INTRODUCTION

ENFORCING EXISTING RIGHTS

By
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For those interested in expanding rights of any kind, there are two historically honored strategies. One is to enlarge the category of rights beyond what the legal system now recognizes. You might think of Thurgood Marshall, the great civil rights lawyer who argued *Brown v. Board of Education*,[1] as having that strategy. He really wanted to enlarge the category of rights enjoyed by African-Americans. Another strategy is just to try to ensure that the rights that are now on the books actually exist in the world. Martin Luther King Jr., much of the time, had that strategy—not the enlarging-rights, but enforcing-rights strategy—insisting, as King did, "we just want you (meaning white America) to be faithful to the rights you recognize on paper." With respect to animals, there is a great deal of work to be done in the Thurgood Marshall direction—to expand the category of rights by ensuring that animals are used less cruelly, or less frequently, or maybe much less, as food, in entertainment, or in scientific experiments. But what I am going to try to explore here is the Martin Luther King strategy—that is, to see what might be done to try to ensure that such rights, as are now recognized on paper, are actually enjoyed by animals in the world. I will try to make a few suggestions for how we might go about doing that.

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[1] *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

My first observation is that the panoply of rights that animals now have at both the state and federal levels is much more expansive than outside observers acknowledge—both observers who are skeptical of the idea of animal rights and observers who are enthusiastic about the idea of animal rights. That is to say, that at the state and federal levels there is a lot of raw material that has not been used very much. If one investigates the laws of almost every state, one finds that that states protect animals—domestic animals certainly—and to a significant degree non-domestic or wild animals too. They protect them against human cruelty, which is defined broadly most of the time to include not only cruel acts such as torture and infliction of pain, but also omission. Thus, people are under an obligation most of the time, in most states, to ensure that their animals are well-fed, that they are well-nourished, that they receive veterinary care, and much more. Hence domestic animals to a large degree have protection of safety and security, which includes protections against welfare deprivation of the kind that human beings actually lack at the state level, as most Americans do not have this degree of protection.

At the federal level, there is also a great deal of legislation protecting animals against suffering and neglect. A statute that is dear to my heart, although I do not believe it means a great deal in the world, protects horses from cruel treatment and particularly protects injured horses from human exploitation.[2] The Horse Protection Act is a statute that, my guess is, was pressed by a few members of the House or the Senate who were really interested in this, and no one stood against it—though it has not meant very much in the real world. The federal Animal Welfare Act creates something like an incipient federal Bill of Rights for animals, providing protection against suffering and abuse and also creating affirmative obligations of humane handling, care, treatment, and transportation of animals—not only by exhibitors, but also by research facilities and dealers.[3] The upshot is that federal and state law recognize a great deal in the way of rights for animals, not only against torture and abuse, but also against neglect.

There is an unfortunate qualification here. All of us who have investigated the area, even a little bit, are aware that the federal government devotes very little in the way of resources to the protection of animals against suffering and abuse. The Animal Welfare Act is badly underfunded and, to say the least, is not a high priority in the Department of Agriculture, which is, in any case, subject to intense lobbying pressure from those who do not want greater protection given to animals. But if the Animal Welfare Act were taken seriously, we could accomplish a great deal to reduce animal suffering.

I have four simple suggestions designed to make the law on the books mean something actual and true in the real world. The suggestions are going to start modest and will get more and more ambitious.

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2 Horse Protection Act, 15 U.S.C. §§ 1821–1831 (2000).

3 7 U.S.C. § 2131 *et seq.* (2000).

My claim is that, for those of you who are interested in animal rights, there is really an enormous amount that actually can be done through creative lawyering. It is just starting to be done—what is missing is enough people really dedicated to ensuring enforcement of the law.

The first suggestion, and the simplest one, is that human beings should be able to bring suit in federal court, if they (that is, human beings) suffer some kind of injury as a result of a violation done to animals. I say this is the modest suggestion because there are already cases tending to recognize this right.[4] The notion is that human beings who go to zoos, or own animals, or who enjoy seeing animals in one place or another, ought to be allowed to bring suit to protect animals from injury, if the injury to the animals inflicts harm on human beings. I hope it is clear that this is a very modest suggestion, as it does not recognize rights in animals as such. It recognizes rights in human beings who are injured if their animals are hurt. Only slightly more controversially, millions of people enjoy seeing animals that are not their own and are miserable upon seeing those animals suffering. These people ought to have a right to bring suit in federal court, if the law is being violated, to ensure that the law is respected. There is a pocket of cases, some involving the Animal Legal Defense Fund, that are starting to recognize this very limited right on the part of human beings to bring suit.[5]

My second suggestion is also modest, but slightly less so, and I really hope some work will be done to see how feasible the idea is. It used to be, about thirty years ago, that there was a federal law that prohibited certain conduct, such as securities fraud, if the individuals who were subject to securities fraud could bring an implied cause of action against the person who was violating the law, even if the Securities and Exchange Commission was just sitting on its hands. The idea was that if there was a violation of the law by some company—which, for example, lies in its prospectus or commits fraud—there could be an implied cause of action against the violator, even if the government did not have the resources or the inclination to act. One of the most regrettable developments of the last 25 years is that the Supreme Court of the United States has cut back on this notion of implied causes of action. It is not so willing to allow private persons to sue admitted violators of the law if the federal agency is sitting on its hands.

Now, here's the thought: What the Supreme Court says about these implied causes of action is not binding on state courts. I have done some preliminary investigation and in many states there is a real interest in allowing human beings (we are still talking about human beings) to bring suit against violators of the law, if the enforcement authority of the state has not done anything. And what these states

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[4] *See e.g. Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986); *Humane Society of the United States v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988); *Alaska Fish & Wildlife Fedn. v. Dunkle*, 928 F.2d 933 (9th Cir. 1987).

[5] *See e.g. Animal Legal Defense Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998).

tend to say is, "Look, our state has forbidden certain misconduct. It is against the law and we will allow a kind of supplement to the state prohibition, enforceable by the state agency—a supplement by individuals who are affected by the prohibition." This idea is a little more ambitious than the first. There are not any cases yet involving the anti-cruelty provisions, but there ought to be. Some state courts should be interested in expanding their implied cause of action idea to bring in these cases so that we break the prosecutor's monopoly on the animal cruelty law.

The reason we want to break the monopoly is not because the prosecutors are necessarily bad, but because they have tons and tons of things to do, and sometimes prosecuting animal crimes is just not a high priority for them. Even if it is not a high priority for them, it is an illegality. Why not allow affected private human beings to help out the prosecutor by picking up some of the slack? I bet some state courts would be receptive to this argument. What little research has been done thus far—maybe some of you will do some more—suggests that there is a real opportunity in this and it would be a great thing for animals, a good thing for human beings, and probably a heroic thing for some states to do.

The third idea is a little more ambitious and complex. It begins with the fact that state courts, unlike federal courts, often do not have a constitutional limit on who can sue; they certainly are not constrained by the limitations of Article III of the Constitution, which applies only to federal courts. The third idea continues to observe that some state courts, unlike federal courts, just allow citizens to sue as citizens against private people who violate the law, or against the government for failing to enforce the law. The latter case is called a mandamus action, and it requires the government to enforce the law. Now it might be that, in some states, new legislative action would be needed to confer a right on the part of citizens, as such, to bring actions in a court 1) to prosecute law violators; 2) to get an injunction; or 3) to obtain damages. Or it might be that legislation is needed to allow people to mandamus the prosecutor to enforce the law in cases where there has been a clear violation. On the other hand, it may well be, in some states, that new legislation is not needed, and that the citizen suits are available under these old things, called prerogative writs—of which mandamus is the most famous.

This idea is a little more ambitious because I am talking, in this third suggestion, about citizen suits, not about suits by an affected human being. My only suggestion is that on animals' behalf, there ought to be an ability to build on what some state courts have already recognized—that is, citizen's suits in certain circumstances.

Thus far, I have suggested three ideas in decreasing order of modesty. The first is that human beings should be allowed to bring suit in federal court if they have been injured as a result of violations of the law by private or public actors. The second suggestion is that there should be, and might well be, an implied cause of action in state court

for violations of the anti-cruelty law. The third suggestion is that citizen suits in state court ought to be available, and ought to be brought, either against the violators or against the government, for failing to enforce the law.

The fourth suggestion is the most ambitious. It is that some states and the federal government, in the next twenty years, should create a private right of action on the part of animals, who would be the main plaintiffs, to vindicate their rights (and they are rights, as a matter of current state and federal law) against those who have violated them. In a way, this seems like a radical idea because now we are talking about suits by animals in their own name. But it may not be as radical as it seems. Of course, it is the case that human beings would be something like trustees on the behalf of animals. In the days of slavery, lawsuits were available not only by slave holders, but also by slaves against people who had behaved illegally or cruelly toward them. It is true that the category of illegality was limited—they were slaves after all, without a lot of rights. But it was also the case that slaves had protection against certain infliction of suffering by owners and others against them. My suggestion is that we ought to recognize for animals at least what was recognized for slaves—that is, a private cause of action that animals enjoy as themselves in their own rights against violations of the law.

We are talking here about an idea that is in one sense radical because these are suits by animals, but in another sense it is very mundane because the suits that animals would bring would be to prevent conduct that is recognized under state or federal law already to be illegal. If the idea seems radical, just notice for a moment that almost every federal environmental statute creates a citizen suit to supplement the enforcement authority of the Environmental Protection Agency. This is, in a way, a more modest suggestion than that because the idea is that animals who are actually injured or at risk would bring the suit, not citizens who have no palpable stake in the outcome (held to be unlawful under Article III[6]). If the idea continues to seem radical, we should just notice that for centuries the Anglo-American system has had parallel criminal and civil remedies—our tort system parallels our criminal justice system. I am merely suggesting that we expand that idea of parallel tort remedies to the domain of animal welfare.

I want to make a few closing remarks about these four suggestions. One thing that those of us interested in protecting animal well-being might focus on is what types of objections would be made against these suggestions. My field of vision is undoubtedly limited by my own imagination, but I have difficulty seeing what objections—what reasonable objections—would be made to an effort to ensure enforcement of laws that are already on the books and that are pitifully under-enforced. Perhaps the most effective objection would be that giving the government a monopoly on the animal cruelty legislation, either at the

[6] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

federal level or at the state level, is necessary to prevent frivolous, harassing, or baseless litigation. The state of California, for example, might think that if we allow any affected person, or any affected animal, to bring suit for what are alleged to be violations, then we are going to get, in practice, a lot of frivolous or baseless actions. This is, in the abstract, an obviously plausible objection, but I have a couple of things to say about it.

One thing is that under the state laws creating citizen suits to protect the environment, there has not been a torrent of frivolous litigation. On the contrary, there have been very few lawsuits and they have not been frivolous. Maybe that is not so surprising if we consider the fact that bringing a lawsuit is expensive and not a lot of fun, even for people who are committed to the underlying cause. So given the fact that a lawsuit is expensive and usually not fun to bring, it is probably just not true that the remedies I am suggesting would give rise to a lot of baseless lawsuits. The second response to this concern is that our legal system has strategies to filter out frivolous or baseless actions. If we think those strategies do not work here, or would not work here, it would be very surprising if we did not have the creativity to think of ways to be more firm in filtering out frivolous or baseless actions under the rubrics I am describing.

I want to conclude with some brief remarks about broader issues. I have been speaking of animal welfare and animal well-being, and not much about animal rights. Is there a connection between the ideas I have offered today and ideas about animal rights, and about whether animals are property? Here we can begin by taking a little bit of Martin Luther King's strategy first—trying to ensure that the world conforms to what is said on paper. Consider some analogies, designed to suggest that objects with the status of property can also be protected through the law.

For example, it is not odd for the legal system *both* to offer protection for a pristine area where the air quality is very high *and* to say human beings are allowed to bring suit to ensure that the air quality remains very high. It is clear that art and other cultural treasures can be protected, and are protected, against human depredation, even if those things are owned and do not have the status of persons. If the government wants to protect, for example, a painting of Leonardo DaVinci against injury, even from the owner of the painting, that would be just fine. We can find many parallels where owners do not have unlimited rights over the things that they own. As a matter of tort law, every homeowner's rights are sharply limited, even over what he or she owns. The ownership limitation applies not just by allowing the prosecutor to sue to prevent or punish crimes, but also by allowing ordinary people to sue to prevent or punish torts. So, my simplest suggestion is that things that have the status of property could, in principle, also have rights. In fact, our legal system is not so far from that in respect to animals because there is a panoply of protections at both the state and federal level that creates rights for things with the status of

property. However, we must acknowledge that, in this domain, Thurgood Marshall's strategy of enlarging rights rather than merely enforcing them, has some serious advantages over Martin Luther King's strategy.

Most people, on reflection, do not consider animals that they "own" to be things or objects. People who have dogs, or horses, or cats are most unlikely to have the same attitude toward living creatures that they have toward books, tables, and chairs. So the rhetoric of ownership really does misdescribe people's conceptions of and relationships to other living beings. There is probably a sense in which they do not really consider their cats, their dogs, or their horses "theirs"—at least they do not on reflection. It is not merely the case that the rhetoric of property misdescribes people's relationship toward animals. The same rhetoric probably damages their relationship too. In the end, I believe that Steven Wise, Gary Francione, and others are correct to reject the rhetoric of property. I do not entirely accept the reasons they give; they tend to think, in my view wrongly, that "property" cannot have rights. I suggest instead that the rhetoric of property tends to undermine and devalue the interests that human beings, on reflection, acknowledge that animals possess.

The four suggestions I have made are intended as a limited step toward the redescription of the relationship between human beings and other animals—steps that by themselves do not repudiate the notion of property, but maybe go a long way within the legal system toward changing that notion. Ultimately, then, I believe the legal system should not recognize animals as objects or things. It should see them as creatures, like human beings, with interests and concerns of their own. But the project I have tried to describe is not nearly as ambitious as that. All I have tried to suggest is that an enormous amount of good can come from enforcing existing laws and from making sure that what happens in the world conforms to what we say on paper.