Spring 2006

Wheir's the Beef - Buffalo Law and Taxation

Erik M. Jensen

Recommended Citation
Available at: https://digitalrepository.unm.edu/nmlr/vol36/iss2/10
“What is life?” asked Crowfoot. “It is the breath of a buffalo in the wintertime.”

If you’re not a student of buffalo law, you might have missed the recent decision in Wheir v. Commissioner, which considered whether a competitive bodybuilder could deduct for tax purposes the cost of the buffalo meat he consumed to make his body buff. Wheir was only a summary opinion issued by a special Tax Court trial judge, and summary opinions aren’t supposed to be significant in the development of the law. (For that matter, many jurists and commentators don’t think any tax case is worth a pitcher of warm spit.) Nevertheless, like all buffalo law cases, Wheir is chock-full of meaty issues. In the field of buffalo law, no issues are black and white.

I. BUFFALO LAW AND THE AMERICAN REGIME

The image of...buffalo [returning to the Great Plains] appears to touch on some primal apocalyptic terror, or else some equally primal sense of Edenic rightness, depending on the listener.

This is heavy stuff. Be prepared.

Before I discuss the particulars of Wheir, a short digression is in order to explain to the uninitiated why this exercise is so vital in furthering legal under-
standing. Buffalo law developments are always important because of the fundamental nature of the field, but they’re particularly important now. The past twenty years have generally been good for buffalo (if you put aside being eaten). They can now be found in every state in the union, and the number of buffalo has rebounded from a few hundred at the turn of the twentieth century to hundreds of thousands today. Professional buffalo associations are flourishing. And a buffalo is back on the nickel!

Buffalo have significant real world effects, above and beyond their involuntary appearances on dinner tables. For one thing, as oil prices climb, buffalo droppings continue to drop. Forget ethanol. Bison fecal pats are the renewable energy source par excellence—as folks on the frontier knew.

“It is a common joke upon the plains,” remarked an overland traveler, “that a steak cooked on these chips requires no pepper.” And one authority—gauged the value of the famous buffalo by-product: “As...westward the course of empire takes its way, the buffalo chip rises to the plane of the steam engine and the
electric telegraph, and acquires all the dignity which is supposed to enshroud questions of national importance or matters of political economy.\textsuperscript{18} What could anyone possibly add to that?

If buffalo chips don't pique your interest,\textsuperscript{19} consider the idea, advanced by Rutgers professors Frank and Deborah Popper, of returning part of the Great Plains to the buffalo—creating a buffalo commons, as it were\textsuperscript{20}—which has aroused a lot of interest.\textsuperscript{21} North Dakota's population was declining anyway, but the great plans for the Great Plains may have created a stampede.\textsuperscript{22}

In academic circles,\textsuperscript{23} buffalo subjects are increasingly popular. In addition to the buffalo commons idea, there are buffalo philosophy\textsuperscript{24} and the comparative study of constitutions.\textsuperscript{25} The bible for buffalo law scholars, the \textit{Buffalo Law Review}, continues its meritorious publication.\textsuperscript{26} And, as communitarian ideas become more attractive to academics, buffalo provide an example of the virtues and the connectedness of rural existence.\textsuperscript{27} "The sociality of the animals carries over to other areas of herd life. Influenced by their companions, buffalo tend to carry on the same activity at the same time ...."\textsuperscript{28} As a result, you won't see buffalo bowling (or

\textsuperscript{18} TOM MCHUGH, \textit{THE TIME OF THE BUFFALO} 47 (1972) (omission in original).

\textsuperscript{19} But "No piquing!" is Big Oil's pat response to alternative energy sources.

\textsuperscript{20} See supra note 15, as it were.

\textsuperscript{21} See generally MATTHEWS, supra note 8. The proposal came from two "wacko professors from New Jersey, a husband-and-wife team claiming that large parts of the Plains were doomed, that the best move might be to bring the buffalo back, that prairie land wasn't meant for much else, that settling this country at all had been a terrible mistake." \textit{Id.} at 8. With brows furrowed, the professors would plow new ground, as it were, see supra note 15, by not plowing old ground.

\textsuperscript{22} \textit{Cf.} MATTHEWS, supra note 8, at 18 ("Bob Dole's press secretary has suggested putting the Poppers in front of a buffalo stampede."). Should it happen, the buffalo's return might be limited to a short lunch—with buffalo as the main course. Scientists are now recommending the introduction of African wildlife to North America. You know, cheetahs, lions, elephants. I kid you not. See Josh Donlan et al., \textit{Re-wilding North America}, 436 \textit{NATURE} 913 (2005).

\textsuperscript{23} Where you go 'round and 'round and get nowhere.

\textsuperscript{24} "Probably the best philosophy would be to always give a buffalo room." Oldest Inhabitant, supra note 9. One is reminded of a photograph of a buffalo standing by a sign: "Don't cross this field unless you can do it in 9.9 seconds. The bull can do it in 10."

\textsuperscript{25} \textit{Cf.} MATTHEWS, supra note 8, at 67 (noting that "[b]uffalo have much sturdier constitutions" than cattle).

\textsuperscript{26} It remains puzzling, however, how few pieces deal explicitly with buffalo law. See Jensen, supra note 2, at 433–34; see also Peter Goodrich, \textit{Satirical Legal Studies: From the Legists to the Lizard}, 103 MICH. L. REV. 397, 402 (2004) (noting "the pseudomelancholic [...] lament of an animal law enthusiast complaining that the \textit{Buffalo Law Review} contains no studies of buffalo law"). Nor has the founding of \textit{Animal Law} filled the buffalo vacuum. See \textit{New Law Review Published for Legal Eagles and Other Beasts}, NAT'L L.J., Oct. 23, 1995, at A27. And buffalo vacuums are usually quick to fill, as you know if you've had to clean your house after a buffalo visit.

\textsuperscript{27} Buffalo are self-effacing; you generally won't find them tooting their own horns. \textit{But see} Buffalo Philharmonic Orchestra, Musicians, http://www.bpo.org/content.aspx?nid=189 (last visited Feb. 11, 2006) (noting tooting horns in Buffalo Philharmonic). This is consistent with behavior throughout the Great Plains, where litigiousness is lower than elsewhere in the nation. (But when someone is Siouxed there, as General Custer was—and at the Little Bighorn, no less—the results can make even opponents of tort reform wince.)

\textsuperscript{28} MCHUGH, supra note 18, at 154.
stampeding) alone. Indeed, bison are noted for "small clubs of buffalo" and for "group travels."

So things are generally good in buffalo country, but difficulties remain as well. I probably sound like an old buffalo, pining for the good old days, but there are those who think the good breeding for which buffalo have been known is diminishing. Buffalo crime is increasing, buffalo kids, driven by a herd mentality, are into drugs, buffalo social unrest is becoming more serious, and psychological problems abound.

To be sure, some upheaval may be desirable. Buffalo gals are quite properly becoming more assertive, no longer content with their traditional roles on and at the range. And the buffalo population has every reason to resist continuing discrimination. Some of it is the same old, same old: centuries ago, "a white buffalo range." And the buffalo population has every reason to resist continuing being more assertive, no longer content with their traditional roles on and at the psychological problems into diminishing.

Those who think the good breeding for which buffalo have been known is I probably sound like an old stampeding) buffalo). But cf. Posner, supra note 2 (suggesting that sacred cows aren't so bad).
A few speciesists even think “buffaloes are the ugliest animals alive.” Given warthogs, that’s a preposterous statement.

Well, prejudice of that sort can be overcome. Ted Turner, who knows a thing or two about glamour, converted 120,000 acres of his Montana lands to running buffalo because, he said, “[t]hey’re better looking” than cattle. And some are really good-looking.

Besides, buffalo can be fun to have around. The North Dakota Buffalo Association (NDBA) has as one of its goals to “[p]romote and develop recreation, education and fellowship where it is connected with buffalo.” In North Dakota you take fellowship where you can get it, and the NDBA folks are clearly trying to foster social interaction between man and buffalo.

Not far away, in South Dakota, a lot of heifers are hoofers (no fox-trotting here!): “[T]he sun dance sacred to many Plains tribes originated at Buffalo Gap, where the buffalo themselves first performed it and later taught it to the Indians.” Sort of a mixer, I guess. And dancing by the light of the moon can lead to other interactions as well (wink wink, nudge nudge): “Where bison and Native Americans lived together, the bison provided much more than food.”

The cancer eating at the team was a clash of cultures between manager Zimmer, a meat-and-potatoes, old-fashioned conservative, and a group of players who were called the Buffalo Heads .... [Ferguson] Jenkins had founded and named the group the Buffalo Head Gang, because according to the big right-hander, Zimmer looked like a buffalo and “buffaloes are the ugliest animals alive.”


You better hope you’re never given a warthog.

But we all know what animal Disney picked as the beauty-challenged beast. Why, Walt, why?


Despite being good at shuffling, they’re easy to beat at Dakota hold ‘em. See MCHUGH, supra note 18, at 216 (“A buffalo can be bluffad, as can other large animals like the elephant and the gorilla.”); see also supra note 37 (noting that some aren’t playing with a full deck).

See also ALVIN M. JOSEPHY, JR., NOW THAT THE BUFFALO’S GONE 89 (1982) (“Some religious counselors also told of a ‘spiritual sickness’ that occurred when their people were unable to see and live near buffalo.”). Cartoon, Gary Larson, Red Cloud’s Ultimate Nightmare (from who knows when) (showing an Indian maiden presenting her fiancé, a buffalo, to parents: “I’m sorry, Mom and Dad, but Brad and I are in love—and I’m going to run off and join his herd.”).

FRAZIER, supra note 39, at 140. One of North Dakota’s famous sons was Lawrence Welk, known in legal circles for step transactions, particularly of the two-step variety: “An’ a one an’ a two.” Welk avoided the blacklist during the McCarthy era despite promoting the Lenin Sisters.

See also CORNELIA GRUMMAN, AMERICANS BUFFALOED, CHI. TRIB., APR. 12, 2000, at 12 (noting controversy as to “[w]hether ancient legends about erotic bison fertility and herd-calling rituals...were true or should even be spoken of outside tribal communities”).

Buffalo aren’t good at keeping secrets, see MATTHEWS, supra note 8, at 163 (noting “talking buffalo”), and buffalogab can lead to foot-in-mouth disease. But the most risqué activity may not be reported simply because
II. WHEIR V. COMMISSIONER

Now that we’ve established the importance of buffalo-human relationships, let’s consider Wheir v. Commissioner, the centerpiece of this Article, and the hard issues that the case raises.

A. A Bodybuilder and His Food

The special trial judge in Wheir concluded that a Wisconsin boilermaker, who was also a competitive bodybuilder, could not deduct the cost of buffalo meat that he ate. The cost was a personal expense, said Judge D. Irvin Couvillion, not an ordinary and necessary business expense, even though Wheir claimed to have eaten the meat without relish. He ate it because of professional bodybuilding needs, not for pleasure.

Wheir said “he consumed the meat for muscle development because the protein levels in buffalo are much higher than those in beef or other meat products—buffalo meat is especially good on buns—and the judge didn’t challenge that proposition. Wheir was a serious bodybuilder, not a slick operator. And Wheir brought in revenue from his bodybuilding activities, including money from one endorsement. Bodybuilding’s a tough business, however—someone is always trying to muscle in on your territory—and expenses exceeded income every year. Wheir milked bodybuilding for everything it was worth, but it wasn’t much of a cash cow.

The numbers didn’t look good, but Wheir did—his fitness was physical, not fiscal—and no one could say that Wheir’s was casual buffalo consumption. No one could say that because Wheir consumed three pounds of buffalo meat per day,
year round. 62 Yes, three pounds. That’s twelve quarter-pounders a day. Wheir had a substantial steak in his bodybuilding enterprise.

Wheir had no choice if he was going to be a serious bodybuilder. 63 Buffalo for Easter dinner. A Thanksgiving buffalo dinner. And I can’t help imagining Ebenezer Wheir, leaning from his window on Christmas morning, asking a boy in the street if the Christmas buffalo were still hanging in the butcher’s shop. 64 Besides, Wheir would have to have eaten twice as much beef—six pounds a day!—to get equivalent bodybuilding results, so there was professional justification for the buffalo intake. 66

Wheir may have eaten buffalo because he thought he had to, but the case for deductibility wasn’t as strong as it should have been. Here was the real bone of contention. We all have to eat, and eating buffalo isn’t bad (except for the buffalo involved). The meat is tasty, 67 and it’s leaner than beef. 68 As BisonCentral.com (the online resource for those who raise and devour buffalo) noted, 69 research “[p]ublications ranging from Gourmet Magazine to the Old Farmers Almanac are heralding bison as a meat for the future.” 70 Dan O’Brien, author of the definitive work on buffalo and the lovelorn, 71 Buffalo for the Broken Heart, added, “Buffalo meat is much better than beef. It is sweet and tender with a unique taste all its own…” 72 (which is true of most unique tastes).

And there’s legal support for buffalo’s tastiness. In 1876, 73 the Illinois Supreme Court took judicial notice of the following: “How often have we heard the old hunters of the plains[24] extol the tongue and rump of the buffalo as most luscious and nourishing food! [75] And it is in proof, the meat of the animal is sold at high prices for food in the markets of the country.” 76

63. His flex plan wasn’t a cafeteria plan.
64. Cf. CHARLES DICKENS, A CHRISTMAS CAROL 17 (Richard Garnett ed., 1900) (1843) (“You may be an undigested bit of [buffalo] … There’s more of gravy than of grave about you …”). Isn’t it cool to think of Ebenezer Scrooge using ProTan Muscle Juice Professional Posing Oil? See supra note 57.
65. You could build quite a body on six pounds of beef a day. See, e.g., Orson Welles after his prime—ribs, filets, tenderloin, etc.
66. Buffalo intake is much better than buffalo exhaust.
67. See Of Bison Men, ECONOMIST, Mar. 9, 2002, at 39 (noting that “it’s tasty, it’s safe and it’s cheap”).
68. See also Nat’l Bison Ass’n, Health Benefits, http://www.bisoncentral.com/index.php?c=67&d=99&a=1056&w=2&r=Y (last visited Feb. 13, 2006) (“[The journal that knows most about digestion, Readers’ Digest,] has even listed bison as one of the five foods women should eat because of the high iron content.”).
69. The BisonCentral.com folks say that “[t]hey stand behind [their] product.” Id. With buffalo, that’s the safest place to be.
70. Id. It’s also a meat for the past. See Flyer for the Denver Buffalo Co., Buffalo: The Meat of the 90s (precise date unknown, but the reference was intended to be for the 1990s) (on file with author, in third pile from far right corner on desk, next to minutes of faculty meeting of 3/7/92). But see Great N. Prods., Wild Boar and Game Meats, http://www.northernproducts.com/html/body_wild_game_meats.html (last visited Feb. 13, 2006) (claiming that “Wild Boar is the meat of the 90’s”).
71. Of which there don’t seem to be many, except at the bottom of the pecking order, so to speak. See supra note 33.
73. The year of the nation’s centennial, 100 years before the bisontennial.
74. Compare FRAZIER, supra note 17, at 147 (“[A] lot of buffalo hunters were as dumb as a rock.”), with MATTHEWS, supra note 8, at 154 (“[B]uffalo are no fools.”).
75. Buffalo rumps are the butts of many jokes.
76. Ulery v. Jones, 81 Ill. 403, 406 (1876).
It would have helped Wheir’s case for deductibility if buffalo consumption were more painful. Instead, consumers are, as a matter of personal choice, eating buffalo steaks and buffalo burgers with pleasure at this very moment. (For all I know, a few might even have selected moo shu bison or buffalo piccata from the buffalo buffet.) Judge Couvillion could reasonably state that “there is no doubt that buffalo meat is also consumed as food by nonbody-builders[,] albeit not with the regularity and in the quantities consumed by [Wheir].”

As far as Judge Couvillion was concerned, that decided the case. It didn’t matter that Wheir was gorging himself on buffalo—eating more than any reasonable person should—rather than dining daintily, pinky in the air, at a chic restaurant. The expenditures were personal, the court held, not ordinary and necessary business expenses.

For buffalo scholars, the decision in Wheir was hard to swallow. It left a bad taste in quite a few mouths, and other senses were similarly offended. Obviously wearing blinkers, Judge Couvillion was out of touch with reality.

All of which is to say that Wheir flunked the smell test, which is why I want to raise a stink.

I have to admit that one of the reasons I’m bothered is that, although...
I’m generally a shy, retiring academic, I can identify with some of what Wheir did. The life of the mind was not uppermost in his activities, as it is in mine, but Wheir evidenced academic proclivities. In his bodybuilding, for example, he “lifted weights, posed to display his muscular finesse, trained other bodybuilders, and gave seminars.” Normally I don’t lift weights or pose to display my muscular finesse, but seminars! That’s what I do!

In addition, Wheir handled publish-or-perish pressures with aplomb: “Some of his poses were published in bodybuilding publications.” I haven’t yet appeared in the Pecs and Abs Law Review, but a lot of my publications have been poses too. In short, Wheir was as serious and scholarly as I am, and if I ate that much buffalo, I’d also want tax relief to go with my Rolaids.

But I have concerns that go beyond the tax situation created by my own uplifting activities. In my high-minded academic role, I’m worried about Wheir’s ripple effects on the development of buffalo law. Wheir proceeded pro se—he did all the heavy lifting himself—and, without the benefit of cutting-edge buffalo law scholarship, his arguments were prosaic. As a consequence, the judge overlooked a potentially decisive argument, one with authority behind it, to which I shall now turn. When buffalo meat is involved, we should carve out an exception to the usual rule of nondeductibility.

B. Are Buffalo the Same as Cattle?

Wheir clearly would not have been able to deduct the cost of beef consumed on a daily basis, but buffalo and cattle are different. For nonlegal purposes, the differences are dramatic, and they aren’t merely matters of taste. As the owner of a buffalo ranch has noted, “Cattle don’t give you an adrenaline rush when you see them.... But when you see a buffalo or an eagle, you get a different sort of feeling.” That works for me.

Another buffalo rancher used the Plains-meaning principle to explain the difference in nativist terms. One critter belongs; one doesn’t.

It’s not that there is anything wrong with [cows] in general. It’s just that out here on the Great Plains, they seem painted on the landscape in a way that will never

85. The retiring part is not coming nearly fast enough for my dean, however.
86. He probably didn’t say things like “evidenced academic proclivities,” however. It takes practice to master an academic style.
88. But like Wheir, I do get exercised about a lot of things.
89. If you haven’t got it, don’t flaunt it.
90. Sometimes with two plombs.
91. Wheir, 2004 WL 1921830.
92. Close to my office is a cast of “The Thinker,” who looks, I like to think, like Wheir. (At least that’s what I concluded after applying my theory of statuary interpretation.) The statue is now green, of course, but, after eating three pounds of buffalo every day, Wheir probably is too.
93. At times I may have been unfair to Judge Couvillion, implying that he butchered the case. The result was offal, it’s true, but no one can make a silk purse out of a buffalo’s ear. The judge had to work with the body of law—the legal carcass, as it were, see supra note 15—available to him, and Wheir didn’t provide much help to the bench on pressing issues.
allow them to be truly part of it. They have always been a sort of ungulate tourist, and in ranching them I felt a little like a tour guide who spends his life translating menus and pointing out the restrooms. . . . [T]he buffalo I’d seen in the road... was no tourist and no one’s ward, and in land as hard as mine, nothing is more valuable.95

Bull’s-eye.

Most important, the law has for 150 years treated cattle and buffalo differently.96 The American bison, or Bison bison as he is scientifically called by stuttering zoologists,97 is not your run-of-the-mill domesticated animal.98

1. State v. Crenshaw

In State v. Crenshaw,99 decided in 1856—see, buffalo law isn’t one of your new, trendy fields like intellectual property—the Missouri Supreme Court concluded that a buffalo did not fall within the statutory category of “cattle.” Quite so.

John H. Ingham, author of the first treatise on animal law (published in 1900), described the results in Crenshaw and related cases as follows:

The word “cattle” in statutes prohibiting cruelty and malicious mischief has been held to designate all domestic quadrupeds collectively, and to include horses, mares and colts, geldings, pigs, asses, and goats. But a buffalo, though domesticated, has been held not to come within the definition.100

As a matter of law, a buffalo isn’t an ass, and that’s more than can be said for you and me.

Crenshaw “was indicted for killing feloniously, willfully[,] unlawfully and maliciously [a little adverbial piling-on here] one buffalo bull[,]101 a domesticated animal, of the value of fifty dollars, of the goods and chattels and property of Benjamin Canefox.”102 If Crenshaw had shot someone’s cow, he would

96. You should too. See Matthews, supra note 8, at 68 (“Cattle will let you do anything you want. Ever try to take a blood sample from a buffalo?”).
97. Or actually Bison bison bison for the plains bison. See McHugh, supra note 18, at 22. This extremely unimaginative scientific name annoys electronic spellcheckers, and that has to be one reason the beast is “also known as Bison americanus.” Matthews, supra note 8, at 35. In contrast, scientific namers of the water buffalo, an un-American breed, anticipated the spellchecker and used artful variation: Bubalus bubalis. See Sarah Lueck, A. P. Leonard Seeks to Shuffle Off His Water Buffalo, WALL ST. J., Mar. 30, 2004, at A1. (This footnote shows I’m adapting my work to modern law school demands, emphasizing global aspects of buffalo law.)
98. Those in buffalo society ordinarily don’t fraternize with lowly cattle unless pressured to do so (hence the beefalo). See supra note 33. Otherwise contact is rare; it’s just not done, not even medium-well.
99. 22 Mo. 457 (1856).
100. JOHN H. INGHAM, THE LAW OF ANIMALS: A TREATISE ON PROPERTY IN ANIMALS WILD AND DOMESTIC AND THE RIGHTS AND RESPONSIBILITIES ARISING THEREFROM 528 (1900) (footnotes omitted) (citing Crenshaw). Recognizing that I do minimal research, Bill B****** of California Western School of Law kindly sent me this reference and many others years ago. See supra note *.
101. Not Buffalo Bill.
102. Crenshaw, 22 Mo. at 457. Doing the deed was probably pretty easy. Shooting bison, even in the wild, has been characterized as “about as sporting as shooting a parked truck.” Brendan Miniter, They Roam Now: They’d Better Start Running, WALL ST. J., Nov. 4, 2005, at W13 (quoting Dan Brister, project director for the Buffalo Field Campaign).
unquestionably have been in trouble with the law, but this wasn’t your everyday Guernsey. The key interpretational issue was

whether a buffalo bull was within the meaning of the legislature, when they used the word “cattle,” in the [criminal statute] or not. This section is as follows: “If any person shall willfully and maliciously kill, maim[,] or wound any cattle of another, he shall, on conviction, be punished,” &c. Here, the word is used by the legislature in the broadest sense—cattle embracing horses, cows, sheep, mules, &c.

And that sense was really broad for a Missouri court in the 1850s. I know it’s the “Show Me” state, but the average Missourian in 1856, if shown, wouldn’t have liked seeing cattle embracing all those other species.

Buffalo are different from the domestic quadrupeds, or so the court said:

We do not think that the legislature meant to include buffaloes under the word “cattle.” Buffaloes are not cattle yet within the meaning of the statute; and the fact that this buffalo bull was tamed, if it be so, does not bring him within the provision of the law, and while his tribe is left out.

Ultimately the question was what the legislature intended:

Though it be admitted that persons may have buffaloes tamed and domesticated, may lawfully acquire property in them, and can maintain suits for injuries done them,...yet the courts must look to the general state of things and to the circumstances attendant on any general legislation, and give such instruction to the words of the law as to enable them to embrace the ideas and notions and designs of the lawmakers. Although it may prove a loss to the owner, and is of itself a serious outrage, maliciously and willfully to destroy a domesticated buffalo [indeed!], yet we are inclined to the opinion that the legislature never meant to embrace those animals under the general word “cattle.”

103. A moo-ving violation, as it were. See supra note 15.
104. Crenshaw, 22 Mo. at 458 (citing Mo. REV. STAT. ch. 47, art. III, § 57, at 364 (1845)). [Joe, don’t worry about checking this cite. The old state statutes were moved off-site to Transylvania or somewhere, and this is just history anyway. No one will ever look at this stuff—emj]
105. Missourians today publicly embrace a lot more than they used to, and I hate to think what goes on in private.
106. Dogs and cats are both domestic quadrupeds (with four little peds each), aren’t they? If John Ingham really thinks that, as a consequence, dogs and cats are cattle in Missouri, I’d make my food choices very carefully when visiting that state. Look out for “Big Dachshund Classics” on the menu. Cf. supra note 77 (discussing taste of German Shepherds). Missourians might not get the point, but the song was supposed to be Get Along, Little Dogie, not Get Along, Little Doggie (or, for the dachshund, Get a Long, Little Doggie).
107. Notice the artful use of “yet,” which suggests that in at least one state the law was considered to be evolving rather than merely a product of semi-intelligent design.
108. Crenshaw, 22 Mo. at 458. Horses are cattle in Missouri:
In another section of the same statute, “Every person who shall maliciously and cruelly maim, beat or torture any horse, ox or other cattle, whether belonging to himself or another, shall, on conviction,” &c. We have no doubt that they meant to include horses under this general phrase, cattle.
Id. (citing Mo. REV. STAT. ch. 47, art. VIII, § 38, at 406 (1845)). I repeat: be careful what you order in a Missouri restaurant! See supra note 106. “Biscuits and gravy” might turn out to be “Seabiscuit and gravy.”
109. There really was a lot of embracing going on back in 1856.
110. Crenshaw, 22 Mo. at 458. So there was one explicit limit on who could embrace whom or what in nineteenth-century Missouri. (As far as I can tell, no such limit exists today.)
Then came the finale: "A tame domesticated buffalo bull is not then under the provisions of this statute. He can not be brought within the provisions while his family is left out." 111

At bottom, the result in the case depended on the existence of the strong buffalo family unit (or "tribe"). If wild cousin Muffy isn’t cattle as she cruises the range, Uncle Biff doesn’t become cattle by moving to the retirement ranch and settling down. 112 Except for a little promiscuity now and then, 113 family values prevail. 114

2. The Civil Cases

Buffalo thus aren’t cattle under time-honored authority. I could have written "Q.E.D." here and gone on to other projects, 115 but, in the interest of full disclosure, 116 I should note that, on the civil side, 117 the distinction between buffalo and cattle wasn’t as significant in the development of the law. It wasn’t a crime to kill another’s buffalo in Missouri, but Canefox might have been able to successfully sue Crenshaw for damages (just as if Crenshaw had shot one of Canefox’s cattle).

In Canefox v. Crenshaw, 118 decided the year after the criminal case, Crenshaw argued that

the buffalo bull was a wild, vicious and mischievous animal—that he had broken into the defendant’s field, and was in the act of destroying the defendant’s property, of the value of one hundred dollars, when the defendant killed him, not wantonly, but from necessity, because he could not otherwise be restrained. 119

If that’s what really happened, said the Missouri Supreme Court, there could be no recovery: "[T]he killing here complained of was quite justifiable not only in a legal but in a moral point of view." 120 But if the buffalo had become cow-like before his demise, damages were due. The ultimate result would depend on the facts, to be determined on remand. 121

Whatever dangers the buffalo presented in Canefox, we know that buffalo can be gentle and caring, something the Illinois Supreme Court recognized in 1876 in Ulery v. Jones. 122 Like Canefox, Ulery was a suit by an owner of a buffalo that had

111. Id. at 458–59.
112. Cf. Matthews, supra note 8, at 105 ("With immense dignity,...the bison settle to the ground once more...."). Symmetrically, a black sheep in the sheep family—"cattle" for these purposes—is cattle regardless of his wild and wooly behavior.
113. Buffalo want to get into a rut. See supra note 50.
114. Cf. Jensen, supra note 2, at 437 (discussing C.J. Tower & Sons of Buffalo, Inc. v. United States, 673 F.2d 1268 (C.C.P.A. 1982), with its heartwarming images of "sons of buffalo"—my son the bison). Strong family values are one of the reasons buffalo are such good writers, like diary cows. Cf. O’Brien, supra note 72, at 169 ("After I purchased the Antelope Island animals I started getting all sorts of buffalo mail.").
115. I'm working on a law school dress code (a "Uniform Uniform Code") and a unified theory of rejection letters ("I Hear America Dinging").
116. I’ve just eaten three pounds of buffalo, and I’m as full as a tick.
117. Where you usually won’t find me.
118. 24 Mo. 199 (1857).
119. Id. at 201.
120. Id.
121. The court in Canefox didn’t discuss the essence of buffalo, as it had in the criminal case. See supra note 83 (discussing buffalo essences).
122. 81 Ill. 403 (1876).
been killed by a neighbor. The defendant argued that, as the buffalo was "ferm natura,"[123] and trespassing on defendant’s close, disturbing his cattle and annoying his family, he had a right to kill him."[124] (I’ll let you work out the antecedents for the he’s, his’s, and him’s in that excerpt.)

The story in Ulery was a moving buffalo biography—starting with a happy adoption, moving through a period of education and socialization, and ending with the tragic bisonicide:

The animal in question was brought, when a calf six months old, with a companion heifer,[125] from their native plains,[126] to the farm of plaintiff, who was engaged in raising cattle, and there reared with his other young stock, treated in all respects as they were [that is so sweet], and became gentle and accustomed to their new home and mode of life, taking food from the hand of a child.[127] When the bull was two years old, he was turned into the pasture with other cattle,[128] and could be and was handled and fed without danger or trouble.129

But he was a typical, adolescent jerk:130 "He was breachy,[131] and of a roving disposition,[132] and annoyed the defendant very much by jumping over his fence into his pasture, and annoying him in various ways,[133] but he had no trouble in preventing him from attacking, by the use of a common pitch fork."134 (Again, the court had a pronounced problem with pronouns.)

Others were scared of the buffalo, but, “when the young animal was in the pasture with plaintiff’s cattle,[135] the school mistress, with little girls in company, were [sic] in the habit of going through this pasture, when the bull was there, to and from school, without the least concern, and defendant permitted his children to do the same.”136 That evidence was helpful, but the best evidence of the buffalo’s domesticity was a big flap:

124. Ulery, 81 Ill. at 403. He also argued, with chutzpah, that he was “licensed and permitted, by the plaintiff, to kill the animal,” id., because at the end of an earlier argument, the plaintiff had sarcastically said, “[T]hen go and shoot him if you want to.” Id. at 406.
125. Just a friend, I’m sure.
127. It’s not clear how the child felt about this.
128. Uh-oh! Other cattle?! Maybe buffalo were cattle in Illinois in 1876, contrary to the law in Missouri, see supra notes 99–114 and accompanying text, and contrary to the argument I’m making. [Eds.: Let’s leave this point buried in a footnote so no one will see it—emj]
129. Ulery, 81 Ill. at 404.
130. He was only two, but he was a teenager in buffalo years—hanging out with heifers and dragging mane.
131. See WEBSTER’S DICTIONARY 1913, available at http://websters.wunderdictionary.com/dictionary/def/english/breachy.html (defining “breachy” as “[a]pt to break fences or to break out of pasture; unruly; as, breachy cattle” (or students at a Nebraska-Oklahoma game)).
132. Well, duh-h-h. Of course he had a roving disposition—he was a buffalo. Buffalo engage in the noblest roamin’ of them all. See supra note 10.
133. It’s annoying how much annoying was going on.
134. Ulery, 81 Ill. at 404.
135. Hmmm, here the court didn’t refer to “other cattle,” as it had earlier. See supra note 128 and accompanying text. Maybe the court didn’t really think buffalo are cattle. Or maybe the court didn’t focus, not realizing how significant this point would be in the twenty-first century.
136. Ulery, 81 Ill. at 404. Try as they might, the school mistress and the parents couldn’t get rid of the youngsters. Today they might have the kids walk through a toxic waste dump.
One witness, Mrs. Anna Gibson, says she lived in the edge of the timber, and one evening she and one of the girls went out to milk, and when they had finished, she looked up and saw the bull, a rod or two off, looking right at them, and instead of running, as the Nicholsons did, one climbing over a fence and the other taking a large tree for protection, she stood her ground, the bull making no hostile demonstrations, but she, still afraid of him, just flapped her apron at him and said "shoo"; the bull turned, and ran away in great alarm, never stopping, "but ran clean away."

The Illinois Supreme Court might have read too much into the apron thing—and the fact that it didn’t take even a pair of "Shoos" to spook the buffalo—but the buffalo’s retreat decided the case: "An animal so easily frightened away, surely can not be adjudged a dangerous animal, so dangerous as to justify a farmer, into whose pasture he might trespass, in 'killing him on the spot.'" Although obviously not tied to Mrs. Gibson’s apron strings—the court reemphasized that she "drove the animal out of sight, by merely flapping her apron at him"—the buffalo was domesticated enough to be property in Canefox’s hands, just like a cow. As treatise-writer Ingham explained, "A buffalo, captured when a calf and so domesticated as to take food from its master’s hand and be easily driven, is the subject of property; its owner is liable for its trespassing and may recover for injuries done to it."

Thus, in both Illinois and Missouri someone might be as liable for killing a domesticated buffalo as for killing a cow. Do Ulery and Canefox therefore undercut my argument that buffalo and cattle are fundamentally different? Nah-h-h. Those cases simply concluded that a buffalo can acquire cow-like attributes in captivity—sort of a bovine Stockholm syndrome. Canefox, which involved the same facts as Crenshaw, can’t stand for the proposition that a buffalo is cattle; in Crenshaw the same court unequivocally said that wasn’t the case.

Just as you don’t become a buffalo simply because you grow a beard to look tougher, a buffalo doesn’t metamorphose into cattle when it acts subserviently.

137. She might have said it—in the edge—but what did she mean?
138. Remember learning what a "rod" is in elementary school? Aren’t you sorry you (1) never had occasion, until now, to use your learning, and (2) have forgotten what you learned?
139. The Sixties hadn’t yet arrived. See supra note 36 and accompanying text.
140. Ulery, 81 Ill. at 404. Ulery was a civil case, but this 110-word stream of consciousness was a criminal sentence.
141. When someone flaps an apron at me, I run away, too, but not because I’m scared. I don’t want to get stuck with the dishes.
142. I can understand how yelling "Shoo" could, in some contexts, be frightening. If I’d been Ferdinand Marcos, for example, I’d have grabbed my wallet whenever Imelda said "Shoo."
143. Ulery, 81 Ill. at 404.
144. Id. at 407.
146. Ingham, supra note 100, at 36.
147. "Exaggerated facial hair probably serves several adaptive functions. As a social organ it inflates apparent body size, thereby helping to establish and maintain the group dominance hierarchy." JERRY N. MCDONALD, NORTH AMERICAN BISON: THEIR CLASSIFICATION AND EVOLUTION pl. 28 (1981).
And buffalo and cattle remain different on the journey from ranch to supermarket: buffalo steaks don’t become beef by sharing a meat locker.  

III. WHEIR AND THE DEVELOPMENT OF BUFFALO LAW

The above analysis demonstrates that the judge in Wheir could reasonably have concluded that consuming buffalo meat is not the same as consuming plain old beef. The court’s understandable reluctance to treat the cost of a juicy, traditional steak as an ordinary and necessary business expense for a bodybuilder need not have foreclosed deductibility of the cost of bison filets. Buffalo meat is sui generis, and Wheir’s helpings were surely generous.

To this point I’ve intimated that Judge Couvillion’s refusal to recognize the uniqueness of buffalo meat was a failure of legal imagination. As a buffalo law scholar, I was horrified when I read Wheir: the case seemed very anti-buffalo. But is that so? For those who divide the world into buffalo supporters and buffalo detractors, there can be no more important question.

It’s true that the Wheir opinion recognizes no special status for buffalo, and, on that ground, the case is a failure. On the other hand, looking at the case through rose-colored bifocals, one can see that denying Wheir a deduction removes any tax incentive for bodybuilders to consume buffalo meat—a decidedly pro-buffalo position. On the other, other hand, the reason there’s a buffalo population today, in most parts of the United States, is that buffalo can be consumed by humans. Removing incentives to consume buffalo removes incentives to rear buffalo. That’s the way the bull market works.

So is the result in Wheir really bad for buffalo and for buffalo law? Oh, I don’t know.... [Eds.: I’m on deadline with another piece. Can you write a conclusion like you do for the Harvard profs who don’t have time to write their own articles? Maybe a little song-and-dance about the need for greater clarity in the law? Give me a call when you’ve come up with something.]

148. For locker room humor, see, for example, supra notes 15–18, 33, 50.
149. Yes, that was analysis—with a detour or two, a few ruts along the way, and an occasional pat stop. Buffalo law is wide-ranging; it’s not your traditional, linear subject.
150. Although I’m generally modest, see supra note 89 and accompanying text, I immodestly think I’m the preeminent buffalo law scholar. Even if that’s not so, my first buffalo article came out in 1990, see Jensen, supra note 2, which makes me a pre-Eminem buffalo law scholar.
151. A buffalo supporter has an awful lot to support.
152. By turning de sod, detractors make de plains less suitable for de buffalo.
153. See supra note 13 (noting development of private herds throughout the United States).