The Extension of Legal Rights to Animals under a Caring Ethic: An Ecofeminist Exploration of Steven Wise's Rattling the Cage

Katrina M. Albright

Recommended Citation
Available at: http://digitalrepository.unm.edu/nrj/vol42/iss4/9
The Extension of Legal Rights to Animals under a Caring Ethic: An Ecofeminist Exploration of Steven Wise’s Rattling the Cage

ABSTRACT

In his book, Rattling the Cage: Toward Legal Rights for Animals, Steven M. Wise argues that nonhuman animals should be counted as persons under the law, therefore granting them legal standing in the American court system. Wise advocates the immediate extension of legal rights to chimpanzees and bonobos (pygmy chimpanzees), on the basis that these animals possess mental capacities that would allow them to pass current standard tests for personhood. Wise’s theory presents a framework for extending legal protections to animals based on the values currently embraced by the American legal system. However, this approach extends legal rights to select species of animals that are deemed to possess rationality. Ecofeminist reform of the American legal system would build upon Wise’s theory and expand legal protections for many more species of animals.

Ecofeminism draws connections between the domination over women and the domination over nature and nonhuman animals. It identifies Western patriarchal value systems as the common source of cultural validation of environmental destruction and violence against women and animals. Ecofeminist animal welfare theorists criticize the classic concept of animal “rights,” which places importance on the idea that rationality and sentience of animals is similar to human reason. Animal “rights” theory, as it is used both in Wise’s book and in the animal welfare movement in general, therefore withholding protections from those animals who fail a “rationality” test. Moving away from animal rights dialogue, then, ecofeminists instead embrace a “feminist caring ethic.” A caring ethic recognizes animals’ inherent right to bodily security and integrity based not on their rationality, but instead on their...
emotional lives and relationships with humans, as well as on humans' ethical responsibilities to end animal suffering.

Recognition of ecofeminist values in the American legal system would reject the rationality standard currently required in personhood status and in Wise's theory, and would extend legal rights to animals based on emotional relationships and moral responsibilities.

I. INTRODUCTION

The animal advocacy movement, in its modern conception, has existed for fewer than 30 years. However, the movement has already splintered into numerous subgroups, each based on distinct theoretical bases and each working to achieve different, though often complementary, goals. Classic animal rights theory is based on the provocative writings of authors who started the movement, such as Peter Singer\(^2\) and Tom Regan,\(^3\) beginning in the mid-1970s. In more recent years, scholars have developed new theories, new arguments, and new activist strategies in defense of nonhuman animals. This article examines and contrasts two such modern arguments: (1) author Steven M. Wise's argument for granting legal personhood and courtroom standing to animals, and (2) the ecofeminist argument for invoking reform of the ways nonhuman animals are valued in American society.

In his book, *Rattling the Cage: Toward Legal Rights for Animals*, Wise argues that nonhuman animals should be counted as persons under the law, therefore granting them legal standing in the American court system.\(^4\) Wise advocates the immediate extension of legal rights to chimpanzees and bonobos (pygmy chimpanzees) on the basis that these animals possess

---

3. See, e.g., TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983). Although Regan appeared on the scene a bit later than Singer, his theories are still considered to be classic animal rights theories.
mental capacities that would allow them to pass current standard tests for personhood. Wise's theory presents a framework for extending legal protections to animals based on the values currently embraced by the American legal system. However, this approach extends legal rights to a select species of animals that are deemed to possess rationality. Alternatively, ecofeminist reform of the American legal system would build upon Wise's theory and expand legal protections to many more species.

Ecofeminism is a theory that draws connections between the domination over women and the domination over nature and nonhuman animals. It identifies patriarchal value systems as the common source of both the cultural validation of environmental destruction and violence against women and animals. Ecofeminist animal welfare theorists criticize the classic concept of animal "rights," which places importance on the idea that rationality and sentience of animals is similar to human reason. Animal "rights" theory, as it is used both in Wise's book and in the animal welfare movement in general, therefore withholds protections from those animals who fail a "rationality" test. Moving away from animal rights dialogue, then, ecofeminists instead embrace the theory of a feminist "caring ethic," first introduced by Carol Gilligan in her landmark book, In a Different Voice: Psychological Theory and Women's Development. As utilized by some ecofeminist scholars, an ethic of care recognizes animals' inherent right to bodily security and integrity based not on their rationality, but instead on their emotional lives and relationships with humans, as well as on humans' ethical responsibilities to end animal suffering.

Recognition of ecofeminist values in the American legal system, then, would reject the rationality standard currently required in personhood status and in Wise's theory, and would extend legal rights to animals based on emotional relationships and moral responsibilities. To support this thesis, this article first gives a brief overview of the history and philosophies of the animal protection movement. Wise's legal rights theory is discussed in this section. Next, the article describes the basic tenets of ecofeminist theory and of feminist animal welfare theory in particular. Finally, the article applies ecofeminist theory to Wise's theory and argues that legal rights for animals should be based on a feminist ethic of caring, rather than on a standard of rationality.

5. Wise, supra note 4, at 4-6. Published just two years ago, Wise's book stands as the foremost theory for legal rights for animals.
II. THEORETICAL BASES FOR ANIMAL RIGHTS

A. The Issue of Terminology

Generally, the term "animal rights" is used to describe any interest in improving the lives of nonhuman animals. The term is perhaps too loosely used by the public, however, as different theorists attach different meanings to the terms "rights" and "animal rights movement." This section explores some of these meanings and defines these terms as they are used in this article.

1. The Definition of "Rights"

An important distinction lies in the difference between the common definition of "rights" and a lawyer's definition of "rights." As the word is used most often by the public, "rights" involve "moral notions that grow out of respect for the individual...[and rights] establish areas where the individual is entitled to be protected against the state and the majority...."

In contrast, practitioners of the law attach more technical definitions to various legal "rights." Wise, himself an attorney, uses these definitions in his book. In particular, he adopts the classification of legal rights developed by Yale Law School Professor Wesley Hohfeld. Hohfeld's classification of legal rights has been followed by most legal scholars and judges for much of the last century.

Hohfeld's classification of legal rights is based on the premise that legal relationships can exist only between two persons. One of the two persons has a right, or legal advantage, over the other person, who has a corresponding legal disadvantage. There are four types of legal rights, each with corresponding legal disadvantages: liberty and no-right, claim and duty, immunity and disability, and power and liability. Each is briefly described below.

- The first type of right, liberty, includes both negative liberty and positive liberty. Negative liberty is the freedom from imprisonment, slavery, and abuse—that is, it provides the right to bodily freedom and bodily integrity. For animals, freedom from
physical abuse could be one example of a negative liberty right. Positive liberty is the freedom to act on one’s free will. For animals, this could mean the freedom of physical movement and interaction with other individuals. The corresponding legal disadvantage to liberty is the “no-right.”

- The second right, a claim, entitles a person to limit the liberty of another; the other person has a corresponding duty to behave in certain ways toward the claimant. Hohfeld believed that the only true legal “rights” are claims with corresponding duties. There are two types of claims. The first is an in personam claim, which exists against a select few individuals who have duties. Wise maintains that this type of claim will likely never be available to nonhuman animals. The second type of claim is an in rem claim, which exists against everyone. In rem claims are recognized and protected in the U.S. Constitution, the common law, and statutory law. Wise gives us an example: an individual has an in rem claim against being kidnapped and forced into biomedical research. Every person then has the correlative duty not to commit such an atrocity.

- The third right is immunity. This type of right disables one person from interfering with the liberty of another. Wise distinguishes immunities from claims: “Claims tell us what we should not do. Immunities tell us what we cannot do.” A holder of an immunity has no inherent power to sue to stop a violation of that immunity, but such power may be specifically granted by a judge.

- The final right is power. This is the ability granted to an individual by the law to affect her or his own rights or the rights of someone else. The right of power is one of the most fundamental rights in

11. *Id.* at 56.
12. To illustrate this concept, Wise cites the following example:
   The fact that a man has a liberty to look at his neighbour over the garden fence does not entail that the neighbour has a correlative obligation to let himself be looked at or not to interfere with the exercise of this specific liberty-right. So he could, for example, erect a screen on his side of the fence to block the view.
15. Wise, *supra* note 4, at 56.
16. *Id.*
17. *Id.* at 57.
18. *Id.* at 58.
the American legal system; the U.S. Supreme Court called it "the right conservative of all other rights." The ability to sue for violations of human rights, for example, arises out of the right of power.

As illustrated above, defining a "right" is a complex and problematic endeavor. Some scholars even contend that the concept of rights has become so ambiguous that it cannot effectively be used in legal debate. Despite the term's ambiguity, however, it continues to be a common word in both layperson and legal discourse; further, its use is necessary in a discussion of extending legal rights to animals. Because this article primarily serves as an exploration of Wise's theory, it generally uses the term "rights" as Wise defines them in Rattling the Cage, as described above.

When referring to the social movement that is commonly called the "animal rights" movement, this article uses phrases such as "animal defense movement" and "animal advocacy." As discussed in the section below, even the meaning of the term "animal rights movement" is debated among scholars and activists.

2. The Definition of "Animal Rights Movement"

Another important term to define is "animal rights movement." Here again, most actions involving animal welfare are commonly considered to be part of the animal rights movement. Some scholars, however, draw distinctions between animal welfare advocates and animal rights activists. Author Gary L. Francione illustrates the distinction:

[U]ntil the late 1970s, concern about animals had been limited to assuring that they were treated "humanely" and that they were not subjected to "unnecessary" suffering. This position, known as the animal welfare view, assumes the legitimacy of treating animals instrumentally as means to human ends as long as certain "safeguards" are employed.... The [animal] rights view reflects a shift from a vague obligation to act "humanely" to a theory of justice that rejects the status of animals as property and the corresponding hegemony of humans over nonhumans.... Animal rights theory rejects the regulation of atrocities and calls unambiguously and unequivocally for their abolition.22
Ecofeminists, whose position is more thoroughly discussed in a later section of this article,23 give yet another definition to the term "animal rights movement." The notion of "animal rights," as used in some literature, is based on the idea that some animals possess rationality similar to that of humans.24 Ecofeminists reject the idea that rationality is the appropriate basis for extending protections to nonhuman animals. Instead, they advocate protections based on our emotional relationships with animals and our moral responsibilities to care for animals.25

This article substitutes words such as "defense," "welfare," and "advocacy" for "rights" to describe what is most often termed the "animal rights movement." "Welfare" as it is used in this article is not based on Francione's distinction between the welfare and rights view, but is used simply under its meaning in layperson's language.

B. Wise's Legal Theory in Rattling the Cage

To give a historical context for his legal theory, Wise carefully traces the foundations of animals' legal "thinghood"26 in Western legal systems, from Aristotle's time through today. Wise begins this endeavor with discussion of Aristotle's "Great Chain of Being." The Chain of Being was the original philosophy envisioning a hierarchical order of Earth's creatures, with the most rational beings at the top. Animals, who were lower on the chain, were designed to serve humans.27 This philosophy would come to

conditions in laboratories and factory farm operations consider themselves animal rights activists, but they would be considered "welfare advocates" by Francione. Francione criticizes this type of work as failing to further the true goals of the animal rights position, because it seeks to regulate, rather than abolish, forms of animal exploitation. Some activists counter with the argument that short-term improvement of exploitative conditions helps reduce animal suffering in the meantime while activists work toward bigger, long-term goals. See id. at 34-36.

23. See infra notes 45-53 and accompanying text.
25. See, e.g., BEYOND ANIMAL RIGHTS: A FEMINIST CARING ETHIC FOR THE TREATMENT OF ANIMALS (Carol J. Adams & Josephine Donovan eds., 1996). To reflect this position and "move away from the notion of 'rights' toward a more feminist notion of liberation," the organization Feminists for Animal Rights (FAR) has decided to change its name. Lauren Smedley, Further than FAR: In Search of a New Name, 12 ECOFEMINIST J., Nos. 1-2, at 13 (2000). Although FAR has not yet changed its name, it is considering the following alternatives: Feminists for Animal Liberation, Feminist/Animal Alliance, Feminist Advocates for Animals, and Feminists for an Ethical Relation to Animal Life (FERAL). Id.
26. Wise uses the term "thinghood" to describe animals' status under the law, as opposed to "personhood." See, e.g., Wise, supra note 4, at 23 (titling his chapter, "The Legal Thinghood of Nonhuman Animals").
27. Wise, supra note 4, at 11. Under this philosophy, humans enjoyed a ranking above all other earthly creatures and below only God and divine beings. Id.
influence virtually all later Western perceptions of the universe.\textsuperscript{28} Fundamental aspects of the Great Chain of Being were adopted by the Stoics, whose philosophies were then incorporated into Greek and Roman thought.\textsuperscript{29} Roman law, of course, formed the foundation of the common law system, first in England and finally in America; therefore, ancient concepts of a hierarchy of existence remained imbedded in each subsequent system of law.\textsuperscript{30} By describing this evolution of the law, Wise meticulously establishes the historical origins of our legal system's devaluation of animals.

Next, Wise moves to a discussion of the behavior of chimpanzees and bonobos. "Minds are critical for legal rights,"\textsuperscript{31} Wise maintains, and therefore he sets out to establish that chimps and bonobos engage in complex thought processes, possess the capacity to reason, and experience meaningful emotional relationships. These animals have logical and mathematical abilities, he explains; they form mental representations of facts and objects, use tools, communicate in sign language, knowingly tell lies, display empathy toward others, imitate observed behavior, and teach learned behavior.\textsuperscript{32} Wise proves all this, and yet he still cautions the reader that he has "mentioned just a small faction" of the recorded evidence "detailing the astonishing cognitive capacities of chimpanzees and bonobos."\textsuperscript{33}

Having established the complex mental and emotional lives of chimps and bonobos, Wise reaches the heart of his argument. "Few would argue that the complex autonomies of chimpanzees and bonobos would not entitle them to bodily liberty and bodily integrity if they were human," he writes.\textsuperscript{34} Therefore, there exists no reasoned argument for failing to grant

\begin{itemize}
\item[28.] Id.
\item[29.] Id. at 14.
\item[30.] Id. at 31.
\item[31.] Id. at 179.
\item[32.] Id. at 170-237.
\item[33.] WISE, supra note 4, at 230. The stories Wise tells truly are "astonishing." Some of his most amazing stories are accounts of chimpanzees teaching sign language to one another. Individual chimpanzees have learned to communicate regularly with other chimps through sign language, without ever seeing a human use sign language. Id. at 3.
\item[34.] Id. at 253. Interestingly, Wise qualifies this statement at several points in his book by writing that the chimpanzees who exhibit the most complex mental capacities are those who have been "human-enculturated." In a review of Wise's book, one legal scholar observes, [L]iving in the company of humans enables chimpanzees and bonobos to develop abilities that they do not manifest when living only with their own species. Because Wise thinks that the realization of these capacities is good for the creature itself, we find ourselves wondering whether he would support the 'adoption' of primates by humans.
\end{itemize}

these animals these basic legal "dignity-rights," or rights to bodily integrity.\textsuperscript{35} He concludes his book by stating that nothing in his theory implies that animals should be entitled \textit{only} to the rights of bodily dignity and bodily integrity. However, the evidence currently available to us most clearly establishes chimps' and bonobos' entitlements to these rights in particular.\textsuperscript{36} Wise also suggests that other species may be entitled to legal rights, so long as a certain, definable presence of mind is shown: "Judges must determine the entitlement to dignity-rights of any nonhuman animal the same ways they determine the entitlements of chimpanzees, bonobos, and human beings—according to autonomy. Autonomy, of course, arises from [having] minds."\textsuperscript{37}

It is important to note that Wise's theory is progressive—some consider it radical. Like many of those who advocate legal reform, Wise and others who support legal rights for animals face fierce opposition. A common concern is that some humans do not wish to be restricted in their ability to kill and/or harm animals for education, entertainment, research, or food purposes.\textsuperscript{38} One author writes, "Society has placed a greater value on human life than on animal life and those with extreme beliefs in animal rights have ignored this....Animal rights would not be co-existent with human rights[,] they would be in competition with each other."\textsuperscript{39} It is true that most rights afforded to a group, human or otherwise, will be in conflict with other existing rights. In our legal system, most rights must be asserted against other rights.\textsuperscript{40} In addition to this concern, other complex questions arise once the premise is established that animals deserve some basic legal rights. Which rights in particular will we grant to animals? Against whom will these rights exist? What will be the boundaries of those rights?\textsuperscript{41} Some

\begin{center}
\textsuperscript{35} Wise, \textit{supra} note 4, at 267.
\end{center}

\begin{center}
\textsuperscript{36} Id. The author recognizes that a significant and compelling discussion of the \textit{extent} to which animals should be granted rights remains outside the scope of this article.
\end{center}

\begin{center}
\textsuperscript{37} Id. at 268.
\end{center}

\begin{center}
\textsuperscript{38} See, \textit{e.g.}, F. Barbara Orlans \textit{et al.}, The Human Use of Animals: Case Studies in Ethical Choice 19-20 (1993) (discussing "speciesism" as the belief that human interests in using animals as resources outweigh animals' interests in freedom from harm).
\end{center}

\begin{center}
\end{center}

\begin{center}
\textsuperscript{40} In Wise's previously cited example, one property owner asserts her/his right to privacy against the neighbor's liberty right to peer over the fence. \textit{See supra} note 12; \textit{WISE, supra} note 4, at 55.
\end{center}

\begin{center}
\textsuperscript{41} Questions similar to these are presented by Schmahmann & Polacheck, \textit{supra} note 39, at 754-55. The authors also ask additional questions, including, "When and how will such rights be invoked?" and "Who will enforce such rights?" \textit{Id.}
\end{center}
opponents of animal welfare believe these questions are so problematic they remain unsolvable.\footnote{42}

Even some scholars who share Wise’s convictions about animal welfare criticize his theory. For example, some maintain that the achievement of independent jural standing for animals is highly unlikely due to the political and legal climate in this country. These critics contend that arguing for jural standing for animals is a waste of time, and that activist resources should be spent instead on strengthening statutory law and the judicial decisions that interpret existing law.\footnote{43} Wise himself realizes that the extension of courtroom standing to animals necessarily must coincide with further social reform, and at one point he refers to his theory as an “experiment.”\footnote{44} Yet radical legal reform is best accomplished when it begins in theory that is well-reasoned and with solid foundations. This is what Wise provides in *Rattling the Cage*. As this article argues later, however, Wise’s theory, though well-founded, still can be expanded and strengthened by the application of ecofeminist theory.

III. THEORETICAL BASES FOR ECOFEMINISM

According to basic tenets of ecofeminism, environmentalism is a feminist issue. The theory of ecofeminism draws connections between the domination over women and the domination over nature, and it identifies patriarchal values and hierarchical thinking as the conceptual frameworks that enable and propagate such domination. An important aspect of ecofeminism is the recognition of dualism in Western thought. “A value dualism is a pair of contrasting concepts in which one is seen as dominant

\footnote{42} See, e.g., Schmahmann & Polacheck, *supra* note 39. Although definitive answers to these important questions lie outside the scope of this article, it is clear that reasonable and just solutions to these problems must exist. Legislators and courts have worked through these issues when granting new legal rights to groups of humans; thus, history shows that our legal system and its practitioners have all the necessary tools to address these questions. Further, the fact that these questions may present a challenge to lawmakers does not invalidate humans’ moral responsibilities to afford basic protections to living creatures.

\footnote{43} See, e.g., Nussbaum, *supra* note 34; Lieutenant Commander R.A. Conrad, *Rattling the Cage: Toward Legal Rights for Animals*, 166 Mil. L. Rev. 226, 227-30 (2000) (book review). One author notes, “If it is generally agreed that animals, because of their capacity for feeling, should be treated humanely, there is no reason why the denial of standing to animals should result in their oppression....[O]ur legal system is adapting to society’s evolving recognition of the importance of animal welfare. There is no reason not to develop and legally enforce this refinement of our collective animal consciousness [through statutory reform].” Fiona M. St. John-Parsons, “Four Legs Good, Two Legs Bad”: *The Issue of Standing in Animal Legal Defense Fund, Inc. v. Glickman and Its Implications for the Animal Rights Movement*, 65 Brook. L. Rev. 895, 932 (1999).

\footnote{44} St. John-Parsons, *supra* note 43, at 118.
over the other, and they are viewed as exclusive and oppositional. This pattern, that one is subordinate and instrumental to the other, can be seen in the exploitation of women and nature in Western patriarchal societies. Such dualisms include women/men, humans/nonhuman animals, and culture/nature. By establishing these dualisms, patriarchal societies perpetuate power imbalances, which are sustained through the domination and submission of women, minorities, nature, and animals. One theorist terms mainstream culture as "dominionist." He writes, "[the] patriarchy...is our dominionist culture's system for the control of hierarchical relations between men and women. It maintains order in those relations just as dominionism maintains relations between human beings and the rest of nature."

Ecofeminism also notes ways in which patriarchal cultures draw comparisons between women and nature. Once women and nature are equated, they may be similarly dominated.

Woven everywhere into the tapestry of European art and literature and seemingly an inseparable part of most philosophical and scientific texts—even embedded in the structure of European languages—is the assumption that women are closer to nature than men are. The notion is not intended as a compliment. In the hierarchical geography of European tradition, not only are human beings elevated above the rest of nature, but men are closer to heaven than...
women. In short, the idea that women are close to nature is an argument for the dominion of men. 49

It is clear, then, that environmentalism is a feminist issue. Why is animal advocacy also a feminist issue? The organization Feminists for Animal Rights (FAR) 50 utilizes ecofeminist theory to explain the connection, stating that "exploitation of women and animals derives from the same patriarchal mentality....[P]atriarchy [is] a system of hierarchical domination, a system which works for the powerful and willing against the powerless and unwilling....[T]he common denominator in the lives of women and animals is violence—either real or threatened...." 51 FAR also draws connections between the position of women and nonhuman animals by stating that “[i]n patriarchal society women and animals are considered...inferior, 'cute,' childish, uncontrollable, emotional, impulsive, instinctive, irrational, evil, property, objects...[and] in patriarchal society women and animals are referred to as...chicks, bitches, pussies, foxes, dogs, cows, beavers, kittens, sows, shrews, heifers, vixens...." 52 Clearly, then, the issues of animal welfare and women’s rights share commonalities. It simply took the activism of a few forward-thinking ecofeminists to expose these commonalities and begin to unite the feminist and animal advocacy movements. 53

49. SUSAN GRIFFIN, WOMAN AND NATURE: THE ROARING INSIDE HER ix (1978). Griffin goes further to argue that the association of women with nature serves the desire of Western culture to perceive of humans as being separate and distinct from nature:

The association between women and nature has not only served to oppress women, it has also acted as a device for denial, a means to evade the simple truth that human existence is immersed in nature, dependent on nature, inseparable from it. By imagining women as closer to nature, it becomes possible to imagine men as farther away from nature. And in this way, both men and women can indulge in the fantasy that the human condition can be free of mortality, as well as the exigencies and needs of natural limitation.

Id. at x-xi.

50. Although FAR members are the leading proponents of the move away from patriarchal "rights" debate, at this point FAR maintains the use of the word "rights" in its name. For further discussion, see supra note 25 and accompanying text.


52. Id.

53. Ecofeminists expose the commonalities between these and still other social issues: [ecofeminist] theory explores a range of concerns using a range of theoretical approaches. Issues of representations of women, reproductive rights, sexual violence, racial violence and white supremacy, environmental exploitation, the relationship between knowledge, power and value, [and] the imaging of God, are issues that intersect with the defense of animals.

A. The Ecofeminist Vision of Animal Advocacy

1. General Principles Connecting Ecofeminism and Animal Welfare Theory

Carol Adams, FAR board member and author of the groundbreaking book *The Sexual Politics of Meat*,\(^{54}\) was perhaps the first scholar to publicly draw connections between feminism, ecofeminism, and the animal advocacy movement. Expanding upon fundamental principles of ecofeminism, Adams creates a “feminist-vegetarian critical theory” based on “the perception that women and animals are similarly positioned in a patriarchal world, as objects rather than subjects.”\(^{55}\) After establishing this connection, Adams calls for the adoption of “ethical vegetarianism”—that is, “vegetarianism arising from an ethical decision that regards meat eating as an unjustifiable exploitation of the other animals.”\(^{56}\) By adopting ethical vegetarianism, feminists are “rebuking a meat eating and patriarchal world.”\(^{57}\) In her later works, Adams applies these ecofeminist principles to other animal and feminist issues in addition to vegetarianism.\(^{58}\)

Adams and other ecofeminists argue that since current patriarchal values are rooted in history, it is important to look to the past to understand commonalities in the situations of women and nonhuman animals. Animal rights philosopher Peter Singer, writing during the initial development and documentation of ecofeminist theory, made such a connection when he argued that “supporters of liberation for Blacks and Women should support Animal Liberation too.”\(^{59}\) Consider the following passage:

> When Mary Wollstonecraft, a forerunner of today’s feminists, published her *Vindication of the Rights of Women* in 1792, her views were widely regarded as absurd, and before long an anonymous publication appeared entitled *A Vindication of the Rights of Brutes*. The author of this satirical work (now known to have been Thomas Taylor, a distinguished Cambridge philosopher) tried to refute Mary Wollstonecraft’s arguments by showing that they could be carried one stage further. If the argument for equality was sound when applied to women, why should it not be applied to dogs, cats, and horses? The reasoning seemed to hold for these “brutes” too; yet to hold

---

55. *Id.* at 180.
56. *Id.* at 27-28.
57. *Id.* at 28.
that brutes had rights was manifestly absurd; therefore the reasoning by which this conclusion had been reached must be unsound, and if unsound when applied to brutes, it must also be unsound when applied to women, since the very same arguments had been made in each case.60

The shared historical oppression of both women and animals, then, is a central principle in ecofeminist theory. Another central principle in Adams's writings is the concept of the "absent referent." Under a feminist vegetarian analysis, the absent referent is the identity of an animal who has been killed for human consumption.61

[What I call the structure of the absent referent [is that] behind every meal of meat is an absence: the death of the animal whose place the meat takes. The "absent referent" is that which separates the meat eater from the animal and the animal from the end product. The function of the absent referent is to keep our "meat" separated from any idea that she or he was once an animal, to keep something from being seen as having been someone.62

The identity of a slaughtered animal is not always the absent referent. The absent referent may be the humanity of a woman objectified in pornography; or it may be the violence inflicted on a woman when one refers, for example, to environmental destruction as the "rape" of the earth.63 Ultimately, the absent referent is any characteristic that is removed from an image or an identity, therefore making it psychologically easier for consumers to subjugate women and animals.

Once connections have been made between feminism, environmentalism, and animal welfare, the next step is to work for change in societal, social, and legal realms. The next subsection of this article explores the adoption of a caring ethic as one method of implementing change.

2. Different Voices Theory and the "Ethic of Care"

In addition to exploring the connections between the subjugation of women, nature, and nonhuman animals, Adams advocates widespread social reform: "The goal of feminist defenses of animals is that humanity will shed its Euro-American malestream orientation, will shed its urge to

61. ADAMS, supra note 54, at 50-56.
63. See ADAMS, supra note 54, at 50-56.
demarcate some 'ultimate' differences between us and the other animals, [and] will reject a vertical hierarchy of humans above animals [and men above women]." Adams and other ecofeminists argue that one means of achieving this goal is to adopt a feminist caring ethic in place of the current notion of animal "rights."

The concept of the "ethic of care" was developed by Carol Gilligan as part of the now classic theory of women's different voices. Gilligan's different voices theory identifies two perspectives used to solve moral problems. One perspective is the "ethic of justice," which is based on hierarchical relationships between rights-holders. Traditionally, in patriarchal culture, men have utilized the ethic of justice. Resolving conflict under this perspective involves the application of formal rules and principles. An alternate perspective Gilligan identifies is the "ethic of care." Those who utilize the ethic of care—traditionally women—consider the details and complexities of emotional relationships between the individuals experiencing conflict. The value of this perspective is based on "the ability to care for and protect others."

In Beyond Animal Rights: A Feminist Caring Ethic for the Treatment of Animals, Adams and Josephine Donovan utilize Gilligan's theory and identify the notion of animal "rights" as a construct of a "morality of rights," or ethic of justice. Application of the ethic of justice has not resulted in success for animals; therefore, the authors argue that we should move instead to an ethic of care framework to implement adequate protections for animals.

64. Id. at 12.
65. See, e.g., BEYOND ANIMAL RIGHTS, supra note 25, at 11-12.
66. Women's different voices theory was established in GILLIGAN, supra note 6.
67. See id. at 73.
68. See id.
69. See id.
70. Id. Gilligan notes fundamental differences between the two perspectives, such as the following:

Women's construction of [a] moral problem as a problem of care and responsibility in relationships rather than as one of rights and rules ties the development of their moral thinking to changes in their understanding of responsibility and relationships, just as the conception of morality as justice ties development to the logic of equality and reciprocity. Thus the logic underlying an ethic of care is a psychological logic or relationship, which contrasts with the forma logic of fairness that informs the justice approach.

61. BEYOND ANIMAL RIGHTS, supra note 25, at 13 (stating that "[w]here the masculine concern with rights, rules, and an abstract idea of justice tends often to seem like 'a math problem with humans,' the feminine approach offers a more flexible, situational, and particularized ethic") (citations omitted).
B. Conflicts between the Ecofeminist and Animal Rights Movements

1. Sextist Tactics in the Animal Advocacy Movement

Despite the strong connections between feminism and animal defense theory, not all animal advocates have embraced feminist values. There is ongoing conflict between FAR and People for the Ethical Treatment of Animals (PETA), the largest and most visible animal advocacy organization in the world.\(^72\) FAR has publicly attacked some of PETA’s sexist advertising campaigns. As one example, a 1995 PETA ad campaign was designed to encourage organ donation and to discourage xenografts, or cross-species transplants. The ads featured a *Playboy* model and a slogan reading, "Some People Need You Inside Them."\(^73\) Perhaps PETA’s most famous ad campaigns have featured nude models and the slogan "I’d Rather Go Naked Than Wear Fur."\(^74\)

Ecofeminists have criticized PETA ad campaigns as objectifying women and promoting the same hierarchical, patriarchal values that lead to the exploitation of animals.\(^75\) One commentator notes, "PETA is seen as a ‘marketer’ that ‘sells’ animal rights and does so using the very same oppressive and exploitative images and slogans that are used in the society at large."\(^76\) Ecofeminist groups such as FAR contend, then, that PETA is propagating the roots of the problem.

2. Theoretical Opposition to the Ecofeminist Vision of Animal Advocacy

Today, the extension of legal rights to animals is still considered by some to be a ridiculous, if not dangerous, notion. One commentator laments that "the legal recognition of animal rights is [considered] either...a frivolous and slightly contemptible waste of legal talent and resources, or...a cruel rejection of the superior rights claims of human beings."\(^77\) Still

---

\(^{72}\) See About PETA, at http://www.peta.org/about/index.html (People for the Ethical Treatment of Animals website) (last visited Oct. 28, 2002).

\(^{73}\) FRANCIONE, supra note 1, at 75.

\(^{74}\) There are many more examples of PETA actions that are criticized by feminists as being sexist, including the following: (1) an anti-fur ad in which a nude actress’s breasts are groped (copy of ad on file with author); (2) anti- Premarin protests featuring a nude "Lady Godiva" riding on horseback through the streets of New York, Washington, and Paris (copy of ad on file with author); and (3) an ad showing a women in a bikini holding a string of sausages, with the printed message, "I threw a party, but the cattlemen couldn’t come (eating meat causes impotence)." PETA online press release, PETA Billboards Targeting Impotence in Meat-Eaters Rejected in Five States, available at http://www.peta-online.org/search/news/row.asp?id=32 (June 1, 1999).

\(^{75}\) See, e.g., I FEMINISTS FOR ANIMAL RIGHTS NEWSLETTER, Nos. 1-2, 4 (1996).

\(^{76}\) FRANCIONE, supra note 1, at 75.

\(^{77}\) St. John-Parsons, supra note 43, at 895.
Rattling the case

More controversy is generated when ecofeminism is added to the debate. Even some fellow animal welfare advocates have harshly criticized the application of ecofeminist theory to animal rights theory:

[The ecofeminists claim that the rights position is hyper-rational and that it devalues emotion....[E]cofeminists advance the claim] that rights are somehow inherently patriarchal or hierarchical. This...is simply wrong. We have seen that to the extent that we are speaking of the right to be included in the moral community at all, this right is anything but patriarchal or hierarchical....[T]he rights position eliminates the "thingness" of nonhumans and thereby diminishes the force of the normatively constructed dualism that has been used to justify the human oppression of nonhumans, just as the rights view diminishes the force of the male/female dualism.78

Ecofeminist theory has been criticized by feminists as well as animal welfare advocates. For example, a common criticism of the different voices theory is that it is essentialist—that is, it defines certain characteristics as being inherently female or inherently male. Some women are not naturally caring individuals; some men are. Also, some feminists argue that attributing caring characteristics to women further feminizes them in damaging ways.79 While these concerns are important considerations, perhaps "this nervousness is excessive," as explained by Mona Harrington:80

Caring is an authentic part of the experience of many women and is directly relevant to criticisms of power-wielding that has become detached from human need. In escaping from the old male conceptions of women's maternal roles, women should not have to pretend that their own experience of caregiving means nothing. What women know and value as caregivers certainly should be on the new agenda of women's social participation if women want to put it there.81

In the face of opposition—from scholars both for and against animal welfare—ecofeminist animal defense activists continue to argue for

79. See, e.g., Leslie Bender, From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law, 15 VT. L. REV. 1, 39 (1990) ("Some feminist theories reject Gilligan's gender-linked analysis of ethical orientations because they fear that it will reinscribe women with characteristics that are a consequence of, or have been the fodder for, gender domination.").
81. Id.
the extension of legal protections to animals, based on a theory of caring and morality.

IV. USING ECOFEMINIST THEORY TO ADVANCE WISE’S THEORY

Wise is correct in his assertion that the American legal system must recognize personhood status and court standing for animals. This aspect of his theory should be maintained, even under ecofeminist theory: extending legal rights to animals would provide needed protections for animals that cannot be implemented if the law continues to regard animals as “property.” However, Wise’s rationality test should be rejected in favor of the standard of an “ethic of care” advanced by ecofeminists.

A. Replacing “Rights” Concepts with an Ethic of Care

Particularly in recent years, both the ethic of justice and the ethic of care have been utilized in the American legal system. This section of this article argues that both approaches are valuable in our legal system, and every legal problem should be independently analyzed to determine whether an ethic of care or justice would more appropriately address the problem. Because of the nature of the legal issues surrounding animal welfare, ecofeminists would apply an ethic of care, rather than an ethic of justice, to the body of law pertaining to animals. The ethic of care would consider the emotional relationships between humans and nonhuman animals and would assign moral responsibilities based on those relationships.

Gilligan’s theory of different voices was not originally designed as a legal theory. However, her theory applies to the law with ease:

[The] ethic of justice closely parallels the dominant rationality and methodology of Anglo-American law. This justice ethic is based on a rights model, where problem-solving consists of the application of abstract, generalized principles to arbitrate rights disputes between separate individuals (conflicting rights-holders) and to privilege one right over another. The justice-oriented problem-solver seeks a distanced stance from which to make objective decisions by applying formal rules of equality and other general principles of justice. Traditionally, this perspective was deemed the highest stage of moral development, and it has monopolized legal reasoning.⁸²

⁸². Bender, supra note 79, at 36 (emphasis added).
Of course, the "legal reasoning" referred to in the above passage is the traditional, hierarchical reasoning valued by the Roman, English, and eventually American legal systems. However, as the number of women in the field of law has increased in recent decades, the ethic of care also has been applied in our American legal system. In one study of practicing attorneys in the state of Washington, researchers found "almost stereotypical distinctions down the line—men focusing on competition and winning, women favoring cooperation and compromise; men interpreting issues as conflicts of rights and duties between individuals, women seeing issues as conflicts of responsibilities in a network of relationships...men trusting hierarchical authority, women looking to decentralized consensus."

Gilligan's theory of different voices maintains that "men tend to solve moral dilemmas by applying rules or principles, and women by seeking to retain and reinforce relationships among the parties involved." While one perspective is not unequivocally superior to the other, one perspective may work more effectively than the other in different types of cases. For example, the ethic of care may best be applied in family law cases, in which the parties will continue to have relationships with one another after the legal dispute is resolved. Alternatively, the ethic of justice may best be applied in cases not involving personal relationships and/or cases in which the parties have directly conflicting interests. A case of environmental justice may serve as an example—one such case might involve a dispute between a defendant company operating a large polluting facility and a plaintiff community group whose members have been adversely impacted by the pollution. Here the application of an ethic of justice would be appropriate. The parties would not have relationships to maintain and established rules of torts should apply: the party responsible for inflicting harm should compensate the parties injured.

While an ethic of justice might appropriately address legal issues like the environmental justice case above, it fails to adequately protect animals. Recognizing this failure of the "rights" approach, Adams and

83. HARRINGTON, supra note 80, at 190 (discussing research included in RAND JACK & Dana Crowley Jack, Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers (1989)).
84. HARRINGTON, supra note 80, at 189-90.
85. From the examples given in the text above, it seems that both the ethic of care and the ethic of justice may play appropriate, if different, roles in our legal system. To determine which ethic should apply, each individual case and legal problem should be independently evaluated. Which approach would adequately solve the problem to further the achievement of justice? Clearly, the ethic of justice and "rights" approach to animal law has failed, as animals are afforded no legal rights of their own and enjoy few legal protections of any kind. Thus, as Adams and Donovan argue, the ethic of care should apply to animal law instead.
Donovan urge activists to go “beyond animal rights” and instead follow an ethic of care, under which “sympathy, compassion, and caring are the ground upon which theory about human treatment of animals should be constructed.” Adams and Donovan identify three main shortcomings of the rights, or ethic of justice, approach. First, this approach is based on perceived similarities between animals and humans. In reality, however, most animals are distinctly different from human beings. Further, we have limited ways of knowing what animals do or do not experience. We know that they experience pain, and we know that they experience a range of emotions that at least seem to be similar to some of the emotions that we feel. We do not know, however, how similar our perceptions, emotions, and experiences are to those of nonhuman animals.

Secondly, the rights approach “presumes a society of equal autonomous agents, who require little support from others.” Yet domesticated animals in particular are dependent upon humans for survival. A caring ethic recognizes this situation of inequality and encourages human networks of support for nonhuman animals.

Adams and Donovan’s final, and perhaps most important, point is that the rights theory rejects the importance of emotion. As the authors see it, “This means that a major basis for the human-animal connection—love—is not encompassed. Since the exclusion of emotional response is a major reason why animal abuse and exploitation continue, it seems contradictory for animal defense advocates to also claim that feelings are inappropriate guides to ethical treatment.”

Adams and Donovan’s analysis applies easily to legal rights dialogue. In fact, some scholars have applied characteristics of a caring ethic in a legal context. For example, Thomas G. Kelch argues for the inclusion of emotion in legal rights for animals and even argues that emotions already play a role in legal rights discourse. “Looking at rights as grounded in a single concept or foundational idea is an oversimplification,” he writes. He argues further,

Rights are complex concepts founded on moral, policy, societal, and cultural ideas. Thus, we should not focus on finding some single basis for a right, but on discovering the sundry elements of a right. The more bases we find for a right

86. See BEYOND ANIMAL RIGHTS, supra note 25 (quotation from the publisher’s prepublication description), cited in FRANCIONE, supra note 1, at 33.
87. BEYOND ANIMAL RIGHTS, supra note 25, at 15.
88. Id.
the more firmly convinced we may be that it is a legitimate and well-founded right.\textsuperscript{90}

Though he does not identify it as such, Kelch's thesis could easily be classified as an ecofeminist argument:

[\textit{Among the many things that should have significance in determining whether an entity, human or non-human, is a rightholder is one that is almost universally ignored in animal rights and other rights literature: emotions, and in particular, compassion. Emotions, being essential aspects of our nature and of our moral lives, are of relevance in determining who should be rightholders. If applied to the issue of granting rights to animals, our sense of compassion should count as a reason for granting rights to animals.}]\textsuperscript{91}

Thus, the argument for the inclusion of the feminist feminine perspective in legal discourse—and in animal rights legal discourse in particular—is not unprecedented. As they work to go beyond animal "rights" and implement a caring ethic for the treatment of animals, ecofeminists have a strong foundation on which to build.

\textbf{B. Using Ecofeminist Principles to Expand Wise's Theory of Legal Rights for Animals}

In \textit{Rattling the Cage}, Wise provides ample evidence of the advanced "cognitive capacities" of chimpanzees and bonobos.\textsuperscript{92} He then argues that because members of these species can reason and engage in complex thought processes, they are entitled to the same rights to bodily dignity, liberty, and integrity as humans with lesser or equal cognitive capacities.\textsuperscript{93}

\begin{flushright}
\textsuperscript{90} Id.\
\textsuperscript{91} Id. at 1.\
\textsuperscript{92} Wise, \textit{supra} note 4, at 230.\
\textsuperscript{93} Id. at 253. Wise points out that some humans with low cognitive ability, such as infants, comatose patients, and mentally retarded persons, possess some basic legal rights that should be extended to those primates who have higher cognitive ability: Some humans—infants, young children, the anencephalic (who suffer from the congenital absence of major portions of the skull, scalp, and brain, never attain consciousness, can neither feel nor suffer, and usually die within a few months of birth), the severely mentally retarded, and those in persistent vegetative states—either lack autonomy or have autonomies too "low" to be called "realistic." Judges routinely award them dignity-rights anyway by using the "all humans are autonomous" legal fiction. But if judges recognize the liberties of these humans but reject the liberties of apes with greater autonomy, they act perversely, and their decisions cannot be explained except as acts of naked prejudice. Id. at 255.\
\end{flushright}
Wise is correct in his assertion that nonhuman animals should be granted basic legal rights. However, Wise's theory would only extend rights to species whose members possess a level of rationality close to that of humans. Countless other species—perhaps even all species other than chimpanzees and bonobos—would be left without adequate protections under the law.

While a rationality test restricts the types of species entitled to legal rights, ecofeminism sets no such limitation. Ecofeminism imposes no particular cut-off point at which humans' moral obligations end, other than perhaps to comply with Jeremy Bentham's oft-quoted standard: "The question is not, Can they reason? nor, Can they talk? but, Can they suffer?" Therefore, ecofeminist principles should serve as the basis for the extension of legal rights to animals. A legal system based on humans' emotional and moral relationships with nonhuman animals would grant rights to a significantly higher number of species than a legal system that would attempt to measure the cognitive capabilities of each individual species.

Most likely, there will be opposition to the argument that ecofeminism should provide the underlying basis of legal rights for animals. Already, Francione, in characteristic criticism of fellow animal advocates, has rejected certain applications of ecofeminist theory to animal advocacy. In his book review of Adams and Donovan's *Beyond Animal Rights: A Feminist Caring Ethic for the Treatment of Animals,* Francione criticizes the non-lawyer authors for, in his perception, failing to adequately consider their theories in the context of legal personhood. Francione states that the ethic of care "only makes sense when it is applied to situations involving extant rightholders" and should not form the basis for granting those rights in the first place. Francione does not reject outright ecofeminist principles; rather, he argues that the ethic of care could "help" with application of the law "once we have accepted the personhood of nonhumans and have included them within the scope of our moral community."

---

94. Again, a discussion of which types of legal rights should be extended to animals is beyond the scope of this article. Rather, this article simply advocates the position that some legal rights should be granted to nonhuman animals.
95. JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789), cited in ORLANS ET AL., supra note 38, at 22-23.
96. For perhaps the most prominent of Francione's extensive criticism of animal advocates and their work, see FRANCIONE, supra note 1.
97. Francione, supra note 78.
98. Id. at 104.
99. Id. (emphasis omitted).
100. Id.
applied before that point, as "[a]n ethic of care cannot coherently suffice to require that inclusion...."101

Rather than demonstrating ecofeminists' lack of understanding of the law, Francione instead reveals his own lack of understanding of the ways the ethic of care may be applied to legal theory. Under the thesis advanced in this article, the ethic of care does suffice to require the inclusion of animals among other rights-holders. In fact, as established above, by incorporating ecofeminist principles in the legal analysis of who should be rights-holders and possess courtroom standing, legal scholars, animal advocates, and lawmakers would be able to provide rights to a larger number of nonhuman species than they would by incorporating rights theories of rationality.

V. CONCLUSION

An ecofeminist ethic of caring eliminates many of the restrictions inherent in Wise's theory in Rattling the Cage. A caring ethic does not require animals to provide proof of autonomy or rationality in order to benefit from legal rights, and it does not limit legal rights to chimpanzees and bonobos only. Further, a caring ethic does not rely on a legal system that is based on antiquated notions of a hierarchical chain of existence. It instead embraces compassion, kindness, and ethics as the basis of legal rights, as illustrated in earlier sections of this article. Importantly, it recognizes humanity's moral obligations to respect and protect the bodily integrity and bodily dignity of nonhuman animals.

Thus, in conclusion, animal advocates and legal reformers should work to incorporate ecofeminist principles in "rights" jurisprudence. Once policymakers have recognized the importance of our moral obligations and emotional relationships with nonhumans, legal rights for animals will naturally and necessarily follow.

101. Id. (emphasis omitted).