

REMARKS

THE LEGAL STATUS OF NONHUMAN ANIMALS

On September 25, 1999, a distinguished group of legal scholars met in New York City at the 5th Annual Conference on Animals and the Law, hosted by the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York, to discuss how the law classifies nonhuman animals and whether the current legal framework is in accord with scientific understanding, public attitudes, and fundamental principles of justice. This conference took a monumental step in facilitating discussion about, and furthering the cause of, the legal protection and welfare of nonhuman animals.¹

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¹ *Animal Law* would like to thank David J. Wolfson and Jane Hoffman for facilitating the publication of this conference, Rita Anderson for the initial painstaking transcription, Christine MacMurray for her tireless dedication in editing the preliminary portions of this work, Mariann Sullivan and Gilda E. Mariani for their roles in creating the conference, and the Association of the Bar of the City of New York for graciously allowing us to publish this work. Finally, we would like to thank everyone who participated in this momentous conference, as it is our honor and privilege to publish the legal views and theories of some the most prominent individuals in the field of animal law in one succinct work.

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The Legal Status of Nonhuman Animals conference consists of four panel discussions. The first panel considers the development and evolution of the law of nonhuman animals. The second panel focuses on the current legal structure which governs the treatment of nonhuman animals, with comparisons made between the approaches taken by the United States and the United Kingdom. In addition, the panelists present their views on whether the current legal system provides real protection for nonhuman animals. Finally, the panelists in the second panel discuss whether nonhuman animals should be considered property, whether nonhuman animals can be afforded adequate protection as property, and what approaches might result in better protection and treatment. The third and fourth panels concentrate on the

potential for change in the common law through litigation, and the potential for change through legislation. The panelists also posit strategies to achieve positive change for nonhuman animals. What follows is an edited version of the conference in its entirety.

John Hart Ely, Richard A. Hausler Professor of Law at the University of Miami School of Law, who was scheduled to be a participant in the conference, was unable to attend. He requested that the following statement be read, and his words speak volumes regarding the importance of legal discourse in the campaign to afford greater protection to nonhuman animals:

I am disappointed that I won't be able to be there, given my passion about the needless abuse of animals to fulfill what are more often than not human needs for a steak or shampoo, interests that pale by comparison to the torture inflicted by factory farming, unnecessary testing, and the like. I am, however, heartened by the fact that you have assembled so many of the heavy hitters in this area. Your conference will serve the valuable function of bringing concerned experts together, hopefully leading to a broader and more forceful campaign against needless sadism, a campaign I hope to be a part of.

PANEL DISCUSSION I

This Panel Discussion features Professors Bryant, Favre, Francione, Freshman, Radford, Reppy, Robinson, Silverstein, and Wise.

JANE HOFFMAN: Professor Favre, what laws currently protect non-human animals today, on both the state and federal level?

PROF. FAVRE: I think you have to start at the state level, because animals fall initially within the realm of property, and the control and regulation of property is primarily a state function as opposed to a federal function. Clearly, the first thing that would come to everybody's mind for the protection of animals is the cruelty laws, which now number about 100, started in the 1860s here in New York, and have remained basically the same kinds of laws since that point in time with some adjustments. For example, they're still trying to decide whether or not birds are animals in some states and whether or not cockfights should be outlawed in some states, so there are still some rough edges on what is or is not within the cruelty laws. We still have major exemptions for farm animals and for scientific experimentation, so those animals don't seem to come within the protection of the laws or the state cruelty laws either. At the federal level, we have a number of laws, but the primary one clearly is the Animal Welfare Act;² but again, the Act is limited in its scope because it applies to a very specific set of holders of animals, and even then there are some exemptions and problems about how the laws apply. Primarily, until a very recent case,³ it wasn't clear that anybody other than the federal government could

² 7 U.S.C.A. §§ 2131–2159 (West 2001).

³ *Animal Leg. Def. Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998).

seek to enforce the Animal Welfare Act, which of course limited its enforceability, because the federal government did not seem to be all that interested in enforcing the Act. To take that point back to the state cruelty laws, the other primary frustration of the state cruelty laws is even if you have a violation, at the moment you have the limitation of the fact that it takes a criminal prosecution to do anything about it, and many prosecutors are simply not willing to put that very high on their agenda. So one of the clear problems is that where animal protection is provided for under the existing law, the enforceability of it is an entirely separate and difficult issue.

JANE HOFFMAN: Does anyone want to grab the Animal Welfare Act and give us twenty-five words or less on what the Animal Welfare Act covers?

PROF. FRANCIONE: Nothing.

If I could just make a comment about the limitations of state anti-cruelty laws: Most state anti-cruelty laws specifically exempt 99.5% of what we do with animals in the first place; that is, there is an exemption in the statute which says this statute doesn't cover animals used for agriculture, hunting, farming, biomedical research, etc. Therefore, right from the outset, the anti-cruelty laws which supposedly protect animals from "unnecessary suffering" don't apply to most of what we do to animals, most of which cannot be considered as necessary using any coherent meaning of the concept of necessity. As far as the federal Animal Welfare Act is concerned, this was originally passed in 1966. It has been amended a number of times. It supposedly regulates the use of animals in biomedical research, but again, like the state anti-cruelty statutes, it really doesn't have much of an effect. It is basically a husbandry statute—you have to feed them, you have to give them water, you have to give them enough space when they are in the cages. Once the laboratory door is closed, there is virtually no restriction or regulation on what can be done to those animals. Indeed, it is explicitly stated in the AWA that the law shall not be construed to interfere with the methodology or actual conduct of any experiments. We do have a lot of laws. We also have a Humane Slaughter Act, which applies on the federal level.⁴ We have laws at both the state level and the federal level that supposedly protect animals from exploitation in the form of unnecessary suffering. For the most part they don't work because for the most part, most of our uses of these animals are explicitly exempted from the ambit of these statutes in the first place.⁵

JANE HOFFMAN: Professor Robinson, would you talk a little about the Endangered Species Act or any other treaties you think would be relevant in the wildlife context?

⁴ 7 U.S.C.A. §§ 1901–1906 (West 2001).

⁵ See Gary L. Francione, *Animals, Property and the Law* (Temple U. Press 1995). See also Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Temple U. Press 2000).

PROF. ROBINSON: There is a body of conservation law which has elements of protection for animals. National wildlife refuges—the very word “refuge” meaning a place to go, to breed, and live in your habitat without hunters—exist at both federal and state levels. There are a number of conservation laws, of course, that do regulate hunting, to establish seasons and so on. Regarding an animal or any other living entity that is in danger or threatened with extinction, the Endangered Species Act⁶ was passed during the very beginning of modern environmental law as an attempt to stop humans from extinguishing other species by creating a listing process and then making it illegal in any way to contribute to or effect the extinction of the species listed. That’s had dramatic effect on things like the *TVA v. Hill* Supreme Court decision,⁷ in which a dam was basically stopped to preserve a small fish, the snail darter, and it’s had other useful effects. At the same time that law was being prepared, the Convention on the International Trade in Endangered Species⁸ was being developed as an international agreement to stop the trade in species which were deemed to be threatened with extinction. That is not a universally observed convention, but it was a very early attempt to put together controls on the marketplace. We have also in New York state developed controls on the marketplace which are fairly effective in prohibiting the sale of certain products, even of species that are not extinct, certain furs and so on, and curbing the trade in birds caught in the wild.⁹

DAVID WOLFSON: Just to continue to set the scene, could someone explain the difference in treatment and protection between domestic and wild animals under the law as it stands?

PROF. WISE: Well, with domestic animals I think I may be going over some ground that Professors Francione and Favre have already gone over. I don’t want to do that. You have the anti-cruelty statutes. That’s the primary way in which domestic animals, nonhuman animals, are protected, whether they are companion animals, whether they are farm animals, whether they are laboratory animals, and I agree with Professor Francione—I don’t think I’ve ever said that before.

JANE HOFFMAN: We told you this would be unprecedented.

PROF. WISE: I agree with Professor Francione that 99.9%, and he may even be a little conservative, of nonhuman animals are not protected. If you look through anti-cruelty statute cases, there are very, very few of them. Considering that nine billion animals a year in the United States are killed for human food consumption and the perhaps fifty million animals used in laboratory experiments, rodeos, circuses, zoos, movies, and television, a torrent of animal lives are lost and a

⁶ 16 U.S.C.A. §§ 1531–1544 (West 2001).

⁷ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

⁸ See *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (Mar. 3, 1973), 27 U.S.T. 1087.

⁹ See N.Y. Environmental Conservation Laws, §§ 11-0535 (endangered species), 11-0536 (prohibiting sale of furs, etc.), 11-1728 (wild birds) (McKinney 2000).

torrent of animal abuse occurs in the United States every year. But, there aren't more than a handful of appellate cruelty cases. There can't be more than a few hundred, at most a thousand, prosecutions under state anti-cruelty statutes, and most of them have to do with dogs or cats, setting fire to a dog, putting a cat in a microwave. Here and there is a tiny island of anti-cruelty prosecution in a torrent of animal cruelty, animal killing, and animal abuse. So I really don't view anti-cruelty statutes as being very effective for domestic animals.

PROF. FAVRE: I think there is a clear difference in the effect to control wildlife versus domestic animals, and it's the philosophy from which the various laws are written. With domestic animals, the anti-cruelty laws focus on the individual animal. How effective they are is another thing. But it is a concern about individual animals, whereas the wildlife law is almost never focused on individual animals. It's an ecological approach. It's a systems approach. It's a protection of ecosystems and species, and there simply is no real concern for individual animals. Now, between the two are some issues like the leghold trap, which are methodologies by which one captures wildlife, but almost all of the wildlife law focuses on good law versus bad law and from the perspective of does it protect species or not, not the issue of when does it not cause harm or pain to individual animals.

PROF. BRYANT: When we're looking at this question of domestic versus feral, we probably need to add this new category of "made" or "created." You may look at it as a continuum: first, animals existing without human intervention in their lives—wild animals; second, possessory interests in animals established to include wild animals if they are reduced to property, and also including the processes by which we make them domesticated and therefore become dependent on us; third, we make animals so that we can use them even further in biomedical research or we can use them in food production for the convenience of people. The legal categories that we have been talking about divide up the universe of animals in some of these ways—domesticated animals, pets, wild animals—but the legal categories fail to capture the reality, which is a continuum of animals and animal behaviors such that the categories don't properly fit. We can think of wild horses. We can think of tamed horses. We can think of trained horses that perform for us. We can think of cats that are fully domesticated, and we can think of cats that are free-roaming or feral. Once you start categorizing animals and then come up with laws to affect those animals, you miss the fluidity of the structure that would enable us to respond most humanely to different animals. So, the existing legal categories, in talking about possessory interests, owned animals versus unowned animals, these are crude in and of themselves, but when you start thinking about the whole range of animals, you are really lost.

I also want to address this idea that when you have domesticated animals and you have anti-cruelty statutes or you have animals used as food who aren't covered under the statutes, then it's the anti-cruelty statutes that need to be changed. I don't think that's necessarily the

message any of us would be sending here. I think the first thing to look at if you have a practice or an act against an animal that concerns you would be the underlying regulations for the industry that you're looking at, to see if there are any regulations in that industry that give you some play for interpretation and enable you to work within that particular structure. No one has yet mentioned the regulatory system that underlies these, but when we start talking about leghold traps, when we start talking about hunting regulations and those kinds of things, we are really looking at another layer of law.

PROF. REPPY: I am a property professor, and it's hard for me to think of a total abolition of a property approach to dealing with animals. Professor Bryant talked about "made" animals. Consider the case of genetically redesigned mice who have a gene added from another species. They simply could not exist in nature and the scientist who has designed them says, "These are my property; I created them." That's probably the very strongest case that can exist when we're talking about animals as property. That doesn't mean I am saying that the property law should apply, but this particular case we ought to keep in mind when we are discussing whether a property approach to animals is completely unacceptable.

DAVID WOLFSON: Professor Radford, let us cross the Atlantic for a bit to discuss the United Kingdom and Europe.

PROF. RADFORD: I will give a few opening remarks, and hopefully will come back to some of the issues. The first thing to say is the legal status of animals in the United Kingdom remains as it always has been, that of property so far as domestic and captive animals are concerned. What has happened is that over the course of 175 years, what one may do to those animals has been qualified quite dramatically by legislation. I don't want to go off on a constitutional track, but it is important to say that in the United Kingdom, we are dealing with a unitary state, for the moment at least, and a principle of parliamentary legislative supremacy, so whatever acts Parliament passes, they are binding on the whole of the United Kingdom and cannot be challenged as being unconstitutional or unlawful. That is one of the reasons why legislation is perhaps more relied on in the United Kingdom for protecting animals than litigation. So far as the framework is concerned, a basic piece of legislation protects animals from cruelty. It protects all domestic and captive animals apart from those that are being used for scientific procedures, as those animals are protected under a separate piece of legislation. The anti-cruelty measure—the 1911 Protection of Animals Act¹⁰—relies principally, not exclusively, but principally on the concept of unnecessary suffering. Backing up the 1911 Act is a great range of legislation which covers animals in specific circumstances: on farms, those undergoing scientific procedures, in pet shops, and so forth. Wild animals are much less well protected. There is a developing body of conservation and environmental law, but that

¹⁰ Protection of Animals Act, 1911, 1 & 2 Geo. 5, ch. 27 (Eng.).

isn't principally intended to protect individual animals from abuse. There is now a piece of legislation which does that, but it is not as far ranging as the law relating to domestic and captive animals. Two very quick points: we also have a so-called animal "protection" law emanating from the European Union, so the European Union is influencing British law, and I think it's also safe to say that British law or British attitudes have also influenced European Union law. All that runs the risk of being undermined by the World Trade Organization.¹¹ There is a problem with enforcement in the same way that United States seems to have. On a final note, traditionally, the law in the United Kingdom has been aimed at prohibiting what may be done to animals in the last 20 to 25 years, and more recently the momentum has increased. There is a new emphasis, not so much on prohibiting what may be done, but in posing positive duties aimed at improving the way in which animals are treated, not just preventing abuse.

DAVID WOLFSON: Professor Wise, if I could ask you a question. We have a sense, I think, of what the law is generally at this time. If we could try to understand how we got to the present state, and specifically whether the law that governs nonhuman animals today is in any way significantly different than the law that governed animals, if there was such a law, 1000 years ago or 2000 years ago.

PROF. WISE: There is little difference in the law today compared with Roman times. Justinian would certainly recognize and feel comfortable with the law concerning animals both in the United States and in the United Kingdom. So the answer is it has virtually stayed stagnant for more than 2000 years.¹²

DAVID WOLFSON: And if we attempted to identify the reason that the law is the way that it has been for so long?

PROF. WISE: My theory is this: The idea that humans are above nonhumans is similar to the idea current at one time that men were above women, or that whites were above blacks, or masters were above slaves. This is part of the chain of being, a very ancient idea that structured the way that we looked at our universe. Our cosmologies were structured in a hierarchical way with either white humans or Athenian free citizens or free Romans always on top of corporeal creatures. Above them were the gods or angels. When you thought that's how the world was structured, then it made sense to structure your law in a parallel way. If you believed that everything below you on the chain of being was made for you and the universe was designed such that you were on top and everything existed to serve you, it would make sense to have the law reflect that. This is a pre-Darwinian idea, and for 200 years now, a sharply increasing number of scientists have come to be-

¹¹ *The Final Act and Agreement Establishing the World Trade Organization*, Uruguay Round (Apr. 15, 1994), <<http://usinfo.state.gov/usa/infousa/laws/gatt/toc.htm>> (accessed Feb. 26, 2002).

¹² See Steven M. Wise, *Rattling the Cage: Towards Legal Rights for Animals* (Perseus Books 2000).

lieve that's not how the world is structured. Darwin's idea of evolution by natural selection put the nail in the coffin of the universe as a designed place in which hierarchy ruled. Now the more educated people, certainly scientists, don't think that's the universe we live in. Science has taken it back, philosophy has taken that back. No philosopher, or hardly any philosophers, thinks that's the way the universe is structured. However, law has remained constant for more than 2000 years. Our modern view is one in which the world is not believed to have been divinely designed for the use of human beings. The only profession that continues to believe that is the legal profession. Our law, both common law and statutory law, remains unchanged. We have a chain of being legal system in a Darwinian world.

PROF. FRANCIONE: I wanted to make a couple of comments. Something that Professor Bryant said I think is really important, and that involves distinguishing among different sorts of animals and the ways that we relate to them. In one sense the largest number of animals that we relate to are animals that we bring into existence for the sole purpose of killing them or using them exclusively as means to our ends. So every year we bring billions and billions of animals into existence for the sole purpose of using them, and then we sit around and we agonize about what are our moral obligations to these animals, which assumes that they have some sort of moral status, and it becomes very circular. If they had any moral status, why are we bringing them into existence for the purpose of using them as means to our ends in the first place? We end up with this strange body of law which Michael Radford was talking about that prohibits "unnecessary" suffering. How do we determine what "unnecessary" suffering is? How do we balance the interests of animals against the interests of humans? What are we really doing? We're balancing the interests of property against the interests of property owners. It's like saying, "Let's balance my interests against those of my bracelet." That would be a very peculiar concept if I started talking to you about the interests of my bracelet and how I was going to value the interests of my bracelet. You might think this guy is even weirder than I thought. So I think that we've got to keep in mind here that there are some notions that create mental cramps for us when we think about these issues.

I wanted to just address briefly the status of animals historically. Yes, animals have been property for thousands of years. You can go back to the notion of the Latin word for money, which is *pecunia*. It is derived from the Latin word *pecus*, which means cattle, so the concept of animals as property goes back a long way. But I think we must as lawyers now in 1999 and in Anglo-American cultures be cognizant of the fact that the universe that we live in and the theory of law that we operate under is very much influenced by John Locke's theory of property.¹³ And what was John Locke's theory of property? And here I would have to disagree that we are a secular culture and that our con-

¹³ See Francione, *Animals, Property and the Law*, *supra* n. 5.

cepts of property are secular. I think our concepts of property are so deeply embedded in religious notions and that is the problem. John Locke read the Bible and the Bible says, "God gives the world to human beings in common." And John Locke wondered, how do we have private property if God gives the world in common to human beings? The answer is that, well, human beings go out there and they join their labor to things in the universe and then they make those things their own. John Locke not only didn't see animals as different in that ontology, but he also believed that the basis of all property rights in animals—and he says this very explicitly in his *Two Treatises of Government*—that the basis of all property rights that all of us have is the right that God gave humans to own animals. So the concept of animals as property that we function with in common law now in 1999 is directly derived and influenced by this very religious notion. When I was coming up on the train last night I was reading an article, albeit in *The Nation*, which some people would say is a biased magazine, but there was an article in *The Nation* talking about the fact that there is only a small number of people in this country who don't subscribe to deeply religious ideas, who don't believe in God, who don't have spiritual views about the nature of the universe. I think this is very, very important for us to understand. Our concepts of property are directly influenced by religious concepts. We like to think of these institutions as being separate. They're not. And the irony is, to those of us who advocate on behalf of animal rights, people often say, "Well, you're talking about natural rights." No, we'll get into that later. I hope we will get into the notion of debunking the concept that animal rights means natural rights. Let me tell you something, though. In this culture, if there is one right that we regard as a natural right, that is, as having existence outside of government and outside of a political context, it is the right of property, and I don't think we can underestimate the importance of the right of property, the religious origins of the right of property, and the direct connection that the most important property theorists in common law have made between property and animals as property, and that's why we have the problem when we go to balance those interests.

PROF. BRYANT: Now that the subjects of religion and philosophy have come up and this question about why is it that we have an underlying continuity of the right to exploit animals, and Professor Wise was talking about the legal profession keeping this intact, I want to point out that it is not just the legal profession that keeps this idea intact. It is all the industries that make use of animals and, as Professor Francione has pointed out, it's because the idea that it's appropriate to do so is so strong that these industries can continue. However, the idea that were it not for this kind of religious and cultural, historical background, we would be in a different place with animals is not something that I can really agree with based on the research I've done in Japan. This was my primary field, Japanese law. One would think that Japan would be an ideal setting for an animal rights philosophy, or at least

some kind of animal equality philosophy, because of the strength of Buddhism and Shintoism there. While there is a hierarchy, and being born a human is the most desirable state, one is not superior because of being born human in the whole spectrum of things. One could just as easily be born an animal, and being kind to animals polishes your soul further and prevents you from living a life of fewer choices, which is the life of an animal. It's a rice-based economy where using vegetables as a source of nutrition and protein is a very deeply embedded idea. It is not a frontier mentality that you have to kill animals as part of the way of settlement. It would seem to be an ideal place, and yet it is not. It is a place in which animals are relegated to invisible but nevertheless cruel exploitative uses, and it is not a place where animal rights or animal equality or even animal welfare ideas have been developing. So in the West, this religious and historical background may have been sufficient for animal exploitation to develop, but it wasn't necessary, because other parts of the world that have not had that history also turn out to evoke hierarchical concepts of "I'm more powerful, my power must give me right and convenience." The intersection of convenience and power would seem to suggest that animals need advocates everywhere despite the historical setting. So even when Buddhism was at its height in pre-Modern Japan, archaeologists tell us there was extensive meat eating going on. The leaders of the day, the Buddhist leaders, the secular leaders were espousing Buddhism and there was extensive meat eating going on. When shogun Tsunayoshi in the late 1600s and early 1700s enacted the laws of compassion for animals, there were many government officials and religious leaders who backed the idea, but there was still widespread disobedience. So these ideas help us in thinking about strategies for the future, but we might best look at the individual situation in the moment to see how we can unravel the cruelty to animals.

PROF. REPPY: The property professor would like to indicate where he is coming from here. I have great difficulty imagining a legal world in which all animals are removed from the category of property. I am not saying that some of them shouldn't be, such as intelligent apes. So I am just wondering whether we can have a reform for those animals who are probably always going to be property within the property context that will achieve the same goals that everybody on this panel is looking for, through some change in the law. There are classes of property, and there long have been. Think of human slaves, for example. Furthermore, a couple of hundred years ago it would have been unthinkable for the law to tell the owner of a factory that he or she couldn't belch as much dirty smoke and soot as he wanted. The notion would have been, "It's my factory, so I'll do as I wish." Today, nobody that I know of is going to defend that proprietary right. We've had an evolution and we can have it perhaps with our attitude toward animals, nonhuman animals, without overthrowing property as the basis for it.

PROF. FRANCIONE: I would disagree that slave law was effective in any way to protect slaves. For example, there were rules or laws that supposedly protected slaves from being killed gratuitously by their masters and then there were also laws that said that if a master gratuitously kills his slave, he is presumed to be temporarily insane because a slave is such a valuable piece of property. There is a dearth, I can assure you, of recorded cases in which slave owners were prosecuted for killing their slaves. And you could beat your slave as much as you wanted, you could punish your slave as much as you wanted, you could gouge his or her eyes out for trying to learn to read. Now when you say could we come up with a better set of rules that limits our use of property, yes, you could come up with a rule that says you can whip your slave three times a week rather than five times a week, but then you have to ask yourself the question, is that sufficient for recognizing the moral status of the slave or are we just tinkering at the edges?

PROF. RADFORD: I have two points. First of all, I think it fair to say that the United Kingdom is probably now a much more secular society than is United States and also that Darwinian thinking has entered the mainstream in the United Kingdom in a way which it perhaps hasn't done in the United States. Those two things together have had, and continue to have, quite a profound influence on what I will call popular attitudes towards animals. So far as property is concerned, our law doesn't change the property status of animals, as I said. It qualifies what those responsible for animals may do with them and to them. And I think there is a cultural difference in the sense that in the United States you've got constitutional rights that are somewhat tied to or based upon property rights. In the United Kingdom, of course property rights are important, particularly so far as the common law is concerned, but there is much less opposition—I say that with a bit of a hesitation—but by and large there is less opposition in principle to qualifying property rights. One can compare the reaction in the United Kingdom, the outrage when someone went into a school and killed a load of children. Immediately there was a public backlash. Parliament intervened very, very quickly and introduced what were really quite Draconian firearms laws. Now, I don't have to make the distinction with the United States. I make no judgment in that. It's just a cultural difference, but the British are much more prepared to have their "property rights" regulated. The significance between property and animals in the United Kingdom is that although the common law property status of animals is unchanged, what legislation has in fact done in many areas is said that people can only be responsible for animals, and I think that there is an important link between property and responsibility. But to make the point I want to, United Kingdom legislation has the effect that people can only keep animals in certain situations if they meet the conditions that the state has set down. So there may be standards, they may have to meet proficiency standards of training and how they go about their business. There are a large number of licensing regulations. So using animals and being responsible for them

in certain situations is conditional upon meeting certain conditions. That, I would suggest, is a significant qualification to property rights, and also the state has a long-standing power to confiscate animals when the owner has been found guilty of abusing them and of imposing a ban on such people having custody of animals. So the state can actually take away the property, remove the property. So there may be in certain situations some leeway to restrict what people can do without changing the legal status of animals.

PROF. WISE: There are two or three points I want to make. One is that I agree with Professor Francione again to a large degree, American law remains influenced by religious ideas. He and I are saying very much the same thing. He was starting at John Locke and I at the Roman emperors or even before. The Old Testament shows how these religious ideas led to humans being persons and nonhuman animals being things. I agree with Mike Radford. If you look at polls, forty to fifty percent of Americans do not accept Darwinian evolution. However, as socioeconomic class and education rises, you tend to find a much greater acceptance of this scientific fact, and those people, of course, are going to be in the pools of judges. Our judges are amongst the most educated people in the country. That means that they probably tend to understand and be educated more about Darwinian evolution. However, I have learned by chatting with people, sometimes on Christian broadcasting radio stations where I debate people about these kinds of issues, is that you don't have to believe in Darwinian evolution to accept that animals should not be things for human use. One can believe that there is no such thing as evolution and that a divine being devised the world, created it, and set it going the way it is now. Where conflict arises is if one believes that the world was designed for humans. If everything was designed for humans, then animals are going to take a subsidiary role and will be seen to exist for use by humans. If you just believe that God designed the world, that does not necessarily restrict the argument for animal rights.

The other point I want to make is the difference between the criminal law and the civil law. There is a dramatic difference. Virtually all of us here, since we are not animal control officers or MSPCA or ASPCA prosecutors, are interested in civil law. Nonhuman animals, being things, are basically invisible to the civil law in the way that Abraham Lincoln, when he was President of the United States, never recognized that the Confederacy was a separate country. When the peace commissioners from South Carolina came to talk about peace, he said, "I only see with constitutional eyes: I cannot see you." That's what judges do. Judges look at nonhuman animals through eyes of the civil law. Judges can't see them. They are just things. Animals are in the same position as you and I would be if we threw out all of the civil laws and had one law that said no human shall be treated cruelly or overworked or tortured and if I happen to be tortured or abused or mistreated, the State may prosecute the offender, or not. That's the position nonhuman animals are in today. We are persons with civil

rights. We are civil persons. If some wrong is done to us, we can go to civil court, complain, and file suit. We might have the power-right to sue. We have a claim-right against someone who commits an assault and battery on us, and an immunity-right against our bodily integrity being violated. That's the essential difference. You can pump up animal cruelty statutes. But until you cross that divide and raise at least some nonhuman animals from the status of legal things, where they are invisible to judges, to the status of legal persons where, all of a sudden, they pop onto the screen of judges, we will not get anywhere.

PROF. ROBINSON: Let me go back to the nexus between some of these conservation and environmental ideas and animals because I think we have not made connections there that need to be made and are latent in this debate. If you go back to the origins of the humane laws, they came about roughly at the same time as the conservation laws. There was something in the late 1800s and the early 1900s that brought parallel developments in legal reform dealing with animals, domesticated and wild. Many of the same people were worried about many of the same issues. These laws emerged, but they really didn't change the underlying principle that an animal, once you capture it, is property. I think what has happened with the development of the environmental concerns from late 1960s, early 1970s onward, is that the cosmology changed in a Darwinian-type way. I disagree a little bit with Professor Wise saying nothing has changed. I think that the reason Congress is so hostile to environmental legislation right now is that the property interests that Professor Francione points out are so strong, are threatened. They feel threatened by a change in cosmology that is coming out of the grassroots, out of the people if you will, and out of a lot of the legislation of the 1970s in environmental law. The environmental legislation began to look at nature and people and people in nature rather than people as apart from nature, controlling nature. It shifted some of the paradigm that nature is there for us to use, that a utilitarian or instrumental approach to nature is what is our right as humans. And the corollary is that when you begin to see human society as part of nature and you must look at environmental impact assessments of what you do and see how you are affecting non-human communities, you begin to see the nonhuman communities, whether they are plants or animals or ecosystems, as a partnership, as a shared and coevolved part of the natural biosphere. And when you have a partnership and people are simply one part of a natural system, not above it necessarily, an actor in it, that's a big shift. We coexist with other living things. We coexist in a way in which we have to begin to think about our status *vis-a-vis* other living entities. They are not there just to serve us. And this gives rise to a communitarian value system. Now that communitarian value system need not be inconsistent with a religious value system and probably isn't, but it certainly is a shift from one which is maximizing the marketplace and maximizing property values as a way to achieve the good. It threatens that system.

JANE HOFFMAN: Professor Silverstein, I know we were talking about how things have and have not changed. I think we need to bring this back to what a lot of people have perceived as changes. There have been changes in the sense that a hundred years ago the cruelty laws came into effect. Thirty years ago, roughly, the Animal Welfare Act was created. The animal rights movement started twenty-five years ago, approximately. And one year ago, for instance, there was the North Carolina hog case in which the workers are actually being prosecuted for cruelty to farm animals.¹⁴ Many states now have felony anti-cruelty laws and the Hegins, Pennsylvania pigeon shoot was just stopped.

How do societal beliefs really affect what's going on here?

PROF. SILVERSTEIN: One of the things that's changed with respect to societal beliefs over time has been the notion of rights. This is, of course, largely a notion of human rights, the idea that we are rights holders, rights claimers and, by virtue of our human rights, we can be protected from a great number of intrusions. That notion of human rights, I think, has developed over time such that it begins to extend, and so many people have talked about the extending circle. Certainly, initially rights holders tended to be white propertied males. That began to extend a little bit to just white males, then of course, in the United States at least, to the freed slaves and then to women. I think that progress of the extension of rights we begin to see moving toward nonhuman beings. This provides, while it hasn't changed things practically speaking terribly much at this point, it provides a kind of opportunity or a kind of space to include animals into the realm of—I think Steven Wise was talking about this earlier—of beings that can be moved out of a property status to a status of beings that can make claims and be protected in those claims. Now, in addition to that change, I think what has happened over the years is that there have been a lot of strategic and savvy people who have been able to use various notions like rights, like equality, like the law and have been able to use these entities to move things forward and to have progress. We saw it with abolitionism and we saw it with women's rights. We saw it with children's rights and we're seeing it with animal rights and animal advocacy. That sense of being able to use the law and rights in a strategic manner can push things forward. Again, I don't think that we've gone terribly far in terms of practical changes, but there does seem to be a good amount of space for pushing these changes forward. I think that to be successful in this way, we have to think about significant changes, not just changes on the margins, on the edges of a current system, and there are, to be sure, significant constraints on those

¹⁴ See People for the Ethical Treatment of Animals, *Pig Farmers Plead Guilty in Landmark Cruelty Case*, <<http://www.peta-online.org/news/500/500belguilt.html>> (accessed Mar. 8, 2002). For a more recent case of documented abuse at a pig farm, see Marc Kaufman, *Ex-Pig Farm Manager Charged with Cruelty; Animal Rights Activists Supply Video Evidence for Oklahoma Felony Abuse Case*, Wash. Post AO2 (Sept. 9, 2001).

changes. One thing I would like to add explicitly to the religious ideology that Gary Francione has spoken about is on the marketplace ideology. The marketplace ideology is a tremendous limitation on the potential changes that can take place, but this competes against other kinds of ideologies. In particular right now, rights ideology can, I think, push against that marketplace ideology.

PROF. FRANCIONE: Capitalism and Christianity, especially in this country, are very close.

PROF. FRESHMAN: I'd like to pick up on that a little bit about the marketplace ideology. It goes back to something that Professor Francione said about his bracelet. One of the reasons we would think it odd if his bracelet were to assert rights, is that the bracelet would be valued insofar as the marketplace values the bracelet, not insofar as there is some sentimental value to it. I have been following the tobacco cases lately, and someone called me up and said, "I wonder if you could help me. My mother has been very sick because of smoking." He went on to talk about this and what had happened to her, and as I listened to what he had to say, I felt two things. First of all, I felt quite sad as he was talking about this. Second, I felt quite disenchanted with how law puts value on certain wrongs. He had spent many years caring for his mother, and yet as a lawyer the reason why there was so little for him was very similar to the reason why there would be so little for the bracelet. His mother had never worked in the marketplace. She had worked in the home, and so if she were to sue and say she had been hurt by tobacco, the legal system would not recognize much of a remedy for her because she had never been paid for the kind of work that she had done. In a sense she had been invisible to the legal system.

Similarly, as I am sitting here, I have been glancing around looking at the pictures on the walls—these tell us something else about what's a failure in the legal system and what's an obstacle to animals. We have the right to exploit animals. It's the invisibility that our ideology creates. If you look at the pictures on the wall, I believe every single one of these depicts white males.

I think the reason for this historically is not that at certain points people did actually think, okay, let's make sure that women are not allowed in, let's make sure that black people are not allowed in, but more often, on a daily basis, the psychology of this is that people simply don't notice that what they're doing is helping people who seem to them in some way to be like themselves.¹⁵ There's just a lot of invisibility that goes on. So we don't see pictures here, for example, of people who are just outside on the street who are. Whether they be nonhuman animals on the street or whether they be homeless people who are on the street, they simply seem invisible to us. Part of this is the marketplace ideology that all we're going to value is things for which people

¹⁵ Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 *Cornell L. Rev.* 313, 383 (2000).

are willing to pay money and things that have a place in the marketplace. And so we talk about why nonhuman animals are exploited and not considered. It is very much the same as why older people are not having their rights considered, why older people, as has been covered in *The New York Times*, do not receive proper medical treatment, because if anything goes wrong with them, they have no market value at the end of their lives. The same thing is true for people who do not have money because they are poor within our system. So I think we have to go back to some of that and think not just about nonhuman animals, but how the marketplace disadvantages lots of other people as well who don't have market value.

PROF. FRANCIONE: The disabled, well we treat them in deplorable ways. I would agree with you. But we have rejected chattel slavery as a general matter for all humans, so however badly we treat some group of humans, there is still a huge difference between animals and humans in the sense that any interest that an animal has can be commodified, traded away, and sold by the owner. Thus, it would seem to me that however badly your client's mother is valued because she only spent her time in the home and not in the workplace, we still don't use her to make shoes and we don't put her in a circus or a rodeo or a zoo. So there is still a fundamental difference, I think.

PROF. FRESHMAN: Right. I think that that's absolutely correct. All I was trying to point out was that there would be some commonality so that instead of us just thinking about the rights of nonhuman animals, we can also see some connections as well to other forms of unfairness.

PROF. SILVERSTEIN: I just want to say that I think one of the points is that we used to commodify, very straightforwardly, like chattel, women and African-Americans, and precisely as we do now to animals, and so I think that there has been movement. Using the same things that we used to undermine the commodification of humans, we can use some of those same things now to try and undermine the commodification of animals.

PROF. FRANCIONE: But if we do that, though, in the context of animals, we end up with a very different result than when we stopped commodifying people of color through slavery. We abolished slavery. If we use that same mechanism with respect to animals, we abolish the use of animals as our property and as means to our ends, and we end up with a very different result.

PROF. WISE: It only takes us so far to talk about the people on the margins of human society whom we do not treat as well as we should. But we don't eat them, we don't conduct unconsented-to biomedical research on them. I think that draws the analogy between nonhuman animals and the human wretched more closely than warranted. There is an incommensurability in the way the law views nonhuman animals and any human being.

JANE HOFFMAN: One interesting case came up about a year ago in New York state, and actually there was a situation in which the appellate division made a decision because some psychiatric patients had

been used in drug experiments without their consent.¹⁶ The institution itself took it upon itself to consent for these people who were unable to consent or did not have family to do so on their behalf. My point is that although there is a gap between animals and people, and it's an important consideration, I think there is a parallel between people who are incompetent in their own right and cannot consent and animals who cannot consent.

PROF. FRESHMAN: There is bit of a parallel with the unconsented-to medical treatment for older people and for disabled people, as well, and to go back to the point that was raised earlier about created animals, there may be a parallel there as well to the way that we think about children. So when we say that there has to be something special about forms of life that are created, that would be similar to the argument that sometimes has been made—and sometimes still is made—that we have special rights as parents over children because we created the children. I think this raises the general question of strategy and the extent to which there can be overlapping strategies or overlapping philosophies that lead to protection for animals. It would be a shame if, given how few people there are in the world today who care that much about nonhuman animals, we gathered a bunch of people who care a lot and emphasized their differences rather than some of their common interests. It would be interesting to know throughout the day the extent to which the panelists think that there are important reasons why we should make choices about underlying philosophy and strategy now, such as the question of how much there can be incrementalism, how much there can be analogies to human subordinated groups, and so on.

PROF. RADFORD: We've been talking primarily about law and its effectiveness as a regulatory body. It also seems important to me that it can play a role in laying down significant statements of principle by the language that it uses. Certainly, within the U.K. and also within European Union law, there is, it seems to me, a significant change of language, moving away from unnecessary suffering toward words and phrases like welfare, proper care and well-being, meeting behavioral and physiological needs, maintaining in good health, and promoting a positive state of well-being. That sort of language is now appearing in legislation. Quite what it means, of course, is another matter. But the language is changing, and potentially the most significant linguistic change in legislation is in an amendment which has been made to the founding treaty of the European Union which now quite openly and explicitly recognizes animals as sentient beings.¹⁷ The word sentient is used. Again, whether the implications of that will be followed through is unclear, and it is covered with a certain number of caveats, but at least the word is there; and it is a word which policy makers and legis-

¹⁶ *In re Joseph O.*, 245 A.D.2d 856 (N.Y. App. Div. 1997).

¹⁷ See David J. Wolfson, *McLibel*, 5 Animal L. 48 n. 206 (1999).

latures and executive agencies will have to take regard of. In fact, it does seem to me a significant potential change.

PROF. ROBINSON: There is an old U.S. Supreme Court case called *Geer v. Connecticut*¹⁸ in which states were deemed to be the stewards and the trustees of the wildlife. The Supreme Court some years later in *Hughes v. Oklahoma*¹⁹ didn't like that very much and criticized it, but mostly ignored the implications of stewardship and ruled that minnows were property and therefore could be traded back and forth across state lines. But that stewardship concept is still there in the underlying responsibility of the states toward not just species, but toward animals, and I think we need to plumb that a little more, but it is in the bedrock of the law now.

PANEL DISCUSSION II

This Panel Discussion features Professors D'Amato, Francione, Freshman, Garner, Reppy, Robinson, Silverstein, Singer, and Wise.

DAVID WOLFSON: There are a couple of themes I would like to start with before I throw out the first question. One of the things that we discussed earlier is that there is a great deal of ambiguity and inconsistency, not only in the law, but in how humans and animals interact generally. Obviously, a large number of people have pets that they care for very deeply, and in some ways I think the law has been altered to reflect the increased value that those types of animals have to humans. For example, recently there have been amendments to anti-cruelty statutes whereby it is a felony to be cruel to a companion animal. At the same time, we raise farm animals in a manner that is exempt from the anti-cruelty statutes. All common farming practices are exempt from enforcement of the cruelty law.

One thing I would just like the panel to think about as we go on to the next stage here is would it be correct to state that the law, in fact, is an accurate and current reflection of human/animal relationships and, while we may be criticizing it for not actually being appropriate, it in fact represents what is the dominant human/animal interaction in society and what the majority of people actually think the human/animal relationship should be. Also, perhaps we could think about what the anti-cruelty statutes do allow for, specifically whether their terms provide for the proper enforcement and prohibition of current activities if the majority of people chose to enforce the laws in that manner. There is a law professor called Jerrold Tannenbaum whose basic point is that the anti-cruelty statutes work—although they can be improved, they work pretty well and, most importantly, the anti-cruelty statutes create legal duties. This means that society or the people who enforce the statutes, perhaps the criminal prosecutor of the state, has a duty under these statutes to look after animals according

¹⁸ 161 U.S. 519 (1895).

¹⁹ *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

to certain standards of treatment. As such, if you have a duty on one side, you have a right on the other. Therefore, the anti-cruelty statutes as we have them now today already provide for a type, a basic type, of legal rights for animals.²⁰

PROF. WISE: Anyone who believes that should try to file a lawsuit on behalf of an animal.

DAVID WOLFSON: Right, but the concept would be that the State has the power to enforce it. Therefore, the State has the right.

PROF. WISE: Any district attorney who believes that should try to file a lawsuit on behalf of an animal.

DAVID WOLFSON: So you are saying that it is only appropriate, you only have rights if you file a lawsuit on behalf of the animal as opposed to on behalf of the State?²¹

PROF. WISE: There are other kinds of rights one can have. One has immunity-rights, claim-rights. One doesn't need to be able to have the right to file a lawsuit. But that idea conflicts with prosecutorial discretion. Even if a cruel act is done to a nonhuman animal in front of a district attorney, she is not required to prosecute. What Professor Jerrold Tannenbaum is saying is a *non sequitur*. The way our legal system is set up, there is no category for this.

DAVID WOLFSON: Is there anyone on the panel who would disagree with that or take a position that the anti-cruelty statutes provide legal rights of any sort at this time?

PROF. SILVERSTEIN: I wouldn't want to say that anti-cruelty statutes provide a legal right for animals at this time, so I would agree with Professor Wise that if anyone believes that, they should try bringing a lawsuit and see what they can do with it. I think the law has a bit of fluidity in it and the potential to be interpreted in interesting and creative ways, and I think it would be quite interesting to see what would happen if someone brought a suit suggesting that anti-cruelty statutes require a duty to act on behalf of animals, and that in turn means that animals have a right to be treated in this way. I don't think the courts are quite ready for that interpretation, but it would be really interesting to see what would happen if that was pushed a little bit. Because of the law's fluidity, there might be some space for having this kind of interpretation, so I would just want to throw that in. I wouldn't want to rely on anti-cruelty statutes as the grounding for rights, to be sure, but in the absence of other things, it would be interesting to see what would happen if that kind of suit was brought and pushed.

PROF. FRANCIONE: Part of the problem, though, is that the anti-cruelty laws themselves exclude so much conduct that they're not even usable from the outset. One is precluded from the very outset from

²⁰ Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Right in Humans and Other Animals* (Arien Mack ed., Ohio State U. Press 1999).

²¹ For further discussion on this issue, see generally Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 *UCLA L. Rev.* 1333, 1363 (2000).

using anti-cruelty laws to go after most of the conduct and most of the pain and suffering that we inflict on animals. We have a sort of a moral schizophrenia. On one hand everybody in this room and everybody outside of the room would probably agree with the proposition that we ought not to inflict “unnecessary” suffering on animals; and we might disagree about in what particular situations pain and suffering is necessary, but we would all agree, I would suggest, that pain and suffering can’t be justified by our pleasure, our amusement, our convenience. I would also suggest to you that most of the pain and suffering that we inflict on animals is as a direct result of our pleasure, our amusement, our convenience. Nobody, including the United States government, maintains that we need to eat meat to lead an optimally healthy lifestyle. Indeed, an increasing number of health care professionals are telling us that meat eating is not good for our health and it is undisputed that meat eating is an environmental disaster. It takes between six and twelve pounds of plant protein to produce one pound of flesh. It takes over 25,000 gallons of water to produce a pound of flesh, whereas it takes a hundred gallons of water to produce a pound of potatoes. The environmental consequences for human rights are just incredible. Nevertheless, we continue to inflict all of this pain and suffering on animals. I think that it is folly, frankly, to suggest that the anti-cruelty laws are worth the paper that they are written on. They apply to a very small portion of our treatment of animals. When a bunch of teenage boys lights a dog on fire, maybe it applies to them. If researchers at the local university torch the dog, that’s protected. We can dehorn cattle, we can castrate them, we can brand them, we can raise them in hideous conditions, we can trap animals, we can torture animals in all sorts of ways. The anti-cruelty laws not only are not effective with respect to these activities, but they explicitly don’t apply. These activities are exempted. The only thing that we are prohibited from doing is inflicting pain and suffering on an animal when there is absolutely no recognized social benefit. That is a very small portion of the pain and suffering that we actually inflict on animals. So I would suggest that really what this all boils down to is animals have a right not to be wasted gratuitously if nobody gets any benefit and when the sole benefit is sadistic pleasure. That’s a right that I would suggest to you is somewhat vacuous.

PROF. D’AMATO: Let me ask you, though, weren’t most of these anti-cruelty statutes passed by reformers who genuinely wanted to stop cruelty to animals? That was the big movement in the nineteenth century to get these kinds of statutes on the books. What happened on the way to the legislature that made this turn out the way it did?

PROF. FRANCIONE: Professor D’Amato, that’s a good question, because before the nineteenth century there was, at least in Western thinking, no idea that we owed a direct moral or legal obligation to animals. For example, you have people like Immanuel Kant, the German philosopher who took the position that we ought to be nice to animals, not because we owe them any moral obligation, but because by

being nice to them we fulfill our obligations to other humans to be nice to other humans, and if we're cruel to animals, we may be cruel to humans, and that would violate our duties toward humans. This notion that we didn't have any direct moral obligation to animals was also reflected in the law. We had malicious mischief statutes. If I injured your cow, you could bring a civil action against me, not because of any interest of the cow that I infringed, but because I had malice toward you and your property. Now, all of this changed in the nineteenth century when Jeremy Bentham came along and said, "Wait a minute. These animals, they may be different from us, but they are like us and we are like them and we are both unlike everything else in the universe in that we are sentient. We can feel pain. We are the sorts of beings who have interests. We are different from rocks and stones and other things. We are like animals. We have interests." Bentham claimed that we ought to apply the principle of equal consideration to those interests. We ought to take animal interests seriously. We ought to recognize that we have a direct moral obligation to animals and, as Professor D'Amato points out, this utilitarian thinking gets incorporated into the law with anti-cruelty laws which are supposed to recognize that we have a direct legal obligation to animals. The problem is that Bentham was willing to say that we shouldn't eat humans. Bentham was willing to say that humans should not be enslaved. Bentham was willing to say humans should not be property. He was not willing to say that animals ought not be property. What he wanted to say and what he thought these laws would do was to make our treatment of these animals more humane. Along the lines of what Mike Radford was saying, could we treat animals better? The answer is, sure we could. There are tremendous economic pressures, sociological pressures, religious pressures *not* to do so, and our track record for the past 200 years in terms of what we've done to improve our treatment of animals hasn't been particularly exciting. Could we do better? Sure, but that's not the question, is it? The question is, does their property status preclude them from having any moral significance at all? So Professor D'Amato is right to say that the moral reformers, the folks in the nineteenth century, particularly Bentham, were trying to elevate the status of animals, but Bentham failed because he didn't confront the fundamental question: Can they have moral status if we continue to treat them as property?

PROF. D'AMATO: I think that Professor Wise may be more pointedly asking: what happened to this movement? These reform groups, whether they were Benthamites or not, really cared about cruelty to animals and got legislation at least enacted, but why was that legislation eviscerated by 99.5%?

PROF. WISE: There were two reasons, and I don't think they were equal, why these statutes were passed. One was to protect the interests of the nonhuman animals themselves. The larger reason was to protect public morality. For example, the Massachusetts anti-cruelty statute, and I am sure it is true in other states, was placed under the

public morality section. You can't gamble or run houses of prostitution or be cruel to animals.

PROF. GARNER: Without wishing to set a trend, I agree with Professor Francione that the general anti-cruelty statutes are likely to be very weak and ineffective, but that's not the only animal welfare model. There is also the model which suggests that what we ought to be doing is regulating particular practices which are outlined in legislation. Secondly, and even better, and I think Professor Francione and I will agree on this, too, there are abolitionist animal welfare measures which can be most effectively implemented and wouldn't necessarily need a great deal of enforcement. To take two examples from the United Kingdom, the banning of live exports, most of us would agree, was an abolitionist measure, and yet it could be justified on animal welfare grounds on the grounds that exporting live animals is unnecessary. Second is the banning of hunting with hounds in the U.K., which is likely to be on the books by the end of this present labor government. That again is an abolitionist measure, but it can be justified on animal welfare grounds on the grounds that hunting is unnecessary. The campaign against hunting in the United Kingdom is based on that principle. It is based on the principle that hunting is a sport. It serves no useful function for humans. Of course the hunting community knows this and their campaign is based on showing that hunting is important on conservation grounds and so forth, but hunting is opposed by seventy-five percent of the British public and will be banned within the lifetime of this labor government.

PROF. FRANCIONE: Mr. Wolfson, you raised a question before that you wanted us to focus on and I thought it was an interesting question. You asked whether, if enough people believed that these anti-cruelty statutes ought to apply to more situations in which we include pain and suffering of animals, would it be possible, would they be usable, would they be useful laws? The answer is of course they would. Mr. Wolfson's question, I think, points out a real problem that we have as lawyers facing these sorts of questions. We need to ask ourselves whether the legal system, whether the court system or whether the legislature, can really take the lead in effecting what we are talking about as a massive social change without there being a broader social context for that. It seems to me as long as most of us think that it's all right to eat animals and our best justification is that they taste good, if that's justification we have for inflicting suffering on them, I'm not sure that we can really look to the court system to have a significant impact on the property status of animals. The legal system is not really going to take the lead in this without there being a broader social context for that change. Remember, it wasn't a bunch of lawyers who got rid of slavery. The legal system supported slavery. It was the greatest support for slavery. It took a civil war to get rid of slavery. It took a revolution to get rid of slavery. It took a lot of people thinking differently and rejecting the notion that human beings could own other human beings. So, as we think about what we as lawyers do and how

we are going to approach this whole problem of animals as property and what strategies we are going to use, I think we need to ask a prior question and that is, are we being realistic at all in thinking that the court system is going to abolish the status of property even incrementally or that the legislature is going to abolish the property status of animals even incrementally, without their being a much broader social context.

JANE HOFFMAN: If we're not going to be able to do it through the law, is society at this point ready to do that?

PROF. SILVERSTEIN: Maybe I can break the trend of agreement with Professor Francione, although I guess I agree a little bit with him in the sense that I don't think the law and the courts can take the lead, and I think Professor Francione is right that the law cannot create the change without the people—the public—going along with this. But I think the law can be a part of a broad attack against the current way of thinking about animals. I think that the law and the courts can be a useful part of the attack and, yes, it took a civil war to get rid of slavery, but it took a lot more than that to begin to push to create more equality. In part, the legal system and use of the courts and the use of litigation helped to actually make the results of the Civil War realistic in terms of creating equality between blacks and whites in this country. I think the law and the courts can be used in part as a process to effectuate change, but I don't think the law can take the lead or the law can do it alone. I think there is a sort of interactive process here between court decisions, interpretations of rights, interpretations of the law and using that in part to raise consciousness, to create mobilization, to have people begin thinking in different ways about the treatment of animals.

PROF. FRANCIONE: The courts couldn't do anything to help people of color or women until there was a fundamental recognition that they couldn't be treated as things. I would say that the emancipation, the decision to emancipate, is a qualitatively different decision from virtually any other decision you make about further resource distribution or treatment.

PROF. SILVERSTEIN: I agree, but I think that the fundamental change in people's attitudes doesn't have to be by the majority or by the large majority. I think that the fundamental change can start small and then the law can be used in a certain way to broaden that awareness and that change in a legal sense.

PROF. FRANCIONE: Do you think we could have gotten rid of slavery incrementally? In other words, do you think that by passing laws requiring the more humane treatment of slaves, we could have gotten rid of slavery?

PROF. SILVERSTEIN: No, I don't, and I am not pushing for an incremental approach here. I'm just saying that, given the way things are now, we have to take a multi-strategic approach to this problem and the courts can be one piece of that multi-strategic approach.

PROF. WISE: We have a model of judges taking the lead. It's in the United Kingdom, and it's the famous *Somerset* case of 1772.²² James Somerset, a slave who'd come from Massachusetts, sailed to England and escaped. He was recaptured, put on the ship, the *Ann and Mary*, and was intended to be taken to Jamaica to be resold. A writ of habeas corpus was issued by someone other than James Somerset, a very interesting thing we may want to consider using in the animal rights movement. It went before Lord Mansfield. Lord Mansfield, in a society not agitating for people like James Somerset to be free from slavery, said that human slavery was so odious to the common law that it could only be supported by positive law. You had a judge who dragged the citizenry behind him. That is a model for those who think this cannot happen.

PROF. SINGER: I think this discussion has perhaps been a little too much on block. I mean, if we're talking about animals as property and people are saying, well, you're not going to get the right changes in the law until we see the end of animals as property, and then Professor Reppy is saying, well, that's never going to happen in our lifetime in North Carolina and I dare say in New York state as well, it leaves you feeling rather hopeless. But I think the point is perhaps we shouldn't really be talking about animals as such. Perhaps we should, to go back to a point that Professor Reppy just mentioned, we should look at some animals, because if we're looking at where the public is now, if that's what Professor Francione sees as the problem, the public certainly thinks that bacon and so on that one buys at the supermarket is property, but it doesn't really think that chimpanzees are property in the same way. You can go out there and do surveys and I'm sure you will find, if you ask the questions in the right way, that there is much greater acceptance by the public of the idea that chimpanzees, maybe bonobos, gorillas, orangutans, maybe dolphins, are more like us in some ways. The public may not want to accept that they are persons, although look at the sort of attention Jane Goodall gets. Even that is not really considered such a far out idea in some senses. But the public certainly sees that these are beings who should not necessarily be bought and sold and used and so on. So, let's maybe look at some particular cases. I think that's the more hopeful strategy, to say well, here you can make arguments and here you can have the public going along with it and that sort of groundswell of public opinion may have an impact on the judges whom you're going before as well. And of course, once you've made that breach, then that's not the end of the road. To get beyond humans in terms of beings with legal rights seen as persons would be such a huge historic breakthrough that it would inevitably have an effect on, perhaps incrementally, a range of other species. So, Professor Francione's question, could you free slaves incrementally, is not quite applicable. We're not talking about beings as similar as African slaves in America. We're talking about being as different as chim-

²² *Somerset v. Stewart*, 98 Eng. Rep. 499 (1772).

panzees, pigs, chickens, fish, oysters, and others, and you must recognize those differences.

PROF. FRESHMAN: This takes us again into an area of questions about expertise of academics. To some extent, what we're asking is what is the most effective strategy, which is to some extent what we are least qualified to do, since academics are the most removed from society in some sense. So when we say what strategy is going to lead to this or that, it's hard to say. But if we look at some parallels in other kinds of rights movements, it turns out that the sequence is sometimes difficult. So, for example, in the United States, it's true that formally all African-Americans have equal rights, but if you look at how the particular regime of enforcement has affected people, it's been very different, so that the light-skinned African-Americans versus dark-skinned African-Americans have very different practical realities in the United States in terms of education, wealth, and income.²³ So, to some extent, if what we do with animals is work on certain animals first, it may repeat those same kinds of inequalities. What may happen is not that we will have one species leading to protections for other species, any more than to some extent protecting upper income African-Americans has led to bettering the socioeconomic status of lower income African-Americans, but that we will have one group of relatively elite outsiders and various other groups still being unprotected as a practical matter. But, to make the point more general, I think that what we have to think about in terms of incrementalism is the question of what is the sequence that we see leading to some eventual better status for animals. I am not sure how exactly we do that, whether we think about that as incrementalism or different types of speciesism, and how we determine what strategy will work best.

PROF. D'AMATO: That's a cautionary note, but I think we really ought to get our strategies straight, because it's not just what would be the utopia, but what we can achieve practically. I like that word that was introduced at the end of the last panel, "sentient creatures." Now we may not know the dividing line between sentient and non-sentient creatures, but maybe that doesn't matter so much as long as there is some kind of distinction. Because if you use the word "animals," I agree with Professor Singer that you take on too much and really you wind up hurting yourself because you wind up defending animals all the way down to insects and things. I know it is hard to say that we should draw a line, but if we don't draw a line at sentient creatures, perhaps, maybe that's where the line should be drawn, I think you wind up destroying your own chance of changing public opinion, because immediately people will say what is that—does that mean all animals, I can't do anything to any animals at all? And I think that's too difficult a position to sustain. So I accept the totality approach that was just mentioned and the cautionary note that if you start somewhere you might wind up destroying the lower line, but we really have

²³ See Freshman, *supra* n. 15, at 435.

a very important bridge to cross right now and that's between humans and nonhumans. If that bridge can be crossed, even though it doesn't go all the way, I agree with Professor Singer that that would be a tremendously remarkable achievement and maybe one that's doable, given the way people are now thinking.

PROF. WISE: I second or third both Professors Singer and D'Amato about the idea we imported from the last panel of this split in thinking, both psychologically and legally, between humans and nonhuman animals, that has been fundamental for so long. The important first step is to break through this gigantic legal and mental wall that separates humans from every other animal. Once we smash through that wall, the best candidate species are one or more of the great apes, because of their similarity to us and because they are such extraordinary beings in their own right. Once any one of them has been designated a legal person, a hole has been punched through that wall. Everyone will have to recognize that a lot of legal reordering will have to take place. That's not going to stop someone from trying to build another wall real quick on the other side of chimpanzees. But it will not be as thick, it will not have the history, and it will go down a lot sooner. That is the way of getting down to other animals. Ultimately, we're not going to cover all other animals, and I don't think all animals should be given rights. There are a million species of animals. If one does not advocate rights for insects, that's 875,000 species of animals right there. Certainly when one deals with mammals, before saying they should not have rights, one would want to look very closely.

PROF. ROBINSON: I think the sentient animals are clearly a class, and even perhaps all mammals are a class worthy of possessing rights, but I think insects may have some rights, too. For instance, let's take the alternative model of the right to exist as a species, and I know people want to look at only individual animals, but now we're getting into a broad class. The courts are not going to recognize that animals of any type are not property, because the courts are established to defend the institutions of the state and the order of the state, and the state is defining its order in terms of its legislation, and property is a part of that. But if you change the statutory model, or you amend the constitution, as the European Union is considering, then you change the rules of the game, you change the order of the state. It seems to me that in the United States we are not going to really smash through anything until there is an amendment to the Constitution, but you can do it incrementally through statutes; and if the statutes are well enough crafted, then the courts will implement the statutes as part of the order of the state. I just give you the small example, under the Endangered Species Act,²⁴ of the Sierra Club Legal Defense Fund choosing to represent the palila, a little bird on a volcano in Hawaii.²⁵ It lived at

²⁴ 16 U.S.C.A. §§ 1531–1544 (West 2001).

²⁵ *Palila v. Haw. Dept. of Land & Nat. Resources*, 639 F.2d 495 (9th Cir. 1981); *Palila v. Haw. Dept. of Land & Nat. Resources*, 471 F. Supp. 985 (D. Haw. 1979).

about the 6,000- or 8,000-foot level, and this was the only place this little bird lived. The Fish and Game Department of Hawaii introduced feral goats because we didn't have deer there, and we had to have hunting, and the goats would be good hunting. The goats could wander around the volcano and then people could go out and hunt the goats. Only the goats ate the bush that the little bird lived on. Under the Endangered Species Act, this threatened the palila with extinction. The court, first the District Court I think in Los Angeles and then the Ninth Circuit Appeals Court, actually said that by introducing these goats that would eat this bush, you were destroying this species' right to exist. That was an extraordinary ruling, first that a district court would allow a human entity, in this case a not-for-profit corporation, to represent a bird as plaintiff. The bird was the plaintiff—the conservation group was not the plaintiff. Then, second, that they would prevail. So it is not quite the Somerset case, but I don't think our courts are going to find natural rights anymore in the United States, not in my lifetime, not with this Supreme Court. We're not going to find natural rights. Therefore, we are in a positivist situation where we have to define the rights and statutes. The statutes can be defined, because this room is full and people vote. You can influence the structure of the legislation. Then the courts will follow. I don't see it the other way around.

PROF. GARNER: I would like to reinforce something that Professor Singer said earlier to get us back on the track of strategy, and that's to set out the options that really are available. I am thinking of two questions which are crucial here. First, is the abolition of the property status of animals possible incrementally? Second, although related to the first, are there any significant reforms in the way animals are treated within the property paradigm? I think you have to be on one or the other side of those two questions. A third, related question is whether there are any reforms within the existing property paradigms that are significant enough to make the abolition of animals' property status irrelevant or redundant. I think that there are and it's something we might explore.

PROF. FRANCIONE: As I argued in *Rain Without Thunder*,²⁶ I think that not all incremental changes are created equally, and that to the extent we get legislation which bans or prohibits rather than regulates, then we at least move things in a better direction. I think these open-ended statutes that would say that we ought to provide for their welfare, or employ some of the language that Mike Radford was making reference to before, will not have much of an impact, because it is within the property paradigm and it gets interpreted in terms of what is in the best interest of the owner. However, for example, there is legislation right now that one of the groups is promoting that would ban the use of elephants in circuses rather than make it more humane; this legislation would not just make it better but would ban it. That sort of

²⁶ Gary L. Francione, *Rain Without Thunder* (Temple U. Press 1996).

incremental change, while obviously it doesn't eradicate the property status of animals, it at least moves it in a somewhat better direction, because it recognizes that the animal has some interest that can't be taken away from it simply because it will benefit someone else to do so.

PROF. GARNER: But what remains of the property status if, say, elephants are banned from circuses?

PROF. FRANCIONE: The elephant is going to still be used as property in other contexts and this is not going to have a revolutionary impact on the status of animals as property as a general matter. All I am suggesting is that if, given the myriad number of statutory reforms which people can pursue, limited time, and limited resources, it would seem to me that those legislative changes which ban uses of animals at least have arguably—again, I am not 100% convinced of this myself—but at least I think it has a better chance of moving us in the direction of eradicating the property status much more so than statutes that prohibit unnecessary suffering or statutes that require that we attend to the well-being of animals. I wanted to address one thing. I was a contributor to the Great Ape Project.²⁷ I believe that would be terrific if we could get the personhood of great apes recognized, and it would be a marvelous first step. I just think we ought to be cautious for some of the reasons that Professor Freshman pointed out before. First of all, I think that it's not quite accurate to say that people are now at the point where they are willing to stop the use of chimpanzees or to stop the use of dolphins for human purposes. I mean we're still exploiting them. We're still using them in research. We still have marine mammal parks, etc. I think that there is somewhat of a greater recognition that these animals are intelligent, which is something that surprises us all—oh, boy, they can think. This is something which is surprising to many people. I think we ought to be very, very careful, though, to not predicate the concept of moral significance on how much like us are they in terms of their sense of self-awareness. Just because we can look in the mirror, and we say we recognize ourselves, we have a particular sort of self-recognition. That doesn't mean other sentient beings don't recognize themselves. I mean, if you take your companion animal, your dog out for a walk in the woods, your dog will be able to recognize himself or herself from a scent on a bush that he or she put there before. None of us can do that, at least none of us that I am aware of, are capable of doing that sort of thing. So, are dogs self-aware? Yes, I think they are self-aware. They are just self-aware in a different way, and I think we have to be very careful for some of the reasons Professor Freshman points out, not to focus our attention on how like us they are, because I think in many ways that's part of the reason we've all gotten ourselves into this situation.

PROF. D'AMATO: Professor Francione, when you say you think it's progress to bar elephants from circuses, and people say it's progress to

²⁷ Gary L. Francione, *Personhood, Property, and Legal Competence*, in *The Great Ape Project* (St. Martin's Press 1994).

get rid of zoos and things like that where animals are deprived of their wildlife habitat, I would like to take just the opposite position. I think that our children are being introduced to animals in zoos and in circuses in very wonderful ways that create an empathy that would not be existent if these beings were remote from us. I think the motion picture, *Dumbo*, made a circus elephant into something very charming, and has probably had an enormous impact on millions and millions of people regarding their empathy and respect for animals. If you take that away, if you take away the zoos and the circuses, you are really destroying part of the educational opportunity that very well may give rise to the major goals we have—which are to create more rights for animals—so you may just be going too far in this legislation.

PROF. FRANCIONE: I think that circuses and zoos teach our children domination. I think the point that Professor D'Amato is raising is an important point. If we get rid of these institutions, what impact will it have? I think this is a completely legitimate question to ask, and I think it is an important thing for us to focus on. I do think, Professor D'Amato, though, when you take your child to a circus, and you have tigers going through flaming hoops with European guys cracking whips and doing all sorts of exciting things, I think what you are doing is teaching your child a lesson that I would question whether you want to teach your child. Also, take a look at the movie, *Babe*. Now there is an interesting thing. Animals were used in that film, animals were abused in that film, and animals were killed in that film. And a lot of people said, but look, it taught us empathy for animals. And what happened, McDonald's appropriated *Babe* and started having *Babe* Happy Meals. So, in the end what effect did *Babe* have in terms of teaching our children empathy? What it taught us is, let's go to McDonald's and get a Happy Meal and eat *Babe*. So, I'm not sure that I agree with you. As a matter of fact, I disagree with you.

JANE HOFFMAN: I want to get back to the whole idea of sentience and rights and which animals can hold rights.

PROF. SINGER: I think there are differences as to whether we're talking strategies or whether we're talking philosophy here. It's important to draw that distinction. Clearly, I agree that all sentient beings, in my view, have moral claims to be treated in ways that are quite different from the way we're entitled to treat lumps of wood or coal or whatever else it might be, something that is not sentient. That, to me, ought to be the foundation of the legal system that we should develop to regulate human relations with sentient beings. The system ought to be developed on the basis that animals have lives to lead and that they have interests, and there ought to be no assumption that the interests of human beings, merely because they are humans, outweigh or count for more than the interests of other sentient beings. That is the philosophical statement; but the question, of course, is how do we get from here to there. That's why I think the first panel was very informative and instructive in talking about the way we've got to where we are now, which comes from a totally different viewpoint. Whether it is a

specifically Judeo-Christian religious viewpoint, or whether, as Taimie Bryant pointed out, the viewpoint of other cultures—we have grown up with the idea that animals are things to use. I think you'd get into very interesting cross-cultural comparisons about the nature of ethics in Japan, say, where in any case it is very much more related to “who do I have specific obligations to—family, the corporation I work for?” and so on. The idea of obligations to strangers in general, in fact, is not very well developed in Japanese society whether they are human strangers or nonhuman. So, for different reasons, I think, different cultures have got to somewhat similar positions with regard to animals today. The question is, how do we change that? Now, I didn't want to suggest by the remarks I made about incremental change in terms of personhood for great apes that this should be the only strategy. I don't think it should be. It seems to me the most plausible legal strategy for a far-reaching change and for getting from where we are now to a stage where more and more animals are not seen as property. But, there are all sorts of other things we can do. Robert Garner raised the question can we get to the point by changing anti-cruelty laws, strengthening anti-cruelty laws, where this whole question of property doesn't matter so much. I think that is an interesting possibility, and I certainly think that if you look at some of the things that have been happening in Europe just recently, you can see what I regard as very important changes that are very far ahead of anything that's happened in the United States. Suppose I had a choice of either bringing about changes in laws relating to farm animals so that the farm animals in America would have the same conditions as those in the United Kingdom, once the changes in the European Union regarding the abolition of the battery cage for hens comes into effect, or would I rather see chimpanzees have the status of personhood and no longer be regarded as property. I think that would be a tough decision, but I think I would rather see all those hundreds of millions of farm animals get some protection than the few thousand chimpanzees in this country get a totally different legal status. That's obviously a judgment that different people may make in different ways, but they're not incompatible strategies. Clearly, they are compatible strategies, and some people as lawyers going into courtrooms in the United States may be in a better position to make one kind of change. Other people, as voters, lobbyists, running organizations, consumers, and so on, may be in a better position to work for other changes. That's fine.

PROF. WISE: The way, generally, to make the deepest change the fastest is to harmonize the changes we're trying to make with the way the legal system already operates. It's hard to take our philosophies about which animals should have rights into courtrooms. I'm not talking about constitutional amendments or legislatures. There we know we're going to face judges who not only do not accept our philosophies, but who will say show me in the law, show me a case, show me a statute, show me something upon which I can ground the legal decision you are trying to get me to make, and there is nothing I can say other

than read Peter Singer's book.²⁸ She will say, I have, but so what? Philosophy is philosophy and law is law. That's the problem that I see as a person who teaches, but also spends time in the courtroom. Another way I think is more likely to achieve success not only for animals like chimpanzees, but for other animals on the road. We must try to understand what judges value and what arguments judges have been educated about or understand from their daily lives. What arguments do they recognize as legal arguments. We need to try to fit our arguments to their framework. I think we can fit our arguments to their framework, which is what I am doing. In another panel, I will argue that the common law is the way to go, not constitutional amendments, not legislation. But when you make those kinds of arguments, the way that you are the most likely to win, I would suggest, is by fitting your philosophies into their legal universes. Then they will understand what you are saying and be more willing to make the changes that you're urging.

DAVID WOLFSON: There are two themes that I think we are getting to now, which I want to talk about. As you just said, Professor Wise, if we feel that change is appropriate, and we have a sense about what change would make sense, should that change be enacted through the common law, through the court system, or through legislation? I think a statement was made by Professor Robinson that it would have to come through the legislature rather than through the common law, whereas I think Professor Wise might think it could come the other way around. The other question we have been skirting around is: What is personhood? What is a legal right? When we talk about legal rights, what are we really talking about?

JANE HOFFMAN: Different penalties apply to different states' anti-cruelty laws. They can be misdemeanors or they can be felonies. There can be different varieties of cruelty, and some will be felonies, some will be misdemeanors within the same statute. The other point is we have been talking about exemptions under the anti-cruelty law. There are two common exemptions. One is for animals used in laboratories, and the other is for farm animals. I want to make it clear that not all anti-cruelty statutes include a farm animal exemption. For instance, New York State's anti-cruelty law does not include a farm animal exemption. This does not mean that the law is enforced against people who treat farm animals badly but simply just that in the law itself there is no exemption.²⁹

PROF. REPPY: I was just going to give a practical example that would illustrate the point that Professor Wise was making about packaging an argument for animals in a legal doctrine well known to the court. I throw out this challenge. I want some of you to think at some

²⁸ Peter Singer, *Animal Liberation* (2d ed. Avon Books 1990).

²⁹ David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 *Animal L.* 123 (1996), updated and republished in *Beyond the Law* (Farm Sanctuary, Inc. 1999); Wolfson, *supra* n. 17.

point of making the argument under state law that the animal cruelty criminal statutes imply a civil cause of action. In the federal context, this is of course the *Chevron* doctrine.³⁰ It is not easy in federal law to win an argument that a non-civil statute creates a private cause of action, but the states do not have to follow the very tough *Chevron* doctrine. They can more readily imply a civil cause of action. So I am hoping that some of you will someday get an animal rights organization appointed guardian and bring a suit on behalf of the animal who is being cruelly treated after the district attorney refused to bring a criminal suit.

PROF. FRANCIONE: Whether or not the statute has a specific exemption, and I think it goes beyond just farm animals and animals used in science—it generally also applies to hunting and a lot of statutes have specific exemptions for animals used in entertainment, such as circuses. But even if there isn't a specific exemption, courts in this country have uniformly and almost without exception read in an exemption because the prohibition is on the infliction of "unnecessary" suffering. Who gets to determine what's "necessary" and not? It's generally the custom of the industry. So, if in fact farmers are dehorning cattle and they are not giving them anesthesia or castrating them without anesthesia, the courts will say that's necessary suffering because the people who own those animals have made the determination that they are not decreasing their value as chattel property by treating them in that way, so therefore the infliction of suffering is necessary. So even if there is not a specific exemption, courts uniformly and without exception read exemptions into those statutes based on what the custom of the industry is and how the owners value that animal property.

PROF. SILVERSTEIN: I just want to make a general point about the idea that when going to the courts, we should try to harmonize what we're trying to do with what the courts already understand and use their language and use their terms. I agree that in terms of effectiveness, the way to make change through the courts would be to use a language that judges will understand, give them cases, give them precedent that they will be able to reflect upon and use and build upon so that you can get victories within the court. But I would caution and encourage the following, that when that happens, what should also happen is that outside of the courtroom, we should do a whole lot more and go well beyond the language that the courts understand and that the law understands and that judges understand. I think we should use those kinds of victories and even sometimes losses in the courtroom to speak outside of the courtroom in much, much broader terms and in ways that could push the edges of what is currently acceptable within the law. I agree with Peter Singer that we should make distinctions between strategy and philosophy, but when it comes to actually being strategic in the law and in politics, we should be able to try and

³⁰ *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

bring those two together; and when you're talking outside of the rooms that look like this, when you're talking outside in the world, we should be using language that is very, very broad and begin using our philosophy to push on the edges and really try and get things to change.

PROF. FRESHMAN: I want to go back to that point as well about whether we use judicial rhetoric or legal rhetoric or not and suggest that as a practical matter, sometimes we can play on empathy and the facts of a case even if there really is no legal doctrine. We as lawyers should know that judges, even when there is law that's quite explicit, will sometimes be swayed by the facts of the case. To make a parallel again, I was once arguing a case involving the County of Los Angeles in which there was a well-established legal doctrine which said that the County's decision whether or not to pull an abused child from a foster home was absolutely immune. It was the same as the prosecutor's decision whether or not to bring a case because the social workers were acting as quasi-prosecutors. When the case was argued, two of the judges who wrote the prior opinion saying there was absolutely immunity were on the panel. The lawyer arguing for the County started to say, "As this panel well knows, the law is clearly established," when the chief judge said, "Does the County dispute that this young girl was abused so much that she will never be able to walk again," he said, "No." The judge said, "Does the County dispute that her medical bills will be in excess of \$4,000,000 over the course of her life," and he said, "No." He said, "Does the County dispute that the social worker actually falsified records," and he said, "No." He said, "And so the County's position is it's tough luck, right," and he said, "The County's position is that there is quasi-judicial immunity." He said, "That's our way of saying tough luck. I think we know what you are saying," and they ruled against the County, even though the law was clearly established in favor of the County. What they did, not unlike a lot of cases, was they didn't overrule the prior case; they just said it was an unpublished decision, so we shouldn't exaggerate the extent to which the law is clear. The published decisions that we look at might be quite clear, but what judges are doing in individual courtrooms can be very different from that, and this does give us some hope in individual cases.

PROF. FRANCIONE: It gets the animal rights people upset because a reporter will come up and say, "Isn't it your view—you're not just opposed to this hunt, but you don't think people should eat animals at all?" I always say, "Yes, that's not a hidden agenda on my part. No, I don't think they should be eating them at all. I don't think they should be hunting them. I don't think they should be buying them in plastic bags at the store, but right now I'm here protesting this hunt." But again, I think it's always very important whatever we're doing, if the strategy is to push it and push it through incremental steps, assuming that can be done, then I think we should keep two things in mind: one, have those incremental steps ban and prohibit rather than merely regulate atrocity; and two, have that ban coupled with the rhetoric of

rights and with the rhetoric of the abolition of the property status of animals and the recognition of the moral status of animals.

PROF. WISE: If Professor Francione is right and lawsuits are educational even when you lose them, I'm probably one of the most highly educated people in this room, although there are a few people, now that I look around, who might give me a run for my money. Two things, both from Professors Freshman and Francione: I think it's one thing—and this is something that animal rights lawyers run into all the time. I tend to view the nonhuman animals as my clients, and I know most animal rights lawyers do. You can sometimes have a conflict between what might be best for your nonhuman animal client and what might be best for animal rights in general. I am a proponent of not trying to go through the back door, of not trying to help animals through the back door in a private way. I am a proponent of saying, "Look, there are billions and billions of animals who are being harmed. There's the law that's been this way for thousands of years. We have to change it." We can't go through the back door because there is no back door; we have no choice but to announce that what we're trying to do. We're trying to get, say, personhood for chimpanzees, and no matter how we dress it, a judge is going to be confronted with the problem of whether she can make the leap between thinghood and personhood. A problem I have that Professor Francione reminded me of is statements lawyers make in court versus statements lawyers make out of court. In twenty-five years, I've never made an animal rights argument in a courtroom. There's no use. All the animal rights arguments I've ever made have either been in the classroom or in public. Because we make animal rights arguments in a large way outside the courtroom, all of us lawyers here may run into a problem of credibility. We all know that when we start making a true animal rights argument for, say, bodily integrity for chimpanzees, the other side is going to say, "he doesn't care that much about bodily integrity for chimpanzees. He's trying to make everyone a vegetarian." You turn to the judge and say, "I'm not trying to do that." But in your heart you may be trying to do just that. I worry that people like Professor Francione and I might not be the best people to make those kinds of arguments in court, because the denials to the judge of what we're actually trying to do may ring hollow.

PROF. FRANCIONE: But that's what the other side is saying about us anyway. Irrespective of what we're saying outside of the courtroom—I was talking about it mostly in the context of legislation—but whatever we're saying or not saying, whenever these arguments are made, the other side is always replying, "Hey, this is just the camel getting the nose under the tent. These people want to go further." Don't kid yourself if you think they're not reading what we're writing or not listening to what we're saying in classrooms. The position we take about personhood or about non-thingness or whatever, if you don't think those positions are going to get before the courts, I think

you're wrong. I think they know what we're about, and I don't think we should hide what we're about.

PROF. D'AMATO: Can't a lawyer say, "I'm representing a situation here. My own personal views could be anything. They could be extreme. They could be narrow." And the other side is that the lawyer's own views should be irrelevant to the issues in front of the court. Isn't that a better way of saying it than to say, "No, I don't believe in vegetarianism, I'm not a vegetarian."

PROF. FRANCIONE: It may or may not be. It may depend on who your client is, whether your client is an animal organization, etc.

PROF. WISE: Are you saying that you go into chambers and the judge doesn't say, "Are you a vegetarian?" I'm sure it happens. Every single time I speak to a newspaper person about chimpanzees, they want to know if I'm a vegetarian. I say, "Well, I don't eat chimpanzees."

PROF. GARNER: I agree with most of what has been said. I agree with Professor Silverstein and I also agree with Professor Francione again, which is beginning to worry me a bit. I'm not a lawyer. I don't know if that's a good or bad thing. I'm a political scientist, and as a political scientist you would expect me to say the law is less important than the social and political realities, which are fundamental to the existence of the law. So the law surely is, in legal principle, subordinate to civil society, and the reason animals are regarded as property is because most of the public agrees they are property. One of the reasons the public agrees they are property is because the industry that uses them and exploits them spends billions of dollars telling people how inferior animals are. So it's changing people's attitudes toward animals and building a powerful movement to challenge industry groups in Washington that is going to change things. I'm not sure that playing around with legal principles is really the fundamental point of what this is about.

PROF. WISE: There is not, or there should not be, much of a dichotomy between the moral principles of a society and the legal principles of the judges who are administering the law of that society. Sometimes they diverge, and then you have judges who are either going to follow the society or follow the legal principles. Sometimes judges follow and sometimes they lead, as Mansfield did in England, and as the U.S. Supremes did in the United States in the famous case of *Brown v. Board of Education*.³¹ That case was one in which judges were certainly leading a large segment of the society. Judges are members of our society, so the moral principles that motivate you or motivate me are going to be a part of that judge's experiences and motivation as well.

PROF. FRANCIONE: I don't see that as being different from what Professor Garner is saying. First of all, with respect to Mansfield and *Somerset*, the judge made that decision in the context of culture, and

³¹ 349 U.S. 294 (1955).

the prevailing social norm was already that slavery was a bad thing. It's not that he led and everybody else followed. He reflected the moral consensus that had already emerged. And I think what Professor Garner is saying, and I agree with him, and I tried to make the point before, perhaps not as well, is that if, in fact, most of us are eating them and most of us are wearing them and most of us are using them and thinking that it's fine to be entertained by them going off of diving boards, then that moral sentiment is going to be reflected in the courtroom, and we're not going to get very far. So when you say there shouldn't be that much of a divergence, the problem, Professor Wise, is that there is a huge divergence in that most people don't accept that animals have any moral status at all. When it really comes to the crunch, they're going to continue eating them, they're going to continue wearing them, they're going to continue supporting their use for entertainment. As long as that's the case, I don't see a whole lot of change happening in the courtroom.

DAVID WOLFSON: One of the things I think you were saying, Professor Wise, was that there are some legal principles that exist now that can be used to argue that in fact the treatment of animals is inconsistent with those principles. Something that Professor Francione said before was that whenever we do advocate positions for animals, we should couple that with the rhetoric of rights. We often use the term animal rights, and people on the panel have been referring to themselves as animal rights lawyers. Perhaps we could just take a step back and define what we would term a legal right for an animal, what it actually would mean, and then we can think about whether it would make sense and the consequences of it.

PROF. D'AMATO: One of the problems about rights talk, which is the title of a book by Professor Mary Ann Glendon, is that it's become a little cheap.³² Everybody now has rights and it goes in one ear and out the other. In the early days of the animal rights movement, for example in the 1970s with the publication of Professor Singer's book,³³ rights for animals was a tremendously revolutionary concept, and I think it played a very important role in the development of the animal rights movement, in the same way that liberty, equality, and fraternity was a very revolutionary concept for the French in getting rid of a monarchy. But over time this rights talk tends to diminish, and we may be coming to a point now that further insistence on rights for animals is too broad a term to really help us all that much in achieving the goals that I think we all share. So I'd be somewhat skeptical, and I would be more interested in seeing if there are some other ways of modifying or changing the concept so that rights isn't what we're talking about so much, because I don't want the rhetoric to get in the way of the progress of the movement. The rhetoric was excellent in the be-

³² Mary Ann Glendon, *Rights Talk* (Free Press 1991).

³³ Singer, *supra* n. 28.

gining, but I think we've come a long way since then, and we now need to sharpen, define, and refine the rhetoric that we're using.

JANE HOFFMAN: Professor D'Amato, could you just talk a bit about using a trust to enforce a moral responsibility to care?

PROF. D'AMATO: Well, yes, trusteeship and stewardship are very much concepts that arose in Anglo-American law as a result of the bifurcation of courts back in the fourteenth and fifteenth centuries in England when the law courts would deal with questions of damages and the equity courts would deal with questions of enforcement and personal responsibility, injunctions, and things like that. Out of all that grew the notion of fiduciaryship, which is a very powerful notion that has helped the modern corporate business world do many flexible things that they couldn't do so well under civil law concepts. So, in looking at it globally, the notion of a fiduciary has very important meaning for accountants, for lawyers, for setting up trusts that have flexibility, especially if you look at trusts as they have developed under Anglo-American jurisprudence. A trustee has a certain kind of responsibility within that trust that's very hard to pin down in actual language terms. The terms of the trust may be rather vague. For example, if a beneficiary has an emergency, then you can pay some money out of the corpus of the trust. What's an emergency? Well, it works very well despite the difficulty of pinning it down in terms of language. So, I was wondering whether some notion of trusteeship might work quite well with animals, since we are beings who talk and who have access to language and we can argue in front of judges and everything else and pass legislation, whether we shouldn't be in some sense trustees in this fiduciary sense to the animal kingdom. That was one of the ideas that I was just sort of floating because I haven't developed it very well.

PROF. SINGER: Professor D'Amato mentioned animal rights in connection with my own book back in the 1970s. In fact, I don't really make much use of the concept of rights in that book. I think I talked about a right to equal consideration for animals, but really that's it. I didn't see myself as putting the claims of animals particularly in terms of rights. That's probably a cultural thing. Americans are much more prone to think of every moral claim as being a claim about rights for some being. Those from other cultures, I think, see rights as perhaps just one part of the whole moral apparatus. Certainly, as far as I'm concerned, I think it's more helpful to talk about interests and about the obligation to give weight to the interests, to consider the interests, to take into account the interests of different beings. Ultimately, the reason for that is that I think the notion of rights relies too much on people's intuitions. That is, we can all have intuitions about what rights we have in varying circumstances, and obviously they conflict, and they conflict in this debate; so that we get up and we say animals have rights and our opponents get up and they say, I have a right to eat meat. If we are just going to exchange assertions like that, we're really not going to get much further. If rights are to lead to a moral argument that gets you anywhere, you really need to ground rights on

something; so you need to have a sense of what it is that underlies them. Then I think perhaps we can argue that the needs of animals not to be treated in the ways that they are treated when they get made into meat are much greater than the needs of the person who says he has a right to eat meat, unless, perhaps, he happens to be an Inuit living a traditional lifestyle where there is absolutely nothing he could do to survive on without eating meat. Then you could have a more serious argument about it. So, in a philosophical sense, I would say we don't really need the concept of rights, but, again, that's distinct from the legal question. You might want to argue that we do need to establish that animals have rights in the sense that they need to be the kinds of beings on whose behalf we can bring suit, as I think it was said earlier in response to the quote from Jerrold Tannenbaum. Can you bring a case on behalf of an animal? I guess one way of seeing what it means to claim that animal have rights would be to say it's possible to bring a case on behalf of them. I don't know whether the trusteeship proposal is something that enables you to do that without . . .

PROF. D'AMATO: The Sierra Club, in an early case about whaling, tried to bring a case against the Secretary of the Interior.³⁴ Since they could not sue on behalf of whales, they had to sue on behalf of people who take pictures of whales and people who somehow enjoy photographs of whales, and these people would be deprived of the picture-taking if the whales were extinguished. That worked. The Supreme Court said you do have an interest in the matter, in that you benefit from observing whales. The problem was that the case somehow didn't have much of an impact on the judges. The judges were thinking, well if that's their interest, it's relatively trivial, and despite a couple of good dissents, it didn't work. The court didn't give them the injunction against the Secretary of Interior that the Sierra Club was asking for. So in a way it's sort of like what Professor Francione was saying earlier. If we can't really get away from the fact that if we're litigating on behalf of animals, we perhaps should say so. Maybe that's a good thing, because you can win a small victory on the tiny approach, the limited approach, but then you might lose the war once you get into court, because the court just thinks your whole approach is trivial, even though, in a way, you're satisfying their standing requirements by doing it. This is a long-winded way of saying the rights thing is the same. You can go in and argue rights to get yourself in the door if you have to, but I would prefer a notion of guardianship or a notion of trusteeship on behalf of the animals so that you wouldn't be restricted in trying either to prove that they have rights or be diminished by trying to show somehow that it's our rights that are affected by the loss that the animal may suffer.

DAVID WOLFSON: Professor Francione, would you mind clarifying what is commonly meant in animal rights discourse when we talk about trying to achieve "rights" for animals?

³⁴ See *Sierra Club v. Morton*, 405 U.S. 727 (1972).

PROF. FRANCIONE: Part of the problem is we use “rights” in a very loose way to mean a lot of different things. I’m not maintaining, and as far as I know no one else is maintaining, that animals should have the same rights that humans have, that they should have a right to vote or attend university or drive cars or whatever. When I use the term right, I use it in the sense that a right is a way of protecting an interest. It’s sort of a wall that exists around an interest. It doesn’t allow the interest to be taken away for consequential purposes, consequential reasons. When I say that animals have rights, what I mean by that is that animals have an interest in not being regarded as things, and that interest can’t be taken away from them simply because it will benefit us. Interestingly, Peter Singer said before he didn’t think we needed the concept of rights in philosophical discourse, but I would suggest that even his own philosophy recognizes the basic right of at least normal human beings—putting aside the marginal human being or the severely retarded human being—he has a presumption in his philosophical system, as I understand it, a very strong presumption, that if I am a normal human being, then my life is important in that I am not a replaceable resource, so therefore my interest in not being treated as his property will be protected. If you want to call that a right or if you want to call it a widgeit or whatever you want to call it, it seems to me that it’s serving the same function as what I’m talking about or what Tom Regan’s talking about when he talks about the right of the animal not to be regarded as a resource.³⁵ He’s simply saying, and I’m simply saying, that the interest that the animal has in not being regarded as a resource shouldn’t be abrogated for consequential reasons. I think, unless I’ve misread you all these many years, that you would take the same position with respect to normal human beings: we can’t treat them as replaceable resources, so in a sense you seem to recognize that basic right as well.

PROF. SINGER: I don’t think it’s any guarantee against being used for consequential reasons.

PROF. FRANCIONE: As property? So that it would be all right to enslave people, normal human beings? It would be all right to enslave them if the consequences—

PROF. SINGER: I can’t see the consequences working that way, but I don’t in principle rule out that possibility without ever even looking at consequences.

PROF. FRANCIONE: Okay, well that’s an honest answer.

PROF. WISE: In order to define legal rights, I opened up my own law review article—and lo and behold, I define legal rights. Legal rights I have as being “any theoretical advantage conferred by recognized legal rules.” Legal rights involve some normative direction of the behavior of persons other than the holder.

³⁵ See Francione, *supra* nn. 5, 26; Tom Regan, *The Case for Animal Rights* (U. of Cal. Press 1983).

PROF. SINGER. Can you just say that again? It wasn't that easy to take in for us non-lawyers.

PROF. WISE. I now know why my book failed to make the best-seller list. Legal rights can be broadly defined as any theoretical advantage that is conferred by recognized legal rules. So in the Hohfeldian system, and my few students out there know what I'm talking about, you're going to have two persons and one thing. One of the persons is going to have a theoretical advantage over the other person in the transaction.

PROF. D'AMATO: But in this context that's circular, because we want to know what rights the law should recognize; and if you start with legal rights, you're reducing yourself to the rights the law already recognizes.

PROF. WISE: No, first you have to define what you're trying to get, and so what we're trying to do is get animals that theoretical advantage.

PROF. FRANCIONE: So if a rat is being used in a lab in a painful experiment, but the caretaker has an obligation to feed the right, then the rat has a right.

PROF. WISE. No.

PROF. FRANCIONE: Well, that's a theoretical advantage, isn't it, that the rat has in that situation?

PROF. WISE: No. It doesn't go to the rat. It's goes to the government. Someone may have a theoretical advantage, but not the rat.

PROF. FRANCIONE: The rat doesn't have a theoretical advantage? Okay.

PROF. D'AMATO: The reason Professor Wise is saying that he's still confining the notion of rights to what the law allows is a positivistic reason. However, people want to crash through that legal system and say, beyond positivism, there are rights we have before the law even exists, the rights that are prior to law, and that the present law at its peril doesn't recognize.

The positivistic system, which we're all swimming in right now because it's the prevailing view, says that all our legal rights and all our claims come from a sovereign who establishes a constitutional legislature and everything else, so all of these things are legal. If you go outside the system, you're not talking law at all; and therefore judges are going to be confined to looking up, as you put it earlier, what is the relevant statute. But the other discourse, the non-positivistic discourse, that preceded positivism as developed by Hobbes, Bentham, etc., in Great Britain and came over here, was the natural law view which goes back to Cicero, who said there are certain kinds of things that are human rights. A classic example was rape. He said if a woman was raped and there was no law against it, that didn't mean it wasn't illegal. It was certainly illegal even though there was no law against it. The notion that we're going to bring into the legal world something from outside that preexists the legal world is a non-positivistic notion; and that's why I was saying that I think your concept of it is enclosed

within a positivistic legal system and therefore is immune to the attack from the outside that I'm trying to urge here, because we're all trying to say that the legal system is deficient and needs some kind of new injection of rights in order to make it better.

PROF. WISE: What I'm trying to say is simply what legal rights are, so that we know when nonhuman animals have them. You have to define your terms or else you won't know when you've won or when you've lost.

PROF. D'AMATO: Not quite, because you want to argue to the judge, not just that your client will win if you find legal rights, but there might be something more; you want to push the judge in a normative direction so that even though the law may seem confining, if the facts of your case are sufficiently horrendous or empathetic or whatever, you might be able to say that the rights are not just what the law says, they're a little more than that, because the law is always trying to move in the direction of full rights.

PROF. WISE: I think that you and I agree.

PROF. ROBINSON: Even if we agree that there are natural rights that ought to be recognized and do exist and I would personally say there are, I think the dominant society, as Professor D'Amato puts it, of a positivist approach right now has to be nudged into a posture in which it will finally acknowledge some of those. That gets us thinking rather pragmatically. When some rather naive and well-intended, perhaps very intelligent lawyers, and indeed law professors, right after Earth Day decided that there had to be a constitutional right to a clean environment, they promptly brought lawsuits to that effect, thinking the judges would jump right on the bandwagon of Earth Day and say, "yes, life, liberty and the pursuit of happiness means a clean environment; therefore, the pollution has to end." Naturally, they lost every case. They created a precedent which precludes incrementalism in the Constitution right now, and therefore everything we do on the environmental front largely has to be grounded in some kind of a statutory basis, until the Constitution is amended, which no one wants to do right now. So what do you do in that kind of situation? I've suggested that there are endless numbers of good statutory reforms that we can put forward. But what's the difference between what we've done in the last 35 years with the environment and the question of the status of animals? There's no bureaucracy for animals—a very weak bureaucracy. There are a few animal welfare officers. The Humane Society is anointed with the authority of the state and is told to go out and do good deeds for animals. But there is no system in government that says animals are important. In the suburbs you find communities canceling the budget for the animal rescue officer because, frankly, it's not important. So you have the problem of the dead animal, the maimed animal, the hurt animal, and nobody to rescue the animal in the suburbs. Of course, a lot of your constituencies wanting reform of this status of animals are the people in the suburbs who vote and are the swing votes in most elections. In New York City, and indeed in New

York State, but still today in New York City, we were unable to get the enforcement of many of the pollution laws taken seriously, and so we created in the Department of Environmental Conservation administrative law judges who would actually enforce the laws. This was rather effective, and suddenly you couldn't get the time of the day of the Supreme Court Judge, or Justice, unless you had a felony. They didn't have time for anything that wasn't a felony. But these ALJ's, these administrative law judges, hear the cases, issue rulings, and if anyone chooses to fight, then you've got a big fight because you go into court and it's the State against the alleged individual wrongdoer. Why don't we have such systems for animals? What's missing? Why don't we care? We live in a regulatory state. We live in an administrative state. You've got an administrator for everything that moves around us. Why don't we have anybody who's charged with worrying about animals, and then we could kick them in the pants and say, you're not doing a good job; but at least there'd be someone charged with doing some of this work. I think if we're in an administrative state, we need to begin thinking a little bit about who are the administrators for animals.

PROF. WISE: I will be brief. I don't agree with something Professor D'Amato said a while back, which I think is important with respect to rights and is something we should not forget. It is one of our strongest, perhaps the strongest argument that we have. It is one of the few places where we animal rights lawyers are actually in the main stream of current legal thinking. There's a lot of rights talk. There's rights talk everywhere. Hey, we're talking rights, too. Everybody understands. Judges know what we mean. Everyone knows what we mean. Anyone who is a lawyer has had a million clients come in, wanting to know if they have any rights. So rights is something we need. We are talking about trying to protect at least some nonhuman animals against the most fundamental and the most egregious wrongs—being killed, being assaulted, being caged. There is no better way for us to protect them than to wrap them in the cloak that we understand, rights.

PROF. SILVERSTEIN: Yes, I want to second that, and suggest that Mary Ann Glendon, the author of *Rights Talk: The Impoverishment of Political Discourse*,³⁶ has it wrong. It seems to me she has it wrong precisely because rights talk in this society—now I should say in the United States—*Rights Talk* is and remains a very powerful political discourse and a powerful legal discourse. It can be deployed in ways that are quite useful, quite effective, and to be Mary Ann Glendon and say that we should turn to other discourses that aren't as effective and that we can discard the rights discourse is to really misunderstand how politically salient rights discourse remains and how useful it can be when appropriated and applied to animals. Now, I think that not only because of the issue of animals, but because of other movements

³⁶ Glendon, *supra* n. 32.

that have commented on the salience and the importance of rights discourse as a political tool; in particular minorities. African Americans in particular, have come out against discarding rights discourse, because they have talked about the cloak that rights provide around them and how useful it is and how really problematic it would be to discard rights discourse. I would also comment that I think that we can do what Peter Singer is suggesting, which is grounding rights discourse. I would like to see a grounding of rights discourse in sentience and reconstructing rights discourse away from the way that we commonly think of it and regrounding it in sentience; which would potentially allow for a broadening of the notion of rights that would be inclusive of animals, nonhumans, and not just of great apes because they are intelligent and like us, but other animals that are worthy of being protected by rights because of the fact that they are sentient beings.

PROF. REPPY: I certainly agree that I'm an animal rights person, and we all are; but I think in looking for incremental gains, knocking one brick out of the wall, it sometimes could hurt the effort to inject rights terminology. In my home state, we recently amended the cruelty law to ban pigeon shoots.³⁷ We weren't totally successful, but we're going to be ultimately. The label on that bill was "An Act to Amend the Cruelty Statute. I was helping to write a draft of that bill entitled "An Act to Give Rights to Pigeons Under the Cruelty Statute," and I think, in retrospect, that would have been foolish on my part. So, I'm just suggesting caution in some situations.

PROF. FRESHMAN: I want to go back a little bit to this trustee question, because I think it raises a general question that also comes up when we talk about standing. This is the question concerning various views about what an animal would want. Since under our current understanding most animals can't communicate their desires in a court, someone needs to show up and say what it is that the animal wants. This may change with some animals and some technologies, but for a long time there will be many animals that can't communicate directly. So, the reason that standing becomes important and the reason that the identity of the trustee becomes important is that there are many conceivable people who would say "I speak for the animal." We get the same problem in other areas of the law. If there is a large class action, for example, the question is who speaks for the entire class, and we have similar issues there. So I guess I don't know if rights gets us around this problem of who speaks and who makes determinations of the compromises that are involved in either litigation or legislation. Rights appears to have some promise here; not to repeat myself, but rights seem to be absolute. So, to some extent, if we think rights are absolute, such as there's a right not to be a slave, and there's no compromise involved; one articulates the right, and then there's nothing more to argue in court. But that's not what rights have become in the

³⁷ See N.C. Gen Stat. § 14-360 (2000).

United States. A right is sometimes just a consideration; so, for example, a due process right to a hearing, if you are a person having your welfare benefits cut off, is a right to a reasonable hearing. A reasonable hearing is all things considered; so if the right becomes a right to be free from suffering, for example, needless suffering, we still have this question of who articulates the interest, whether it's a question of standing or we call it a question of trustee or guardian. I'm not sure if the trustee/guardian question changes that or not.

PROF. D'AMATO: I think the idea of rights is a common law court's idea, and the idea of trusteeship is the equity court idea. The equity courts, in their conflict with the common law courts, through English history, would take a more, let's say, analog view of matters, whereas the common law courts would take a sort of digital view. You know, you win or you lose. So the equity courts would say, no, it's not a question of winning or losing, it's a question of adjusting these things so that they work out. The common law courts weren't able to do that because they only thought in terms of win versus loss, damages or no damages. But the equity courts, because they applied to you as a person, were able to steer you in a certain way: here's what we'd like you to do given the interests that are involved that we see that are somewhat complex and have to be worked out. And I think that what you're saying was a good intro for this because in a way, to get into court and argue rights talk, you're telling the judge that the right of this say, cow, to be not maltreated on this particular farm is a right that we have to apply to all cows on all farms forever and ever. The judge may not be willing to adopt that discrete a view of the situation. The judge might be more willing to say, well, given this farm and this farm's resources, you know it's a small farm, and the cows can't roam at will, but certain adjustments ought to be taken to provide at least a reasonable lifestyle for a cow that's headed to the slaughterhouse. That kind of thing, I think, has more promise because it doesn't ask the judge to take a huge rights-bound precedential type of step, but rather to take a more flexible trusteeship type of step.

PROF. FRANCIONE: It seems to me there's still a circularity that we're not confronting, and that is, can animals have any legal rights if they're still property. I want to read you two statements, one from the Restatement of Property: "Legal relations cannot exist with property. Legal relations in our law exist only between persons. There cannot be a legal relation between a person and a thing or between two things." Another statement from a philosopher, Jeremy Waldron from Columbia: "Property cannot have rights or duties or be bound by recognized rules."³⁸ We've already gone through this trusteeship thing in the context of human slavery when we tried to have three categories. We had persons and things, and we wanted to have slaves somewhere between persons and things, and it didn't work. It's like a pregnancy. You either are or you're not. You're either property or you're not. It seems to me

³⁸ See Francione, *Animals, Property and the Law*, *supra* n. 5.

that if animals are property, to talk about their rights strikes me as incoherent. I don't even understand what it means to talk about the right of a cow to be humanely treated. I really don't even understand what that means. The way that has played out, the only restrictions that are placed on how we treat cows have to do with whether or not the treatment results in an efficient exploitation of the animal. So if the pain is inflicted, and it results in an economic benefit for human beings, then it's considered to be appropriate conduct. So I think we have to be very, very careful, and I am completely unclear from what I've heard as to how we think that animals can have legal rights while they are still property. The bottom line is if you don't have a basic right to physical security, if you don't have a basic right not to be used exclusively as the means to the ends of another, if you don't have a basic right not to be the property of another, then any other right we give you, I think, is meaningless.

PROF. ROBINSON. What we've seen in this discussion is that it's very difficult to agree on what the right is and the source from which the right is derived. Those degrees of ambiguity become more precise as we get around to actually writing it down in a positive statute because then we know what it is. But there is something that is antecedent to that. In trusteeship relationships, we have an underlying set of duties. The duties are given by the trust instrument, a document that's written down, or there is an implied trust. The difficulty with the implied trust is that it has to be derived out of what is reasonable in the relationships of the people or the situation. The reasonableness then depends on the prevailing norm again in the community, unless we appeal to some commonly held natural right view of how an animal is entitled to be treated. I think there are still ways that you can begin to find that right in places where people understand it. Let's go back to the status of the wild animal who is injured, and someone then has to rehabilitate the wild animal, not to become a pet or a zoo animal but for release back to the wild. The rehabilitator is a steward, a guardian, and has a trusteeship obligation in that sense to that individual animal as a wild animal to live out the rest of its life in the wild after having been rehabilitated from an automobile crash or something. I understand that there is legislation pending in San Francisco and Marin County and elsewhere to actually redefine the laws with respect to animals to say owner and/or guardian,³⁹ because there you introduce this idea of guardianship in a normative way; but then you can begin to imply all kinds of obligations to, in this case, the wildlife rehabilitator.

³⁹ To date, the state of Rhode Island and the cities of San Francisco, California; Boulder, Colorado; West Hollywood, California; Berkeley, California; and Sherwood, Arkansas have enacted laws that recognize the legal status of the word "guardian" as it relates to the traditional notion of pet "ownership." <<http://www.idausa.org/campaigns.html>> (accessed Mar. 11, 2002).

PANEL DISCUSSION III

This Panel Discussion features Professors Bryant, D'Amato, Favre, Francione, Friesen, Freshman, Garner, Kelch, Radford, and Wise.

DAVID WOLFSON: We started off these panel discussions in an attempt to understand what the law was that relates to nonhuman animals and where it came from and how well it worked. Our focus then was to think about realistic ways to improve the situation. I would like to start with the issue of whether the current, and as many of us would think improper, treatment of animals is in fact at this time in violation of the contemporary laws that we have. In other words, does the common law today actually provide us with the tools to challenge the inappropriate treatment of nonhuman animals? I want to give an example that we can think about as we go through this discussion, so we can keep it realistic. Imagine a situation in which we have a chimpanzee in a laboratory that is about to undergo experimentation. The question is whether we can use the common law to bring a claim—a lawsuit—to argue that the chimpanzee should not be treated in this manner.

PROF. WISE: I wouldn't bring such a claim today. I don't think that common law judges are ready to allow it. Common law judges need to understand there are cogent and powerful arguments that can be brought under the common law that would lead to a chimpanzee having a common law right to bodily integrity. Those arguments are being developed as we sit, and the intellectual foundation for that case is being developed. One of the ways you develop them is to have conferences like this. Another way is to have journals like *Animal Law* at Northwestern School of Law at Lewis and Clark. Another way is to teach animal law courses at the law school level.⁴⁰ These lay the intellectual foundation that will allow us to bring these kinds of cases.

Also, as the older generation of judges begins to die off, there will be younger judges. I hope my students and the students of all the other people who are teaching animal law will begin to ascend the bench and, with any luck, have a different attitude. I remember last year Professor E.O. Wilson from Harvard was speaking about how change is made, and he quoted the economist, Robert Samuelson, as saying progress occurs funeral by funeral. Those of us who go into court realize that there are some judges who are never, ever, ever going to agree with us. I'm hoping we outlive them. Once we do, we can start to bring

⁴⁰ There are currently eighteen law schools offering animal law courses: Benjamin N. Cardozo School of Law, California Western School of Law, Duke University School of Law, George Washington University Law School, Georgetown School of Law, Golden Gate University, Harvard Law School, Hastings College of Law, Indiana University School of Law, Michigan State University-Detroit College of Law, Northwestern School of Law of Lewis & Clark College, Rutgers University School of Law, San Joaquin College of Law, University of California-Los Angeles School of Law, University of Miami Law School (as of Summer 2002), University of New Mexico School of Law, University of Southern California, and Vermont Law School (summer session), <<http://www.aldf.org/>> (accessed Mar. 8, 2002).

these cases with some reasonable chance of success. We will be bringing them before judges who have heard of animal rights, who understand there's an environmental movement, who may have read law review articles, may have attended this conference in New York in 1999. Their minds may be less biased, maybe not biased, or maybe even biased in our favor. Then what kind of arguments can we make on behalf of chimpanzees?

I suggest there are very powerful arguments that can be made under the common law. Liberty, especially bodily liberty, lies at the foundation of the common law. So does the idea of equality. And so does the idea that judges make decisions in a reasoned way. I suggest that we may, within the next 10 years, be able to succeed in convincing a Supreme Court bench that a chimpanzee is so like human beings who have fundamental rights in ways that entitle human beings to those fundamental rights, that the doctrine of common law equality demands that chimpanzees be given the fundamental right to bodily integrity. If a judge refuses to do that, we would be able to justly accuse that judge of drawing arbitrary lines when fundamental rights are at stake.

The second prong is that we should argue that the reason human beings have liberty is because of our capacity for autonomy, not in a Kantian way, in that we have to have self-awareness and operate at a very, very high level. There are billions of human beings who are autonomous at much lower levels, and they're entitled to fundamental rights as a matter of liberty because of their level of autonomy. We will prove the facts of autonomy through a parade of primatologists, geneticists, veterinarians, psychologists, and probably half a dozen other disciplines that the mental abilities and capabilities of this chimpanzee exist at a very high level. As a matter of liberty, the autonomy they can demonstrate should entitle them to fundamental rights totally separately from their entitlement as a matter of equality. To deny these chimpanzees these fundamental rights will open the judges up to a very serious charge of simply being biased and arbitrary.

PROF. D'AMATO: I think Professor Wise is right in saying that it's hard to bring that case right now; but I suggest that maybe one reason it's hard, one of many reasons, is that you're asking for a right to bodily integrity. As I was saying earlier, asking for a right is asking for a lot. I would applaud anybody who could bring such a case successfully. But while we are maybe waiting for a more appropriate time and for people to die off and all that kind of stuff, I would suggest that somebody here in this room might try to bring a case on a trusteeship basis, that you are the trustee and the chimpanzee is the beneficiary of an implied constructive trust that you are arguing, that this chimpanzee is being denied reasonable rights, and you are asking the court for equitable enforcement of those rights. I don't know if it's going to work, but I think it has more of a chance of maybe working now than the rights approach. So I would just suggest that maybe somebody might want to try that out and see if it flies.

PROF. FAVRE: I would like to tie in two things and suggest some new idea about how we might be able to do something in the interim with the rather strong case that Professor Wise is talking about. One is a modest but I think very important idea that follows from Professor Wise's talking about autonomy as a fundamental focal point, which is to try to establish within the legal system the idea of self-ownership. What do we think about wildlife? What is their legal status, their property status? There is actually a fair amount of misconception among lawyers who think that the state asserts property ownership in wildlife as we understand the word property. That is not really the case right now. The state asserts the right to control access to wildlife, but not really title in wildlife. If we could establish the idea that if you're not owned by a human being, then you are self-owned, that gives us a new tool to work with, the idea that if you give up human ownership, then maybe the animal can go back to being self-owned.⁴¹ This is not unlike if an eagle gets shot out of the sky, nobody owned that eagle before. The rehabilitator takes that eagle. What is the status of the eagle at that point? What is the property ownership of that? When the rehabilitator lets that eagle go, the title is gone. It goes away. The eagle is going back to self-ownership. It works very nicely with wildlife, I think, and I'm not sure how we might be able to deal with it in domestic animals, but that's another possibility. In the area of the trust concept, I'd like to push that a little bit further and say what if we go about trying to precreate that relationship so we really have something? Not just use an implied trust, but what if we tried to create some trust? The idea there is, again, the constraints of property law. Is it a brick wall or is it tapestry? Do you have to blow up the bricks, and that is one way to think about this, or is it a tapestry that you can pull some threads on and weaken and try and do something with? I think one of the things—I'm sort of taking Professor Reppy's place here because I'm a property professor, too; those that teach property like to think in property terms—is we have another tool that we could use in the property law area, which is the idea of equitable ownership. We have for centuries thought of property as having two components, legal title and equitable title. What if we could get somebody to say, "I'm going to give my animal equitable title." Nobody's ever done that. There's no precedent for it. But what if a thousand people did that? It would create a new construct to think about.⁴² The legislature didn't do it. It could be done by this autonomous act of individuals in their relationship to animals, with the consequence being a statement by an individual saying I recognize this animal as having interests separate and apart from my interests and I'm willing to be bound by the idea that I have a trust obligation to this animal. That would then give the court something to think about, a little lever point.

⁴¹ See David Favre, *Equitable Self-Ownership for Animals*, 52 Duke L. J. 473 (2000).

⁴² See *id.*

PROF. D'AMATO: And you could add to that. Even if it wasn't you who was the trustee, once there's equitable title of the animal, the court can find a trustee. In other words, a trustee can be appointed by the court, which is what courts do when there is a trust, so it would carry a lot of weight even if you didn't push it beyond that point.

DAVID WOLFSON: Going back to Professor Wise's original point, what would be the big problem in terms of achieving success as he mentioned ten or fifteen years from now?

PROF. D'AMATO: I'm saying that rights talk is difficult for judges to deal with because they would be saying that if this animal has rights, then all animals like this animal have the same rights, and it's a little harder for them to take that bolder step than it is to deal with a particular problem in an individual animal. Once they deal with a particular problem in an individual animal, we've created a precedent. The next animal would at least be entitled to that kind of dealing, so it's not as if you haven't done anything. It does have reverberations, but it doesn't have the kind of doctrinal reverberation that a right would have. Now, that's not to say that if you can win the case on rights, you shouldn't do it. But if you can't right now because judges are not ready to take that step, perhaps they are willing to take a more equitable sort of approach.

PROF. FRANCIONE: Seventy percent of the federal judiciary has been put there by Ronald Reagan or George Bush. They are in their 40s, which from my point of view is really young, and we are experiencing in this country a reactionary political movement that I find absolutely terrifying. We now regard affirmative action as an ugly concept. We no longer accept the notion that we need something like affirmative action to create a baseline so that people can compete from a position of equality. Sexism is reasserting itself in ways that are absolutely horrifying. Now if you object to sexism, you are just being politically correct. There is no more concept that sexism is bad because sexism is bad. We're seeing racism, sexism, homophobia in ways we've never seen it before. I wish I could share the optimism of my brethren, that we're going to be able to go into the courts and get justice for animals in five, ten, or twenty years.

The legal system has always been the protector of property rights. It has always been the conservative protector of the patriarchal power establishment. I do not see any change in that coming soon. If anything, I see the courts shifting dramatically to the right. So I suggest that if we think that we're going to be able to use the courts now or in ten years in any significant way to effect justice for nonhumans—and I go back to the point I made this morning—it's not going to happen until we have a social movement. Look what happened with abortion. Abortion is a perfect example. The Supreme Court said, "We've got to take the lead here. We've got to take the lead because the state legislatures aren't going to act, they're all controlled by white conservative men, and the federal legislature isn't going to act. No one's going to act. We the Supreme Court are going to have to do something." So they

came down with *Roe v. Wade*⁴³ and from the day it came down, it has been attacked and, as far as I'm concerned, the right of abortion no longer exists. Eighty percent of the women in this country do not live anywhere near an abortion provider. So yes, it's a fundamental right. As a matter of fact, your right to have an abortion is considered legally as important as your right of free speech. It's one of the few rights that the Supreme Court has considered to be a fundamental right, and yet most of the women in this country cannot get an abortion. So I suggest that if we think that the legal system is going to get out there in front, we are deluding ourselves. I think we need to take this to the people in the street first. We need to get ourselves, first of all, off of that tremendous addiction to meat. I think we need to go out there and talk to people and get them to start thinking sanely, sensibly, and rationally about the fact that there is no characteristic that distinguishes us from nonhumans, that whatever characteristic we think makes us special is shared by them, and whatever defect it is that we think they have that allows us to do what we want with them is shared by some group of us that we would never eat or put into a circus, rodeo or zoo. I am perplexed, I have to tell you, to think that we're really seriously thinking that the legal system is going to take the lead here and that it's going to play any significant role before we convince more people and we turn this into a real social movement.

PROF. D'AMATO: Boy, do I have to disagree with you.

PROF. FRANCIONE. Professor D'Amato, the concept of trust, this notion of trust—the bottom line is they are property or they are not. I don't care whether they are held in a trust relationship or not. They are either *things* that we get to value or they have some value independent of the value that we give to them.

PROF. D'AMATO: You have an either/or view of the universe. You say unless the lawyers in this room go out and act like everybody else—forget the legal talents you have, forget whatever ability you have to convince anybody—that unless you go out and get your legislators to do something, you're wasting your time. I think that is the counsel of despair. I think what you should really say to these people is: you can make a difference. Go into some court and make the argument. Even if it's a Reagan-appointed judge, you never know whether that person might have a very soft spot for this particular movement and be a total hardliner on everything else, and it does happen.

DAVID WOLFSON: Professor D'Amato, in line with that, would you discuss the development of rights to life for whales out of customary international law, since this is using a law to create a right?

PROF. D'AMATO: That is a perfect lead-in, although I don't want to take up too much of the talk here. But when I started out to write an article on whales,⁴⁴ what was it, about 14 years ago, one could always

⁴³ 410 U.S. 113 (1973).

⁴⁴ See Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 Am. J. Intl. L. 21 (1991).

write an article about the need for legislative change. We needed the countries of the world to have a treaty to protect these magnificent animals, so it was a bit of a counsel of despair. We decided to look at the development of international law, and see if we couldn't tease out of it some kind of normative implication of where this law has been leading. It hasn't just been a series of static steps. We started with ordinary conservation measures affording a certain amount of protection and a certain amount of entitlement, then proceeded to a moratorium on whales. Doesn't this all lead to some kind of culmination point at which we're really knocking on the door of saying that whales are entitled to a right to life? And I would do the same thing in an ordinary litigation in a local court. I would take the animal cruelty statutes and say "what is the purpose of the cruelty to animals statutes? Is the only purpose so that 99.5% of the cases can be exempted from it?" That would be terrible. The purpose of those statutes was to send a legislative message that we cannot be gratuitously cruel to animals. If exceptions were put in through the political process, I would like to ask the court to think about not the exceptions, but what was really sort of going on there. Wasn't there a development? Haven't we seen progressive legislation moving in this direction? The common law works this way. The common law works progressively through time to try to make itself as, Lord Mansfield said, "pure." That's where I was going with the whale article, and I think that's what we could do sometimes as litigants.

PROF. KELCH: I think I agree with everyone. I think that the common law can be used as a mechanism to effectuate change in the law relating to animals, but at the same time I don't think that's going to happen without some change in society and the moral values of society itself and a change in the world-view. I think that if everybody in this country were a Darwinist, the law would probably be different as it relates to animals. The common law is meant to change; it is meant to evolve; it is meant to be a living organism. But that living organism only moves through changes in society, and I think that some of those changes are occurring such that the common law can be used as a mechanism here. I mean, there are changes in moral theory. Many people are talking about animal rights now from utilitarian perspective, from the right sort of perspective. There are changes in the way that we view the world. We know a lot more from science now that tells us that there is no impenetrable gulf between humans and animals. That gulf has been closed. That's a fact, a scientific fact, and as people come to accept it, I think that it will find its way into the law and into the common law. Social values are changing. People are taking this issue seriously. Look around you. This wouldn't have happened thirty years ago. It wouldn't have happened twenty years ago. The common law doesn't change in the abstract. It doesn't change arbitrarily. It changes when society changes, and I think society is changing. It isn't going to happen overnight. I'd also like to say one other thing about the trust concept that's been brought up. I seem to hear people talking as

though on the one hand you have an idea of trusts and on the other hand you have the idea of animals having rights. I'm not sure those two things are mutually exclusive, or that they can be mutually exclusive. I'm not an expert on trust, but my understanding is that in a trust you have a trustee and a beneficiary; and the beneficiary has certain rights with respect to the trustee, that is the beneficiary has at least the right that the trustee live up to his fiduciary duties. So I'm not sure that we can talk about these two things as though they are entirely separate.

DAVID WOLFSON: Just so people are aware of some examples of common law decisions that might be useful, one might refer to *Bueckner v. Hamel*⁴⁵ in the Court of Appeals of Texas. One of the judges in it stated that, "[s]ociety has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons, and hence, *mere* property. The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live."⁴⁶ So, while that is not necessarily what we are saying here, it is an example of language that can appear in common law decisions.

JANE HOFFMAN: There is another decision that would be interesting to look at here. It's what we call the Vermont Horse case, whereby a gentleman passed away and, upon his death, he required his two horses to be euthanized, even though they were perfectly healthy horses.⁴⁷ He also had a Cadillac he was disposing of—I don't know what he was doing with the Cadillac, maybe he was having it crushed—but the court basically forbade the killing of the two horses, and they distinguished between a Cadillac and these horses as two types of property and specified what could be done with your property. Maybe the law did not say outright that these horses have the right to life and they have a right independent of the owner, but the court actually took the step that they distinguished between types of property at least.

PROF. FRANCIONE: If you canvas the cases for the past 100 years, you will find a couple dozen cases over time in which judges make those sorts of statements; but again we're probably using more animals now in more horrific ways than ever before. So that's great that you get this in isolated decisions, but is this really enough and is this really moving it in the direction we need to move it in?

Indeed, in every state in the United States, you have the right to kill your companion animal if you wish to do so.

PROF. BRYANT: A couple of ideas that have circulated with respect to rights make someone like me very nervous. One is the idea of autonomy, independence, separateness, and it implies that nonhuman animals are in a position to be self-protective if given the opportunity to

⁴⁵ See 886 S.W.2d 368 (Tex. App. 1st Dist. 1994).

⁴⁶ *Id.* at 377–78 (emphasis in original).

⁴⁷ *In re Estate of Howard H. Brand*, No. 28473 (Vt. Prob. Ct., Chittenden County Mar. 17, 1999).

speak into a voice synthesizer or sign, or something like that. Another idea that makes me uncomfortable is the idea that because animals could communicate in ways we could understand or because they seem to make decisions the way we would make decisions, that on the basis of this reasoning ability that, too, is a claim to rights. That sort of thing makes me nervous when I look at what autonomy has meant to wild animals. As a good friend of mine said, “Well, as non-property and as a public trust asset, they are protected from extinction, but they are not protected from suffering.” It makes me nervous when I think about autonomy factors concerning women’s rights, and how no-fault divorce seemed like such a great idea, but nobody really considered that because women didn’t have equal earning power and had been dependent for so long, that suddenly giving them rights was really more beneficial to the man who was freed from providing care (because, after all, the woman was an autonomous person), and we had to back up on that. We made that shift, and then we had to rethink the amount of dependency that had been established in our society as to women *vis-a-vis* men, and we had to make those adjustments in areas like equitable property division. It seems to me that you can’t really have a concept of self-ownership without stepping into the arena of rights, and that’s what is very nontraditional about the separation of equitable and legal title that you’re talking about. So I think that when you are looking at the equitable or the issue of self-ownership, Professor Favre, you’re really talking a lot about rights and autonomy and being respected; so I see this as a very radical step, although you are not seeing it that way. But I see the trust relationship after that right has been established as being something of a necessary piece of the puzzle, because nonhuman animals are dependent in many ways on those of us who have more power in this society to be protective; and so I can’t see rights without someone to speak for the individual—I can’t really see that happening in isolation.

When I think about the notable accomplishments in this country, and I think about how in this room we have gathered together law people, but we are farther behind than countries where you can’t get the law people together, and everybody else has been able to move forward, which kind of goes to Professor Francione’s point and Professor Silverstein’s comment that the activism outside the courtrooms really is the adjunct, just as someone to speak for the autonomous creature is an adjunct in the process. When I think about the individuals who have so inspired me and they give me a reason to work on animal issues without becoming hopelessly depressed; I think of, for example, Farm Sanctuary and Lori and Gene Bauston—I think of how they work on their sanctuaries. They gain credibility by hands-on contact with the creatures for whom they speak. The other individual who springs to mind is Karen Davis with the United Poultry Concerns, where there is a certain amount of connection that gives her credibility when she talks about the feelings as well as the reasoning ability of chickens. But they also engage in education. Both of those entities talk

about not just education about battery cages or farm animal conditions, but they educate people about options, making it convenient not to rely on those products of exploitation. They work on legislation and they work on litigation. They take every strategy that's available, and they exploit it as fully as they possibly can. And so while we do focus on rights, and we do focus on trustee relationships, at some point they all have to come together in the public mind. I do think there are organizations, many of which just haven't sprung to mind right at the moment, but represented by you folks, who are very good users of the existing legal system, the common law as well as the legislature. I think that building on some of those achievements makes it possible for others of us to work on those bigger issues of rights in the more pure sense.

PROF. WISE: I want to raise a few quick points. I want to add a case to the ones discussed, which happens to be a case I worked on, one of the legion that I lost, but it was an interesting decision. It involved a dolphin. We sued under the Marine Mammal Protection Act to try to stop a dolphin from being sent to the United States Navy. There were actually two cases.⁴⁸ One was very interesting because we settled the case, and I signed the settlement agreement as attorney for the dolphin. This is an unpublished case. In the second case, the federal judge bounced me out for lack of standing. In fact, he struck the dolphin's name from the caption because he didn't have standing. No one else had standing either, but he only struck the dolphin's name. I don't know why. He ruled, however, that under Rule 17 of the Federal Rules of Civil Procedure, which in American law is that rule that talks about the capacity to sue or be sued, he said that a dolphin was not excluded from suing, and could have the capacity to sue or be sued. He said, however, that under the Federal Rules of Civil Procedure, one looks to the state in which the plaintiff is domiciled to determine how that state would treat the capacity of the plaintiff to sue. Then he did a remarkable analysis. It was brief but remarkable. He tried to determine the domicile of the dolphin. He found he didn't know whether it was Hawaii or Massachusetts, but in either state the dolphin couldn't sue. Remember, this dolphin was a thing, yet the judge is trying to determine where he is domiciled. I don't know whether he realized what he was doing, but I got the very distinct idea that if I had sued on behalf, say, of an automobile, he would not have tried to determine where that automobile was domiciled.

PROF. FRIESEN: Let me admit that I am from the state of Kansas originally, the state which made necessary *Brown v. Board of Education* and which recently repudiated Darwinism in the educational system, and I still have hope. I wanted to come back to the common law question, and I am going to be talking just briefly about a tort theory

⁴⁸ *Citizens to End Animal Suffering and Exploitation v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993); *Rainbow v. New England Aquarium*, (D. Mass. 1990) (unpublished).

that has been used to implement the positive duties and legislation into tort liability. When I do this I am thinking of Professor D'Amato's "soft-spot judge." I am going to imagine a judge with a soft spot that I am going to be litigating in front of who has normative impulses, and here's what I've been thinking about. We talked about rights and we talked about obligations. It seems to me that I'm not going to settle that debate, but if we focus on obligations and responsibilities, we're led quite naturally to a common law tort model. With a tort, of course, in order to prevail you've got to identify a duty. The first thing a judge is going to ask you, or your torts professor, is let's have duty first, then we'll see if we have breach, causation, and damages. The advantages, possibly, of proceeding under a tort theory over legislation, which I have a lot to say about later if there's time, include probably six advantages you can identify, if you have a soft spot judge, of course. Number one is that judges decide concrete cases. They don't decide cases in the abstract. Concrete cases, number two, take place on a record. A record has a potential for having many emotive facts as well as scientific expert testimony on the cognitive and emotional capacities of animals. All that factual record can be made very powerfully before a single judge. Third, judges take small steps. They don't take giant steps, and you can persuade judges to make a small step where you couldn't perhaps persuade legislature to make a huge one. Fourth, judges are often insulated from public retaliation, although not always. I can give you names of judges who have lost their jobs because they set aside a death penalty or because they ordered busing into segregated schools; but many judges are not immediately vulnerable to public retaliation, not as immediately as legislators. Fifth, judges do disregard hostile precedent. I've seen it happen in my own field, as mentioned earlier this morning. Sixth, it's a jury question. If you can get to a jury, you often find that juries will do things you wouldn't have believed possible before the fact. So what tort theory could you use?

This morning there was a reference to an implied cause of action as being a fairly futile sort of theory in federal court. The implied cause of action was invented by state courts. It is a common law theory and a very live theory in state courts. It even has its own place in the Restatement (Second) of Torts, section 874A, if anybody wants to look that up.⁴⁹ That section says that if there's a positive duty found in legislation or in constitutional law and no remedy supplied for its breach, the court has the power to supply a remedy for its breach. So if we go looking for a duty in legislation, you have to identify some duty toward the animal. I was trying to think of an example in which a criminal statute such as a statute prohibiting cruelty to animals had been the occasion for a tort, making it into an implied cause of action or tort, and I couldn't think of one. I don't say that that's not possible, but let me give you a couple of examples from my field, which is civil rights for humans, where that has occurred. A prominent case from

⁴⁹ *Restatement (Second) of Torts* § 874A (1979).

Oregon examined the question whether a woman who had been battered by her husband could sue the police officer who had failed to arrest the husband when he was reported, and the court responded, yes, there was a cause of action in tort for that, because there was a mandatory arrest order in that police department, which the officer had disregarded.⁵⁰ Thus, the court supplied a tort remedy. A second example is, and this is even closer to home, perhaps, that five or six states have in their Bills of Rights a clause that says prisoners shall be not be treated with unnecessary rigor. This came out of the Prison Reform Movement of the 1800s, whereby people sought to make prisons more humane. There is no duty supplied for its breach, but several courts have found that inhumane conditions in prisons are a breach of that duty and have allowed prisoners to sue in tort. That's just one suggestion that I wanted to make. However, I don't know where you would look in regulations, statutes, or constitutions for positive duties toward animals that you could argue could be a source of a duty in tort.

PROF. D'AMATO: In a way you could say a cruelty to animal statute, I don't care how many exceptions are in it, can only have been designed for the animal. You can say that the impetus for that was to protect animals from cruelty, so maybe you have the statutory standard that's been breached for a tort case.⁵¹

PROF. FRANCIONE: The problem is you have multiple rationales. They were originally passed in order to establish obligations that were owed directly to animals. On the other hand, there were other reasons, such as protection of public morals. As a matter of fact, when the Model Penal Code came out and it had its section on anti-cruelty, it didn't even mention the interests of the animals. It neglected everything that happened in the nineteenth century and said anti-cruelty legislation was for the protection of public morals.

PROF. RADFORD: I think from the United Kingdom's perspective, we have very little to contribute so far as the common law is concerned. Largely that is because the field has been occupied principally by legislation and, given the fact that under our constitutional arrangement, the courts are subservient to the legislature, they're very reluctant to do anything too radical in an area that's traditionally been settled by Parliament. Two and now three brief points do come to mind.

First of all, with regard to one area of the common law, which is not mine, but it's come to my mind whilst we've been sitting here, in the English courts it's been held that an embryo in its early stages of development is not a person. Notwithstanding that, the courts have entertained challenges; they've not exactly given the embryo standing, but they've given parties who seek to represent the interests of the embryo standing, regardless of the fact that the embryo itself isn't regarded as a person. There may be some mileage in that.

⁵⁰ *Nearing v. Weaver*, 656 P.2d 965 (Or. 1983).

⁵¹ For examples of this concept, see Sunstein, *supra* n. 21.

The second point is with regard to statutory intention. Certainly in the United Kingdom, in interpreting legislation, and particularly the anti-cruelty legislation, the courts have been very definite in the fact that this legislation has been passed by Parliament to protect animals and for no other purpose; and the significance of that approach—I don't want to get too technical—but the significance of that approach has been in the way in which the court's have applied the *mens rea* test to cruelty. For those of you who are not lawyers, *mens rea* is one of these dreadful Latin tags. What it relates to is the state of mind of the defendant at the time that they committed the alleged offense. Essentially, it comes down to this. Do you have to show that the defendant intended what he did—that is, a subjective test—or is it enough to show that a reasonable person in the same situation would have realized the consequences of their action. It used to be said, it was argued before the courts, that there had to be a positive intention, that you had to demonstrate the defendant intended abuse. The court said that cannot have been the intention of Parliament.

Professor Francione, you mentioned dehorning earlier. The case I have in mind concerned the dehorning of cattle, and the defense was that it was necessary suffering because by dehorning cattle, you could get more cattle in the cattle truck.⁵² It was therefore economic. They didn't gore one another whilst they were traveling, and certain other economic arguments were put forward. The court said, first of all, that the economic arguments did not override the suffering and, secondly, it could not be the case that someone could turn up to court and say, well I thought it was all right. In other words, it was a subjective test. Because, and this was the way in which the court put it, if a person could do that, they could therefore avoid the protection that Parliament had created. Those are two important principles. They're also quite significant in that this wasn't recent. This was in 1889. It is interesting that a Victorian high court did that and it's still the basis of the unnecessary suffering test in the United Kingdom.

PROF. FRANCIONE: But didn't the court in that case reject the argument that it was necessary economically? For example, in the Irish case, the *Callaghan* case,⁵³ the court said that the owners of the cattle had determined that dehorning was necessary in order to pack the cattle in and keep them from injuring themselves and their handlers. I thought the court, I haven't obviously read *Ford v. Wiley* in a couple of years, but my recollection is that the court rejected those arguments in that case. Had a good argument been made that it was economically necessary, I thought the court would have accepted it, that they rejected it because they said there wasn't evidence that it was necessary economically.

⁵² See *Ford v. Wiley*, 23 Eng. Rep. 203 (Q.B.D. 1889).

⁵³ *Callaghan v. Soc. for the Prevention of Cruelty to Animals*, 16 L.R. Ir. 325 (C.P.D. 1885).

PROF. RADFORD: But the law in the United Kingdom, following on from *Ford v. Wiley*, is that an economic argument of itself does not automatically make suffering necessary.

DAVID WOLFSON: One thing I would add is also similar to Steve Wise's story. Sometimes you can go to a court when you should have standing, and you don't have standing, and they just sort of ignore the issue. We had a situation, it was actually in New York, in which under the West Side Highway, there was effectively a tunnel where a lot of homeless people used to live, where Amtrak used to run trains through, and the homeless people had a lot of pets. When they needed to move the people out of the tunnel to reoccupy it for a train, they started to destroy things and harm their pets; and so a group brought an action to us for a temporary restraining order (TRO) to stop the destruction of the property within the tunnel by Amtrak so we could get the pets out. Now the group that went in and asked for that had no standing whatsoever, but the court and the particular judge found this a worthwhile thing to do and so the court granted a TRO. Admittedly, the other side didn't make a very good argument, but the point isn't necessarily raised. Sometimes you can get away with something that you wouldn't necessarily expect.

PROF. RADFORD: I'm sure that this isn't being overlooked, but it's not actually been mentioned, although slightly in passing. This is the importance of the work that is being done in the scientific field, being brought to the attention of courts and legislatures. I think certainly in the United Kingdom, one of the extremely and possibly amongst the most important elements, which has influenced both public opinion and the opinion of policy makers, is the work of animal behaviorists, ethologists, and others. Not just because it's actually extremely good work and makes valid points, but with courts and politicians, it's not their home territory, and they're uneasy about challenging experts in that field. They're not sure how to do it. The importance of using the scientific community can't be overstated.

PROF. WISE: I'm unclear about the one aspect of the trust problem. I, too, am merely an animal rights lawyer and not a trust lawyer or professor. But it seems that one rule is that you can't own a person and another is that only persons can own things. I don't know if those are true, but if they are, then an animal who is a person can't own herself because she's a person, and if she's a thing, she can't own herself because she's a thing.

PROF. FAVRE: My response to that is your logic is imminently correct under existing principles, and perhaps I underestimated the amount of change it would take to get to the point where I want to be. It indeed would be a radical change from where we are, but I try and couch it in terms that are least threatening to people. Under existing property principles, obviously an animal can't have title on itself, but I'm going to suggest that that might be an appropriate goal to try to achieve.

PROF. D'AMATO: Isn't there a parallel to international law where the ocean floor used to be considered *terra nullius*—ownable by anybody—that has now changed to where it's owned by everybody? Now, that's a big change because it means that the world community has a right to the parceling out of mining interests on the ocean floor, whereas before it was first given to the person who staked out a claim. So in a sense, I hear you saying that if we could put some kind of ownership back in the animals, whether it's self-ownership or whatever the concept is, you will have taken them out of the things of nature somehow and put them in a more legal posture. If we could combine it with mine—combining them was your idea—combine it with the trust, we might have some notion that we are trustees for living things and that that makes them different from rocks and lumps of coal.

PROF. FRANCIONE: It eradicates their property status?

PROF. D'AMATO: Well, of course, it would be—well, you're not in favor of defending their property status.

PROF. FRANCIONE: No, no, but you're the one who's saying that we can keep the property status.

PROF. D'AMATO: No, I don't care what happens to the property status.

PROF. FRIESEN: I see another parallel. In 1866, Congress was faced with the task of defining civil rights for newly emancipated slaves; and they did not begin with a concept of civil rights as we think of it now, but they evolved a list of the attributes of legal personhood.⁵⁴ The attributes of legal personhood that were enacted in 1866 were as follows: the right to sue, the right to be sued, the right to own property, the right to make binding contracts, the right to testify in court. Each one of those is an attribute of personhood, which may be one for an animal, not altogether perhaps, but one at a time until it adds up to the whole thing.

PROF. D'AMATO: You don't need the concept of personhood, then, because you're filling it in a more realistic way.

PROF. FRIESEN: It's legal personhood, though.

PROF. BRYANT: Yes.

PANEL DISCUSSION IV

This Panel Discussion features Professors Favre, Freshman, Friesen, Garner, Kelch, Radford, Robinson, Silverstein, and Singer.

JANE HOFFMAN: We are constantly challenged on where to draw the line, and I would like to have Professor Singer address this line-drawing concept about which animals should be worthy of consideration and which shouldn't, from a philosophical basis.

PROF. SINGER: Not an easy topic to address without making some enemies. I notice the applause for the statement about defense of insects in the earlier session. So, let me just say that for me, as has al-

⁵⁴ See 42 U.S.C. § 1981 (2001).

ready been said by a number of people around the panel, what is important is that we are talking about sentient beings. For me, I am concerned about beings who have interests, beings that you can harm in the most obvious and straightforward sense, that is, you can make things go worse for them. You can imagine what it is like to be them. They have a subjective point of view. They have conscious experiences, and you can imagine that they can feel pain or suffer in some way, and in that very direct sense—they can be harmed. So, that's the category of beings that I am directly concerned with.

I think there are other living things, certainly, definitely plants, and arguably some things that belong to the animal kingdom of which that might not be true; and we might regret the destruction of a venerable old tree, for example, but I think it's a different kind of thing from wanting to prevent harm to a being who can suffer. So then, of course, you still have to ask which beings are sentient beings, and that's a very difficult question; because it's not just a factual question, that is, not just a question of looking at the nervous systems that the beings have, but it also is a philosophical question of asking what do we know about nervous systems or behavior, for that matter, that we can associate with consciousness, with experiences? So nervous systems might be quite different from our own, but can we be confident that they do not involve consciousness or sentience? I think that really what we have is some very clear cases, and essentially I would say all vertebrate animals are clear cases in which the nervous system is sufficiently like ours, the behavior is sufficiently like ours, and there is a common evolutionary origin. It seems to me quite clear that they are sentient beings.

Then you have a gray area, if you like, with increasing shades of grayness, as you move to less and less complex nervous systems, so that beyond vertebrates you get to, say, crustacea or the octopus which is a mollusk but shows quite highly complex behavior and ability to learn and so on. It seems to me very plausible to say that they are sentient beings, not as clear as to say that dogs or pigs are sentient beings, but very plausible. Then you get down to things like an oyster, say, and there was some discussion of insects. And it just becomes more difficult to say. Insect behavior, for example, looks like it's involved with sentience, but it's not impossible to explain it in ways that don't require sentience, because of course we know that we can build quite complex behaving robots, which are not sentient. And although insects are not robots, we can't be absolutely confident, in my view, that they're sentient. So that's why I think it was reasonable to say, as I think it was Steven Wise who said, I'm not going to bring cases about rights for insects on the grounds that it would be very difficult, you could argue impossible, to establish that they're sentient.

On the other hand, I think, not talking now about the courts, but in general, you ought to give the benefit of the doubt to anything that might be sentient. When we talk about what we can do through the courts or through legislation, I think you have to be realistic about

this. I agree with Joyce Tischler of the Animal Legal Defense Fund that we should get started with the clear cases. There's so much to be done for vertebrates, for birds and mammals, specifically. Let's move along with them and leave to another generation perhaps the issue of where to extend the question of legal status for animals once we get the kind of legal standing we want for all vertebrate animals.

DAVID WOLFSON: One thing that leads from that is as we think of the category of animals that was described as being identifiable as having sentience, and as we think of the various arguments that we've discussed throughout the day in terms of either legal rights or greater legal protection through trusts, guardianship, or whatever category we think of, one of the criticisms of the movement toward greater protection of animals that seems to be prevalent is that to provide greater protection would involve such a large number of lawsuits, cases brought before the courts and so on, that we would overburden a legal system that is already stretched to perhaps its capacity at this point. In doing so, we might somehow have a negative impact upon the justice system from a human perspective, and I do think it's a reasonable question to ask—exactly how in this world, whichever way we see it, be it the terms of a trust argument or a legal rights argument, one could adequately handle the arena that we're thinking of creating.

PROF. FAVRE: I think the environmental movement gives us a very good way to gauge the impact of this kind of negative argument. I remember very clearly the argument in 1970 was that if we passed these rights and all these rights actually had citizen suits in them, that the courts were going to be overwhelmed with little old ladies in tennis shoes coming in and suing everybody in sight. And obviously it has not worked out that way, because to file a lawsuit is a very complex thing. It takes resources to do it; it takes distinguishing important from unimportant activities; it takes a sense of prioritization. And I suspect that the same thing would happen to the extent that maybe we have opened the door for some suits under the Animal Welfare Act, even though there is not a citizen suit provision, but again, you're talking about a very small number of cases trying to establish precedents, which you then hope will apply to lots of other situations.

JANE HOFFMAN: Professor Favre, could you very quickly explain standing as a right that's built into a statute as opposed to general standing?

PROF. FAVRE: Under the Clean Air Act and the Clean Water Act, for example, Congress specifically put into those Acts the right of citizens to sue to enforce the Acts under certain circumstances. The constitutional standing requirement is still there, which requires that you as a plaintiff have to have been harmed, although what harm means has been stretched almost to the breaking point in the environmental field because the courts have been fairly liberal in allowing that suit to come in. Under the Animal Welfare Act, there is no citizen suit provision and, indeed, a large number of organizations have spent a lot of money in Washington D.C. lobbying Congress to get a citizen suit pro-

vision. Although I think the last couple of years we sort of gave up on that one—without any positive impact, as the notion of a citizen suit provision for animals has not been accepted by Congress.

PROF. ROBINSON: I think the question of access to the courts and burdening the courts is an interesting one. In the case of environmental litigation, we've seen that the companies in America have been the ones to make most use of those rights. The judicial review of environmental regulations by industry has outnumbered the number of citizen suits enormously. Maybe only 20% of the total volume of environmental litigation involved public interest questions, and the others are testing whether the government's interpretation of the implementation of the statutes was appropriate. So I think as we begin to change the status of animals, you won't find—and there are organized economic interests that would have a different point of view—you won't find them sleeping. They will challenge that process and use the courts as well. The burden, therefore, it seems to me, is not so much from the public sector but from social change generally.

Just two quick points further. Tactically, I think you can begin using sentient creatures to address the law, and I don't think that by doing so you close the door to developing legal status for other types of living things. I don't see these as mutually exclusive approaches. Finally, one of the things about the courts—and this point that Professor Favre makes on standing—is that the Supreme Court has chosen to narrow standing, narrow the rights of individuals to come into court bit by bit, using a constitutional argument that Article 3 of the Constitution requires a very clear injury and a direct nexus, direct connection, between the injured person who is the plaintiff and the right that they are choosing to litigate, and they're going to continue narrowing that. I think the indications are that the process hasn't ended.

The Supreme Court has also announced through a series of decisions that they're going to defer much more to the states and try to cut back on what the federal government and Congress does. There was a labor decision, whereby parole officers who didn't like working overtime in Maine sued Maine under federal labor laws about how long an employee could work, and the Supreme Court found that Maine was a sovereign state.⁵⁵ Maine was not just part of the United States. It was a sovereign state in the federation and Maine, therefore, could not be sued without its consent. I think that this case will result in an increasing number of states deciding they can't be sued without their consent. The question is then going to be what do you do with the state capitals, because it's in the legislatures of each state that you will make most of these statutory reforms. The Supreme Court, then, if it follows its own precedent, will defer to the states. So if a state becomes extremely progressive on these issues or, on the other hand, engages in creationism and other sorts of policies, you will find the Supreme Court saying, well, we're a federation, these are matters left to the

⁵⁵ *Alden v. Maine*, 527 U.S. 706 (1999).

state, let the state decide. These are the things that under our founding fathers' view belong to the states. So I think there is a double edged sword there, and it means those who want to develop this area of law are going to have to be quite active at the state level, and the focus of the last 20 years on Congress and on the federal courts may need to be redirected.

PROF. SILVERSTEIN: I just want to respond very briefly to this criticism about the burden on the courts that might result. This criticism strikes me as not that different from the criticism of the proliferation of rights. If we keep doing these things we will have a proliferation of rights and that will undermine rights for those of us who already have them. If we allow the statute's creation and so on and so forth, we're going to have a proliferation of lawsuits and litigation and that will burden the courts. For those of us who already have access to them, this strikes me as not a very powerful argument. It's an argument that you've heard again and again whenever new groups, new entities gain access to the courts. You heard it with the civil rights movement. You heard it with the women's rights movement. You heard it with the Americans With Disabilities Act—oh no, we're going to pass this act and now there are going to be all of these lawsuits. You heard it when the Supreme Court decided that sexual harassment was protected against under the Civil Rights Act—oh no, we're going to have all of these lawsuits concerning sexual harassment burdening the courts. These just strike me as not terribly persuasive arguments, and I think when you hear this kind of criticism with respect to animal issues, one ought to strongly resist this kind of argument.

PROF. GARNER: On a related issue, I think part of the problem is that the animal rights movement is unique as far as social movement goes, because it's the only social movement, as far as I can see, whose beneficiaries are not human. Given that, rightly or wrongly, animal rights' objectives are seen to be damaging to human interests. Thus, I think the animal rights movement faces very difficult problems in trying to persuade legislators to pass significant measures. One strategy that might be adopted, which the animal rights movement uses already, is to focus on the human benefits of reforms in the ways animals are treated. Clearly, there are significant human costs of animal exploitation in terms of animal agriculture and environmental costs of intensive farming, and so forth. It is ironic here, for instance, that in the United Kingdom, the banning of veal crates was caused not by the process of animal rights activists, although they did cause the issue to be at the top of the political agenda for a while, but it was caused by BSE.⁵⁶ So, it seems to me that if we can relate the exploitation of animals to the human costs, we might get a bit further.

⁵⁶ The exact biology of bovine spongiform encephalopathy, commonly known as mad cow disease, is still uncertain. BSE is thought to be transmitted between cows when infected cows are reduced to meat and bone meal and fed to other cows. Since the discovery of BSE in England in the 1980s, many countries have prohibited this feeding

DAVID WOLFSON: If someone wanted to lobby or move toward some worthwhile and realistic legislation, either on the federal or state level, perhaps the panelists have an opinion regarding where would be the best place to start and why, and what sort of issues would be encountered.

PROF. FRIESEN: I'm going to be brief because I know there will be a lot of ideas. I would create a state agency that has the powers to enforce expanded anti-cruelty statutes. I would have an ombudsman kind of staff for investigating and prosecuting—well, not criminal prosecuting—but prosecuting complaints under that civilly. I think that I would also focus on what's been a little bit of a movement in the state initiative process, that is, passing strict regulations on factory farming. In South Dakota and Colorado last year, two citizen initiatives resulted in legislation getting passed to restrict hog farming severely.⁵⁷ These are enormous operations. They're very polluting and very stinky. The people were interested in having them limited. If the regulatory mechanism could be employed to make these factories pay the true cost of their operations, their product would soon become too expensive for people to eat. The true cost of their operations include the harm to human health—think of the tobacco industry—but more immediately, the harm caused by runoff to agricultural land and the water table. If they had to bear the cost of all those things, I don't think they could stay in business.

PROF. SINGER: I just want to throw out a question regarding that to other people on the panel, because this is a problem we have had in Australia, which is also a federal system. If you try and regulate factory farming through state legislation—okay, I understand that you can regulate it in the sense of pollution—that you don't want to have it in your state. But if you try and regulate it on welfare grounds by saying that, for example, the state of North Carolina will not allow sows in crates, in individual stalls, then the argument is going to be that this will drive the pig producing industry out of North Carolina and into some other state that has lower standards. Everyone is familiar with this in Europe. How is this going to work in the United States? If you try and use state legislation to improve the lot of farm animals, you're

practice for ruminants like cows. Nearly 200,000 cases of BSE have been reported worldwide, and millions of animals have been destroyed in an attempt to prevent even more serious outbreaks. There has not been a documented outbreak of BSE in the United States. BSE can incubate in animals and humans for years before symptoms appear. If a person eats the meat of an infected cow, she may eventually manifest symptoms of a new variant of Creutzfeldt-Jakob disease, a degenerative neurological condition.

⁵⁷ South Dakota voters passed Constitutional Amendment E to Art. XVII of the state Constitution in 1998 to prohibit corporate hog farming in that state; Colorado voters passed Amendment 14 to Title 25, Col. Rev. Stat. § 25-8-501.1 in 1998 to more closely regulate the environmental impacts (particularly relating to water quality) of hog farms in that state. See National Resources Defense Council, *America's Animal Factories: How States Fail to Prevent Pollution from Livestock Waste*, <<http://www.nrdc.org/water/pollution/factor/aafinx.asp>> (accessed Mar. 6, 2002).

not going to be able to prevent the import of products from elsewhere. Has anyone got an answer to that?

DAVID WOLFSON: I guess the question is that if a state passed a statute that prohibits the battery cage, could the producers of eggs in that state bring into court the argument that that law was not a good law because they have been basically put at an economic disadvantage because of the import of cheaper products from another state.

PROF. SINGER: But more than that, you're not actually doing any good for chickens, for hens, right? I mean if you move the battery industry from Maryland to Alabama and exactly as many hens are in battery cages across the United States as before, they're just geographically in a different place, and you haven't done any good for hens.

DAVID WOLFSON: That's true. I think if I could break that up. First, one could argue that the precedent is good whether or not it had an impact in that state; but I'm interested in terms of the economic argument and maybe in the context of the European Union, there might be something similar.

PROF. RADFORD: I think the issue regarding whether the law would be a good law is frankly irrelevant, because the politicians simply won't pass the law if they think that their state is going to be put at an economic disadvantage. Certainly, the experience in the United Kingdom in relation to the European Union is that it's simply not worth even attempting to introduce law unilaterally in those areas that the European Union has competence for. It has to be done at a European level.

DAVID WOLFSON: I would like to add here that the one thing you have in the United States that makes it a little different politically is that certain states provide for ballot initiatives;⁵⁸ so while we may have discussed the process whereby the legislature would not make the decision for an economic benefit, you could actually enact a statute that is crazy economically, but if enough people in the population agreed with it and went through the ballot process, you'd have the law passed.

PROF. FAVRE: Talking about the European Union, I think, brings up another leverage point that we ought to think about. We have talked about state-passed initiatives and federal legislation, but the international community is still there, and it is a growingly important area for leveraging what happens in the country. I think that under the World Trade Agreement and with the European Union taking basically such good, positive first steps, it may be that the United States is going to find itself leveraged into some positions over animal welfare conditions, and we may be able to do things with outside pressure that we wouldn't otherwise be able to do. Or at least it may create a context in which the United States would be embarrassed into the position of having to acknowledge that there are economic ways to raise chickens

⁵⁸ For a discussion of recent ballot initiatives in the animal context, see Aaron Lake, 1998 *Legislative Review*, 5 *Animal L.* 89 (1998).

and make money from the sale of eggs without battery cages in Europe, so why can't we bring that over to the United States. The idea is to make the economic argument and take it up to a higher level and deal with it at that level.

PROF. KELCH: I just wanted to make a couple of points. When you start talking about legislation, you have to start worrying about lobbying, and you have to start worrying about the money that's on the other side of the issue. Therefore, if you're choosing issues, I suppose if you're trying to be particularly pragmatic, you're going to analyze the opposition on any particular issue, and you're going to ask one, whether it's organized; and two, how much money they have, and that may help you in making choices on legislative initiatives if you want to do this in a stepwise fashion. Related to what Professor Favre said, I think that the European Economic Union may ultimately have an impact here in this country because their laws are much more strict with respect to animals. The United States has been challenging certain import restrictions of the European Union, and the United States has been fighting back with GATT⁵⁹ saying, "well, you can't do that." I'm not an expert on GATT, but I think that if the United States starts losing on issues, you're going to see the United States changing their practices order to avoid not being able to export things.

PROF. ROBINSON: One of the real problems when we look at whether we could ban an entire activity in a given state is how we go about doing it. The United States constitution has the Dormant Commerce Clause,⁶⁰ which says that if you regulate commerce in a way that puts a burden on interstate commerce—such as by creating a tariff—it's unconstitutional and will be struck down by the federal court. So you have to show an overriding state interest in order to establish a prohibition. If I had a contract to import cheap pork from a factory farm and you were trying to stop me from importing that cheaper pig meat, that might be done in such a way that a federal court would strike it down as a burden on interstate commerce. If we were to restrict all farming for everyone neutrally, and say you can't have any factory farms in our state, that might be constitutional; and the fact that the activity fled to another state wouldn't be so bad in the sense that it would cause the people in the other state to want to take similar action and eventually close down that kind of activity because they would have all of the extra costs building up in their state. There are some states that, for instance, have never created a process for having a hazardous waste landfill, and the states that have hazardous waste landfills now get all the hazardous waste from factories in places like Maryland that don't have any hazardous waste landfills.

The ideology, of course, is that we want free trade in all property, so that free trade in all animal property is something that will be presumptively good. You can only restrict that trade right now if you have

⁵⁹ *General Agreement on Tariffs and Trade* (Oct. 30, 1947), 61 Stat. A-11.

⁶⁰ U.S. Const. art. I, § 8(3).

another treaty like the Convention on the International Trade in Endangered Species or it is a phytosanitary concern. So states could begin to structure their phytosanitary laws in such a way as to find, for instance, as happened with shrimp farming in Taiwan, that it was actually unsanitary to have big shrimp farms. One shrimp farm in Taiwan actually went bankrupt because they couldn't control the disease that had broken out in the large concentrations of shrimp in a very effective way. The amount of care that has to be put into a factory farm to keep everybody healthy in that farm is enormous, I suppose. Thus, one could create sanitary rules that would make it very impractical to run those operations or restrict the production without some showing that the production from those farms was extra sanitary.

PROF. SILVERSTEIN: I just want to say with respect to what kinds of legislation we might attempt, that we ought to think of legislation not unlike we think of litigation. That is to say that it's not merely the end goal of the particular legislation or the end goal of the particular litigation that is the only thing that is important. Among the other things that are important is how we might use a legislative campaign to raise consciousness, to gain publicity, to educate, to mobilize the movement, and so on and so forth. One of the nice things about initiative campaigns at the state level is that a small group of people can gain a lot of attention by putting something on a ballot and get that going for discussion across the nation and get something on the political agenda across the nation. I think of physician-assisted suicide initiatives and how much publicity and discussion in the political sphere it has raised, just when it happens in one state. So people ought to be thinking in those terms with respect to legislation as well as with respect to litigation.

DAVID WOLFSON: Also, I think that the type of language you can put into legislation, whether it be in the legislation itself or in the preamble to the legislation, can be extremely useful in terms of whether you want to wait to try to do something in court. An example is the Treaty of Rome when animals were classified as sentient beings,⁶¹ and another is, as Professor D'Amato was speaking of earlier, using language in whale treaties to argue some sort of customary law right.⁶²

PROF. RADFORD: To take that point further about the language, there may be some merit in considering whether it's preferable to impose positive duties through legislation rather than attempting to prohibit things, because when one attempts to prohibit something that has been going on, obviously the civil liberties arguments over here and probably constitutional arguments come into play, and the issue can get lost in other relatively relevant issues that the media takes up. Whereas, if you say we're not aiming to stop you doing something; what we're aiming to do is to get you to do it better. Imposing responsibility on those who own animals and are responsible for the way in

⁶¹ See Wolfson, *supra* n. 17.

⁶² See D'Amato & Chopra, *supra* n. 44.

which they are looked after may be a better way of going forward; not the ultimate answer, but in the short term, a better way of going forward rather than trying to prohibit something outright. And associated with that is bringing in the scientific evidence which I was speaking of earlier. It puts the other side on the back foot. You're not saying you can't make money out of this. You're not saying you've got to stop it and do something else. What you're saying is you can carry on but you've got to do it to higher standards, and the standards that you're looking for are those that scientific experts say the animals require. That is a much more difficult argument to counter than the one about "oh, we've always done this, and now our livelihood is going to be lost, or we're not going to be able to do it"—civil liberties, freedom, and the rest of it.

DAVID WOLFSON: Could you think of a specific example, maybe in the farming context? Would this be something like saying you have to give a calf used for veal a space to turn around?

PROF. RADFORD: Yes, in respect to the welfare legislation regarding farm animals in the United Kingdom, it's by no means perfect, and we would never claim it is. It is an ongoing campaign to improve it, but there are significant schedules of objective requirements delineating space requirements, prohibiting things like slippery floors and protrusions that may cause damage or injury, giving revisions about periods of light, provisions about ventilation, the way they are fed, the sort of diet, provisions about how often they have to be inspected. Similarly, with transport, again by no means perfect, but there are detailed provisions about journey plans. The journey plans have to be submitted to the ministry, they have to be approved, they have to be signed, they have to be kept for six months so they're checked up on. People who drive transport lorries have to demonstrate that they are proficient, and their authorization can be taken away from them. It goes a long way. It's by no means perfect, but it does go a long way; and the important thing is that those who are engaged in farming or transport can't say our livelihood is being taken away. What they are asked to do is to operate at acceptable standards in the light of our scientific knowledge. Our scientific knowledge of the needs of animals has advanced immensely even in the last decade. It also has to be said if you go—I don't know if this is possible in the United States—but, if you can go for the standards of the best in the industry, then it's actually to their advantage, and it's possible to get them at least a bit on side, because you're cutting out the cowboys, frankly.

PROF. FAVRE: I'd like to take two different threads and put a suggestion on the table. One is the problem of bringing in the federal level of government into the issue of animal husbandry issues, which is really more traditionally a state issue; and the World Trade Organization problem of free trade, in that if Europe should decide they don't want to allow imports of animals raised in the United States under certain conditions, the present view of the World Trade Organization is that that probably wouldn't be allowed, because they want free trade

without limitations on methodology of raising. The exception under World Trade Organization, and one that allows our federal government to get more involved with these issues, if we want that, is the creation of treaties. If you have a treaty that goes to the issue of creating standards for the care and raising of animals, or the keeping of animals, then those conditions, even though they may impose new economic requirements on the raising of those animals, would be acceptable under World Trade Organization. As CITES gives leverage to the federal government's deal with endangered species that otherwise doesn't happen in the constitution, such an international agreement would now give to the federal government a whole new power to deal with those issues. It just so happens that a friend of mine, Bill Clark from Israel and I tried to draft such a treaty about a decade ago, so we actually have a structure in place and have dealt with a number of different topics and various people in Europe who we have talked to over time. What we don't have at the moment is a country to come forward and actually host the first meeting of the parties, but I think with resources and focus that actually is possible, and I think it might be something worth putting some resources into.

PROF. FRESHMAN: Let's go back to something that Professor Singer raised, about what's the good of abolishing things in a particular state. Maybe one possibility is that we can look at states as little laboratories for experiments. We've had experimenting in the states and it shows what might work there, and that may have to do with abolition. For example, suppose we ban a particular form of raising chickens. What will happen at that point? It could be that things simply shift to another state, but if there are already producers within a particular state, the capital not being completely mobile, they will have some incentive to try and figure out some other way. Now, if Gary Francione were here, he might say, "Well, that might turn out to be even more inhumane. Why not abolish completely?" But, if we did do that, the producers in a particular state might come up with a better alternative and that would then encourage people in other states to try to do that as well. Let me give you one example of how that might work. Some years ago, people proposed a federal equal rights amendment that failed. One of the arguments made against it was that if the Equal Rights Amendment passed at a federal level, it would lead to all sorts of disastrous consequences. In the meantime, a number of states, including even relatively conservative states, passed little Equal Rights Amendments. They did not lead to disasters in those states, and now some people are able to say, "Look, this didn't lead to disasters in these states. Maybe it will work at the federal level." So, in a similar way, that's one possibility. It is, as they like to say in my profession, an empirical question of what would happen, which means I won't deal with exactly what will happen, but at least that's one possibility.

PROF. GARNER: I would make one general point and one more specific one. The general point is you get what you can, and what you get will depend on how much public support there is for it. We talk about

organizations like the World Trade Organization and even the European Union as organizations as though they're out there and not influenced at all. The World Trade Organization does what it can get away with, and the way of insuring that it does what you want it to do is to relentlessly campaign and get public support. That's the first general point. The more specific one is that I think the experience in Britain is that animal welfare legislation is likely to be achieved if there is an existing state agency with bureaucrats in it, even if it starts off at a very low level. On farm animal welfare, for instance, an Act in 1968 set up a system within the Ministry of Agriculture which determines animal welfare policy. Even though that legislation was only a very general anti-cruelty statute with no specific provisions, it has led on secondary legislation to a variety of abolitionist measures such as the veal crate and sow stalls and tethers and so forth. Another advantage of having state agencies is they give access points to activists and access points to animal rights groups. For instance, the law in animal experimentation in the United Kingdom set up an inspector within the home office and the Animal Procedures Committee, which is a group of lay people who oversees legislation. That provides a really good access point for animal rights groups, which they have used subsequent to the act to get benefits for animals. One specific instance is, of course, that in the last few months, cosmetic testing has been banned in the United Kingdom; so even though the Act that was passed in 1968 didn't prohibit anything, it has led ultimately to abolitionist measures.

PROF. FRIESEN: I do most of my work in state constitutions. Interestingly, in the 16 states that have equal rights amendments, not only was there not a disaster, but most of the beneficiaries of those happened to be men, as it turned out. Custodial rights, family obligations were equally shared and so forth and that is sort of an irony of history. Equal rights amendments are only the least of it, though. Many, many state ballot initiatives have resulted in new individual rights, rights of privacy, rights that even regulated nuclear siting at one point, and animal rights issues. According to one report I read recently, since 1990 there have been 24 campaigns that involved an issue relating to animal welfare, 17 of the 24 campaigns were won by the pro-animal side through the initiative process, which is a successful record. Now, lately the other side has been getting very well funded and, especially on anything to do having to do with hunting, they have been winning over the pro-animal ones. Has anyone heard of the National Animal Interest Alliance? Do you know these are people who have banded together, I quote, "for the purpose of supporting anyone who uses animals for food, research, or profit." They have a friend in Orrin Hatch and they have a lot of money. Legislative or constitutional amendments to protect animal welfare need to treat hunting as a special category, especially out in the West. It's probably the last place that reform will be successful; although in California, I should add before I leave this topic, the initiative to ban leghold traps did pass, and an initiative to ban the use of cyanide to kill coyotes passed, so there are

some victories. But the hunters are really, really up in arms, as it were, in the West. I should say also that there have been several initiatives to abolish cock fighting. It passed in Arizona by a large margin, something like 68% in Arizona, home of the cowboys, to ban cock fighting, and there are only three states left —Oklahoma is one of them— and there will be a ballot measure next year to ban it there.⁶³ So it's a small abolitionist issue, but it's been a successful one.

PROF. RADFORD: Professor Garner said that cosmetic testing on animals had been banned in the United Kingdom, and that is certainly the effect, but no law has been passed to ban it. We're back to our friend licensing, because in order to carry out a scientific procedure on an animal, the procedure and the person doing it and the establishment, each of those three has to be licensed by the home secretary. What the home secretary has done is to announce that in the exercise of his discretion, he's no longer convinced that cosmetic testing is appropriate or necessary, and therefore he won't issue any further licenses for it. So, two things come out of that: one is how useful licensing can be, and secondly, the importance, as Professor Garner said, of public opinion. What has influenced the secretary's decision is public opinion. What influenced the European Commission on banning imports of, for example, beef that has been treated with hormones in the United States, wasn't that they were lying awake at night on their own initiative thinking what a dreadful thing this is. It was that public opinion brought it to their attention and they've acted in response to public opinion. Another example which is probably useful, because it shows that there are ways of going about this other than by using the law, is that in the United Kingdom, largely as a result of restrictions and difficulties emanating from the World Trade Organization, pressure has been put on the supermarket chains by consumers encouraged, it has to be said, by effective lobbying. Battery eggs are a good example—the battery cage restriction won't be fully effective until well into the next century, but in the United Kingdom now a significant number of the supermarket chains simply don't stock them. Why? Because of public pressure. Genetically modified crops is another area where public pressure has made politicians, against their better interests, in some instances it has to be said, react. The fundamental basis of the progress that has been made in the United Kingdom and in Europe has been public protest—public concern which has been harnessed and encouraged very effectively by professional lobby groups.

DAVID WOLFSON: To move to another area quickly, maybe Professor Singer can clarify whether I have the facts right on this. One of the areas that we'll talk about finally, I think, is the role of the lawyer in all of this. But there are obviously situations in which animal activists have been taking the law into their own hands somewhat, direct action and so on. I'm interested in the type of argument that can be made in

⁶³ Oklahoma, Louisiana, and New Mexico are the only remaining U.S. states to permit cockfighting.

certain situations on behalf of an individual who views an animal in a dangerous or life-threatening situation, and therefore steps in and performs what is a necessary, justifiable act—a justification defense. I believe in Australia recently that someone actually went into a farm and rescued some chickens from a battery cage situation or a bad situation, and the court upheld that particular activist's right to act in that particular moment because of the justification to save the lives of the chickens. So perhaps we could just discuss, if anyone has any experience or knowledge, the use of the justification defense for an individual's actions.

PROF. SINGER: With the Australian case, you are correct on the decision on the first instance, that is, the magistrate dismissed the prosecution for trespass on the grounds that they went in to rescue hens that were in a condition that needed urgent veterinary attention. Unfortunately, and this was in the Australian Capital Territory, it was appealed, and it was lost on appeal. I think there is a move to appeal it again. I think that is still yet to come up, so I don't know what will happen if, indeed it is appealed again, but at this stage, my understanding of the case is that we're not on the winning side.⁶⁴

PROF. GARNER: I would say about direct action that exactly the same thing applies to ordinary campaigning, that you do what doesn't alienate public opinion. If it doesn't alienate public opinion, then go ahead. That's my view. It's amazing in the United Kingdom how getting information from labs which is then published quite openly in the national press is regarded as quite acceptable, and that's been a huge success story, I think, in the United Kingdom.

PROF. SILVERSTEIN: I would just make a side point with respect to the question you're asking, which relates to a broader issue, and that is if you're going to use this model to justify this kind of illegal activity or civil disobedience, one would want to at least think about the precedential value it might set for other issues. The reason I'm thinking of this is that a law was recently passed in a state with respect to abortion. Was it Kansas? Missouri? I can't think of it quite precisely, but basically the law provides an opening for using this kind of justification to stop women from having abortions in order to protect the fetus, and so we have to be aware what the implications are for other kinds of activism and other movements.

JANE HOFFMAN: I think there was a decision against someone who had published a sort of hit list of abortion providers. I'm in no way advocating this, and I don't want to get into abortion, but when these decisions are made, many people applaud them, and I'm just following up on Professor Silverstein's point. There are animal rights groups that will then publish lists, not hit lists, but lists of researchers that

⁶⁴ Following the magistrate's finding for the rescuers, the Supreme Court of the Australian Capital Territory (ACT) overturned the decision. The Federal Court rejected the appeal from the Supreme Court of the ACT, and the High Court of Australia did not grant leave to appeal against the Federal Court decision.

use animals. It's always important to look at where you are going with the law, because it does evolve from decisions that are made.

PROF. ROBINSON: I think the reference to the civil rights movement is important. I mean ever since Henry David Thoreau's essay on civil disobedience,⁶⁵ if you are prepared to go to jail and protest for a public purpose in a very public way, you can help change society. The suffragettes did it. The civil rights movement did it. But that's a very different thing from going in privately in the dark or in a terrorist manner to disrupt established relations in an ordered society. I don't think that's what Thoreau was writing about in civil disobedience. So I would say that if society is on the verge of making a fundamental realignment of its thinking about animals, then you're very close to where Thoreau is, and you ought to read *Civil Disobedience* again if you haven't read it lately and understand it. That's very different from what some of my colleagues might call eco-terrorism. I think you will not engender public support in a direct action way if one is not prepared to stand up for change and take the consequences.

JANE HOFFMAN: Would anybody else like to make a comment on the role of the lawyer? I know that Bill Kunstler used to say that the role of the lawyers in revolution is to keep the revolutionaries out of jail, but I'd like to think we could do a little more than that.⁶⁶

Would anyone like to make any closing statements on anything we've talked about?

PROF. KELCH: I just wanted to mention one argument that I think one can use in the legislative area and in the judiciary that no one seems to mention. They don't mention it in the courts. They don't mention it in asking for legislation. They don't even mention it to their spouses. And that is caring and compassion. I think that caring and compassion are emotions that humans have that are legitimate considerations relating to animal rights and other issues, and I think that we should not be afraid to bring those considerations up, both in the judicial area and in the legislative area.

PROF. FRIESEN: I would like to add that this extends beyond animal interests into human interests. I think we should be vigilant about language in judicial opinions that refuses to acknowledge that compassion and care are part of what the law is about. Let me give you an example, two examples, that I was thinking of recently. It's common to find arguments that are purely utilitarian in this sense. Remember the mandatory helmet laws of a few years ago that were constantly being challenged in court—"we want to ride free without the helmets and it's our libertarian right to do so." Commonly, when courts sustain those statutes, they say things like, "Well, we've got to have the helmet law because if you were hurt, it would be a burden on society to take

⁶⁵ Henry David Thoreau, *Walden, and Civil Disobedience* (Owen Thomas ed., W.W. Norton 1966).

⁶⁶ Mr. Kunstler wrote the Introduction to Gary L. Francione's *Animals, Property, and the Law* (Temple U. Press 1995).

care of you, and we're using you as a means to relieve society's end, which is to pay your bills." In rights to education cases, it's common to find arguments from the court, or rather rationales from the court like, "Well, education is a fundamental interest because if you kids weren't educated, employers wouldn't hire you, and if you didn't have an adequate education, our economy would suffer." What about the self-fulfillment of the child? Why is that rationale accepted by us, that purely utilitarian rationale, with no acknowledgement that the child is an end itself? I find that language in other places and I want to underline what you said, that compassion and caring is a legitimate end of the law.

PROF. KELCH: I just want to add that I think it is typical for lawyers to say that emotion is not appropriately considered in connection with the law, but there are a lot of legal areas where such issues are in fact considered. For example, we give people damages for emotional distress. In the criminal area, a person's state of mind and their emotions at the time that they commit a crime are considered of significance in the law, and so I think there is precedent for consideration of feelings and emotions.⁶⁷

PROF. SILVERSTEIN: There is—moving away just a little bit from this—a political scientist named Stuart Scheingold, who wrote a book published in 1974 that I would recommend for both lawyers and non-lawyers who are interested in activism.⁶⁸ He writes about the myth of rights, and what he says is that the myth of rights is a kind of naive faith in the law, a naive faith in the efficacy of rights, and he suggests that most Americans have adopted this image of the myth of rights, and we turn to the law and expect the law to work for us terribly well. It's really a very interesting notion, and we ought to not fall under this idea that the law or rights will be efficacious every time we use them, anytime we turn to them. He also talks about the politics of rights, and that it is a conscious, strategic awareness of the law and rights and litigation, and how activists and lawyers can use the law strategically, consciously, and carefully, being aware not to fall under the myth of rights, and being aware of when they might use rights, when they might use law, and when they might use other things in order to effectuate change. That seems to me to be a very good model for lawyers and non-lawyers to be thinking about when thinking about animal rights issues and animal care and consideration as well.

PROF. RADFORD: Animals are used in many ways which most of us, if not all of us here, would like to see banned. But being realistic about it, it's not going to happen overnight, and therefore we have to act at two levels. We have to act in the long term to try and achieve goals, but whilst that is being done, we also have to think about the conditions in which animals are being kept in the meantime. In the long term we go

⁶⁷ Thomas Kelch, *The Role of the Rational and the Emotive in the Theory of Animal Rights*, 27 B. C. Envtl. Aff. L. Rev. 1 (Fall 1999).

⁶⁸ Stuart A. Scheingold, *The Politics of Rights* (Yale U. Press 1974).

for far-ranging reform, but in the meantime, we try and get the law to recognize the duties, the moral duties that arise from the needs of animals as sentient beings.

In the 1911 Act in the United Kingdom,⁶⁹ there is a list of different actions and omissions which can amount to cruelty. Most of those center on the notion of unnecessary suffering, and most of them are written in terms of the fact that if you cause an animal suffering, or do something or omit to do something directly and cause suffering, you can be guilty—that is, if you cause it to happen you can be guilty, and if you permit it to happen you can be guilty. Under this list of offenses, there is a particular provision which isn't often quoted, but that I think is probably one of the most important statements of principle in the Act. It says "For the purposes of this section" (the offenses of cruelty) "an owner shall be deemed to have committed cruelty within the meaning of this Act if he or she shall have failed to exercise reasonable care and supervision in respect of the protection of the animal therefrom." Few words, but what it actually means in principle and in practice is that in the United Kingdom, the law lays down in words of not much more than one syllable a continuing, ongoing, non-delegable responsibility on an owner to insure by the standards of the reasonable person that their animal does not suffer unnecessarily. Whilst animals remain property, that is an aim that we should be looking for in the legislation of all countries.

⁶⁹ Protection of Animals Act, 1911, 1 & 2 Geo. 5, ch. 27 (Eng.).