

TEN LESSONS OUR CONSTITUTIONAL EXPERIENCE CAN TEACH US ABOUT THE PUZZLE OF ANIMAL RIGHTS: THE WORK OF STEVEN M. WISE

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I have two basic reactions when I read Steve's quite wonderful book--or hear him talk. The first is to share his outrage at the grotesque way that human cultures have treated and continue to treat animals--beings who don't happen to be human, but who often seem nearly as intelligent, every bit as lovable and no less capable of feeling pain and anguish. And ever since 1970, I have been writing about looking for ways to recognize the need for, and to achieve, greater protection for beings other than humans. My second reaction is to cheer the energy, passion, learning and intellect that Steve and his wife and law partner, Debbie have devoted and continue to devote to the cause of legal rights for animals, not simply in writing, but in life. But I wasn't asked to join you this evening to provide either hand-wringing or cheerleading. I think I was asked to join your discussion because my work in constitutional law has led me to believe that our Constitution, and our experience with its care and feeding by judges of every ideological stripe, may have some interesting lessons to impart to the cause that Steve espouses--a cause with which I have enormous sympathy. And having taught and written about constitutional law for over a quarter of a century, I'd

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like to share my reflections on what our constitutional experience has to say about the processes through which we can protect others across the species boundaries of the animal kingdom who often act and think in hauntingly human ways.

The first lesson that our Constitution teaches is that rights are not such a scary thing to recognize or to confer, since rights are almost never absolute. Arguing for constitutional rights on behalf of non-human beings, which some people viscerally oppose, shouldn't be confused with giving certain non-human interests absolute priority over conflicting human claims. Recognizing rights is fully consistent with acknowledging circumstances in which such rights might be overwritten, just as human rights themselves sometimes come into conflict. That's something that the National Rifle Association, for example, forgets when it assumes that, if the Second Amendment right to bear arms really protects individuals and not just state militias, then effective gun control suddenly becomes unconstitutional. That simply doesn't follow. That equation mistakenly assumes that a right to bear arms, if applicable to private citizens, would suddenly become absolute--and, of course, it wouldn't. In just the same way, if it could really be shown, for example, that performing a particular experiment on chimpanzees would be the only means of relieving some terrible form of human suffering, then recognizing the chimps' rights of integrity, wouldn't necessarily end the argument under our constitutional tradition. It would be open to argument that, in that circumstance, perhaps the right should give way. It wouldn't follow that it ought to give way, but those who oppose what Steve and lawyers like him are doing often do so on the basis of a myth--the myth that conferring rights on non-human beings would be a conversation-stopper--that it would, in effect, preclude the possibility of arguing for exceptions.

But, and this is the second lesson, taking rights seriously, whether they are the rights of people or of other animals, does preclude allowing invasions of bodily integrity or liberty that are

in any sense gratuitous or unnecessary, needlessly cruel or painful or prolonged, or avoidable by using some other less fully autonomous and less self-aware life form. Or, better still, by using computer simulations. And I would venture to say that perhaps 90% of the grotesque experimentation now done in the name of science itself would flunk that simple test. In constitutional law, we refer to the principle at work here as the requirement of the least invasive means or the least restrictive alternative.

The third lesson is that it is a myth--a myth that is sometimes accepted even by observers as astute as Steve--that our legal and constitutional framework has never accorded rights to entities other than human beings and, therefore, that a high wall must be breached or vaulted if rights are now to be accorded to non-human animals. Adopting that myth helps to dramatize the crusade and makes for a more colorful book--but, and I say this with hesitation and deference, it could complicate our struggle in the long run, because the truth is that even our existing legal system, rickety and incoherent though it often is, has long recognized rights in entities other than individual human beings. Churches, partnerships, corporations, unions, families, municipalities, even states are rights-holders; indeed, we sometimes classify them as legal persons for a wide range of purposes. Broadening the circle of rights-holders, or even broadening the definition of persons, I submit, is largely a matter of acculturation. It is not a matter of breaking through something, like a conceptual sound barrier. With the aid of statutes like those creating corporate persons, our legal system could surely recognize the personhood of chimpanzees, bonobos, and maybe someday of computers that are capable not just of beating Gary Kasparov but of feeling sorry for him when he loses. Just as the Constitution itself recognizes the full equality of what it calls natural born citizens with naturalized citizens, who acquire that status by virtue of Congressional enactment, so the possible dependence of the legal personhood of non-human animals on the enactment of suitable statutory measures need not be cause

to denigrate the moral significance and gravity of that sort of personhood.

The fourth and closely related lesson is that, even when the assignments of rights to new entities is widely regarded as only a legal fiction--we all know the corporation isn't really a person--even when it's widely regarded as just a fiction, that assignment of rights can make a vast difference to the real and non-fictional protection of the new rights-holders in the real world. Steve and his wife and others have written about the pathetically inadequate statutes banning various kinds of cruelty to animals. And it's true that those statutes often contain unconscionable substitutive loopholes. But the worst loophole in those laws are the loopholes found in statutes like the Marine Mammal Protection Act, the Animal Welfare Act, and the Humane Slaughter Act. The loopholes I have in mind are structural. What I mean by that is that existing state and federal statutes depend on enforcement by chronically underfunded agencies and by directly affected and highly motivated people--and that's just not a sufficiently reliable source of protection. Recognizing the animals themselves by statute as holders of rights would mean that they could sue in their own name and in their own right. Then Steve's Jerom could file suit as a plaintiff. Such animals would have what is termed legal standing. Guardians would ultimately have to be appointed to speak for these voiceless rights-holders, just as guardians are appointed today for infants, or for the profoundly retarded, or for elderly people with advanced Alzheimer's, or for the comatose. But giving animals this sort of 'virtual voice' would go a long way toward strengthening the protection they receive under existing laws and hopefully improved laws, and our constitutional history is replete with instances of such legislatively conferred standing.

But, as important as they are, we should not obsess over legal rights: the fifth lesson is that rights are not all they are sometimes cracked up to be. Not only can they sometimes be overridden, as we saw at the outset; they are sometimes ineffectual. If

you lost the status of holding constitutional rights, it does not necessarily follow that you are going to be reduced to a thing. Put another way, constitutional law (and lesser law as well) sometimes confers protections by identifying and prohibiting wrongs, rather than by bestowing rights, and it can prohibit those wrongs in terms that are sweeping enough to provide a shield that is independent of who or what the immediate victim of the wrong happens to be. Let me give you some examples. The First Amendment basically says that government shall not abridge the freedoms of speech, press, assembly, petition or religion. The First Amendment speaks in terms of what Congress may not do. It forbids Congress to censor speech by anyone or anything, even people or things that might not themselves have free speech rights under our First Amendment, like banks. In one famous case from Massachusetts, the U.S. Supreme Court held that an attempt by the state legislature to silence selective banks on certain referendum issues violated the First Amendment. The Court's opinion said that it's not really material whether banks 'have' free speech rights under the Constitution, because the Constitution protects freedom of speech, not just the speaker. In another case, the Court said that a law making it hard for people in this country to receive subversive speech from certain sources abroad--ources that were not themselves under the umbrella of our Bill of Rights--violated the First Amendment. And in exactly the same way, if chimps and gorillas, for example, were deemed to possess no First Amendment rights of their own, the First Amendment would still ban government suppression of supposedly indecent sign language by these apes-- at least if the sign language were directed to human listeners or observers. Similarly, the Eighth Amendment to the Constitution forbids all cruel and unusual punishments. Nothing is said about who is being punished. The language at least seems rather well-suited to the problem of cruelty to animals, although I wouldn't expect any of our current judges or justices to construe the language that generously. Best suited of all, the Thirteenth Amendment,

which prohibits slavery throughout the United States and which is not limited to government violations but extends to private conduct as well, simply says ‘Neither slavery nor involuntary servitude shall exist in the United States.’ Clearly, Jerom was enslaved. I am not suggesting that today’s judges would so read the Thirteenth Amendment; I am simply pointing out that our constitutional apparatus and tradition includes devices for protecting values even without taking the step of conferring rights on new entities—by identifying certain things that are simply wrong.

The sixth lesson is that the Constitution, both in the rights that it confers and in the wrongs that it forbids, is far from the only useful source of legal protections and claims, whether for people or for animals. Protection can be created by ordinary state and federal legislation, or by judge-made common law. And the important thing to note—something often not fully understood—is that protections created by mere legislation or by common law can sometimes trump federal constitutional rights. Let me give you one example. Hialeah, Florida passed an ordinance that forbade certain ritual slaughter practices involving chickens and goats. It was obviously a law targeting that particular religion and discriminating it. And the U.S. Supreme Court unanimously struck the ordinance down. In the course of doing that, the Court said that if this were a truly general law prohibiting the cruel treatment of animals across the board, it would be fine. Hialeah would not have to grant an exception to the Santeria religion. In that sense it would be permissible to burden a federal constitutional right—the right to the free exercise of religion—through a suitably designed law to protect animals—not through anything in the Constitution, but through simple legislation.

Speaking of religion leads me to the seventh lesson of our constitutional experience. I have in mind the lesson that crusades to protect new values, or to attach old values to new beings and new entities must take great care to avoid religious intolerance or antagonism. Here I tread on sensitive ground, and I

may have misread some things in Steve's book, but at times arguing for animal rights appears to rest on a condemnation of religion, at least of Western religion, as the real culprit in helping people to rationalize self-serving subordination of the rest of the animal kingdom. True, religion and its crusades have been guilty of many things. But I think it is a mistake to tie the protection of non-human animals so tightly, to anything, that might be understood as anti-religious or anti-spiritual. Making that link can obviously alienate scores of potential allies. And it seems to me basically fallacious. In Bhutan, for instance, it is a crime to chop down a living tree or to kill a crane. It is the teachings of Buddha, not any scientific discovery or doctrine, that generated those norms. It was not any new discovery about the thought processes of the crane that did it. I think the Constitution counsels against tossing spiritual and religious impulse and intuition out the window when they bring out the better angels of our nature.

A broader constitutional lesson, the eighth, is that searching for a non-intuitive, non-spiritual, wholly objective and supposedly scientifically-based formula for deciding which beings have sufficient autonomy to deserve dignity and hence legal rights is to tilt at windmills. I concede that much of what motivates the passion of what both Steve Wise and I believe in is the discovery of what is probably going on inside the mind of that poor little chimp. But to move from 'is' to 'ought' defies a teaching as old as David Hume's philosophy. To surmise that our obligation to regard and respect and protect these beings somehow follows from our scientific understanding and is therefore, grounded more firmly than in intuition is to indulge in an impulse I understand, but I think it is a dangerous impulse, one we should resist. Let me give you just one example. Dignity plays a central role in Steve Wise's argument about why beings with autonomy deserve rights. And he suggests at various points in his book that dignity is one of those 'hard' values that we can grab hold of and that can somehow escape the vicissitudes of changing

opinion and intuition. A California court held some time ago that dignity requires that we allow someone to defend himself, even if incompetently, in court. But, just to show you how a value like dignity is every bit as subject to intuition as any other, the U.S. Supreme Court, less than a week ago, held 9-0 that a person need not be permitted to defend himself on appeal in the state's judicial system, because the dignity of the judicial system itself would be damaged. And just last summer the U. S. Supreme Court, 5-4, held that state and local employees whose statutory rights under the federal Fair Labor Standards Act were violated by their government employers cannot be given, by act of Congress, a right to sue their employer--namely, the state or the city--for back pay or for damages in the state's own courts without that state's approval. Why not? The majority opinion said that such sovereign immunity for the state is required by the dignity and autonomy of the state as a legal entity in our federal system. The lesson is that dignity, like the significance of species identity or the relevance of cognitive capacity, is in the eye of the beholder. And trying to erect a truly 'scientific' case for animal rights, unhinged from invariably controversial and controverted moral premises, seems to me a fruitless mission.

The ninth lesson also bears on the way we argue about the boundary between humans and non-human animals. Steve Wise wants to maintain that it is necessarily arbitrary to make the availability of rights and of legal protection coextensive with the boundary of our species. The nub of his argument is that our constitutional system is committed to treating everyone as an individual and thus not lumping entities together on a group basis or on the basis of the 'kind' to which various individuals belong. But this kind of argument won't really work very well. It's just not true that race-based affirmative action to correct the proven effects of past discrimination represents some isolated exception to our general insistence on always viewing each individual on his or her own merits. In fact, our laws and traditions do not typically condemn regulations that automatically group

together everyone who violates some flat rule, like everybody who goes above the posted speed limit, regardless of individual circumstances. Going to court and saying, 'Look, my eyes are better than the average bear, or the conditions were such that it was okay to go 60 in a 50 mile per hour zone,' clearly isn't going to fly. In the same way, our laws and traditions don't condemn a college for giving group preferences to alumni children, or to kids from Alaska in a Missouri school that prizes geographical diversity. Our laws and traditions don't condemn a state for setting a drinking age of twenty-one without allowing exceptions for unusually mature twenty-year-olds. When Steve, who condemns assigning rights purely on the basis of where the group we call 'human' begins and ends, would extend rights to chimps and bonobos as kinds of beings about which he has adduced impressive evidence relevant to the group as a whole, he wouldn't administer a battery of IQ tests to each individual chimp before declaring it eligible for these newly proclaimed rights. He, like all of us, would make decisions on a group basis even as he purports to condemn doing so. So those people who say we all have rights just because we are human, including the infant who can't solve equations, and including the comatose person, are not necessarily guilty of some form of species megalomania or of group think. That's the way our legal system works, and if we want to break through that barrier and argue that rights shouldn't stop there, I think we need a better reason than the proposition that deciding things based on the group you belong to automatically violates a basic axiom of our legal system. So the lesson is that, if we are to oppose drawing the line of rights and of protection at the boundaries of our own species, we need a better reason than the proposition that doing so entails a form of group justice inimical to our law.

A related and tenth and final lesson is that, when we insist that rights depend on the individual's possession of certain measurable traits such as self-awareness or the ability to form complex mental representations or to engage in moral reasoning,

and when we treat it as a mere matter of grace or optional beneficence whenever a simulacrum of such rights is awarded as a privilege to human beings who lack all of those qualifying traits (like infants or the severely mentally retarded or the profoundly comatose), then it follows that it would be entirely permissible not to award those basic legal protections to such beings. That is the conclusion of the best known of the philosophers of animal rights, Peter Singer, and I hope I'm wrong in inferring from how his book treats the topic of rights for infants and the infirm that it is Steve's conclusion as well, but it does seem to follow from the mode of reasoning that Steve employs. What other conclusion can you reach, after all, if your theory of who is entitled to rights is entirely a function of the supposedly scientific question of who has autonomy and who may therefore make a rational plea for dignity? If your theory is that simply being human cannot entitle you to basic rights, although it might be nice if they were given to you, I think you are on an awfully steep and slippery slope that we would do well to avoid. Once we have said that infants and very old people with advanced Alzheimer's and the comatose have no rights unless we choose to grant them, we must decide about people who are threequarters of the way to such a condition. I needn't spell it all out, but the possibilities are genocidal and horrific and reminiscent of slavery and of the holocaust.

That ends my tenth and last lesson. Let me conclude by repeating that, although I have been critical in this talk of some aspects of Steve's reasoning, I have enormous admiration for his overall enterprise and approach. And I don't pretend to have devised some alternative, invulnerable theory of my own to substitute for his. I certainly haven't solved the problem of how best to persuade others to share one's deep intuition that chimps and dolphins and dogs and cats are infinitely precious--like ourselves, and that it is unjust, that it is obscene and evil to treat them as things that anyone can really own. When people ask my wife Carolyn and me whether we own any dogs, we say

no. We don't 'own' our dog Annie. I can't really think of myself as owning a dog. We and Annie are a kind of family. But how do we persuade people to view the situation that way? How do we persuade people that these creatures have rights and must be allowed, through others as their spokespersons, to press moral claims? I don't claim to have figured that out. The secret to making that case may well reside at a level deeper than rational argument and deeper than provable fact, but, paradoxically, in a visceral appeal to our own common humanity.