, for basic legal rights.<sup>49</sup> An animal's species is irrelevant to his or her entitlement to liberty rights; any who possesses practical autonomy has what is sufficient for basic rights as a matter of liberty.<sup>50</sup> And as long as society awards personhood to non-autonomous humans, such as the very young, the severely retarded, and the persistently vegetative, then it must also award basic rights, as a matter of equality as well, to nonhuman animals with practical autonomy.

## Legal Education in Animal Law

I have written that an animal rights lawyer should not expect a judge to appreciate the merits of arguments in favor of the legal personhood of any nonhuman animal the first time, or the fifth time, he or she encounters them. While a sympathetic judge might be found here and there, no appellate bench will seize the lead until the issue has been thoroughly aired in law journals, books, and conferences. Law reviews discussing animal legal rights must be established around the country in order to provide an important scholarly forum in which the relevant legal issues can be explored. Legal conferences must be organized, law school courses devoted to educating students on animal law issues must be established, animal rights lawyers and law professors must reach out to acquaint the profession with the importance of their work and the power of their arguments.<sup>51</sup>

Legal education, in every sense of that term—law reviews, legal conferences, and law school courses—is critical to the legal changes that animal rights lawyers seek. As of 2002 much work remained. In 1950 it had not even begun. The wildlife legal scholar Michael Bean has written that, even in 1977, “the very term ‘wildlife law’ was novel, for few had seen fit to distinguish such a body of law from the broader categories of ‘environmental law’ or ‘natural resources law.’”<sup>52</sup>

In 1950 no law reviews—those scholarly journals published by the students of every American law school—were devoted exclusively to even environmental (much less animal rights) law. That gap was not plugged until 1970, when *Environmental Law* began to be published by students of the Northwestern School of Law of Lewis and Clark College in Portland, Oregon. In the middle of the twentieth century no law school classes solely addressed environmental law, much less wildlife law. The

more arcane subjects of animal protection law and animal rights law lay nearly forty years in the future.

There were no animal law conferences in 1950. In the 1980s the Animal Legal Defense Fund held sporadic conferences. By 2002 four state bar associations (in Washington, Texas, Michigan, and Washington, D.C.) had formed animal law sections, as had the New York City and San Diego County bar associations. Several states (Connecticut, Florida, Georgia, and Oregon) appeared to be in the process of forming animal law sections. Since 1995 the Committee on Legal Issues of the Association of the Bar of New York City has held a continuing series of educational seminars on animal issues, and annual full-blown legal conferences. This series of programs was capped by “The Legal Status of Non-Human Animals,” a 1999 conference that attracted speakers from three continents and hundreds of participants.<sup>53</sup> The Center for the Expansion of Fundamental Rights has begun a program to take the issue of animal rights law directly to the judges who will be making the decisions, by offering to send speakers to judicial conferences throughout the United States.

Precisely a quarter century after *Environmental Law* was founded, *Animal Law* joined it as a sister publication. David Favre wrote in the premiere issue that,

[i]n the tradition of the prior students at Lewis and Clark, a substantial number of present students have focused upon what will be a cutting area of scholarship for the next generation of law students—animal related legal issues. In the 1970s the new area of jurisprudence was environmental law. In the 1990s there is a growing interest in animal issues.”<sup>54</sup>

*Animal Law* is important because it was, and remains, both a cause and an effect of the intensifying interest in animal law within the legal profession, an interest that must continue to build if animal rights lawyers are to

succeed. (As of 2002 a second animal law review, this one a Northeast regional publication, was in the planning stages.) It is important that general law reviews have begun publishing animal law articles, including those written by such prominent legal academics as Cass Sunstein of the University of Chicago School of Law and Anthony D’Amato of the Northwestern University School of Law. Oxford University Press has just published a series of groundbreaking essays edited by Sunstein and Martha Nussbaum in *Animal Rights: Current Debates in New Directions*.

The first American law school class in animal law was offered by the Pace University School of Law in White Plains, New York, in the mid-1980s. The instructor was adjunct professor Jolene Marion, a pioneer in animal rights law. Though it lasted just a few years, it paved the way for every animal law class that followed. In 1990 I began teaching a law school class at the Vermont Law School, again as an adjunct. This course, entitled “Animal Rights Law,” focused on whether nonhuman animals should be eligible for basic legal rights.

In 2002 animal law classes were being offered at nineteen American law schools, including Harvard, Georgetown, UCLA, Hastings, and George Washington universities. Courses were being offered in the United Kingdom, Holland, and Austria. Most of these courses were taught by practitioners acting as adjunct professors or lecturers on law. They offered such an intellectual smorgasbord that a student might attend several and encounter little repetition.

Most focused on “animal law” and surveyed either the statutes and case law in which the nature of nonhuman animals is important, or “animal protection law,” which addresses how attorneys can protect the interests of nonhuman animals within a legal system that considers them to be legal things. Some courses, however, concentrated on “animal rights law,” in which the arguments are explored for and against having judges recognize

that at least some nonhuman animals possess at least some basic legal rights. All classes were given a boost by the publication in the year 2000 of *Animal Law*, the first casebook exclusively concerned with animal law issues.<sup>55</sup> As its authors noted, “There has been a reticence in many legal quarters to teach, learn, or practice in the area specifically because of the absence of meaningful assistance and coverage.” The authors’ hope that their casebook will “serve as a valuable guide to students and professors stepping onto this new frontier and provide more law schools with a template for animal law courses” has been fulfilled.<sup>56</sup>

The last fifty years—and especially the last ten—have seen tremendous strides in the evolution of animal protection law, both in its teaching and in the laying of the foundations for true animal rights law. The first serious attempts to gain legal rights for at least some nonhuman animals will likely be upon us in this decade.

## Notes

<sup>1</sup>Radford, M. 2001. *Animal welfare law in Britain—Regulation and responsibility* 261. New York: Oxford University Press.

<sup>2</sup>*Id.* at 99.

<sup>3</sup>*Id.* at 99–100, 101.

<sup>4</sup>Favre, D., and V. Tsang. 1993. The development of anti-cruelty laws during the 1800s. *Detroit College of Law Review* 1, reprinted in D. Favre and P.L. Borschelt, 1999, *Animal Law and Dog Behavior* 251, 264 Tucson, Ariz.: Lawyers and Judges Publishing Co., Inc.

<sup>5</sup>*Id.* at 251.

<sup>6</sup>Radford, M. 1999. ‘Unnecessary suffering’: The cornerstone of animal protection legislation considered, *Criminal Law Review* 702; Annotation, “What constitutes statutory offense of cruelty to animals,” 82 ALR 2d 794, 798.

<sup>7</sup>Annotation, note 6, *supra*, at 799.

<sup>8</sup>Leavitt, E.S. 1968. *Animals and their legal rights: A survey of American laws from 1641 to 1968*. Washington, D.C.: Animal Welfare Institute.

<sup>9</sup>Favre, D.S., and M. Loring. 1983. *Animal law* 127 Westport, Conn.: Quorum Books.

<sup>10</sup>Personal communication from Pamela Frasch, April 16, 2002; P.D. Frasch et al. 1999. State anti-cruelty statutes: An overview, 5 *Animal Law* 69: 69.

<sup>11</sup>USDA/NASS “Meat Animal Production, Disposition, & Income(1998); USDA/NASS “Broiler Hatchery” (October 1999); USDA/NASS “Chicken and Eggs (October 1999); USDA/NASS Turkey Hatchery (October 1999); USDA/NASS Livestock Slaughter 1998 Summary (March 1999); USDA/NASS Poultry Slaughter 1998 Summary (February 1999).

<sup>12</sup>Wolfson, D.L. 1999. *Beyond the law: Agricultural*

*and the systemic abuse of animals raised for food or food production* 27 Watkins Glen, N.Y.: Farm Sanctuary, Inc.

<sup>13</sup>*Id.*

<sup>14</sup>*McDonald’s Corporation v. Steel*, [http://www.mcsportlight.org/case/trial/verdict/\\_jud2c.html](http://www.mcsportlight.org/case/trial/verdict/_jud2c.html), at page 5 (High Court of Justice, Queen’s Bench Division June 19, 1997), rev. in part on other grounds (Court of Appeals, March 31, 1999).

<sup>15</sup>Wolfson, D.L., note 12, *supra*, at 31.

<sup>16</sup>*Taub v. State*, 443 A. 2d 819, 821 (Md. 1983).

<sup>17</sup>P.D. Frasch et al., note 10, *supra*, at 76–77 and note 31.

<sup>18</sup>*Id.* at 76–77.

<sup>19</sup>*Allen v. Wright*, 468 U.S. 737, 751 (1984); *Warth v. Selden*, 422 U.S. 490, 499 (1975).

<sup>20</sup>*Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

<sup>21</sup>Davis, K.C., and R.J. Pierce, Jr. 1994. *Administrative Law Treatise*, (3rd. ed.) sec. 16.1. Boston: Little, Brown and Company.

<sup>22</sup>*Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). See Tribe, L.H. 1999. *American Constitutional law* (third edition) 393 New York: Foundation Press.

<sup>23</sup>*Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 137–139 (1939).

<sup>24</sup>Allen, note 19, *supra*, at 751.

<sup>25</sup>*Id.*

<sup>26</sup>5 U.S.C. 702.

<sup>27</sup>*Clarke v. Securities Decision Association*, 479 U.S. 388, 399 (1987).

<sup>28</sup>*Id.*

<sup>29</sup>23 F. 3d. 496 (D.C. Cir. 1994).

<sup>30</sup>Compare 7 U.S.C. 2132(h) with 36 Fed. Reg. 24, 917, 24, 919 (1971).

<sup>31</sup>29 F. 3d.

<sup>32</sup>*Animal Legal Defense Fund v. Glickman*, 154 F. 3d 426 (D.C. Cir. 1998)(en banc), cert. den. 119 S.Ct. 1454 (1999). For an excellent treatment of the case, see R.R. Smith, “Standing on their own four legs: The future of animal welfare litigation after *Animal Legal Defense Fund, Inc. v. Glickman*.” 1999. 29 *Environmental Law*: 989.

<sup>33</sup>*Alternatives Research & Development Foundation v. Glickman*, 101 F. Supp. 2d 7 (DDC 2000).

<sup>34</sup>7 U.S.C. sec. 2143(a)(2)(B)(1985).

<sup>35</sup>Personal communication from S. Wilkes, head of Animal Procedures Section, Home Office, Constitutional and Community Directorate to Steven M. Wise, March 26, 1998; Supplementary Note to the Home Secretary’s response to the Animals Procedures Committee—Interim report on the review of the operation of the Animals (Scientific Procedures) Act 1986 para. 10 (November 6, 1997).

<sup>36</sup>Supplementary Note to the Home Secretary’s response to the Animals Procedures Committee—Interim report on the review of the operation of the Animals (Scientific Procedures) Act 1986, note 35, *supra*, at para. 11.

<sup>37</sup>*PACE News*. 1998. at 8:1 (January–March).

<sup>38</sup>*The Great Ape Project: Equality beyond humanity*. 1993. Cavalieri, P., and P. Singer, eds. New York: St. Martin’s Press/Griffin.

<sup>39</sup>Submission of David Penny and 37 others to the Parliamentary Select Committee on Primary Production concerning the Animal Welfare Bill No. 25, 14 (October 27, 1998).

<sup>40</sup>New Zealand Animal Welfare Act of 1999, sec. 76A.

<sup>41</sup>B. Dyke et al. 1995. “Future costs of chim-

panzees in U.S. research institutions,” 37 *American Journal of Primatology* 25.

<sup>42</sup>*Chimpanzees in research: Strategies for their ethical care, management, and use*. 1997. 66–67 Washington, D.C.: National Research Council.

<sup>43</sup>*Id.* at 28.

<sup>44</sup>This section has been adapted from S.M. Wise, *Rattling the cage: Toward legal rights for animals* (Perseus Books 2000); S.M. Wise, *Hardly a revolution: The eligibility of nonhuman animals for dignity: Rights in a liberal democracy*, 22 *Vermont Law Review* 793 (1998); S.M. Wise, *Legal rights for nonhuman animals: The case for chimpanzees and bonobos*, 2 *Animal Law* 179 (1996); S.M. Wise, *The legal thinghood of nonhuman animals*, 23(2) *Boston College Environmental Affairs Law Review* 471 (1996); and S.M. Wise, *How nonhuman animals were trapped in a nonexistent universe*, 1 *Animal Law* 15 (1995).

<sup>45</sup>Momsen, T., P. Krueger, and A. Watson, eds. 1985. Dig. 1.5.2 *Hermogenianus, Epitome of law, Book 1*. Philadelphia: University of Pennsylvania Press.

<sup>46</sup>*Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)(Stewart, J., concurring).

<sup>47</sup>Koenig, R. 2000. Animal rights amendment defeated. 288 *Science*: 412. April 21.

<sup>48</sup>*Norway Plains Company v. Boston and Maine Railroad*, 67 Mass. (1 Gray ) 263, 267 (1854).

<sup>49</sup>S.M. Wise (*Rattling the cage*), note 44, *supra*, at 243–248.

<sup>50</sup>*Id.* at 63–87, 243–270.

<sup>51</sup>S.M. Wise. 1999. Animal thing to animal person: Thoughts on time, place, and theories. 5 *Animal Law* 61: 66–67.

<sup>52</sup>Bean, M. 1983. *The Evolution of National Wildlife Law*. Revised and expanded edition 1. New York: Praeger Publishers.

<sup>53</sup>The proceedings were published in 8 *Animal Law* (2002).

<sup>54</sup>Favre, D. 1995. Time for a sharper legal focus. 1 *Animal Law* 1: 1.

<sup>55</sup>Frasch, P. et al. 2000. *Animal law*. Durham, N.C.: Carolina Academic Press.

<sup>56</sup>*Id.* at xviii.