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2006

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### Repository Citation

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# The University of Kansas Law Review

Winter 1990

Volume 38, no. 2

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A Call for a New Buffalo Law Scholarship

*Erik M. Jensen*

# A Call for a New Buffalo Law Scholarship

Erik M. Jensen\*

Some of us who have long been interested in animal law<sup>1</sup> are only now starting to go public. I, for one, have intended since 1979 to write the definitive article on parrot law,<sup>2</sup> but I have hesitated to tell my dean of this hidden desire. Sheepish proponents of other species have also been waiting anxiously to declare themselves.<sup>3</sup>

It was with particular pleasure, therefore, that I recently came across the *Buffalo Law Review*, a publication that competes with the *Kansas Law Review*, in the library. Buffalo law has many attractions for academic study, and I was delighted that a specialized journal devoted to such scholarship exists. We have been celebrating anniversaries of the nation's founding since 1976; what better way for us academics to honor the various bisontennials than to focus on the buffalo?

The *Buffalo Law Review* has provided an opportunity for scholars to come to terms with the world of buffalo law, but the potential has not been fulfilled. In fact, I have difficulty in seeing what many of the articles within its pages have to do with buffalo law. I suppose an argument can be made that law is a seamless

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\* Professor of Law, Case Western Reserve University, Cleveland, Ohio. The author sees no reason why one person should take all the blame for this commentary, and he therefore wishes to thank his colleague, Jonathan Entin, for his helpfully absurd comments on an earlier draft.

1. With the species-centrism characteristic of humanity, I generally use the term "animal law" to mean the law developed by humans to control relationships with animals, rather than the internal ordering mechanisms developed by the animals themselves. However, since consistency is limiting, I may ignore my own definition. See, e.g., notes 26-31 and accompanying text (discussion of buffalo family law).

2. Luckily, parrots should be able to survive until I complete the project. See *Casablanca* (Metro-Goldwyn-Mayer 1942) (Richard Blaine reminding Ilsa Lund that "[w]e'll always have parrots").

3. At one time a former colleague of mine wanted to put together a law school course on "Law and the Chicken," studying the sick chicken case, eggshell plaintiffs, Henn on Corporations, and so on. That he is a *former* colleague does not reflect my institution's evaluation of the project's merits. (I must admit, however, that the institution may not have been capable of an informed judgment. See W. PERCY, LOVE IN THE RUINS 219-20 (Dell paperback ed. 1972) (ridiculing the linguistic abilities of "chicken\*\*\*\* Ohioans").) Before the idea had passed beyond the embryonic stage, he moved up (or down) the law school pecking order, becoming a dean. He took his ideas with him—poultry in motion?—leaving chicken law scholarship unhatched at this school.

web and that any legal problem eventually affects the buffalo.<sup>4</sup> All of law can therefore be seen as buffalo law.<sup>5</sup> That theory has some appeal, I must admit, but it is not fully satisfying.

The *Kansas Law Review* can do better. Because the *Buffalo Law Review* editors have not filled the void, this journal must now take the lead<sup>6</sup> by putting buffalo law at the center of its activity. This journal is an appropriate forum for several reasons, at least one of which is based on theory. Two Rutgers University professors have recently suggested that the Great Plains states were never suitable for human habitation and that those states should, in effect, be returned to the buffalo.<sup>7</sup> Discounted by the Governor of Kansas as "a real buffalo pie in the sky idea,"<sup>8</sup> the notion nevertheless has some merit. This journal, whose sponsoring institution depends on public support, cannot afford to ignore the effects of relinquishing the state of Kansas to the tax-exempt buffalo.

## I. THE SHORTAGE

That other legal journal has not lived up to expectations, but I do not question the wisdom of its editorial board. Editors cannot publish articles that are not written, and they now have few buffalo law articles from which to choose. I am aware of no law school offering a course in buffalo law.<sup>9</sup> Although I gather from reading advance sheets that specialists in the subject exist<sup>10</sup>—and I have reason to think that firms of specialists have formed<sup>11</sup>—the aca-

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4. For example, the *Buffalo Law Review* recently published an American Indian law article, Smith, *Republicanism, Imperialism, and Sovereignty: A History of the Doctrine of Tribal Sovereignty*, 37 *BUFFALO L. REV.* 527 (1988-89). As numismatists know, Indians and buffalos are two sides of the same coin.

5. Or parrot law. See *supra* note 2 and accompanying text.

6. See Chinese Zodiac placemat, Golden Wok Restaurant, Cleveland, Ohio (meal of Oct. 16, 1989) ("Buffalo: A Leader, you are bright and cheerful. Compatible with the snake and rooster; your opposite is the goat.") (on file with the author).

7. See *Return the Great Plains to Buffalo, Planners Say*, Cleveland Plain Dealer, Oct. 10, 1989, at 11-D, col. 1.

8. *Id.*

9. Some do offer trial practice courses, which teach a form of buffaloing. Cf. *Henry v. Farmer City State Bank*, 127 F.R.D. 154, 157 (C.D. Ill. 1989) ("counsel either are trying to buffalo the court or have not done their homework") (quoting Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073, 1082 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988)).

10. See, e.g., *United States v. McGraw-Edison Co.*, 718 F. Supp. 154, 159 (W.D.N.Y. 1989) ("Buffalo counsel shall attend in chambers.").

11. See, e.g., *New York State Energy Resources & Dev. Auth. v. Nuclear Fuel Servs.*, 714 F. Supp. 71, 73 n.5 (W.D.N.Y. 1989) (referring to "Buffalo firm"). They must send out buffalo bills.

demic literature is skimpy. Legal scholars have been slow to pick up on buffalos.<sup>12</sup> Why is there so little buffalo scholarship today?<sup>13</sup>

I am convinced that the primary reason is the difficulty of research. The traditional research services do not isolate buffalo law materials into a discrete category; West Publishing Company has no key number for the buffalo. The computer research services are only slightly more helpful. Put "buffalo" and its variants into the computer and you wind up with lots of cases that mention the snow-covered city on Lake Erie's shores,<sup>14</sup> that cite precedents with the word "buffalo" in the name,<sup>15</sup> or that use "buffalo" as a verb.<sup>16</sup> I don't want to read all that stuff,<sup>17</sup> and I bet others feel the same way.

Buffalo law has generated little academic excitement<sup>18</sup> also because of the Supreme Court's absence from buffalo jurisprudence. Areas of the law can become noteworthy simply because the Court deals with them, but nothing like that has happened with buffalo law. I suspect, but cannot prove, that the Justices are not directly to blame—that it is litigants who have kept the buffalo cases out of Washington. No self-respecting buffalo proponent relishes appearing before a body that was once called the Burger Court.<sup>19</sup> Chief Justice Burger may be gone, but we are tasting the aftereffects of his regime. Eventually, one hopes, litigants will muster sufficient courage, forcing the Court to play catch-up and to put buffalo law on the front burner.

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12. Picking up *after* buffalos is beyond the scope of this essay.

13. By using the term "little buffalo scholarship," I do not mean to suggest that research on miniature buffalos has priority over research on the larger variety. "Greater buffalos" do seem to have been given disproportionate consideration in the case law. *See, e.g., Greater Buffalo Press, Inc. v. Federal Reserve Board*, 866 F.2d 38 (2d Cir.), *cert. denied*, 109 S. Ct. 3159 (1989). But reverse sizeism has no place in buffalo scholarship. *Cf. infra* note 20.

14. *See, e.g., A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1398 (7th Cir. 1989) (Indianapolis area egg dealer had "cracked markets as far away as Buffalo"). Another chicken case! *See supra* note 3.

15. *E.g., Buffalo Forge v. United Steelworkers of America*, 428 U.S. 397 (1976). Everyone seems to cite this case—it has something to do with labor law—and it really screws up buffalo research. How does one forge a buffalo anyway?

16. *See, e.g., Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1340 (7th Cir. 1989) ("Judges should not be buffaloeed by unreasoned expert opinions.").

17. Nor do I want to do the research on parrot law, which suffers from many of the same problems. Someone is always parroting someone else. Thank goodness there's no Parrot City.

18. Big academics have remained calm.

19. The buffalos themselves may be nervous undergoing the grilling common in litigation. *See Buffalo Shook Co. v. Barksdale*, 206 Va. 45, 141 S.E.2d 738 (1965).

## II. THE CALL

We cannot wait for the Supreme Court, however. Neither research difficulties nor Supreme Court hesitancy should prevent the development of a scholarly field. If authority is scant—or if it is too much of a hassle to find—we academics can proceed in the time-honored way by writing “think pieces.” I suggest we do just that: Let us bury the editors of this journal in material that will form a new buffalo scholarship.<sup>20</sup>

In urging a new direction,<sup>21</sup> I envision something approaching a stampede of legal academics into buffalo law. A herd mentality has been criticized in some quarters,<sup>22</sup> but it should be encouraged in this special context. Think buffalo!<sup>23</sup>

On what should we focus our scholarship? Buffalo scholarship, like the buffalo him- or herself, should be wide-ranging, but we might begin at the beginning. The threshold requirement for buffalo law, it seems to me, is to define the field: What distinguishes the buffalo from other beings for legal purposes? What is the essence of buffalo?<sup>24</sup> Should buffalo law be subsumed by bovine law, or does it stand on its own four feet? At a minimum, we should clarify the nature of the buffalo sufficiently so that confused judges can place the animal in his or her proper habitat.<sup>25</sup>

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20. I do not mean to distinguish new buffalos from old. Ageism has no place in buffalo scholarship. Cf. *supra* note 13. But see *United States v. Young Buffalo*, 591 F.2d 506 (9th Cir.), cert. denied, 441 U.S. 950 (1979).

21. Governmental thinking about the buffalo has already taken new directions. In the early 1980s Secretary of the Interior James Watt tried to outflank his critics by remodelling the Interior Department's seal—the symbol, not the animal—so that the symbolic buffalo faced right rather than left. The change was sometimes justified on the basis of “artistic reasons,” see N.Y. Times, May 7, 1981, at B12, col. 2, but a spokesman later admitted that Watt “thought the right side should have equal time.” Gailey, *Watt Turns His Buffalo to the Right*, N.Y. Times, May 21, 1982, at A18, col. 4.

When Watt left office after a turnaround in his own fortunes, “right-facing buffaloes were [no longer] in vogue,” and the buffalo returned to the orientation he or she had taken since 1849. N.Y. Times, Jan. 24, 1984, at A13, col. 4.

22. See, e.g., F. NIETZSCHE, *BEYOND GOOD AND EVIL* ¶ 212 (1886) (disparaging the situation “[t]oday, . . . when only the herd animal is honored and dispenses honors in Europe”), reprinted in *THE PORTABLE NIETZSCHE* 446 (W. Kaufmann ed. 1954).

23. Lest any reader misconstrue my approval of a herd mentality, I should emphasize that the scholarship must be unfettered. In the best traditions of academic inquiry, we must let the buffalo chips fall where they may.

24. See *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333 (7th Cir. 1989).

25. See, e.g., *Mississippi v. Marsh*, 710 F. Supp. 1488, 1491 (S.D. Miss. 1989) (referring to “rough fish such as catfish and buffalo”). Perhaps I am being unfair to the *Marsh* judge. Helping the buffalo survive by creating alternative aquatic environments is a praiseworthy enterprise, and if that was the judge's point, I commend him. A buffalo would indeed be one rough fish.

Once the threshold has been passed,<sup>26</sup> substantive areas will demand attention. Buffalo family law holds particular promise. For example, *C.J. Tower & Sons of Buffalo, Inc. v. United States*,<sup>27</sup> a decision of the now-extinct Court of Customs and Patent Appeals, appears to recognize the buffalo family unit. "Sons of buffalo" has the warm ring of an earlier family-oriented era, evoking images of young buffalo bundled up for the trek to school.<sup>28</sup> But consider the problems needing analysis. We have developed no formalities to memorialize buffalo marriage.<sup>29</sup> What is the appropriate family unit? Moreover, the case law emphasis on "sons of buffalo" suggests an excessive male-orientation.<sup>30</sup> The emergence of buffalo-feminist (or, if you prefer, feminist-buffalo) studies<sup>31</sup> is necessary if buffalo daughters are not to be shortchanged.

After we open the door to feminist-buffalo law studies, critical buffalo-legal studies and buffalo law and economics will surely not be far behind.<sup>32</sup> One might posit the buffalo as a metaphor for subhyperbolic meta-spacial synergistic power relationships in our society. Or one might study how law has moved inexorably to an efficient allocation of buffalo.<sup>33</sup> The possibilities are endless, and I am sure your mind is already filling with buffalo think pieces waiting to be disgorged.

### III. CONCLUSION

The possibilities may be endless, but this commentary is not. We are just about there. Few have heard of buffalo law, but I have suggested that the *Kansas Law Review* can change that fact. It is time to begin a new deal for buffalo law, this is the place to do it, and this commentary is a humble attempt at that beginning.

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26. Another threshold question comes to mind: Can you imagine Mr. Buffalo carrying a new Mrs. Buffalo into their new home? *But see infra* note 29 and accompanying text (questionable marital status of buffalos).

27. 673 F.2d 1268 (C.C.P.A. 1982).

28. Education obviously remains important in the buffalo community. *See* Buffalo Teachers Fed'n v. Arthur, 467 U.S. 1259 (1984); Moore v. Buffalo Bd. of Educ., 465 U.S. 1079 (1984).

29. I am reminded of a *New Yorker* cartoon in which a distressed kitten is reassured by his elders that his status is not peculiar: all cats are bastards. *See* my memory (1989) (computer research services not yet set up for cartoons).

30. *Cf. supra* notes 13 & 20.

31. *Cf.* "Buffalo Gals, Won't You Come Out Tonight?" (cassette tape of singing author, who doesn't know how to find citation information for this item, is on file at the *Kansas Law Review*).

32. Given my research habits, I find all of these possibilities appealing. Think pieces are easiest without documents to read, and none of these schools of thought, in its non-buffalo manifestation, cares about textual analysis—of judicial opinions or anything else.

33. *I.e.*, almost none anywhere.