LEGAL RIGHTS FOR NONHUMAN ANIMALS: THE CASE FOR CHIMPANZEES AND BONOBOS

BY
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"Animal rights" is a term that we all have used, though often imprecisely. As a lawyer, the rights for which I have practical use are not moral rights, but legal rights, because these are the "real rights" that can protect the real and fundamental interests of nonhuman animals. Moral rights are of little use until and unless they assume the shape of law.

What are legal rights? Wesley N. Hohfeld acknowledged that legal rights, in the eyes of judges, "generically . . . denote any sort of legal advantage."[1] Louis Henkin has defined a legal right as a claim that the law recognizes as valid, with a legal obligation on the addressee, and that the legal system renders likely that the benefit will in fact be enjoyed.[2]

It is easy to enumerate the number of species of nonhuman animals whose members possess legal rights—none. Nonhuman animals have no legal rights; in all of Western jurisprudence they have never had legal rights. I teach a course at Vermont Law School called "Animal Rights Law." I generally begin the first class something like this: "Welcome to 'Animal Rights Law.' The title of this course is a lie. Nonhuman animals have no legal rights. What this course is really about is whether nonhuman animals *should* be entitled to legal rights. If so, which nonhuman animals should be entitled to them, which legal rights should they be entitled to, and how can they be obtained?"

Such fundamental legal rights as bodily integrity and bodily liberty can be achieved for nonhuman animals, especially such nonhuman animals as chimpanzees and bonobos,[3] in the coming decades. Those who tell you that achievement of such legal rights is impossible for nonhuman

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[1] WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED TO JUDICIAL REASONING 71 (Walter W. Cook ed., 1919).

[2] Louis Henkin, *International Human Rights as "Rights,"* 1 CARDOZO L. REV. 425, 445 (1979).

[3] Both chimpanzees, *Pan troglydytes*, and bonobos, *Pan paniscus*, are species of the same genus, *Pan*. Until recently, bonobos were often mistaken for chimpanzees and were sometimes referred to as pygmy chimpanzees.

animals are ignorant of American legal history, the history and operation of the common law, and the principles behind the explosive growth of international human rights law over the last fifty years. For example, in 1854, the Supreme Court of California barred Chinese witnesses from testifying in proceedings in which a white person was a party "on grounds of public policy."[4] The Chinese were said to constitute a race of people "whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point."[5] Three years later, in 1857, the United States Supreme Court held that a black man was not a citizen of the United States, because of the status of his race in the United States at the time of the Constitutional Convention.[6] In the words of Chief Justice Taney, blacks were seen in late eighteenth-century America as "beings of inferior order . . . so far inferior, that they had no rights which the white man was bound to respect," and far below [whites] in the scale of created beings.[7] In 1875, the Supreme Court of Wisconsin unanimously denied a woman's petition to practice law before it because, in the court's opinion, the female practice of the law was "treason against [nature]."[8] Catalyzed by the recognition that these kinds of decisions were the rotted fruits of dead ages and philosophies, the "deliberate reconsiderations" of these ideas have led to their demise.[9]

As the end of the twentieth century approaches, modern law recognizes only the legal *thinghood* of chimpanzees, bonobos, and every other nonhuman being, and not their legal *personhood*. But why are legal rights still limited to human beings? In order to facilitate the deliberate reconsideration of this idea, we must first peer into history. History teaches that the best answer to this question is this: because the ancient Romans did it, the biblical Israelites did it, and the ancient Greeks did it. As the legal philosopher, Alan Watson, has pointed out, "[to] an astounding degree law is rooted in the past."[10] When one peels the layers of law away, one finds at bottom the idea that *hominum causa omne ius constitum* (all law was established for man's sake).[11] I use the Latin phrase because that is how it was coined by the Romans nearly fifteen hundred years ago.[12]

The law was established for man's sake in Roman eyes because the Greek and the Roman denial of justice to nonhuman animals fit naturally into their physical, biological, and cosmological worlds. They believed in what we might call a "teleological anthropocentrism," the notion that the universe was designed solely to serve human beings. This designed uni-

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4 People v. Hall, 4 Cal. 399, 404 (1854).

5 *Id.* at 405.

6 *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

7 *Id.* at 407-409. This was an apparent allusion to the position of blacks in the *Great Chain of Being.* Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe,* 1 ANML. L. 15, 25 (1995).

8 Motion to Admit Miss Lavinia Goodell to the Bar of this Court, 39 Wis. 232, 245 (1875).

9 Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 HARV. L. REV. 457, 469 (1897).

10 ALAN WATSON, LEGAL TRANSPLANTS - AN APPROACH TO COMPARATIVE LAW 95 (1993).

11 Dig. 1.5.2.

12 *Id.*

verse was populated, they believed, by an infinite number of finely graded beings placed in an immutable hierarchy—a "Great Chain of Being." The creatures arranged upon this Great Chain ranged from the corporeal, but barely alive, through the sentient and intellectual, to the wholly spiritual. The rational human being was believed to occupy the highest rung possible to be obtained by a corporeal being. The only beings above human beings were wholly spiritual beings.[13]

The Greeks and Romans believed that human beings possessed powerful and complex minds that were well-equipped for thought, belief, emotion, memory, learning, and, above all, for reason. In contrast, they understood that the minds of nonhuman animals were good only for the recording of fleeting perceptions. Nonhumans could experience only the raw and momentary pricks of a present that immediately evaporated. They could not anticipate the future. They were not even aware that they existed.[14]

The science historian, Arthur O. Lovejoy, thought the Chain of Being was "one of the most curious monuments of human imbecility."[15] However, the philosopher, Robert S. Brumbaugh, realized that "the preposterous idea of a world designed for human exploitation diffused quite thoroughly into Western common sense."[16] Preposterous as it may have been, it accurately described how not only the Greeks and Romans, but virtually the entire West thought about the world for many centuries. Today, it is the way that many of us, at least unconsciously, think about the world still.

Teleological anthropocentrism vanquished its philosophical opponents, then went on heavily to influence science, political science, and finally law for many centuries. It was a commonplace in the Middle Ages and persisted into the nineteenth century, fading only as physical and biological scientists strengthened their abilities to separate the real from the imaginary, and to explain the universe in terms of natural physical processes. The idea of the Great Chain of Being was not finally uprooted until the nineteenth century in the wake of Darwin's exposure of the world as having been designed not by God but by Greeks.[17] However, stray remnants of the Great Chain carry on today, fighting little rearguard actions against reality.

Unfortunately, well before its rout in the halls of science, the ancient understandings of the relationship between human and nonhuman animals were injected deep within the law, most notably by the Roman jurist, Gaius, and through Justinian's *Digest* and *Institutes*.[18] With the possible ex-

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[13] Wise, *supra* note 7, at 23-25.

[14] *Id.* at 25-30.

[15] ARTHUR O. LOVEJOY, THE GREAT CHAIN OF BEING - A STUDY OF THE HISTORY OF AN IDEA 186 (1960).

[16] Robert S. Brumbaugh, *Of Man, Animals, and Morals: A Brief History, in* ON THE FIFTH DAY, ANIMAL RIGHTS AND HUMAN ETHICS 11 (Richard K. Morris & Michael W. Fox eds., 1978).

[17] Wise, *supra* note 7, at 38-40.

[18] Dig. 1.5.3; Dig. 41.1.6; J. Inst. 41.1.5.6. *See* G. Inst. 2.66-67.

ception of the Bible, no writings have so profoundly influenced the development of Western law. Such great writers on the English common law, which became our common law, as Bracton, Fleta, Coke, and Blackstone passed Justinian's ideas to American common lawyers, such as Kent and Holmes, who passed them to us today. Consequently, the common law of each of the fifty states, as it concerns the relationship between human and nonhuman animals, is nearly a living fossil of archaic Greek and Roman notions of science and jurisprudence.

In order to discern why the common law sees chimpanzees, bonobos, and all other nonhuman animals as legal things, instead of beings possessed of such fundamental legal rights as bodily integrity and bodily liberty, and to explore how this might be changed, we need some understanding of the nature and sources of law and legal change, including common law change. Since at least the time of Aristotle, justice has been said to consist of giving one that to which one is due. One's due may be determined either noncomparatively or comparatively.[19] Noncomparative legal rights, often referred to as liberty rights, are determined without reference to anyone other than the rights-seeker. Statutes and constitutional provisions frequently protect liberty rights, but so does a strong and persistent natural rights and natural law jurisprudence that focuses on the nature of human beings and expresses itself through the workings of the common law and such open-ended notions as substantive due process. A liberty rights analysis focuses on the nature and importance of the individual interest that is sought to be protected by the legal right. The more fundamental the interest is to the individual seeking the legal right, the stronger the claim for its recognition will be. Many fundamental interests of human beings are anthropological, rooted in human genetics, neurobiology, and psychology. Over the centuries, common law judges have identified a handful of fundamental liberty rights, including bodily integrity and bodily liberty, that protect these fundamental interests.

A comparative right, on the other hand, is determined solely by the relationship of the rights-seeker to a rights-holder. Equality, which has itself often been seen as a fundamental liberty right,[20] and its close relation, proportionality (which stresses inequality as a matter of justice) are the major kinds of comparative rights. An equality or proportionality rights analysis compares the interests sought to be protected with the relevant interests of someone who already has the desired legal right. The Fourteenth Amendment to the United States Constitution furnishes an example of the constitutional protection of both liberty and equality rights. A small number of fundamental liberty rights are protected by the notion of substantive due process contained in the Due Process Clause.[21] Comparative rights are protected by the Equal Protection Clause.[22]

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19 I am indebted to Professor Kenneth W. Simons for his lucid discussion of the natures of comparative and noncomparative rights. Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387 (1985).

20 Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

21 Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

22 Plyler v. Doe, 457 U.S. 202, 216 (1982), *reh'g denied* 458 U.S. 1131 (1982).

A relatively simple illustration of a liberty rights and an equality rights argument may be given in the context of the desire of nineteenth and twentieth century women to obtain the right to vote. A simple liberty rights argument would have been as follows: it is important to women, as human beings participating in a democracy and desiring to control the direction of their lives and their society, to have the right to vote. These interests are both inherent and fundamental. They can only be vindicated if women are given the right to vote. A noncomparative legal rights argument would have focused solely on these fundamental interests of women. Whether men had the right to vote would have been irrelevant.

A simple equality rights analysis would have compared the interests said to justify the right of women to vote with the interests said to justify the right of men to vote. Nothing would have been said about whether men should have the right to vote or whether the interests of women, standing alone, justified their right to vote. Instead, the interests of men that justified their right to vote would have been identified. If women had the same or similar interests that could be similarly protected by the right to vote, as a matter of equality women should be given the right to vote.

Liberty rights and equality rights analyses are generally distinct, but can converge when the interests in question are not only fundamental to the individual seeking legal rights, but are protected almost universally by law. While each, standing alone, should justify the recognition of a fundamental interest as a legal right, the convergence of fundamental liberty and equality rights analyses denotes a powerful and universal interest whose recognition as a fundamental legal right should virtually be compelled. For example, humans should have a fundamental legal right not to be tortured both on liberty and on equality grounds. The liberty right exists because torture destroys bodily integrity and psychological health, while an equality right exists because it violates the right to equal treatment in that torture is nearly universally condemned. The legal right to freedom from torture should therefore be recognized as a fundamental legal right, as it is under both domestic and international law.[23]

The common law is the law that judges construct and declare in the course of deciding cases based upon general principles, as opposed to statutes and constitutional provisions. In the course of making and interpreting the common law, which is much of what state courts do, judges may weigh many factors including precedent, fairness, justice, and policy. The common law is dynamic, subject to reformulation when it is perceived as mistaken. Judges owe a fidelity to precedent, but owe a greater fidelity to fairness and justice. Therefore, a common law system empowers judges to refashion old law into new law by solving new problems, conducting a reasoned reweighing in light of evolving principles of justice and fairness as well as new facts, and reinterpreting precedent and policy.[24] The explanation below will describe how the legal thinghood of chimpanzees and

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[23] Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980).

[24] One of the greatest modern judicial expositions on the flexible nature of the common law was the dissent of Chief Justice Vanderbilt in Fox v. Snow, 76 A.2d 877, 878-885 (1950).

bonobos should be refashioned by the common law so as to declare that they possess the fundamental liberty and equality rights to bodily integrity and bodily liberty.

Chimpanzees and bonobos are exceedingly complex beings. Through twentieth century scientific investigations, both in the wild and in laboratories, we have learned that chimpanzees and bonobos possess, at minimum, a simple level of consciousness, which may be termed a "primary consciousness." This allows them to experience physical pain and suffering, present awareness, and the thwarting of desires, intentions, and expectations. But they also have what may be termed a "secondary consciousness" from which they derive sophisticated cognitive, emotional, and social capabilities; immense and powerful intellects; and an ability to anticipate the future that qualitatively differ little from the capabilities of human beings.[25] However, the law concerning the relationships between humans and nonhumans developed at a time when the received wisdom was that the universe and everything in it, including bonobos and chimpanzees, was made for human beings. But bear in mind that the common law is a dynamic and flexible process subject to a reasoned reformulation in light of new facts, justice, and changing values. Also, bear in mind that the convergence of a liberty and equality rights analysis should virtually compel us to declare that the fundamental and universal interests of chimpanzees and bonobos deserve the protection of legal rights. As will be argued, two prime examples of such fundamental interests are bodily integrity and personal liberty.

The fundamental human legal right to bodily integrity protects the fundamental human interest in freedom from physical and emotional injury and from the pain or fear of their imminent infliction. Pain, as we all know, makes it impossible to function normally. It can trigger complex emotional states that make us feel sad, depressed, helpless, and angry. The knowledge that our bodily integrity may be infringed upon can make us think about little except how to prevent it. As social beings, we are concerned if others whom we care about may be subjected to pain. It is therefore no surprise that bodily injuries were among the first wrongs dealt with by the law. In 1891, the United States Supreme Court said that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others."[26] The Declaration of Independence, and many of our state Declarations of Rights, declare fundamental the basic rights to "life, liberty and the pursuit

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[25] The scientific literature on the nature of the consciousness, cognition, psychology, and culture of chimpanzees and bonobos is vast and growing. Those primatologists to whom I owe a personal debt for discussing their pioneering work with me, often at great length, include Roger and Debi Fouts, Sally Boysen, and Richard Wrangham, but above all Jane Goodall and Sue Savage-Rumbaugh. For good overviews of this subject, see JANE GOODALL, THE CHIMPANZEES OF GOMBE - PATTERNS OF BEHAVIOR (1986) (concerning chimpanzees); SUE SAVAGE-RUMBAUGH AND ROGER LEWIN, KANZI - THE APE AT THE BRINK OF THE HUMAN MIND (1994) (concerning chimpanzees and bonobos).

[26] Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

of happiness." Without the protection against the infringement of bodily integrity, these fundamental interests would be impossible to realize. The fundamental nature of this interest is also reflected in international law. The Universal Declaration of Human Rights proclaims that "[e]veryone has the right to life, liberty and security of the person,"[27] a sentiment echoed throughout numerous international conventions and declarations.[28] It is therefore fair to conclude that the interest in bodily integrity is not only fundamental, but is universally recognized and protected.

As was briefly explained, chimpanzees and bonobos have similar nervous systems to ours that allow them to possess complex cognitive, emotional, and social abilities that can be stunted by being physically attacked or harmed by human beings. Pain and suffering to chimpanzees and bonobos represents a qualitatively similar risk to their physical, emotional, psychological, and social integrities, as it does to human beings. It has been universally recognized that pain and suffering can destroy our natures. So can it destroy theirs. They should therefore be entitled to the legal right to bodily integrity both as an equality right and as a fundamental liberty right.

The legal right to bodily liberty is intended to prohibit the human unilateral and forcible domination and control of the body and personality of another being, including a chimpanzee, bonobo, or another human being. A long-term loss of personal liberty is virtually a definition of slavery. The enslavement of any being depends upon force alone. As with an assault upon bodily integrity, this dramatic loss of bodily liberty has a severe detrimental impact upon a being's fundamental interests. It interferes almost absolutely with that being's social, emotional and cognitive interests and development. The slaves' emotional and physical needs are also often ignored.

As was briefly discussed, chimpanzees and bonobos are likely aware of themselves, of their environment, and of the future and past. They have wishes and desires and a complex family-based structure. Their culture and learning may be passed from one generation to the next within families. To forcibly remove chimpanzees and bonobos from their natural environment or to maintain them in artificial environments for human purposes is usually to deny them their culture and their ability to form important and social relationships. This deprives them of a substantial portion of what gives meaning to their lives, as slavery would deprive us of a substantial portion of what gives meaning to our lives.

Bodily liberty has been a cornerstone of human rights since the Magna Carta.[29] The Thirteenth Amendment to the United States Constitu-

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27 United Nations Universal Declaration of Human Rights, *reprinted in* ENCYCLOPEDIA OF HUMAN RIGHTS 1655 (Edward Lawson ed., Taylor & Francis 1991) (1948).

28 *E.g.*, American Declaration of the Rights and Duties of Man, art. I, § 1, *reprinted in* ENCYCLOPEDIA OF HUMAN RIGHTS, supra note 27, at 58. ("Every human being has the right to life, liberty and the security of the person.").

29 Article 39 of the Magna Carta states that "[n]o freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him,

tion,[30] the Universal Declaration of Human Rights, and other international covenants and declarations prohibit human slavery.[31] The federal Animal Welfare Act recognizes that chimpanzees and bonobos have minds and psychological well-beings, as well as bodies, that can suffer from serious infringements of their bodily liberties, as it requires that primates have a "physical environment adequate to promote the[ir] psychological well-being."[32] It has been universally recognized that enslavement can destroy our natures. So it can destroy the natures of chimpanzees and bonobos. They should therefore be entitled to the legal right to bodily integrity both as an equality right and as a fundamental liberty right.

In conclusion, the natures of chimpanzees and bonobos, as well as the nature of the common law, compel recognition of their fundamental common law rights to both bodily integrity and bodily liberty. Securing these two fundamental legal rights for these two species of nonhuman animals may seem a modest achievement to some, but it would constitute a legal earthquake, a piercing trumpet that would shake the legal wall that was erected thousands of years ago between humans and all other beings and cause it finally to come tumbling down.

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unless by the lawful judgment of his peers or by the law of the land." MAGNA CARTA 375 (William Sharp trans., Burt Franklin 1974) (1215).

[30] The 13th Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The constitutions of most of the fifty states contain similar provisions. U.S. CONST. amend. XIII, § 1.

[31] Article 4 of the Universal Declaration of Human Rights states that "[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all forms." United Nations Universal Declaration of Human Rights, art. IV, *supra* note 27, at 1655; *see also* Slavery Convention, *id.* at 1356-57; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *id.* at 1417-41.

[32] Animal Welfare Act of 1970, 7 U.S.C. § 2143(a)(2)(B) (1994).