

# BOOK REVIEW

## A REVIEW OF *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS*

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### I. INTRODUCTION

Animal law is one of the nation's fastest growing fields of legal study<sup>1</sup> and practice.<sup>2</sup> While there have been laws related to society's treatment of animals since the 1600s,<sup>3</sup> and books on the subject of

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<sup>1</sup> There are currently forty-two animal law classes being taught at law schools around the country. Animal Leg. Def. Fund, *Student Animal Legal Defense Fund*, <http://www.aldf.org/students.asp?sect=resources>; *select* View Animal Law Classes (accessed Mar. 12, 2005). There are also fifty-eight Student Animal Legal Defense Fund chapters, including two international chapters. *Id.* at <http://www.aldf.org/students.asp?sect=resources>; *select* View Student Chapters.

<sup>2</sup> See Animal Leg. Def. Fund, *Bar Association Animal Law Sections and Committees*, <http://www.aldf.org/associations.asp?sect=resources> (accessed Feb. 24, 2005) (offering contact information for bar association animal law sections and committees at the state and federal level, of which there are twenty-one total).

<sup>3</sup> The first animal anticruelty law was passed by Massachusetts in 1641. Emily Stewart Leavitt, *Animals and Their Legal Rights: A Survey of American Laws from 1641-1990* 1 (Animal Welfare Inst. 1990).

animal rights have been written for over the past century,<sup>4</sup> the emergence of animal law as a separate field is quite recent. The seeds for this growth were planted decades ago by prominent practitioners and legal scholars such as Steven Wise,<sup>5</sup> David Favre,<sup>6</sup> Joyce Tischler,<sup>7</sup> Mark Holzer,<sup>8</sup> and Gary Francione,<sup>9</sup> along with the philosophical writings of Peter Singer<sup>10</sup> and Tom Regan.<sup>11</sup> These luminaries, and others now too numerous to list, have helped tend those seeds, and their success is evidenced by the expansion of animal law courses,<sup>12</sup> the establishment of state animal law bar associations,<sup>13</sup> the publication of the *Animal Law Review* and animal law textbooks,<sup>14</sup> efforts to create animal law programs,<sup>15</sup> and the growing number of animal law students<sup>16</sup> and attorneys.<sup>17</sup>

<sup>4</sup> E.g. Henry S. Salt, *Animals' Rights: Considered in Relation to Social Progress* (George Bell & Sons 1892) (one of the earliest books to address the issue of animal rights).

<sup>5</sup> Literati.net, *About the Author: Steven M. Wise*, <http://www.literati.net/Wise> (accessed Mar. 12, 2005).

<sup>6</sup> David S. Favre & Murray Loring, *Animal Law* (Quorum Books 1983); Mich. St. U. College of L., *Faculty Profiles: David S. Favre*, [http://www.law.msu.edu/faculty\\_staff/profile.php?prof=12](http://www.law.msu.edu/faculty_staff/profile.php?prof=12) (accessed Mar. 12, 2005).

<sup>7</sup> Animal Leg. Def. Fund, *About ALDF: A Brief History of ALDF*, <http://www.aldf.org/history.asp?sect=about> (accessed Mar. 12, 2005).

<sup>8</sup> Henry Mark Holzer is a constitutional law expert, founder of the Institute for Animal Rights Law, and a pioneer in the animal law field. Institute for Animal Rights Law, *Mission Statement*, <http://www.instituteforanimalrightslaw.org> (accessed Mar. 14, 2005); International Society for Animal Rights, *The Activist*, [http://www.isaronline.org/about\\_activist.htm](http://www.isaronline.org/about_activist.htm) (accessed Mar. 14, 2005).

<sup>9</sup> Rutgers Sch. of L.-Newark, *Gary L. Francione: Professor of Law and Nicholas deB. Katzenbach Distinguished Scholar of Law & Philosophy*, <http://law.newark.rutgers.edu/facbio/francione.html> (accessed Mar. 12, 2005).

<sup>10</sup> Princeton U., *Peter Singer*, <http://www.princeton.edu/~psinger/index.html> (accessed Mar. 12, 2005).

<sup>11</sup> N.C. S. U., *An American Philosopher: The Career of Tom Regan* <http://www.lib.ncsu.edu/archives/exhibits/regan> (accessed Feb. 23, 2005).

<sup>12</sup> See Animal Leg. Def. Fund, *supra* n. 1, at <http://www.aldf.org/students.asp?sect=resources>; *select* View Animal Law Classes (listing of animal law classes currently offered nationwide).

<sup>13</sup> See Animal Leg. Def. Fund, *supra* n. 2, at <http://www.aldf.org/associations.asp?sect=resources> (listing the contact information for all state bar animal law sections and committees).

<sup>14</sup> Jordan Curnutt, *Animals and the Law* (ABC-CLIO 2001); Sonia S. Waisman et al., *Animal Law: Cases and Materials* (Carolina Academic Press 2002); David Favre, *Animals: Welfare, Interests, and Rights* (Animal L. & Historical Web Ctr. 2003).

<sup>15</sup> The National Center for Animal Law works to provide resources for future generations of animal law attorneys and advocates. National Center for Animal Law, <http://www.lclark.edu/org/ncal> (accessed Mar. 11, 2005).

<sup>16</sup> See Animal Leg. Def. Fund, *supra* n. 1, at <http://www.aldf.org/students.asp?sect=resources>; *select* View Student Chapters (listing Student Animal Legal Defense Fund Chapters).

<sup>17</sup> See Animal Leg. Def. Fund, *supra* n. 2, at <http://www.aldf.org/associations.asp?sect=resources> (listing the contact information for all state bar animal law sections and committees); see also generally Bobbi Ann Weaver, *Research in the Peaceable Kingdom: A Selected, Annotated Bibliography on Animal Law from an International Perspective*, 30 Intl. J. Leg. Info. 426 (2002) (providing an annotated bibliogra-

In 2004, Cass Sunstein and Martha Nussbaum, two of the nation's leading legal scholars, contributed to and compiled an essential resource for those interested in advancing legal protections for animals. Their new book, *Animal Rights: Current Debates and New Directions*, marks a new era for the field of animal law.<sup>18</sup> While *Animal Rights* is not exclusively an animal law book, the essays provide an essential foundation in philosophy, scientific theory, and ethics with important comparisons to fields such as women's rights and environmentalism.

While advancements in animal law have been made, and some agree that animals do have rights, there are still debates as to what those rights are and how to best recognize them.<sup>19</sup> *Animal Rights* has brought together the most prominent scholars of the highest caliber to help address those fundamental issues so that we may have a legal system that better protects animals. Each essay in *Animal Rights* offers thirteen to thirty-five pages of an author's area of expertise condensed and described in ways that are both profound and accessible. The first half of the book, *Current Debates*, explores the major obstacles currently facing the animal protection movement, and the second half, *Drawing Lines*, is dedicated to laying the foundation for moving beyond those obstacles.

Cass Sunstein begins the book by introducing readers to the essays and to the concept of animal rights.<sup>20</sup> He points out the crux of many issues facing the animal rights movement, asking the reader to reconsider society's relationship with animals. Sunstein's introduction explains the differences between the struggle for animal welfare versus animal rights,<sup>21</sup> and what the goal of the animal rights movement may be.<sup>22</sup> Most significantly, Cass Sunstein writes from the platform that many animals *do* have rights—the right to be legally protected against harm<sup>23</sup>—and we can build on the foundation of state anticruelty statutes that aim to prevent acts of cruelty.

From this position he introduces state and federal protections, noting that the statutes look very strong at first glance, but further exploration exposes their lack of enforcement and significant exemptions.<sup>24</sup> Sunstein highlights the disparate treatment of animals and questions why we are able to tolerate horrific abuses to some animals, most notably farmed animals, when the same act to others, such as

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phy presenting and analyzing select print and online resources concerning animal rights and animal welfare).

<sup>18</sup> *Animal Rights: Current Debates and New Directions* (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

<sup>19</sup> *Infra* pt. II–III (discussing the varying perspectives of the authors in *Animal Rights*).

<sup>20</sup> Cass Sunstein, *Introduction: What Are Animal Rights?* in *Animal Rights: Current Debates and New Directions* 3 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

<sup>21</sup> *Id.* at 4–5.

<sup>22</sup> *Id.* at 5–15.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* at 5–6.

companion animals, would send the abuser to jail. Readers are introduced to the main questions raised in animal rights, and to the authors who provide direction to help answer those questions.<sup>25</sup>

## II. A LOOK AT *CURRENT DEBATES*

A book exploring animal rights would not be complete without the inclusion of Steven M. Wise, author of the essay *Animal Rights, One Step at a Time*.<sup>26</sup> Wise is best known for his books *Rattling the Cage*,<sup>27</sup> *Drawing the Line*,<sup>28</sup> *Unlocking the Cage*,<sup>29</sup> and most recently *Though the Heavens May Fall*.<sup>30</sup> Wise is also a practicing attorney, professor, and president of the Center for the Expansion of Fundamental Rights.<sup>31</sup> The essay in *Animal Rights* contains concepts that will be familiar to those who have read his books and articles over the years. For those who have not been exposed to Wise's work, this essay is an excellent introduction to and highlight of his arguments supporting legal rights for animals.

*Animal Rights, One Step at a Time* takes readers through the seven major obstacles in the progression of animal rights: physical, economic, political, religious, historical, legal, and psychological.<sup>32</sup> Wise explores how we may overcome those obstacles by exposing flaws in our arguments regarding the arbitrary wall that has been built between nonhuman animals and human animals in the legal system.<sup>33</sup> He constructs and argues for effective methods to advance legal protections for animals through the common law, and advocates using the precautionary principle in advancing animal rights to counteract inherent judicial bias.<sup>34</sup> Finally, Wise explains how science can be used to help answer a fundamental question posed to rights advocates: which animals and which rights?<sup>35</sup>

As a prominent figure in the animal rights debate who has articulated a strategy for furthering legal protections for animals on an incremental basis, many scholars take issue with Wise's arguments and strategy. This first essay of the book sets the stage for those debates.

<sup>25</sup> *Id.* at 13–14.

<sup>26</sup> Steven M. Wise, *Animal Rights, One Step at a Time*, in *Animal Rights: Current Debates and New Directions* 19 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

<sup>27</sup> Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Basic Books 2000).

<sup>28</sup> Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* (Basic Books 2002).

<sup>29</sup> Steven M. Wise, *Unlocking the Cage: Science and the Case for Animal Rights* (Basic Books 2002).

<sup>30</sup> Steven M. Wise, *Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery* (Da Capo Press 2005).

<sup>31</sup> *Animal Rights: Current Debates and New Directions*, *supra* n. 18, at xi.

<sup>32</sup> Wise, *supra* n. 26, at 19–26.

<sup>33</sup> *Id.* at 26–27.

<sup>34</sup> *Id.* at 28–33, 35–38.

<sup>35</sup> *Id.* at 33–41.

Richard Posner is the first to enter the debate. He articulates arguments against those of Steven Wise and Peter Singer in his essay, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*.<sup>36</sup> Judge Posner begins by stating that the debate over animal rights is “whether to create legal duties to treat animals in approximately the same way we treat the human residents of our society, whether, in effect, animals, or some animals, shall be citizens.”<sup>37</sup>

Posner and Richard Epstein, those critical of the animal rights movement, are the only authors in the book *Animal Rights* who state a belief that recognizing animal rights means having to give them rights equal to humans, or to bestow the benefit of citizenship upon them.<sup>38</sup> However, this position highlights the fact that one of the animal rights movement’s largest obstacles is the difficulty articulating a common definition of “animal rights” and articulating a clear picture of how our society would function by truly recognizing those rights.

Of all of the essays included in *Animal Rights*, Posner is the most critical of the idea, the goals, and the tactics of the animal rights movement. Beginning with criticism of Wise’s approach, Posner questions the tactic of expanding legal protections to animals based on their likeness to humans.<sup>39</sup>

Posner questions the ability of the animal rights movement to analogize with other civil rights movements, notably of women and minorities.<sup>40</sup> In part, this criticism is based on the ability of civil rights

<sup>36</sup> Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in *Animal Rights: Current Debates and New Directions* 51 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

<sup>37</sup> *Id.*

<sup>38</sup> Richard Epstein, *Animals as Objects, or Subjects, of Rights*, in *Animal Rights: Current Debates and New Directions* 143, 156 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004). While describing the concept of animal rights, Peter Singer states:

That doesn’t mean that all animals have the same rights as humans. It would be absurd to give animals the right to vote, but then it would be no less absurd to give that right to infants or severely retarded human beings. Yet we still give equal consideration to the interests of those humans incapable of voting. We don’t raise them for food, nor test cosmetics in their eyes. Nor should we.

Peter Singer, *Ethics Beyond Species and Beyond Instincts: A Response to Richard Posner*, in *Animal Rights: Current Debates and New Directions* 78, 79 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

Gary Francione describes animal rights as protecting their interest in not being treated as property, yet recognizing that they do not guarantee equal treatment in all respects. Gary Francione, *Animals—Property or Persons?* in *Animal Rights: Current Debates and New Directions* 108, 124 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

Cass Sunstein explains, “If we understand ‘rights’ to be legal protection against harm, then many animals already do have rights, and the idea of animal rights is not that terribly controversial.” Sunstein, *supra* n. 20, at 5.

<sup>39</sup> Posner, *supra* n. 36, at 51–59. He notes that “most people would not think [cognitive capacity is] either a necessary or a sufficient condition of having rights.” *Id.* at 56.

<sup>40</sup> *Id.* at 58–59.

movement leaders to articulate a goal and give a clear answer as to the desired outcome of their struggle, in contrast to the varying strategies and goals of the animal rights movement.<sup>41</sup> Posner believes the best way to protect animals is to forbid gratuitous cruelty.<sup>42</sup> What he fails to recognize is that most, if not close to all, of society's uses of animals constitute gratuitous cruelty. As pointed out in a number of the essays in *Animal Rights*—including those of Wise, Francione, Sunstein, Wolfson, and Sullivan—on paper we have federal and state statutes that are supposed to protect animals from gratuitous cruelty, but they are not working on a number of levels for a number of reasons. Animals need us to do more.

However, Posner directs stronger criticism at Wise's emphasis on animals' cognitive abilities as the reason for granting them fundamental legal rights.<sup>43</sup> Posner faults Wise for his unwillingness to take his argument to the furthest extreme, for example, by not recognizing that in the future computers may be given consciousness.<sup>44</sup> It is questionable whether engaging in debates over the furthest extremes is necessary to begin taking incremental steps. It does not seem that any contributing author in *Animal Rights* is suggesting, or expecting, the entire wall between human and nonhuman animals to fall tomorrow. While debating extremes or possible outcomes of each theory of animal rights is important and has its place, articulating a more unified response to the question "what are animal rights?" may be beneficial to attract wider support for further legal protections.

The second half of Posner's essay debates the role of theoretical arguments in the quest for animal rights, and Posner posits that, pragmatically, people may not want to recognize such rights.<sup>45</sup> Posner uses Peter Singer's position on utilitarianism as the foundation for this portion of his essay, arguing that moral instincts, not ethics, should guide our relationships with animals.<sup>46</sup> The following essay by Peter Singer, *Ethics Beyond Species and Beyond Instincts: A Response to Richard Posner*, clearly rebuts those arguments and continues to defend the principle of equal consideration of interests.<sup>47</sup>

Cora Diamond then enters the debate with *Eating Meat and Eating People*, which continues the discussion of a philosophical approach to animal rights (like that of Singer, Tom Regan, and others), taking issue with the notion of "speciesism."<sup>48</sup> Her essay is arguably the best in the collection and certainly worth taking the time to wrestle. While

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<sup>41</sup> *Id.* at 57–59.

<sup>42</sup> *Id.* at 59.

<sup>43</sup> *Id.* at 55–59.

<sup>44</sup> *Id.* at 55.

<sup>45</sup> Posner, *supra* n. 36, at 59.

<sup>46</sup> *Id.* at 59, 66.

<sup>47</sup> Singer, *supra* n. 38, at 78–90.

<sup>48</sup> Cora Diamond, *Eating Meat and Eating People*, in *Animal Rights: Current Debates and New Directions* (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

these philosophical discussions are not central to animal law, an understanding of the philosophies and practicalities of animal rights are fundamental to developing and defending legal strategies.

Gary Francione introduces another fundamental debate in animal rights in his essay *Animals—Property or Persons?*<sup>49</sup> Like Wise, Francione is an accomplished attorney, author, professor, and legal scholar.<sup>50</sup> Although he also has his critics, Francione's perspective is critical in the discussion of animal rights and will be familiar to those versed in animal law. Francione's stance is quite clear: in order to truly recognize animals' rights, we must abolish their status as property and not merely regulate society's institutionalized exploitation.<sup>51</sup>

This essay begins by reminding the reader of the suffering animals endure for human "gain," and that we as a society have a moral schizophrenia toward animals—we simply do not walk our talk.<sup>52</sup> He then describes how classifying animals as property or "things" under the law allows us to treat them as if they are not living, breathing beings with their own interests.<sup>53</sup> Changing this classification will help bring our treatment of animals more in line with our morals.<sup>54</sup>

Francione's argument leaves no room for the progress of animal welfare, incremental changes that reinforce the property status of animals, or balancing interests from a solely human perspective. He notes that if humans are to truly prohibit the unnecessary suffering of animals, we cannot use them for our own purposes.<sup>55</sup> The problem with our laws, highlighted within state anticruelty statutes, is their basis in the belief that the majority of the suffering we inflict is necessary.<sup>56</sup> The laws are designed to protect agriculture, research, entertainment, and hunting—essentially the statutes allow us to use animals in any way we wish.<sup>57</sup> Francione points out that none of these activities are necessary and therefore none of the suffering we impose is necessary.<sup>58</sup> Instead he argues for the principles of humane treatment and equal consideration: "the rule that we ought to treat like cases alike unless there is a good reason not to . . ." <sup>59</sup> He goes on to explain this balancing of interests in more detail, pointing out that if animals are "legal persons" it does not mean they are "human persons," and there may be times when human interests do take precedence over animal interests.<sup>60</sup>

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<sup>49</sup> Francione, *supra* n. 38, at 108.

<sup>50</sup> Rutgers Sch. of L.—Newark, *supra* n. 9.

<sup>51</sup> Francione, *supra* n. 38, at 108.

<sup>52</sup> *Id.* at 108–10.

<sup>53</sup> *Id.* at 108–13.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 133–34.

<sup>56</sup> *Id.* at 132–34.

<sup>57</sup> Francione, *supra* n. 38, at 117.

<sup>58</sup> *Id.* at 115–20.

<sup>59</sup> *Id.* at 121.

<sup>60</sup> *Id.* at 132–34.

Francione is clear that he believes the only goal of animal rights is abolition of the property status,<sup>61</sup> and only efforts that promote this end should be supported. While everyone might not agree wholeheartedly with his perspectives,<sup>62</sup> Francione articulates an important and unwavering position for animal rights.

While David Favre's article is appropriately placed with the essays included in *New Directions*, one may wish to read *A New Property Status for Animals: Equitable Self-Ownership* as a counterbalance to Francione's arguments.<sup>63</sup> Favre has taken the liberty to express a possible outcome of abolishing the property status of animals, and the picture he paints is quite bleak.<sup>64</sup> His idea of "equitable self-ownership" would allow animals to bring legal action in their own right,<sup>65</sup> or through a guardian ad litem,<sup>66</sup> and he suggests language for a deed or contract to establish self-interest in animals.<sup>67</sup> Favre's theory allows for an alternative to the two current legal theories—property or legal persons—by blending the two to create a new paradigm.

Also included in *Current Debates* is Richard Epstein's article, *Animals as Objects, or Subjects, of Rights*.<sup>68</sup> Epstein departs from the theories of Wise and Francione in a number of respects. His essay explores the history of the relationship between humans and animals, then argues that both humans and animals have benefited from, and animals continue to benefit from, animals' current property status.<sup>69</sup> Epstein is quite critical of any comparison between humans and animals, or between any civil or human rights struggles, and believes that animals' cognizance or sentience does not support the granting of rights.<sup>70</sup>

Along with Posner, Epstein mistakenly states that the goal of the animal rights movement is for animals to be treated as human beings.<sup>71</sup> He also relies too heavily on the ability of animal anticruelty statutes to protect animals from suffering.<sup>72</sup> From this perspective, he asks questions that the movement has difficulty answering.<sup>73</sup> While his viewpoints (which surely he does not alone hold) certainly raise

<sup>61</sup> *Id.* at 108.

<sup>62</sup> Claudette Vaughan, *Debating Francione (and loving it)*, 6 *Vegan Voice* 11 (June 2001) (available at [http://www.animal-lib.org.au/more\\_interviews/francione](http://www.animal-lib.org.au/more_interviews/francione)) (discussing how Francione's opinions differ from those of other animal rights theorists).

<sup>63</sup> David Favre, *A New Property Status for Animals: Equitable Self-Ownership*, in *Animal Rights: Current Debates and New Directions* 234 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

<sup>64</sup> *Id.* at 234–36.

<sup>65</sup> *Id.* at 237–42.

<sup>66</sup> *Id.* at 242.

<sup>67</sup> *Id.* at 245–46.

<sup>68</sup> Epstein, *supra* n. 38, at 143.

<sup>69</sup> *Id.* at 144–48.

<sup>70</sup> *Id.* at 152.

<sup>71</sup> *Id.* at 156.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 156–58.



issues that animal rights proponents must address, Epstein enters this debate with very fundamentally different personal and moral beliefs than those of some that he criticizes within the animal rights movement. Unlike other authors in *Animal Rights*, he supports the current divide between humans and animals.<sup>74</sup> His essay is a reminder that, on some level, we may need to agree to disagree, but we also need to try to find common ground that allows improvements in the lives of animals.

In *Drawing Lines*, James Rachels, a philosopher, continues the debate over which animals and which rights.<sup>75</sup> He briefly discusses different theories of moral standing and connects the idea of moral standing to "personhood."<sup>76</sup> Rachels then uses those ideas to point out why the proponents of animal rights should not rely on certain characteristics of animals to make the case for how they should be treated.<sup>77</sup> Instead, our treatment of animals should come from the viewpoint that if an action causes harm to an animal, for whatever reason, we should not engage in the action.<sup>78</sup> The essay concludes with an answer to the common question of "Where do we draw the line?" with the answer being there is no method, and no need, to draw one line.<sup>79</sup> He argues that we should step away from an approach to legal rights that addresses all animals in every situation and instead rely on the known characteristics of animals to help create policies that address their needs in particular situations or environments.

Along a similar line of thought, Lesley J. Rogers and Gisela Kaplan's essay, *All Animals Are Not Equal*, argues that scientific knowledge of animals' biology and behavior should help guide policy regarding their treatment, but warns against creating a hierarchical scale for recognizing rights.<sup>80</sup> The authors discuss evidence of animals' awareness and abilities, highlighting the fact that there is significantly more research that needs to be done for us to truly understand the complexities of other species.<sup>81</sup> In addition, our current research should caution against relying on a certain test or assigning rights based on certain characteristics.<sup>82</sup>

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<sup>74</sup> Epstein, *supra* n. 38, at 156.

<sup>75</sup> James Rachels, *Drawing Lines*, in *Animal Rights: Current Debates and New Directions* 162 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

<sup>76</sup> *Id.* at 164–66.

<sup>77</sup> *Id.* at 166–71.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 173.

<sup>80</sup> Lesley J. Rogers & Gisela Kaplan, *All Animals Are Not Equal*, in *Animal Rights: Current Debates and New Directions* 175 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

<sup>81</sup> *Id.* at 175–76, 178, 193.

<sup>82</sup> *Id.* at 175–76.

### III. A LOOK AT NEW DIRECTIONS

*Foxes in the Hen House*, by David J. Wolfson and Mariann Sullivan, is the first essay in *New Directions*.<sup>83</sup> This insightful essay on animals, agribusiness, and the law highlights the most unjust treatment of animals in the legal system. Wolfson and Sullivan explain that while ninety-eight percent of the animals that are used and killed in the United States are farmed animals, they are afforded no real legal protections.<sup>84</sup> The essay exposes exemptions in and the lack of enforcement of federal laws including the Animal Welfare Act and Humane Methods of Slaughter Act.<sup>85</sup>

The authors also discuss the limitations of state anticruelty statutes due to the exemptions of common or normal husbandry practices—meaning those who use animals for agricultural purposes ultimately determine what is or is not cruel.<sup>86</sup> In addition, the treatment of “poultry” or “fowl,” who make up ninety-five percent of the animals raised and killed for food, is often exempted altogether.<sup>87</sup> These exemptions, loopholes, and standards allow for and perpetuate horrific cruelty to billions of animals.<sup>88</sup>

The authors then compare and contrast laws in the United States to those in Europe, where significantly more progress has been made in animal rights.<sup>89</sup> The essay highlights the efforts of a few within the industry to improve treatment of farmed animals, and some recent successes at the state level.<sup>90</sup> Wolfson and Sullivan conclude with questions that will hopefully inspire change.<sup>91</sup> The answers to those questions should be that the farming community should not set the standards for humane treatment of animals, industries should not be allowed to regulate themselves, and we should not tolerate a legal system that simply does not in any way protect most of the animals in the United States from cruelty.

Next, Cass Sunstein offers his proposal for better protecting animals in his essay *Can Animals Sue?*<sup>92</sup> Sunstein explains two strategies for expanding rights: to enlarge the category of rights beyond

<sup>83</sup> David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House*, in *Animal Rights: Current Debates and New Directions* 205 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

<sup>84</sup> *Id.* at 206.

<sup>85</sup> *Id.* at 207–09.

<sup>86</sup> *Id.* at 209–12.

<sup>87</sup> *Id.* at 212.

<sup>88</sup> Wayne Pacelle, *Humanity Can't Be Forgotten, Even When Slaughtering Poultry*, Chicago Tribune C25 (July 28, 2004) (advocating for legislation to control factory farm abuses and noting that more than nine billion chickens and turkeys are slaughtered every year).

<sup>89</sup> Wolfson & Sullivan, *supra* n. 83, at 221–24.

<sup>90</sup> *Id.* at 224–26.

<sup>91</sup> *Id.* at 226.

<sup>92</sup> Sunstein, *Can Animals Sue?* in *Animal Rights: Current Debates and New Directions* 251 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

what is currently recognized, or to promote the enforcement of existing laws and protections.<sup>93</sup> This essay explores advancing animal rights through better enforcement of existing rights, giving both private citizens and animals (with humans as their representatives) standing.<sup>94</sup>

Sunstein points out three limitations of state anticruelty statutes as they currently exist. First, it is within state prosecutors' discretion whether or not to enforce criminal statutes, and private prosecution would allow for increased prosecutions.<sup>95</sup> Second, problems arise because our duties and obligations to animals only exist through relationships that are entered into by people, and state laws do not protect most animals from cruelty.<sup>96</sup> Third, Sunstein discusses federal protections for animals and the shortcomings of their enforcement.<sup>97</sup> There are a number of environmental and animal welfare statutes on the federal level protecting migratory birds, horses, endangered species, and marine mammals—the list is quite comprehensive—but the tapestry of laws, and unequal enforcement, leaves out a number of animals.<sup>98</sup>

To create a system that both protects animals and is better enforced, Sunstein argues that standing for new or existing statutes needs to be expanded.<sup>99</sup> The essay lays out the requirements and possible injuries that would allow a party to bring an action.<sup>100</sup> He notes that:

human beings have standing to protect animals in federal court under three circumstances. The first is when they seek information about animal welfare . . . . The second is when the government's failure to protect animals inflicts competitive injury on the human plaintiff. The third is when a human being visits or works with animals that are threatened with illness, death, or other harm.<sup>101</sup>

Given these limits, a more effective method of enforcement would allow animals to protect their own rights and own interests through a human representative.<sup>102</sup> While Congress has not yet explicitly granted standing to animals, it is within their ability to grant a cause of action to animals. Congress has created legal personhood in nonhuman entities such as corporations, ships, and trusts.<sup>103</sup> Sunstein explains that a system that allows for both enhanced private and public enforcement of existing laws will certainly go a long way to better protect animals and their interests.<sup>104</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 251–52.

<sup>95</sup> *Id.* at 253.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 253–55.

<sup>98</sup> Sunstein, *supra* n. 92, at 253–55.

<sup>99</sup> *Id.* at 255.

<sup>100</sup> *Id.* at 255–58.

<sup>101</sup> *Id.* at 259.

<sup>102</sup> *Id.* at 260.

<sup>103</sup> *Id.*

<sup>104</sup> Sunstein, *supra* n. 92, at 260–61.

*Of Mice and Men: A Feminist Fragment on Animal Rights*, by Catharine A. MacKinnon, exposes animal rights advocates to the related and important field of women's rights.<sup>105</sup> MacKinnon, a leading advocate for women's rights, effectively compares humanity's treatment (and domination) of animals to men's treatment (and domination) of women by looking at inequalities, power structures, women's treatment as property, and the view that both animals and women need to be subdued and controlled.<sup>106</sup> She explains that just as our society has done a disservice to women to argue for their rights only because they are like men, we do a disservice to animals to argue for their rights based on their likeness to humans.<sup>107</sup> Through John Steinbeck's play *Of Mice and Men*, MacKinnon shows that even with good intentions, unequal relationships, such as those between humans and animals, cause harm to those dominated.<sup>108</sup> MacKinnon also recognizes that our continuing struggle to gain equality for women only illuminates the struggle that lies ahead to gain rights for animals.<sup>109</sup>

In *Animal Rights and the Values of Nonhuman Life*, Elizabeth Anderson explores the different philosophies, intersections, and tensions between animal welfare, animal rights, and environmentalism.<sup>110</sup> The essay focuses on the idea of the "argument from marginal cases."<sup>111</sup> She argues that conferring rights based on animals having morally relevant qualities is not a sound approach,<sup>112</sup> and instead proposes a "rational attitude theory of value."<sup>113</sup> Anderson's essay, similar to the arguments of Rogers and Kaplan, demonstrates that different animals need recognition of different rights.<sup>114</sup> She also states there is room within our policy considerations to be open to animal welfare (sympathy for animals), animal rights (respect for animals), and environmentalism (wonder of nature).<sup>115</sup>

The final essay in *Animal Rights* comes from one of the editors, Martha C. Nussbaum.<sup>116</sup> Through *Beyond "Compassion and Humanity": Justice for Nonhuman Animals*, Nussbaum proposes the "capabil-

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<sup>105</sup> Catharine A. MacKinnon, *Of Mice and Men: A Feminist Fragment on Animal Rights*, in *Animal Rights: Current Debates and New Directions* 263 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 267.

<sup>108</sup> *Id.* at 271–73.

<sup>109</sup> *Id.* at 273.

<sup>110</sup> Elizabeth Anderson, *Animal Rights and the Values of Nonhuman Life*, in *Animal Rights: Current Debates and New Directions* 277 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

<sup>111</sup> *Id.* at 279.

<sup>112</sup> *Id.* at 279–90.

<sup>113</sup> *Id.* at 279.

<sup>114</sup> *Id.* at 290.

<sup>115</sup> *Id.* at 293.

<sup>116</sup> Martha C. Nussbaum, *Beyond "Compassion and Humanity": Justice for Nonhuman Animals*, in *Animal Rights: Current Debates and New Directions* 299 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

ities" approach to animal rights.<sup>117</sup> She first enters the philosophical debate over the benefits and shortcomings of utilitarian and contractual approaches for animal rights,<sup>118</sup> then articulates a different strategy through expanding the current capabilities approach to apply to animals.<sup>119</sup> The capabilities approach focuses on one's ability to flourish based on one's own dignity.<sup>120</sup> Nussbaum compares central human capabilities (including life, bodily integrity, emotions, reasoning, and play)<sup>121</sup> with a broad list of basic entitlements for animals (who also need the same basic categories, but within their own context).<sup>122</sup> Nussbaum argues that by using these principles we will have a system that helps us better wrestle with inherent conflicts between the well-being of humans and the well-being of animals.<sup>123</sup> It is heartening to conclude the compilation of essays with the notion that we should move forward to a "fully global theory of justice" for all living beings.<sup>124</sup>

#### IV. CONCLUSION

Our society is in the midst of a major debate over animal rights, our duties, and the legal status of animals. This new compilation of essays has profoundly contributed to this debate. While *Animal Rights* is an incredible resource introducing readers to the basic issues in animal rights and highlighting directions animal advocates may go, the fundamental obstacle in the struggle for animal rights is not overcome. It is simply pushed to the forefront. As a whole, our movement is not able to agree on an end goal; we are not able to articulate what we are struggling to obtain or want others to recognize, and subsequently, we cannot agree upon which steps to take and struggle to gain widespread public support. While we must continue to strive over the long term for a recognition of animal rights, in the short term there are numerous and extensive steps that must be taken to better protect animals and their interests.

Throughout our history, and most significantly in the last few decades, the animal rights movement has moved forward due to the significant contributions of researchers, scholars, and authors in the fields of science, philosophy, ethics, and law. Hopefully, this latest contribution will help continue the advancement of legal protections for animals and help animals gain recognition of their inherent rights.

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<sup>117</sup> *Id.* at 300.

<sup>118</sup> *Id.* at 299–305.

<sup>119</sup> *Id.* at 305–10.

<sup>120</sup> *Id.* at 306.

<sup>121</sup> *Id.* at 313–14.

<sup>122</sup> Nussbaum, *supra* n. 116, at 314–17.

<sup>123</sup> *Id.* at 318.

<sup>124</sup> *Id.* at 319.

