ESSAYS

ANIMAL THING TO ANIMAL PERSON—THOUGHTS ON TIME, PLACE, AND THEORIES

BY
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The rule that "animals are property," and do not merit legal rights, is ingrained in the law of English-speaking countries. Challenges to this rule must be brought in strategic, thoughtful, sensitive, sophisticated, and coordinated ways. This essay offers seven related strategic considerations for anyone who wishes to battle the "animals as property" rule.

I. INTRODUCTION

For centuries, a Great Legal Wall has divided humans from every other species of animal in the West.[1] On one side, every human is a person with legal rights; on the other, every non-human is a thing with no legal rights. Every animal rights lawyer knows that this barrier must be breached. Serious attempts are beginning around the world. Recently, the governing coalition of the German Social Democrat and Green Parties, along with the opposition Free Democracy and East German Communist Parties, introduced an amendment to the German constitution that would give non-human animals the legal rights "to be respected as fellow creatures" and protected from "avoidable pain."[2] In New Zealand, proponents of an Animal Welfare Bill are seeking to obtain from the New Zealand

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1 *See generally* Steven M. Wise, *The Legal Thinghood of Non-human Animals*, 23 B.C. ENVTL. AFF. L. REV. 471 (1996); Steven M. Wise, *How Non-human Animals Were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15 (1995).

2 Robert Koenig, *European Researchers Grapple with Animal Rights*, 284 SCIENCE 1604, 1604 (June 4, 1999); Quirin Schiermeier, *German Science Fights Animal Rights Bill*, 397 NATURE 461 (1999).

Parliament such fundamental legal rights for great apes as the right to life and the right not to be tortured, cruelly treated, or subjected to invasive biomedical experimentation.[3]

Legal personhood through legislation is unlikely in the United States. There is hope, however. The flexibility and responsiveness of common law makes it the ideal battering ram in the United States and an important weapon in other English-speaking countries to gain legal rights for non-human animals.[4]

The rule that "animals are property" and do not merit legal rights is ingrained in the law of English-speaking countries.[5] Judicial discussions of the legal thinghood of non-human animals rarely exceed a sentence. The reader is simply directed to an earlier case or treatise in which the writer summarily stated a similar rule, and so on into the mists of legal history. Certainly, no appellate court has attempted to justify the "animals as property" rule since Darwin's principle of evolution by natural selection turned biological science on its head in 1859. A broad "animals are property" rule is as anachronistic as human slavery. It can be overturned. However, challenges to this rule must be brought in strategic, thoughtful, sensitive, sophisticated, and coordinated ways. Like some knots, the law can either loosen, or tighten, under pressure.

Since "animal law" is primarily a matter of state concern, the battle for the legal personhood of non-human animals will have to proceed on fifty state fronts. However, all battles will not be equal. The earliest cases will be the most significant, as judges will be required, for the first time since modern biology dawned and modern sensibility to fundamental rights rose from the Nazi death camps, to either buttress this Great Legal Wall or begin to demolish it. Later courts will find it easier to swing into whatever judicial line has been formed. This essay offers seven related strategic considerations for anyone who wishes to start one of these battles.

II. Seven Strategies for Challenging the "Animals as Property" Rule

A. Know That Any Challenge Will Be Difficult and Expensive

Prospective litigators for non-human animal rights must carefully evaluate their challenges with respect to time, place, and tactics. Some attorneys may hope to keep initial fights from the spotlight and gain unobtrusive footholds in the law through the back door. However, human slavery could not have been abolished when the masters were not looking; they were *always* looking. Any serious demand for the fundamental legal rights of non-human animals will necessarily implicate the law's deepest and most cherished principles and values, along with some of our widest, and often most contradictory, public policies dealing with non-human ani-

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[3] Animal Welfare Bill, No. 2 (1998) (N.Z.).

[4] Steven M. Wise, Rattling the Cage—Toward Legal Rights for Animals (forthcoming 2000) (manuscript at chs. 7 & 11, on file with author).

[5] Wise, *supra* note 1.

mals. This will not only be the fight of the proponents' lives, but of the opponents' lives as well. Battles will be both pitched and public. A failure to realize this will severely undermine any chance of success.

Moreover, success will not come cheaply. As Oliver Wendell Holmes once told a class of law students, "Your business as lawyers is to see the relation between your particular fact and the whole frame of the universe."[6] When the "whole frame of the universe," or even a chunk of it, is considered, the legal thinghood of many non-human animals can be seen starkly for what it is — an anachronism, a legal anomaly so out of step with fundamental human rights that it threatens them. But unless a judge is a William Blake, who can "See a World in a Grain of Sand,"[7] a lawyer should not expect to convince her easily.

In a challenge to the legal thinghood of chimpanzees or bonobos, for example, plaintiffs will have to be prepared to present complex expert testimony in primatology, taxonomy, genetics, psychology, cognitive ethology, linguistics, anthropology, neurology, biology, veterinary medicine, and perhaps, philosophy and legal history. Attorneys must be prepared to cross-examine and rebut the defendant's experts in the same disciplines. Some of these opposing experts will be world-famous, deeply educated, and thoughtful men and women. These legal challenges will be time-consuming. No litigator should consider doing anything else for several years. Therefore, such a challenge should not be raised unless adequate financial support exists.

B. Know a State's Traditional Approach to Jurisprudence

The main purpose of a trial will be to establish the facts that support your claim. The highest court of that jurisdiction will then decide whether the facts established justify legal personhood for a non-human animal. However, the high courts of the fifty states display an astonishing variability in their approaches to jurisprudence. One study concluded that

> even a passing familiarity with state supreme courts reveals marked difference in jurisprudence and in the roles they play both nationally and within their state. Some courts have tended to defer to other state political institutions and to eschew independent policy development, while others have aggressively seized opportunities to define policy for the state. Still others have followed a more complex course, embracing activism in one period and judicial restraint in another or adopting different postures depending upon the substance of the issue or the type of law involved. Thus legal, political, and historical factors peculiar to a state affect the orientation of a state high court.[8]

The attorney must choose the most favorable jurisdictions in which to litigate initial challenges to the legal thinghood of non-human animals. This decision will require the aid of experts in jurisprudence and the help of

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[6] HAROLD BERMAN, LAW AND REVOLUTION—THE FORMATION OF THE WESTERN LEGAL TRADITION vii (1983).

[7] WILLIAM BLAKE, Auguries of Innocence 1 (1863).

[8] G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION x (1988).

lawyers and professors intimately familiar with the tendencies of current high court judges and the histories of their courts in multiple areas of the law. For example, a state high court may be an activist in areas of tort law, but less so in civil rights law, and not at all in property law. Yet, the thinghood and personhood of non-human animals implicates all three of these areas of law.

C. Know the Philosophies of the High Court Judges

Common law acknowledges the legitimacy of different jurisprudential philosophies. A case may be decided very differently depending upon which philosophy dominates an appellate court. At one end of the spectrum are judges who will refuse to alter the common law once they believe it settled. For them, only legislatures can create new rights or categories of legal persons. This philosophy substantially, though not completely, accounts for why American courts refused to grant fetuses the right to compensation for injuries suffered *in utero* for sixty years following Justice Holmes' seminal decision in *Dietrich v. Inhabitants of Northampton*.[9]

At the other end of this spectrum are judges who will freely alter common law principles when they think precedent is wrong and needs to be changed. These judges generally divide into two groups: those who believe that principle should be the common law's touchstone and those who think it should be policy.[10] Although the Nuremburg Trials should have settled this question with respect to fundamental rights - principle *always* controls - some judges still do not agree.[11] If principle is to be a lawyer's major argument for the legal personhood of a non-human animal, she should ensure the high court of the state in which she intends to litigate is dominated by judges who value principle above all else. The same holds true if the lawyer intends to anchor her argument in policy. If a high court is loaded with judges who rely heavily on precedent, suit should be brought elsewhere.

D. Know the High Court Judges' Personalities

The lawyer must know the personalities of the high court judges in the states where the litigation is to be brought. The core beliefs of many judges will be so hostile to the idea of legal rights for non-human animals that litigating the issue before them would be foolish. Do not underestimate the resistance that will be encountered when core beliefs in science, economics, law, or religion are challenged. As a result, knowledge tends to advance, in the words of economist Paul Samuelson, "funeral by funeral."[12] Judges likely to be the most intellectually and emotionally able to recognize that non-human animals could *possibly* be legal persons are

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9 138 Mass. 14 (1884); *see* WISE, *supra* note 6 (manuscript at ch. 7, on file with author).

10 WISE, *supra* note 6 (manuscript at ch. 7, on file with author).

11 *Compare* Byn v. New York City Health & Hosp. Corp., 393 N.Y.S.2d 390, 393 (N.Y. 1972) *with id.* at 397 (Burke, J., dissenting).

12 E.O. Wilson, *From Ants to Ethics: A Biologist Dreams About a Unity of Knowledge*, N.Y. TIMES, May 12. 1998, at C6.

those who came to maturity since the post-World War II expansion of the legal principles of equality and liberty and who have been exposed to the modern environmental and animal rights movements. Social and cognitive psychology findings suggest that judges who will be the most receptive to the possibility of legal personhood for non-human animals had the idea introduced to them early in their lives. These judges understand the basic principles of Darwinian evolution and ecology, believe least in the anachronistic idea that God designed the universe for human beings (once exemplified by the Great Chain of Being), and have the least personal or social investment in the wholesale exploitation of non-human animals.[13] Be aware that the vast majority of the first sympathetic judges are currently law students enrolled in an "Animal Rights Law" course, children attending elementary school, or infants in diapers.

E. Select the Best Causes of Action

Differing statutory law among the more than fifty American jurisdictions will make it relatively easy to choose to litigate the issue of legal personhood of non-human animals in one jurisdiction over another. Take, for example, the problem of how to bring a legal personhood claim of a non-human animal before a court. Non-human animals have no more power to bring their own claims than do human incompetents. Guardianship is often suggested as an appropriate vehicle. "Courts derive authority to appoint a guardian ad litem from statutory provisions, procedural rules and their own inherent equity power."[14] Some courts hold their power to appoint a guardian ad litem is inherent and merely complemented by statutes.[15] Litigators will have the formidable task of persuading these judges to invoke these inherent powers and appoint a guardian ad litem for non-human animals. Other courts, however, believe their inherent power to appoint a guardian can be circumscribed, or eliminated, by statute.[16] An advocate in these courts will have the different and almost impossible task of convincing these judges the legislature intended the statutes be used to appoint guardians ad litem for non-human animals.

A lawyer contemplating a suit to establish legal personhood for any non-human animal should carefully compare and contrast state law with respect to other areas of the law, including: (1) the availability of state analogs to Federal Rule of Civil Procedure 17(b) (upon applying it to a dolphin, one federal court stated this rule could "apply to . . . non-human

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[13] Steven M. Wise, *Hardly a Revolution—The Eligibility of Non-human Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793, 824-38 (1998).

[14] Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, 66 WASH. L. REV. 503, 505 (1991). For the discussion of guardianships, the author relies heavily on a series of papers written by Vermont attorney Pamela Dein (on file with the author).

[15] *See, e.g.*, Hatch v. Riggs Nat'l Bank, 361 F.2d 559, 565-66 (D.C. Cir. 1966) and cases cited therein; Buckingham v. Alden, 53 N.E.2d 101 (Mass. 1944).

[16] *See, e.g.*, Culton v. Culton, 386 S.E.2d 592 (N.C. Ct. App. 1986); Moxley v. Title Ins. & Trust Co., 154 P.2d 417, 419 (Cal. Ct. App. 1945), *aff'd. on other grounds*, 27 Cal. 2d 457, 165 P.2d 15 (Cal. 1946) (*en banc*); Faulkner v. Faulkner, 315 P.2d 14 (Cal. 1946).

entities");[17] (2) the common law allowing next friends to bring suit; (3) the ancient common law and statutory writ of *de homine replegiando* (famously used by Henry Bergh, founder of the New York Society for the Prevention of Cruelty to Animals, to bring an abused child named Mary Ellen before a court, and by others to gain freedom for slaves);[18] (4) the writ of *habeus corpus* (famously used to gain the freedom of the English slave James Somerset);[19] (5) *jus tertii*; (6) a *parens patriae* equity writ; (7) a declaratory judgement; (8) the capacity to defend or intervene in a forfeiture action against a non-human animal on the ground that the non-human animal was a person not subject to forfeiture; and even (9) antebellum Freedom Suit Acts that might still be available in the former slaveholding states of the American South (used by Dred Scott in his challenge to his slave status in the Missouri state courts).[20]

F. Is the Time Ripe?

A lawyer thinking of bringing a suit in the coming decade to establish the legal personhood of any non-human animal should wet her thumb, hold it to the winds of history, and ask, "Is the time ripe?" Sadly, it is not today. If anyone disagrees, she should conduct a practical experiment. Ask lawyers, judges, and law professors whether non-human animals should have fundamental legal rights. When they appear startled, ask them if they have ever read about, or even eavesdropped upon, a legal discussion of whether non-human animals should have fundamental legal rights. Most will not have and many will think it is a joke.

This means the necessary foundation for the legal rights of non-human animals does not yet exist. Do not expect a judge to appreciate the merits of arguments in favor of the legal personhood of any non-human animal the first time, or even the fifth time, she encounters them. While a sympathetic judge might be found here and there, no appellate bench will seize the lead until the issue has been thoroughly aired in law journals, books, and conferences. Law reviews discussing animal legal issues must be established around the country in order to provide an important scholarly forum in which the relevant legal issues can be explored. Legal conferences must be organized.[21] The Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York is a leader in this regard; others need to follow. Law school courses devoted to edu-

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[17] Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45, 47-48 (D. Mass. 1993).

[18] Mason P. Thomas, Jr., *Child Abuse and Neglect—Part 1: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 393, 398-99 (1972); ROBERT COVER, JUSTICE ACCUSED—ANTISLAVERY AND THE JUDICIAL PROCESS 164-65 (1975).

[19] *See* Somerset v. Stewart, 98 Eng. Rep. 499 (K.B. 1772); *see also* Wise, *supra* note 15, at 813.

[20] Wise, *supra* note 15, at 820; *see, e.g.*, A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *Yearning to Breathe Free: Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1234-48 (1993).

[21] Currently, students at Northwestern School of Law of Lewis & Clark College publish ANIMAL LAW, the Nation's only law journal devoted solely to animal legal issues.

cating students on animal law issues must be established. The late Jolene Marion began teaching the first law school-level course on animal law at the Pace University School of Law in the late 1980s. I began teaching the second, entitled "Animal Rights Law," at Vermont Law School in 1990. Presently, perhaps ten animal law courses are part of law school curricula. Animal rights lawyers and law professors must reach out and educate the judiciary, the bar, and other law professors. In 1996, Jane Goodall and I delivered a joint presentation to the Senior Lawyer's Division of the American Bar Association.[22] Many more of these presentations to bar associations and judicial conferences must be made to acquaint our profession with the power of our legal arguments before lawyers argue them in court

G. Know When To Hold On and When To Let Go

To establish the legal personhood of a non-human animal, a lawyer must know when to hold on and know when to let go. Sometimes the time is just not right, even though many of us are ready. Steven Vincent Benet illustrated this idea in a short story.[23] Benet tells of a tortured and frustrated Napoleon Buonaparte, set to conquer the world like a modern Alexander the Great, but instead lay rotting away as an obscure retired French Artillery Major on the island of Corsica, born decades before the world was ready to be conquered.[24]

Sophisticated proponents of affirmative action such as the National Association for the Advancement of Colored People (NAACP), the NAACP Legal Defense Fund, and the National Organization for Women Legal Defense and Education Fund understand this principle. Believing, with good cause, that the current United States Supreme Court is likely to be hostile to affirmative action, these organizations press to convince unsuccessful litigants asserting affirmative action claims in federal courts of appeal to forego appeals to the Supreme Court. They believe it better to restrict unfavorable rulings to small geographical areas than to take the risk of setting an unfavorable precedent nationwide. This is precisely the reason a coalition of civil rights groups offered to pay a judgment of almost half a million dollars if the Piscataway Board of Education would agree to dismiss its appeal in a 1997 affirmative action case.[25] It is also why the coalition prevailed upon the Boston School Committee to change its mind

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[22] Jane Goodall & Steven M. Wise, Presentation to Senior Lawyer's Division of the American Bar Ass'n, *reprinted in* Jane Goodall & Steven M. Wise, *Are Chimpanzees Entitled to Fundamental Legal Rights?*, 3 ANIMAL L. 61 (1997).

[23] Steven Vincent Benet, *The Curfew Tolls*, *in* TWENTY-FIVE SHORT STORIES BY STEPHEN VINCENT BENET 115 (1943).

[24] *Id.*

[25] Beth Daley & Andy Dabilis, *In Switch, City Won't Appeal the Latin Case*, BOSTON GLOBE, Feb. 4, 1999, at A1; Barry Bearak, *Rights Groups Ducked a Fight, Opponents Say*, N.Y. TIMES, Nov. 22, 1997, at A1; Linda Greenhouse, *Tactical Retreat*, N.Y. TIMES, Nov. 22, 1997, at A1.

about appealing a decision that struck down a partially raced-based admissions policy for the Boston Latin School.[26]

III. Conclusion

When the time is right, not a moment should be lost; however, discretion can be the better part of legal valor, especially in common law. The earliest cases are likely to have a disproportionate impact on the final outcome. The right suits must be brought in the right places, at the right time, using the right theories, before the right judges. If these early cases are brought at the wrong time, in the wrong place, or before the wrong judges, they may strengthen the Great Legal Wall. This will only make the job of the next generation of animal rights lawyers even more difficult than our own.

[26] Daley & Dabilis, *supra* note 27, at A1; Bearak, *supra* note 27, at A1; Greenhouse, *supra*, note 27, at A1.