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AN ARGUMENT FOR THE BASIC LEGAL RIGHTS OF FARMED ANIMALS

Steven M. Wise* †

INTRODUCTION

The most abused beings in the United States are those whom we raise and kill for food. The numbers of dead are staggering. Most are victims of the severe and almost entirely unregulated practices that Americans permit on their factory farms. According to the United States Department of Agriculture's National Agricultural Statistics Service, in 2007, a total of 10.4 billion land-based animals were killed by the American food industry. These included 9.4 billion broiler chickens, 450 million laying hens, 317 million turkeys, 121 million pigs, 39 million bovines, 28 million ducks, 10 million rabbits, and 4 million sheep and goats—fifty times the number killed in biomedical research, for sport, as pests, and for all other reasons combined, carrying a value of hundreds of billions of dollars a year. The degree to which animal enslavement is embedded in our society is difficult to calculate or fathom. In commenting on human slavery, slave historian David Brion Davis wrote in the *New York Times* that

[a]fter decades of research, historians are only now beginning to grasp the complex interdependencies of a society enmeshed in slavery. There were shifting interactions among West African enslavers, sellers and European buyers; European investors on the slaver trade, which ranged from small-town merchants to well-known figures like the philosophers John Locke and Voltaire; wealthy Virginian and Brazilian middlemen who purchased large numbers of Africans off the ship to sell to planters; New Englanders who shipped foodstuffs, timber, shoes and clothing as supplies for slaves in the South and the West Indies; and, finally, the European and American consumers of slave-produced sugar, rum, rice, cotton, tobacco, indigo (for dyes), hemp (for rope-making) and other goods.

Brutalized as they were, at least human slaves in the United States were not eaten.

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I. LEGAL RIGHTS AND NONHUMAN ANIMALS

Twenty-three years ago, as officers of the California-based Animal Legal Defense Fund, Michigan State University Law Professor David Favre and I commenced work in earnest on a long-term attempt to solve some of the most desperate problems posed by the legal thinghood of every nonhuman animal. As legal things, nonhuman animals lack all legal rights and remain entirely the object of the rights held by us legal persons—that is, the beings with rights. We understood that, with the exception of those few nonhuman animals protected by such statutes as the American Endangered Species Act, it is extremely difficult to protect and advance the interests of rightless beings in the courts. All legal history bears this out, whether those rightless things have been black slaves, women, children, the insane, or nonhuman animals. Most legal protections for nonhuman animals remain indirect (mostly anti-cruelty statutes), enforceable only by public prosecutors. Even the Endangered Species Act requires a human plaintiff to have standing sufficient under Article III of the United States Constitution.

Our years of practicing animal law and our knowledge of legal history convinced Professor Favre and me that no meaningful percentage of nonhuman animals will ever be treated well or fairly until they attain some minimum degree of legal personhood—that is, until they achieve some minimum level of fundamental legal rights. All legal history bears that out, too. Precisely because whether one is classified as a legal thing or a legal person determines who dies and who lives, who may be enslaved and who may not, who does not count and who does count within our legal system, legal personhood is the most important individual issue that can come before a court.

The arguments for the fundamental legal rights of any being, human or nonhuman animal, are strongest when they are most firmly grounded on accepted legal principles. Therefore, in arguing for the fundamental rights of a nonhuman animal, I rely upon bedrock principles of Western law: liberty and equality. Liberty entitles one to be treated a certain way because of characteristics one may possess. Presently for humans, some irreducible degree of bodily liberty and bodily integrity are everywhere protected. If we trespass upon this deeply personal liberty, we commit the terrible wrong of treating a person as a thing. Equality means that likes should be treated alike and unalikes can be treated unlike.

II. FUNDAMENTAL LIBERTIES APPLY NOT JUST TO HUMANS

“In giving freedom to the slave, we assure freedom to the free,” said Abraham Lincoln in his 1862 message to the United States Congress. After centuries of struggle, it is clear that humans may not be legally enslaved and they may not be legally tortured, no matter how beneficial their enslavement or torture might be to others. Today virtually no legal scholar or moral philosopher seriously contends that rational arguments support a claim that all and only human beings ought to possess fundamental liberties. Yet these

most fundamental liberties are denied to every nonhuman animal. This not only inflicts grave injustice upon its victims, but underlines the arbitrariness of claiming fundamental liberties only for human beings.

Dignity mandates fundamental liberties. Dignity is, significantly, a product of the capacity for autonomy and self-determination. Things are not autonomous. Persons are. Things do not self-determine. Persons do. This entitles them to fundamental liberties. Most moral and legal philosophers, and nearly every common law judge, recognize that a normal human possesses autonomy and self-determination if she has preferences and the ability to act to satisfy them, can cope with changed circumstances, can make choices—even ones she cannot evaluate well—or has desires and beliefs and can make appropriate inferences from them.

I call these basic autonomies “practical.” Practical autonomy is not just what most humans have, but is what most judges think is *sufficient* for basic liberties. Any being possesses practical autonomy and is entitled to personhood and basic liberties if she can desire, can intentionally act to try to fulfill her desire, and can possess a sense of self-sufficiency to allow her to understand, even dimly, that it is she who wants something and is trying to get it. Consciousness, though not necessarily self-consciousness, and sentience are implicit.

How do we know when nonhuman animals possess practical autonomy? The more their behavior resembles ours and the taxonomically closer we are, the more confident we can be that they do. Chimpanzees, for example, are quite close to us taxonomically and genetically. Further, chimpanzee behavior resembles that of humans. They are conscious, probably self-aware, possess some or all the elements of a theory of mind (i.e., they know what others see or know), understand symbols, use a sophisticated language or language-like communication system, deceive, pretend, imitate, and solve complex problems that require mental representation. We can therefore be highly confident they possess practical autonomy sufficient for basic liberty rights.

The animals most commonly used for food (pigs, sheep, goats, cows, chickens, turkeys, and ducks) may have all the cognitive characteristics of chimpanzees. They may have none. Or they may have some; or perhaps they possess some simpler consciousness, are able mentally to represent and act insightfully, use symbols, think, use a simple communication system, and have a primitive, but sufficient, sense of self. The stronger and more complex these abilities are, the more confident we can be that a being possesses practical autonomy. We do not know much about the cognitive abilities of farmed animals, because those who make billions of dollars exploiting them have never bothered to conduct significant research into what sorts of beings they are. A leading twenty-first century text on pig production, *Pig Production: Biological Principles and Applications*, states that, despite the fact that tens of millions are raised in horrendous factory farm conditions then brutally slaughtered, “[l]ittle is known about the behavioral needs of pigs.” Scattered academics have recently begun to investigate farm animals’ cognitive abilities, but there remains little research on the subject.

In light of what we know—and we do know some things—it may be appropriate to apply the precautionary principle that is often used in the field of environmental law. Depriving any being with practical autonomy of basic liberty rights—treating a being as a thing rather than as a person—is the most terrible injustice we can inflict. When there is doubt and serious damage is threatened, we should err on the cautious side where evidence of practical autonomy exists. More than a million animal species exist. Darwinian evolution postulates a natural continuum of mental abilities. In *Drawing the Line*, I demonstrate that we know that all four species of great apes and at least some cetaceans, for example, possess practical autonomy, and that African elephants and African Grey Parrots probably do, too—or at least come close.

We could deal with this problem in another way. Personhood and basic liberty rights might be given in proportion to the degree a farmed animal possesses practical autonomy. If you have it, you get full liberty rights. But if you don't, the degree to which you *approach* it might make you eligible to receive some proportional liberties. This idea of receiving proportional liberties accords with how judges often think. They may give *fewer* legal rights to humans who lack autonomy. But they do not make her a legal thing. A severely mentally limited human adult or child who lacks the mental wherewithal to participate in the political process may still move freely about. A court may give *narrower* legal rights to her. A severely mentally limited human adult or child might not have the right to move in the world at large, but may move freely within her home or within an institution. A court may give *parts* of a complex right. A profoundly retarded human might have a claim to bodily integrity, but lack the power to waive it and be unable to consent to a risky medical procedure or the withdrawal of life-saving medical treatment. Elementary justice demands that research on what sorts of beings farmed animals are begin in earnest.

III. EQUALITY RIGHTS AND NONHUMAN RIGHTS

Finally, recall that liberty is not the only ground for the allocation of basic legal rights and that equality demands that likes be treated alike. Equality rights depend upon how one rightless being compares to another being with rights. An animal might be entitled to basic equality rights, even if she is not entitled to liberties, because she is similar to another with basic liberty rights. Equality rights require a comparison. Since like beings should be treated alike, something can only be equal to something or someone else. The strongest argument for equality rights of a farmed animal is simple: even very young or severely cognitively-impaired humans possess the basic right to bodily integrity, though they lack autonomy. Presently, such nonhuman animals as chimpanzees possess very complex minds, yet lack all rights, as they are things. This offends equality. To the degree that the animals we raise and kill for food also possess complex minds, the refusal to recognize their basic rights also offends the principle of equality. Only care-

ful scientific investigations will answer the questions of what kinds of minds the various farmed animals possess.

There is only one reason not to determine what rights farmed animals are due and recognize them. That is the reason that once justified human slavery: powerful economic interests are arrayed against it. This is a practical reason why beings who ought to have liberty or equality rights do not, but it in no way justifies it. I leave the last words on that subject to David Brion Davis:

Considering that slavery had been globally accepted for millennia, it is encouraging that people were able to make such a major shift in their moral view, especially when a cause like abolition conflicted with strong economic interests. We can still learn from history the invaluable lesson that an enormously powerful and profitable evil can be overcome.