

Animal Rights: Current Debates and New Directions

by Cass R. Sunstein and Martha C. Nussbaum
 Toronto: Oxford University Press, 2004. Pp. 352.

It is revolting to have no better reason for a rule of law than so it was laid down at the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

—Oliver Wendell Holmes, Jr.¹

A NEW OPPORTUNITY IS BEING OFFERED to extreme adventurers: travel to Norway, enjoy the beauty of the stark winter and to make the trip a unique experience, why not take a shot at a seal or two? Really, choose Norway for your next vacation and go seal hunting. For kicks. Norway is visited by a bigger seal population than the calculations of its wildlife managers can accommodate, and it solicits your help to get rid of the excess.²

If this seems unusual or even amiss, it is not terribly unlike the approach to human-seal relations undertaken in Canada, where the annual seal hunt on the country's east coast is bigger than it has been in decades. Canada just completed a three-year program designed to kill 975,000 seals, which was a success.³ In 2004, 365,971 seals were reported killed.⁴ In one 48-hour period alone, 140,000 seals were killed.⁵

The hunt occurs during the few spring weeks when migrating seals stop on Canadian shores and ice floes to give birth, nurse their young, mate and move on. While they are here, hunters use guns, clubs or hakapiks to kill seals as fast as they can.⁶

People who criticize the hunt are regularly dismissed by those who fancy themselves more serious thinkers: i.e. the seals are eating all of our cod; life in the wild is too dangerous for them; death at human hands is bet-

1. "The Path of the Law" in Peter Smith, ed. *Collected Legal Papers* (New York: Harcourt, Brace and Co., 1952) 167 at 187.
2. Juliette Jowit and Hildegunn Soldal, "It's the new sport for tourists: killing baby seals" *The Observer* (3 October 2004), online: The Observer <<http://observer.guardian.co/uk>>. The article describes how some companies offer training for beginners and will guarantee two seals, for a fee.
3. The Department of Fisheries and Oceans, "Facts About Seals 2004-2005," online: <http://www.dfo-mpo.gc.ca/seal-phoque/reports-rapports/facts-faits/facts-faits2004_e.htm>. The program covers 2003-2005, inclusive.
4. The Humane Society of the United States, "Facts About the Canadian Seal Hunt," online: HSUS <http://www.hsus.org/marine_mammals/protect_seals/facts_about_the_canadian_seal_hunt.html>.
5. International Fund for Animal Welfare, "Seal Hunt Begins Full Throttle: IFAW on the Scene," online: IFAW <<http://www.ifaw.org/ifaw/general/default.aspx?oid=88711>>.
6. *Marine Mammal Regulations*, SOR/93-56. See s. 28(1)(b) a "hakapik" is defined as an instrument consisting of a metal ferrule with a slightly bent spike and a blunt projection that is attached to a wooden handle.

ter because nature can be cruel; you are too emotional; you only care about baby seals because they are so cute.⁷

One might expect actual serious thinking from the law professors and constitutional scholars whose essays are part of a new book entitled *Animal Rights: Current Debates and New Directions*.⁸ That numerous law schools, legal thinkers and scholars are dabbling in the subject is a sign that animal rights is an idea whose time is coming.⁹ But it has not come yet; the collection shows that reactionary self-defense is still the *modus operandi* of even established academics. To this extent, *Animal Rights* is a real disappointment.

The book has some merit, which lies in the thoughtful analyses offered by those who do take the subject seriously, including Peter Singer (the philosopher who is generally credited with bringing the idea into the popular domain with his 1975 book *Animal Liberation*),¹⁰ Gary Francione (perhaps the first scholar of modern times to articulate animal rights as an intelligent philosophy)¹¹ and Catharine MacKinnon (the law professor who mingles her thoughts on the subject with the feminist perspective for which she is well known).

The introduction reveals that the editor of the collection fundamentally misapprehends the essence of the argument to be explored. He takes a superficial look and applies flimsy excuses, purporting to present a debate without even defining its terms or understanding its premises. He assumes that the goal of "animal rights" is to "reduce suffering" and presents these as interchangeable when they are very different ideas. Reducing animal suffering is the goal of those who advocate a position of *animal welfare* and believe that animals are ours to use as we please, but hope that we would do

7. Each of these arguments has a response, though making that case is beyond the scope of this book review: i.e., government scientists warned for decades that modern commercial fishing had become so efficient that cod stocks were sure to crash and the evidence is quite clear that seals are not the cause of the problem. Life and death in nature are what wild animals are adapted to experience and, if protecting one from danger-out-there is a reason to deprive her of all freedom and independence, would life in prison not be preferable for humans? As to being too emotional, Margaret Somerville often makes the case that "emotion" should not be dismissed as though it has nothing to do with reason: if your gut tells you something is wrong, it probably is. Finally, it is true that baby harp seals seem to have an aesthetic appeal not necessarily shared by vultures and warthogs, but doesn't that shift the question—if we can ruthlessly kill creatures who really are so adorable, is there no limit to our cruelty?
8. Cass R. Sunstein and Martha C. Nussbaum, *Animal Rights: Current Debates, New Directions* (Toronto: Oxford University Press, 2004) [*Animal Rights*].
9. I share the view succinctly expressed by Catharine MacKinnon, who noted in the first footnote to her essay in the collection: "Recognizing that human beings are also animals, and the linguistic invidiousness that elides this fact of commonality, I sometimes here, for simplicity of communication, term nonhuman animals "animals," while feeling that this usage gives ground I do not want to concede". Catherine A. MacKinnon, "Of Mice and Men: A Feminist Fragment on Animal Rights" in *Animal Rights*, *supra* note 8, 263 at fn 1 at 273.
10. Peter Singer, *Animal Liberation* (New York: Avon Books, Inc., 1975).
11. Gary L. Francione has written numerous articles, essays and books on the subject. See e.g. *Animals, Property and the Law* (Philadelphia: Temple University Press, 1995) [*Animals, Property and the Law*], and *Introduction to Animal Rights—Your Child or the Dog?* (Philadelphia: Temple University Press, 2000) [*Introduction to Animal Rights*].

so “humanely”, whatever that might mean. *Animal rights* is a term which means that animals have an interest in their own lives and an entitlement not to be treated as human property. The former is a charitable approach, the latter is a concept of justice.

Anybody who has critically considered the anti-cruelty legislation and case law which exists in more or less similar fashion across North America should understand that existing laws give no meaningful protection to animals, let alone anything that could even accidentally be called “rights”.¹² Yet Sunstein and other contributors use the term as though some animal rights already exist. And when Sunstein refers to an animal as “it”, he has consigned the whole lot of them to the category of object. He then fails to consider that by doing so, the debate has ended before it has begun, for once one party has been named “person” and the other has been named “thing” the resolution of any conflict between the two has already been determined. The most important right property owners have, after all, is ownership of their property.

Some of the book’s contributors think there is nothing wrong with animals being the property of people and that there might be a kind of benevolent ownership idea to be explored. Defenders of human slavery tried the same angle. To see through such an argument one need only consider the state of affairs for animals today, in a world where we do have property rights in animals as well as laws which prohibit us from causing them “unnecessary” pain and suffering.¹³

Around the world, billions of animals are hurt and killed for human benefit every year. Some ten billion die for the American dinner plate alone; in Canada the number is somewhere around 650 million. Raised in increasingly intensive confinement (made possible by the development of antibiotics in the 1940s), many of these animals are mutilated without anaesthetic, kept indoors in the dark or artificial lighting their entire lives, in cramped and highly stressful conditions, medicated, diseased or crippled, before or while being taken on long truck rides to a violent death.

Many millions of animals are used by the research industry in biomedical experiments, product testing and education. They are burned, poisoned, irradiated, blinded, starved, given electric shocks, infections and diseases, deprived of sleep or maternal care, kept in solitary confinement, subject to the removal of their organs or the breaking of their limbs, addicted to drugs or forced to withdraw from a drug addiction, caged for their entire

12. This point is thoroughly examined in Francione’s book *Animals, Property and the Law*, *ibid*. Francione writes about American laws and cases, however, the argument is quite analogous to Canada.

13. *Criminal Code of Canada*, R.S.C. 1985, c.C-46, s. 446. The statutory language itself is revealing. Having chosen this term, we have already decided that it is sometimes “necessary” for us to cause pain to others, and we hereby grant ourselves permission. The wording of anti-cruelty laws across the United States and elsewhere is very similar.

lives and then killed at the end of the experiment or recycled into another one. To say nothing of what new cloning and genetic engineering experiments entail.

Many million more die each year to provide us with fashion or some form of entertainment. Fur-bearing animals are trapped, snared or raised in the same intensive confinement known to their cousins in agriculture and then die by disease, neglect, electrocution, gassing or neck-breaking. We hunt them in the wild with guns or bows and arrows; increasingly, we hunt them on ranches, game compounds or dog compounds from which there is no real chance of escape. They are captive in zoos, circuses, horse races, dog races, marine parks, rodeos, bullfights and ever-new forms of entertainment. They are killed when no longer useful or sold for another use, like the baby animals that are so popular at zoos who grow up, crowd the display and are sold to circuses or hunt camps.

To the extent that studying history helps us to confront our own ideas and uncover lingering biases, perhaps a glimpse at the history of our animal ideas is warranted. Below I take up some of the themes explored in *Animal Rights* and put them in a Canadian context.

ANIMALS IN EARLY CANADIAN LAW¹⁴

Canadian laws with respect to animals date back to the 19th century, a time when animals had no legally recognized interests of their own, or they are based on the knowledge, values and customs of that time. Historically, our law has regarded all of the nonhuman members of the animal kingdom not as individuals with their own legal interests, but simply as human property. The original legal concern about harming animals had little to do with the impact of human behaviour on the animals themselves, but rather, invoked the Kantian concern that those who would harm animals were of such character that they created a public harm. The precursors to anti-cruelty legislation adverted to the danger of “great nuisances and annoyances to the neighbourhood” caused by the such practices as bear baiting which “tend to demoralize those who frequent such places”.¹⁵

When a concern for an animal’s well-being was later injected into the law, it was not for the sake of animals themselves, but for the people who owned them and had an interest in their continued survival. The next step

-
14. The analysis outlined below was articulated in a factum I co-wrote with Clayton C. Ruby in a 2002 case before the Supreme Court of Canada called *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4. S.C.R. 45, 219 D.L.R. (4th) 577. In that case, Harvard was seeking a patent on the “oncomouse”, a mouse which it had genetically engineered to be predisposed to cancer, and thus allegedly a better “tool” in cancer research. Ruby and I acted for several national animal advocacy organizations which intervened in the case to make the point that animals are not things invented in laboratories.
 15. *An Act to Amend and Consolidate the Several Laws Relating to the Cruel and Improper Treatment of Animals, and the Mischiefs arising from the driving of Cattle*, 5 & 6 Will. IV c. 59 (1835), s. III.

toward anti-cruelty legislation was provisions which applied only to domestic animals such as cattle, poultry and dogs—animals that belonged to somebody. They were enacted under Title VI, *Offences Against Rights of Property and Rights Arising out of Contracts, and Offences Connected with Trade*.¹⁶

19TH CENTURY APPROACH SAW ANIMALS AS MACHINES

The origin of the perspective that animals are things to be used for our benefit has been widely attributed to René Descartes.¹⁷ According to Descartes, human language demonstrated that humans were conscious, and since he did not perceive that animals exhibited linguistic behaviour, he determined that they could not be regarded as conscious or sentient beings. Comparing animals to “automata” and “moving machines fabricated by human industry,” Descartes pronounced upon the difference between “men” and “brutes”:

For it is highly deserving of remark, that there are no men so dull and stupid, not even idiots, as to be incapable to joining together different words, and thereby constructing a declaration by which to make their thoughts understood; and that on the other hand, there is no other animal, however perfect or happily circumstanced, which can do the like... And this proves not only that the brutes have less reason than man, but that they have none at all.¹⁸

Descartes and his colleagues performed experiments on living, unanesthetized animals whose screams Descartes compared to the noise of a malfunctioning machine. From his time onward, animals were seen to be automatons: unable to think, communicate, feel pleasure or pain. Descartes saw it this way:

What is worthy of remark is that though many animals manifest in some of their actions more skill than we do ourselves, those same animals, in some of their other actions, are found to show none at all. Thus their doing certain things better than we do is no proof of their being endowed with mind. For on that assumption they would have to possess more of it than any of us do, and ought to surpass us in all things. On the contrary, what it shows is that they are destitute of mind and that it is nature which acts in them according to the disposition of their organs, just as a clock, which is composed only of wheels and weights, can number the hours and measure time more exactly than we can with all our knowledge.¹⁹

Cartesian dualism maintained that animals were no more than the sum of their parts, fundamentally different from and inferior to humans. From this

16. *Crankshaw's Criminal Code of Canada* (1894) (Toronto: Carswell Co. Ltd., 1954) s. 512.

17. “Origin” refers to the modern period, i.e., the last several hundred years, which is the period relevant to tracing and understanding the source of our existing laws. In this essay, a complete analysis of human-nonhuman relations over thousands of years is prohibitive. Descartes’ impact on human-animal relations is noted in several of the essays in *Animal Rights*, supra at note 8.

18. René Descartes, *A Discourse on Method, Part V, Meditations and Principles Writings*, (J.M.Dent and Sons Ltd., 1975) at 45, and generally 43–46.

19. *Ibid.* at 46–47.

it generally followed that humanity's only concern about animals was what purpose of ours they could serve and to whom they belonged.²⁰ Descartes' views became entrenched, with the result that legislation which developed in Canada and elsewhere paid little regard to animals as sentient beings. In 1892, when Canada's anti-cruelty provisions were enacted in the *Criminal Code*, the society operated on the understanding that animals were non-rational, non-sentient, machine-like things which were categorically different from humans.

Yet starting in the late 18th and early 19th century, social critics had begun to object to the instrumental approach of Descartes and his followers. For example, Voltaire wrote:

There are barbarians who seize this dog, who so greatly surpasses man in fidelity and friendship, and nail him down to a table and dissect him alive, to show you the mesaraic veins! You discover in him *all the same organs of feeling as in yourself*. Answer me, mechanist, has Nature arranged all the springs of feeling in this animal to the end that he might not feel?²¹

Legal scholars, such as Jeremy Bentham, had also begun to argue that by so exploiting them, animals had been "degraded to a class of things", with the result that their interests were completely ignored. While Cartesians denied animals any thoughts or feelings, Bentham raised the following question in his Introduction to the *Principles of Morals and Legislation*:

The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognised, that the number of legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate? What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog, is beyond comparison a more rational, as well as a more conversable animal, than any infant of a day, or a week, or even a month old. But suppose the case were otherwise, what would it avail? The question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?²²

Bentham was a radical when he suggested that animals should be legally protected from cruelty. His doctrine—that the ability of animals to suffer is the basis of their entitlement to better treatment than that to which they have become accustomed—has grown in importance and his ideas are with us today, providing the basis of an argument for both the animal welfare advo-

20. See Francione's "Animals—Property or Persons?" in *Animal Rights*, *supra* note 8 at 108.

21. Voltaire, *Dictionnaire Philosophique* (1769), (Paris: Garnier Frères, 1961) "Bêtes" at 51 [translated by author].

22. Jeremy Bentham, "Introduction to the Principles of Morals and Legislation" in John Bowring, ed. *The Works of Jeremy Bentham* Vol. 1 (New York: Russell & Russell, Inc, 1962) at 143 [footnote omitted].

cate (we should minimize suffering while using animals) and the rights advocate (that animals suffer is the reason we should not cause them to suffer in the first place).

MODERN APPROACH TO ANIMALS IS DRAMATICALLY DIFFERENT

And then came Darwin. *The Origin of Species*,²³ *The Descent of Man*²⁴ and Darwin's other late 19th century works changed everything, for they established that, in reality, there is no such thing as a uniquely human characteristic and that "the difference in mind between man and the higher animals, great as it is, is certainly one of degree and not of kind". Darwin found that:

the senses and intuitions, the various emotions and faculties, such as love, memory, attention, curiosity, imitation, reason &c., of which man boasts, may be found in an incipient, or even sometimes in a well-developed condition in the lower animals.²⁵

The species discrimination espoused by Descartes was flawed at its core, based as it was on 17th century knowledge. Evolutionary theory takes a significantly different approach to the question of animal life and awareness, incorporating all that has since been learned about the structure and sophistication of animal life. Yet evolutionary theory contradicts material aspects of religious creationist beliefs that (along with Descartes' views about animal "automata") were deeply held for a very long time, thus, it has taken some time to penetrate the Western conscience.

During the 20th century, significant study added to Darwin's findings and dramatically reshaped our understanding of animals. In addition to learning that humans and apes descended from a common ancestor, we now know that the central nervous systems and brain structures of the great apes (chimpanzees, gorillas and orangutans) are practically identical to ours. They all share more than 96% of their DNA with us, chimpanzees in particular differing from humans by approximately 1%.²⁶

Where we used to draw a line between "us" (humans) and "them" (the many thousands of species that comprise the rest of the animal kingdom), science itself, in whose name we continue to cause untold harm to many animals every day, now clearly recognizes that no such line can be justified. Dr. Jane Goodall has explained:

23. Charles Darwin, *The Origin of Species: By Means of Natural Selection* (New York: D. Appleton and Company, 1890).

24. Charles Darwin, *The Descent of Man*, 2d ed. (Clowes and Sons, 1874).

25. *Ibid.* at 126.

26. Jane Goodall, "Chimpanzees—Bridging the Gap" in Paola Cavalieri and Peter Singer, eds., *The Great Ape Project*, (New York: St. Martin's Press, 1993) at 13 [*Great Ape Project*]; see also Jeff Hecht, "Chimps are human, gene study implies" *New Scientist* (19 May 2003), online: [New Scientist <http://www.newscientist.com/article.ns?id=dn3744>](http://www.newscientist.com/article.ns?id=dn3744).

The postures and gestures with which chimpanzees communicate—such as kissing, embracing, holding hands, patting one another on the back, swaggering, punching, hair-pulling, tickling—are not only uncannily like many of our own, but are used in similar contexts and clearly have similar meanings. Two friends may greet with an embrace and a fearful individual may be calmed by a touch, whether they be chimpanzees or humans. Chimpanzees are capable of sophisticated co-operation and complex social manipulation....

The structure of the chimpanzee brain and central nervous system is extraordinarily like ours. And this appears to have led to similar emotions and intellectual abilities in our two species....

It is all a little humbling, for those cognitive abilities used to be considered unique to humans: we are not, after all, quite as different from the rest of the animal kingdom as we used to think. The line dividing 'man' from 'beast' has become increasingly blurred. The chimpanzees, and the other great apes, form a living bridge between "us" and "them", and this knowledge forces us to re-evaluate our relationship with the rest of the animal kingdom, particularly with the great apes.²⁷

Scientists studying animals over the last century, and particularly the last few decades, have broken down the sharp conceptual lines that had long been drawn to separate "us" from "them".²⁸ A vast literature now establishes that animals, including mammals, birds and even fish, possess considerable intelligence and process information in sophisticated and complex ways; that animals are self-conscious, can reason, use tools, act in altruistic ways, and live in complex social systems, all to varying degrees. It is also now beyond dispute that many species have sophisticated languages, including dialects, which may use sound, sonar or gesture to communicate complex ideas.²⁹

Lest any doubts linger, enter genetics, including the new field of xenotransplantation. In this process, an underclass of pigs was bred recently in Canadian laboratories who may eventually be able to supply body parts and organs for transplantation to humans. In order to reduce the risk of organ rejection, human genes are introduced to pigs to make their organs more welcome in the human body.³⁰ As several branches of science call into question the line we have historically drawn between humans and the rest of the animal kingdom, whatever may be left of that line is further degraded by the very genetic manipulation which the research industry itself undertakes.

27. *Great Ape Project*, *ibid.* at 13–14.

28. I am mindful here of MacKinnon's admonition in her essay in the collection against requiring an individual to be "like us" to gain admittance to the sphere of moral concern. This thought deserves more attention.

29. Singer, *supra* note 10 at 113–119.

30. Margaret Somerville, *The Ethical Canary: Science, Society and the Human Spirit* (Toronto: Viking Press, 2000) at 96–97.

The pig receives human genes. The human receives pig organs. Where does the pig end and the human begin? How much DNA trading does it take before one becomes the other? The answer to these questions, once ridiculous and offensive to some, may now just be a matter of degree. As this science becomes more and more sophisticated, the lines dividing "us" and "them" continue to blur both scientifically and ethically.

Current evolutionary, biological and behavioural science, and now genetics, have thus revealed that the real world consists only of beings that are remarkably similar to each other in many ways. We can no longer claim that all the other animals are just automatons, devoid of the capacities we once thought to be uniquely human. The difference between "us" and "them" is one of degree and a line demarcating any clear separation is now very difficult to draw:

The biological reality is that all classifications are artificial. They force a certain order on to the rather chaotic mess of the natural world. Species, as we describe them, are matters of convenience rather than biological reality. The real world consists only of individuals who are more or less closely related to each other by virtue of descent from one or more common ancestors.³¹

LAW MUST REFLECT DEVELOPMENTS IN SOCIETAL KNOWLEDGE AND VALUES

We know that animals are not the machines we used as our model when we first embarked upon legislating the rules of our relationship with them. Rather, they are the experiencing subjects of a life, a life that fares well or ill for them, as individuals, over time, independently of whether anyone else knows or cares about their condition.³²

Our new understanding of our biological kinship with the other animals brings with it ethical questions which are fundamentally important to the system of values which animates our society and informs our law.

1) Laws regarding people change in accordance with changing social values

Today, for the most part, human beings are legal persons entitled equally to fundamental legal rights, but the concept of legal personhood is relatively modern and it is not fixed. Throughout the course of history, various humans were considered unworthy of legal rights and, in many cases, were actual chattels in whom others held proprietary interests.

Jews in medieval Europe were seen as lower forms of life not meriting

31. R.I.M. Dunbar, "What's in a Classification?" in *Great Ape Project*, *supra* note 26 at 110.

32. Tom Regan, "Animal Rights and the Law" (1987) 31 *Saint Louis U.L.J.* 513 at 516.

33. Christopher D. Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects" (1972) 45 *S. Cal. L. Rev.* 450 at 454 quoting from Schechter, "The Rightlessness of Mediaeval English Jewry" (1954) 45 *Jewish Q. Rev.* 121 at 135.

legal rights. A 13th century text described Jewish people as: “men *ferae naturae*, protected by a quasi-forest law. Like the roe and the deer, they form an order apart”.³³ Prior to the abolition of slavery, American law regarded black people as property. In 1858, an American court found that the status of slave as property was a valid reason to deny him the right to claim an inheritance: “The investiture of a chattel with civil rights or legal capacity is indeed a solecism and absurdity”.³⁴

It is equally trite to observe that women have only recently been considered to be legal persons. In the “Persons Case” the Supreme Court of Canada considered the eligibility of women for appointment to the Senate: “Does the word ‘Persons’ in section 24 of the *British North America Act, 1867*, include female persons?” Unanimously, the Court said no.³⁵ The Privy Council reversed the Supreme Court’s finding, in part by rejecting an argument which relied on the way women had historically been regarded. The Privy Council determined that the exclusion of women from all public offices was a “relic of days more barbarous than ours”.³⁶ Outdated customs could not be used in support of a modern legal interpretation:

...supposing in an Act of Parliament several centuries ago it had been enacted that any person should be entitled to be elected to a particular office it would have been understood that the word only referred to males, but the cause of this was not because the word “person” could not include females but because at Common Law a woman was incapable of serving a public office. The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made, or the point being contested...

...Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared....

The appeal to history therefore in this particular matter is not conclusive.³⁷

On the other hand, one need not be a human being to be entitled to legal rights. Ships once held the status of legal personhood. Estates and trusts have certain legal rights. Corporations are considered to be legal persons for some purposes, but not for others: they can be criminally liable but cannot be incarcerated, they must pay taxes but cannot vote. In short, the category of legal “person” has never been fixed or static and it is not limited to human beings.

34. *Bailey v. Poindexter's Ex'r*, (1858) 14 Gratt.132 (Va. C.A.) at 143. See also Stone, *ibid.* at 453-455.

35. *Re British North America Act 1867 (UK) Section 24*, [1928] S.C.R. 276, 4 D.L.R. 98.

36. *Re British North America Act 1867 (UK)*, [1930] 1 D.L.R. 98 (P.C.), A.C. 98 at 99.

37. *Ibid.* at 104-105.

2) *Laws regarding animals should change in accordance with changing social values*

Stephen Wise's essay in *Animal Rights* outlines a remarkably similar approach to human slaves then and animal property today. And as legal views of blacks, women and others have changed, so now is there a shift in legal thinking on the subject of animals. It is becoming evident in legal discourse as scholars, philosophers and others (including several of the contributors to *Animal Rights*) question whether the regard for animals as property or things retains any logically defensible premise. William Kunstler, renowned American civil rights lawyer and co-founder of that country's Center for Constitutional Rights, described it this way:

It may surprise many who are familiar with my work that I have become interested in the plight of animals at a time in which there seems to be more human misery and injustice than ever before. I have given considerable thought to this question, and I have resolved any doubts in favor of speaking against the exploitation of nonhuman animals...

...it is unjust to the animals themselves to deny them their rights, irrespective of any salutary effect that it may have on relations among humans. Like us, animals are individuals with interests. Their value does not depend on their use to us any more than does the inherent value of a human being depend on that person's use to others.³⁸

A more general respect for nature has been slowly making its way into legal discourse in the last several decades. In his seminal 1972 essay, *Should Trees Have Standing?*, legal scholar Christopher Stone took a pioneering step in addressing the relationship between granting rights to an "other" and the parallel moral understanding of the other as "one of us". He cites Darwin's *Descent of Man* for the proposition that "man's moral development has been a continual extension in the objects of his "social instincts and sympathies".³⁹

Professor Stone's question was considered laughable to some and his call for environmental protection was not answered in the 1970s. Yet hardly thirty years later, Canada's highest court recognized that environmental protection has emerged as a fundamental value in Canadian society.

"Twenty years ago there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to live in and what quality of life we wish to expose our children [to]."... This Court has recognized that "[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment...environmental protection [has] emerged as a fundamental value in Canadian society".⁴⁰

38. *Animals, Property and the Law*, *supra* note 11 at x.

39. Stone, *supra* note 33 at 450.

40. *114957 Canada Ltee v. Hudson (Town)*, [2001] 2 S.C.R. 241, 200 D.L.R. (4th) 419 at para. 1, citing *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, 125 D.L.R. (4th) 385 and *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1.

This history of legal progress, and even the variously credible essays in *Animal Rights*, accords with John Stuart Mill's observation that every great social movement must proceed in three stages: ridicule, discussion and adoption. Stone demonstrates that this was the case for groups of people once considered inferior. Today, their entitlement to certain rights seems so obvious that any other state of affairs would be appalling.

The fact is, that each time there is a movement to confer rights onto some new "entity," the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a *thing* for the use of "us"—those who are holding rights at the time.⁴¹

Stone further stresses, as do scholars who now lay the groundwork for the extension of rights to animals, that the recognition of certain legal rights does not mean all rights. Children may not vote, blind people may not drive, persons with disabilities hold rights, yet may require guardians to exercise them. In these cases, some rights are held, recognizing that the holder, regardless of his or her level of intelligence, his or her ability to reason or to engage in sophisticated abstract thought, possesses a "legally recognized worth and dignity in its own right" and does not exist "merely to serve as a means to benefit "us".⁴²

The progression toward legal recognition of animal rights will not entitle animals to decent public education or a full year of maternity benefits. Rather, what should come is a gradual evolution from the notion of animal-as-thing to animal-as-subject-of-a-life, meaning animals have certain interests that people ought not to violate. The rights to which scholars refer do not see animals and people as "equal". The point is simply that since animals are not machines, we should not treat them as if they were.

Some of the contributors to *Animal Rights*, such as Richard Posner (whose contribution was the most lacking in logic and reason, an observation made even sadder by the fact that he is a judge),⁴³ wonder how animal rights could ever be implemented into our society and laments the many human-animal conflicts that would arise. But conflict is an inherent part of

41. Stone, *supra* note 33 at 455 and generally at 455 [footnotes omitted].

42. *Ibid.* at 458. See generally *ibid.* at 457–458 and 464–467. See also *Introduction to Animal Rights*, *supra* note 11 at 98–101.

43. Posner's was the most disappointing, perhaps insipid, essay in the collection (though Epstein came close). Posner thinks that our domestication of animals and historic reliance on them necessarily invoked empathy and kinship on our part, yet history itself proves him painfully wrong and in any event, the premise itself is illogical. If we felt empathy and kinship with these animals, we could not possibly use them in the ways we did then and do now. Many animal abusers make public claims of this nature that appeal to our inclination to want to justify (and continue) our own harmful behaviour, but the claims collapse upon the slightest examination. Posner seems to have a problem even understanding human equality, referring to all of humanity as "man", to persons with intellectual disabilities as "retarded" and to "minorities" generally. Richard A. Posner, "Animal Rights: Legal, Philosophical, and Pragmatic Perspectives" in *Animal Rights*, *supra* note 8 at 51.

any society; there would be no legal profession without it. And until there is a broad understanding of what “animal rights” really means, and agreement that it is a goal toward which our society ought to move, it may be premature to begin scaring one another about how different our society will look if ever that day comes. Changes examined at intervals of a century seem shocking; on a day to day basis, change can be gradual and implemented in ways society can accommodate.

None of this is to deny that there are differences between people and animals. There are also differences between adults and children, for example. These differences are relevant when it comes to deciding who may vote or drive or see restricted movies. However, we have come to recognize that the differences are not relevant when it comes to determining, *inter alia*, whether or not one group may be regarded as the property of the other. It is the absence of *relevant* differences between human and nonhuman animals that propels their changing legal status.

CONCLUSION

Perhaps *Animal Rights* (the book) will prove to be part of the progression toward animal rights (the idea), revealing as it does the lack, to date at least, of a coherent argument against it. The book does show that there is much to think about on this subject. In North America, we bring billions of animals into existence year after year just so that we can kill them. We then sit around pretending to contemplate the nature of our moral obligations to them, failing to admit that any conflict we may choose to acknowledge has already been resolved by the way we have characterized the parties in the first place.⁴⁴

We assume animals are ours because we have always assumed animals belong to us because it has been convenient, or because when our science was younger, we could say we didn’t know any better. We can’t plead ignorance anymore and the “because we can” argument has gone stale. As Holmes forewarned, if the beliefs on which our legal assumptions rest no longer have a factual base, then it is time to re-examine the validity of those assumptions.

Lesli Bisgould

B.A. (York University, French Studies, 1987)

LL.B. (Osgoode, 1990)

44. Francione, *Animal Rights*, *supra* note 8.