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WHEIR'S THE BEEF? BUFFALO LAW AND TAXATION

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*"What is life?" asked Crowfoot.... "It is the breath of a buffalo in the wintertime."*¹

If you're not a student of buffalo law,² you might have missed the recent decision in *Wheir v. Commissioner*,³ which considered whether a competitive bodybuilder (no, not that one!)⁴ 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.⁵ (For that matter, many jurists and commentators don't think any tax case is worth a pitcher of warm spit.⁶) 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.⁷

I. BUFFALO LAW AND THE AMERICAN REGIME

*[T]he 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.*⁸

This is heavy stuff.⁹ Be prepared.

Before I discuss the particulars of *Wheir*, a short digression¹⁰ is in order to explain to the uninitiated¹¹ why this exercise is so vital in furthering legal under-

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1. David Montgomery, *Buffalophobia*, NEW REPUBLIC, Dec. 23, 1991, at 12, 12. Unless you're stripping paint, that's got to be a lot better than the breath of a buffalo in the summertime.

2. And why aren't you? The field hasn't been overgrazed. The seminal (nothing artificial here, thank you very much) article is Erik M. Jensen, *A Call for a New Buffalo Law Scholarship*, 38 U. KAN. L. REV. 433 (1990), reprinted in AMICUS HUMORAE: AN ANTHOLOGY OF LEGAL HUMOR 195 (Robert M. Jarvis et al. eds., 2003). Cf. Richard A. Posner, *Appeal and Consent*, NEW REPUBLIC, Aug. 16, 1999, at 36, 36 ("American law is rich grazing land for sacred cows....").

3. No. 4350-03S, 2004 WL 1921830 (T.C. Aug. 30, 2004).

4. Sorry.

5. *Warning! This is a serious, substantive footnote.* See I.R.C. § 7463(b) (2000) ("A decision entered in any case in which the proceedings are conducted under this section shall not be reviewed in any other court and shall not be treated as precedent for any other case."). The special procedures are for disputes of \$50,000 or less, if the taxpayer and the court agree to use them. *Id.* § 7463(a).

6. See, e.g., BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN* 362 (1980) ("This is a tax case. Deny. That was [Justice] Brennan's normal reaction to a [cert] request in a tax case.").

7. Graze, graze, everything is graze.

8. ANNE MATTHEWS, *WHERE THE BUFFALO ROAM: RESTORING AMERICA'S GREAT PLAINS* 27 (2d ed. 2002) (quoting Professor Frank Popper, who, with his wife Professor Deborah Popper, raised the uncommon idea of a buffalo commons); see *infra* notes 21–22 and accompanying text.

9. The average weight of a "bison butcher bull" is 950–1,250 pounds. Nat'l Bison Ass'n, *Raising Bison*, <http://www.bisoncentral.com/index.php?s=&c=63&d=155&a=1169&w=2&r=Y> (last visited Feb. 11, 2006). And some mature bulls weigh more than a ton. See Flyer from the Nat'l Buffalo Ass'n, *Buffalo: America's Oldest Inhabitant* (1989) [hereinafter *Oldest Inhabitant*] (on file with author). That's a lot of bull.

10. Yes, I digress, but I can't hold a roamin' candle to the buffalo. Remember the *New Yorker* cartoon, where a buffalo holding a cell phone says, "I love the convenience, but the roaming charges are killing me"?

11. That's all of us. It's an outrage, but no buffalo law scholar is yet in the National Buffalo Foundation Hall of Fame. See Karen Conley, *National Buffalo Foundation Hall of Fame Honorees*, http://web.archive.org/web/20050305071214/http://www.bisoncentral.com/history/nbf_fame.asp (last visited Mar. 25, 2006).

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,¹² and the number of buffalo has rebounded from a few hundred at the turn of the twentieth century to hundreds of thousands today.¹³ Professional buffalo associations are flourishing.¹⁴ 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.¹⁵ Forget ethanol. Bison fecal pats are the renewable energy source *par excellence*¹⁶—as folks on the frontier knew:¹⁷

"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

12. If you miss buffalo, *see infra* note 44, it's nice to be able to find one. At least seventeen states have towns called "Buffalo": Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wyoming. That's not counting Buffalo Center, Iowa; Buffalo Creek, Colorado; Buffalo Gaps in South Dakota and Texas; Buffalo Grove, Illinois; Buffalo Junction, Virginia; Buffalo Lake, Minnesota; Buffalo Mills, Pennsylvania; Buffalo Prairie, Illinois; Buffalo Ridge, South Dakota; Buffalo Valley, Tennessee; and New Buffalos in Michigan and Pennsylvania. You can throw in three Bisons too (but be careful of your back, *see supra* note 9) in Kansas, Oklahoma, and South Dakota.

13. We don't know precise figures because, until recently, buffalo scholars were out of their census. *See* MATTHEWS, *supra* note 8, at 66 ("Before the Civil War between twenty and sixty million buffalo—one, then or now, can be sure of the figure—roamed the Plains. In 1900 less than a thousand were alive."); Nat'l Bison Ass'n, Bison History, <http://www.bisoncentral.com/index.php?s=&c=63&d=65&a=1079&w=2&r=Y> (last visited Feb. 11, 2006) ("Current estimates place the size of the U.S. herd at 270,000 animals, with most of the production occurring on private ranches."). Altogether over 350,000 buffalo are in North America, with 232,000 in private U.S. herds. *See* Nat'l Bison Ass'n, Outlook, <http://www.bisoncentral.com/index.php?s=&c=63&d=70&a=1018&w=2&r=Y> (last visited Feb. 11, 2006) (relying in part on a 2004 USDA census). Even as the population has revived, however, there have been unexpected fatalities. *See* KATY KLINE & CAROL NASH, BUFFALO BURIED: THE BLIZZARD OF '77 (1977).

14. By "professional buffalo associations" I don't mean clubs for buffalo professionals (buffalo lawyers, architects, etc.), *see, e.g.*, REYNER BANHAM ET AL., BUFFALO ARCHITECTURE: A GUIDE (1981), or ones for professional bison, like the late Buffalo Bob Smith ("Hey, kids, what time is it?"). I have in mind organizations like the National Bison Association, the result of a 1995 merger of the American Bison Association and the National Buffalo Association, with 1,500 members in fifty states and ten foreign nations. *See* Nat'l Bison Ass'n, Frequently Asked Questions, <http://www.bisoncentral.com/index.php?s=&c=63&d=&a=1022&w=7/> (last visited Mar. 10, 2006).

15. A falling market, as it were. (No law review article is legit without at least one "as it were," as it were.)

16. *See* J. Scott Crockett & David M. Engle, *Combustion Characteristics of Bison (Bison bison) Fecal Pats Ignited by Grassland Fires*, 141 AM. MIDLAND NATURALIST 12, 16 (1999) (noting, among other things, that the "heat released per unit area of fecal pat was very high in each of the grassland fires"). (This is a pat you don't want on the back.) Serious study of excrement is not limited to buffalo. *See* Tony Horwitz, *Endangered Feces: Paleo-Scatologist Plumbs Old Privies*, WALL ST. J., Sept. 9, 1991, at A1. Paleo-scatology isn't a field of dreams (except perhaps for Kraft-Ebbing and friends), but it's nice to think of a discipline in which "Your work is a crock" is a compliment.

17. *See* IAN FRAZIER, GREAT PLAINS 73 (1989) ("The early homesteaders used dried buffalo droppings for fuel...."). Buffalo droppings that were tied to the sexual abstinence movement in buffalo society were particularly prized. *See* MATTHEWS, *supra* note 8, at 13 (describing "Genuine Virgin Buffalo Chips," "the Old West's Pioneer Fertilizer and Fuel"). But virgin buffalo are hard to come by these days. *See infra* note 50.

electric telegraph, and acquires all the dignity which is supposed to enshroud questions of national importance or matters of political economy.”¹⁸

What could anyone possibly add to that?

If buffalo chips don't pique your interest,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 were²⁰—which has aroused a lot of interest.²¹ North Dakota's population was declining anyway, but the great plans for the Great Plains may have created a stampede.²²

In academic circles,²³ buffalo subjects are increasingly popular. In addition to the buffalo commons idea, there are buffalo philosophy²⁴ and the comparative study of constitutions.²⁵ The bible for buffalo law scholars, the *Buffalo Law Review*, continues its meritorious publication.²⁶ And, as communitarian ideas become more attractive to academics, buffalo provide an example of the virtues and the connectedness of rural existence.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”²⁸ As a result, you won't see buffalo bowling (or

18. TOM MCHUGH, *THE TIME OF THE BUFFALO* 47 (1972) (omission in original).

19. But “No piquing!” is Big Oil's pat response to alternative energy sources.

20. See *supra* note 15, as it were.

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.” *Id.* at 8. With brows furrowed, the professors would plow new ground, as it were, see *supra* note 15, by not plowing old ground.

22. 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., *Re-wilding North America*, 436 NATURE 913 (2005).

23. Where you go 'round and 'round and get nowhere.

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.”

25. Cf. MATTHEWS, *supra* note 8, at 67 (noting that “[b]uffalo have much sturdier constitutions” than cattle).

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, *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 *Buffalo Law Review* contains no studies of buffalo law”). Nor has the founding of *Animal Law* filled the buffalo vacuum. See *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.

27. Buffalo are self-effacing; you generally won't find them tooting their own horns. But see Buffalo Philharmonic Orchestra, Musicians, <http://www.bpo.org/content.aspx?iid=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.)

28. MCHUGH, *supra* note 18, at 154.

stampeding) alone.²⁹ Indeed, bison are noted for “small clubs of buffalo”³⁰ and for “group travels.”³¹

So things are generally good in buffalo country, but difficulties remain as well. I probably sound like an old buffalo,³² pining for the good old days, but there are those who think the good breeding for which buffalo have been known is diminishing.³³ Buffalo crime is increasing;³⁴ buffalo kids, driven by a herd mentality, are into drugs;³⁵ buffalo social unrest is becoming more serious;³⁶ and psychological problems abound.³⁷

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.³⁸ 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 was thought to be favored by the gods.”³⁹ (Doesn’t that sound just like American

29. See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

30. MCHUGH, *supra* note 18, at 158. One is the Rotary Club of Buffalo. See Rotary Club of Buffalo, <http://www.buffalorotary.org> (last visited Feb. 11, 2006).

31. MCHUGH, *supra* note 18, at 169; see also *At Least the Buffalo Are Thriving*, *ECONOMIST*, Oct. 15, 2005, at 34, 34 (discussing “buffalo tourism”). Just imagine the tour buses unloading at rest stops!

32. Really. See MATTHEWS, *supra* note 8, at 66–67 (“Even over the engine you can hear their breath burst out—huff, huff, huff—each time a one-ton body lands and rebounds.”). Shaq would have trouble rebounding in this NBA. See *supra* note 14.

33. See Mark Derr, *Genetically, Bison Don’t Measure Up to Frontier Ancestors*, *N.Y. TIMES*, Apr. 23, 2002, at F2; J. Lynn Lunsford, *Texas Is Looking for a Few Good Bison to Replenish a Herd*, *WALL ST. J.*, Aug. 3, 2005, at 1 (noting that the last remnant of the Great Southern Bison Herd suffers from “inbreeding depression”). With buffalo, “good breeding” often means, well, good breeding. Buffalo society isn’t egalitarian. There’s a “distinct class structure”: “To the top-ranking male goes the first cow in heat; bulls with lower status get a chance at breeding only if more than one cow is available at a time.” MCHUGH, *supra* note 18, at 160.

Purists are concerned about humans pushing buffalo into star-crossed relationships. See MATTHEWS, *supra* note 8, at 67 (describing beefalo, a cross between cow and buffalo, as distinguished from beefaroni, a cross between cow and pasta). But bison have borne this cross for centuries. See *Ulery v. Jones*, 81 Ill. 403, 405–06 (1876) (“The owner of this animal was at great expense in transporting him from his native wilds, rearing and taming him, and for a good purpose—to produce a cross with the domestic animal, which might prove of great public benefit.”).

34. See, e.g., *United States v. Buffalo*, 358 F.3d 519 (8th Cir. 2004). The problems with buffalo criminals are serious enough to have spawned (probably not the right word in this context) the *Buffalo Criminal Law Review*, a specialty journal.

35. See Nat’l Bison Ass’n, Health Benefits, <http://www.bisoncentral.com/index.php?s=&c=67&d=99&e=&a=1056&w=7/> (last visited Mar. 10, 2006) (“Bison...spend their lives on grass”). Given baseball’s obliviousness to steroids, it shouldn’t be surprising that the NBA downplays buffalo drug use: “They are not subjected to questionable drugs, chemicals or hormones.” *Id.* (Oh, in this context the NBA is the National Bison Association. See *supra* note 14.)

36. See *Nearly 200 Arrested in Buffalo Protest*, *PLAIN DEALER* (Cleveland), Apr. 23, 1992, at 14A.

37. The problems aren’t of the buffalo’s making: buffalo are often baffled because they were involuntarily de-ranked. See also *supra* note 33 (noting depression when inbreeding is in).

38. There’s now a Buffalo Branch of the American Association of University Women. See Am. Ass’n of Univ. Women, Buffalo Branch, <http://www.aauw.buffalo.edu> (last visited Feb. 11, 2006); see also Buffalo Women’s Law Journal, <http://wings.buffalo.edu/law/bwlj/> (last visited Feb. 11, 2006). But as recently as 1972, McHugh could write that “[p]resent-day buffalo mothers, unlike the beleaguered creatures of the early days, live in a docile world, and present a picture of faithful attention to their young.” MCHUGH, *supra* note 18, at 186. No more.

39. MATTHEWS, *supra* note 8, at 70; see also IAN FRAZIER, *ON THE REZ* 24 (2000) (noting the “sacred white buffalo”). But cf. Posner, *supra* note 2 (suggesting that sacred cows aren’t so bad).

society today?) A few speciesists even think "buffaloes are the ugliest animals alive."⁴⁰ Given warthogs,⁴¹ that's a preposterous statement.⁴²

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.⁴³ And some are *really* good-looking.⁴⁴

Besides, buffalo can be fun to have around.⁴⁵ 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."⁴⁶ In North Dakota you take fellowship where you can get it,⁴⁷ and the NDBA folks are clearly trying to foster social interaction between man and buffalo.⁴⁸

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."⁴⁹ 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."⁵⁰

40. 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."

PETER GOLENBOCK, *FENWAY: AN UNEXPURGATED HISTORY OF THE BOSTON RED SOX* 390 (1992).

41. You better hope you're never given a warthog.

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

43. MATTHEWS, *supra* note 8, at 66; see also Nat'l Bison Ass'n, *Bison History*, <http://www.bisoncentral.com/index.php?s=&c=63&d=65&a=1079&w=2&r=Y> (last visited Feb. 11, 2006) (noting that "[t]he great American bison is a truly magnificent animal").

44. See Miss Buffalo Scholarship Program, <http://www.missbuffalo.org/> (last visited Feb. 11, 2006) (describing Miss Buffalo competition).

45. 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 bluffd, 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).

46. N.D. Buffalo Ass'n, *Learn About the NDBA*, <http://www.ndbuffalo.org/about.htm> (last visited Feb. 11, 2006).

47. With rainfall problems in the Plains, at least North Dakota isn't a permanent vegetative state. Cf. MATTHEWS, *supra* note 8, at 144 ("One of ten Montanans lives in Billings...., and most of them like to tell North Dakota jokes. Why can't you get ice cubes in North Dakota? The old lady who had the recipe died. What is the North Dakota state tree? The telephone pole.").

48. 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.").

49. 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.

50. Nat'l Bison Ass'n, *Bison History*, <http://www.bisoncentral.com/index.php?s=&c=63&d=65&a=1079&w=2&r=Y> (last visited Feb. 11, 2006). Some lively behavior may have been kept quiet for the sake of propriety. See Cornelia Grumman, *Americans Buffaloe*, 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,⁵¹ let's consider *Wheir v. Commissioner*,⁵² 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,⁵³ who was also a competitive bodybuilder, could not deduct the cost of buffalo meat that he ate.⁵⁴ The cost was a personal expense, said Judge D. Irvin Couvillion, not an ordinary and necessary business expense,⁵⁵ 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"⁵⁶—buffalo meat is especially good on buns—and the judge didn't challenge that proposition. *Wheir* was a serious bodybuilder, not a slick operator.⁵⁷ And *Wheir* brought in revenue from his bodybuilding activities, including money from one endorsement.⁵⁸ 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.⁵⁹

The numbers didn't look good, but *Wheir* did⁶⁰—his fitness was physical, not fiscal—and no one could say that *Wheir*'s was casual buffalo consumption.⁶¹ No one could say that because *Wheir* consumed three pounds of buffalo meat per day,

it happens so fast. You think one-night stands show lack of commitment? *See* MCHUGH, *supra* note 18, at 195 ("Copulation in American buffalo is of such short duration that a person scanning one section of a large herd may well miss a mating going on in another...."). But for voyeurs it's still a grand show. *See id.* at 191 ("Those of you who would engage in buffalo-watching could select no better time than July or August: two or three days of waiting and watching should surely reward you with a glimpse of a majestic and dramatic grassland pageant, the rut among the buffalo."). And boys will be boys. *Id.* at 195 ("The moment of copulation among buffalo usually attracts the attention of nearby buffalo bulls.").

51. And that is what we've done, isn't it?

52. No. 4350-03S, 2004 WL 1921830 (T.C. Aug. 30, 2004).

53. Not a Purdue badger.

54. *Wheir* also considered the deductibility of travel expenses in the boilermaking trade or business, and on that question the case was a subject of commentary. *See* Burgess J.W. Raby & William L. Raby, "Metropolitan" Area and "Away from Home," 106 TAX NOTES 1275 (2005). That question is a serious one, however, and is therefore beyond the scope of this Article.

55. *See* I.R.C. §§ 162, 262 (2000).

56. *Wheir*, 2004 WL 1921830.

57. But he did use ProTan Muscle Juice Professional Posing Oil "prior to pumping up backstage for optimum effect," the cost of which he was permitted to deduct. *Id.*

58. The endorsement had nothing to do with buffalo, however, *see id.*, except in the sense that everything has something to do with buffalo.

59. *Id.* *Wheir* nevertheless developed nice calves.

60. *Wheir*'s beefcake poses were really buffalocake, I suppose, but they worked just as well in helping him pick up bar belles.

61. The concept of "casual buffalo" hasn't taken hold in buffalo country. It's hard to dress down if you don't dress up to begin with: "The adults' fur looks as if someone has thrown an old rug with many bare spots over their lumpy backs." Montgomery, *supra* note 1, at 12.

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,⁶⁵ 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^[74] 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

62. *Wheir*, 2004 WL 1921830.

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 “[they] 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.

72. DAN O'BRIEN, BUFFALO FOR THE BROKEN HEART 181 (2001).

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.⁷⁷ Instead, consumers are, as a matter of personal choice, eating buffalo steaks and buffalo burgers with pleasure at this very moment.⁷⁸ (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,"⁷⁹ albeit not with the regularity and in the quantities consumed by [Wheir]."⁸⁰

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.⁸¹ It left a bad taste in quite a few mouths,⁸² 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,⁸³ which is why I want to raise a stink.⁸⁴ I have to admit that one of the reasons I'm bothered is that, although

77. Although it's a minority view, not everyone thinks buffalo meat is great. The meat has been lumped with "mice in batter."

[Oxford don William] Buckland became a legend...for his remorseless application of the scientific practice of experiment and observation in his private life. He used to say that he had eaten his way through the whole animal creation and that the worst thing was a mole—"perfectly horrible"—though afterwards he told Lady Lyndhurst that there was one thing worse than a mole and that was a blue-bottle fly. Mice in batter and bison steaks were served at his table in London. A guest wrote in his diary: "Dined at the Deanery. Tripe for dinner last night, don't like crocodile for breakfast."

NOEL ANNAN, *THE DONS: MENTORS, ECCENTRICS AND GENIUSES* 26 (1999); see also JONATHAN RABAN, *BAD LAND* 110 (Vintage Books 1997) (1996) ("[Antelopes taste] [k]ind of midway between a hummingbird and a whooping crane. Same as venison.... When you skin them, they look like German Shepherds, and if you get a tough one, it tastes a lot like German Shepherd too.").

78. The good burghers of Buffalo, once known for their wings, are now also known for their burgers.

79. I've been building a nonbody for years.

80. *Wheir v. Comm'r*, No. 4350-03S, 2004 WL 1921830 (T.C. Aug. 30, 2004). In fact, if Judge Couvillion had done his research, he could have strengthened his opinion by noting that some folks have eaten a lot more buffalo than Wheir did. As Ian Frazier noted, "Buffalo meat did not make you feel full" and "[s]ome Indians could eat fifteen pounds of buffalo meat at a sitting." FRAZIER, *supra* note 17, at 57. Hence the name Sitting Bull. Unfortunately Sitting's distant relative John didn't have the same dining opportunities. See *THE JOURNALS OF JAMES BOSWELL*, 1762-1795, at 48 (John Wain ed., 1991) ("I eat like a...very John Bull, whose supreme joy is good beef."); cf. David Pringle & Mark Champion, *On the Bicentennial of Nelson's Victory, a Rivalry Heats Up*, WALL ST. J., July 7, 2005, at A1 (quoting French president Chirac as stating that "[t]he only contribution [Brits] have made to agriculture is mad cow").

81. At least initially. But see *infra* notes 150-153 and accompanying text (questioning whether *Wheir* is really anti-buffalo).

82. I know bad taste. See, e.g., *supra* notes 1-81 and accompanying text; *infra* notes 83-153 and accompanying text; cf. Foodreference.com, Charlie the [Buffalo], <http://www.foodreference.com/html/wcharliethetuna.html> (last visited Feb. 13, 2006) ("Sorry, Charlie. Starkist wants [buffalo] that tastes good, not [buffalo] with good taste.")

83. Buffalo have a lot of common scents, and some uncommon ones as well. See MATTHEWS, *supra* note 8, at 67 ("A dusty, spicy smell rises all around, part trampled pasture, part healthy ungulate.").

84. Cf. FRAZIER, *supra* note 17, at 58 ("When a group of [buffalo hunters] walked up to a bar, they would reach into their clothes, and the last one to catch a louse had to buy. The prostitutes who catered to them were a special type.").

I'm generally a shy, retiring academic,⁸⁵ 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.⁸⁶ In his bodybuilding, for example, he "lifted weights, posed to display his muscular finesse, trained other bodybuilders, and gave seminars."⁸⁷ Normally I don't lift weights⁸⁸ or pose to display my muscular finesse,⁸⁹ but *seminars*! That's what I do!

In addition, Wheir handled publish-or-perish pressures with aplomb:⁹⁰ "Some of his poses were published in bodybuilding publications."⁹¹ 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 Roloids.⁹²

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.⁹³

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."⁹⁴ 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.

87. *Wheir v. Comm'r*, No. 4350-03S, 2004 WL 1921830 (T.C. Aug. 30, 2004).

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 statutory 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.

94. Montgomery, *supra* note 1, at 13 (quoting Glenn Bayger, owner of the B&B Buffalo Ranch of Ellicottville, New York).

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

95. O'Brien, *supra* note 72, at 19–20.

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. Leonards 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,¹⁰³ 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.¹⁰⁴

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.¹⁰⁵

Buffalo are different from the domestic quadrupeds,¹⁰⁶ 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;[¹⁰⁷] 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.¹⁰⁸

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.[¹⁰⁹] 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."¹¹⁰

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 “*feræ naturæ*,^[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:

123. Which means “naturally furry,” I think.

124. *Ulery*, 81 Ill. at 403. He also argued, withchutzpah, 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.

126. See also DAVID KUCHARSKY, *THE MAN FROM PLAINS: THE MIND AND SPIRIT OF JIMMY CARTER* (1976).

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,^[137] 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,^[138] 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,^[139] 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."¹⁴⁰

The Illinois Supreme Court might have read too much into the apron thing¹⁴¹—and the fact that it didn't take even a pair of "Shoos" to spook the buffalo¹⁴²—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.'"¹⁴³ 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"¹⁴⁴—the buffalo was domesticated enough to be property in Canefox's hands,¹⁴⁵ 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."¹⁴⁶

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,¹⁴⁷ 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.

145. Well, not really in his hands. See Nat'l Bison Ass'n, Health Benefits, <http://www.bisoncentral.com/index.php?s=&c=67&d=99&e=&a=1056&w=7/> (last visited Mar. 10, 2006) ("Bison are handled as little as possible."). But you know what I mean.

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.¹⁴⁸

III. *WHEIR* AND THE DEVELOPMENT OF BUFFALO LAW

The above analysis¹⁴⁹ 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,¹⁵⁰ 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 supporters¹⁵¹ and buffalo detractors,¹⁵² 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.¹⁵³ 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 pros 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).