

## HEAR ME ROAR

A presentation in Law Week hosted by Lawyers for Animals and Victorian Women Lawyers at Victoria University 20<sup>th</sup> May 2010

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### 1. Introduction

I'd like to acknowledge the Warundjeri people of the Kulin nation as the traditional custodians of the land where we are meeting today.

Then I want to take my heart from my sleeve, where I usually wear it, and lay it on the table. This is where I come from.

First, let me quote from a letter Abigail Adams wrote to her husband John, who was to become President of the United States of America, in 1776. She begged her husband to make sure that the new Congress not place:

*"[U]limited power into the hands of Husbands. Remember that all Men would be tyrants if they could."*

Though I am, of course, an advocate for the rights of women (I am one) this should be an important reminder that gender isn't the issue: power is.

Of course the founding fathers issued a Declaration of Independence in terms of the Rights of Man; wrote a US constitution which did not abolish but entrenched the status of slavery in its component states and a Bill of Rights which said nothing whatever about women's subordinate position in society.

Secondly, let us remind ourselves of what Peter Singer wrote in the very first sentence of his preface to the first edition of **Animal Liberation**<sup>2</sup>, a book

*'... about the tyranny of human over nonhuman animals. This tyranny has caused and today is still causing an amount of pain and suffering that can only be compared with that which resulted from the centuries of tyranny by white humans over black humans. The struggle against this tyranny is a struggle as important as any of the moral and social issues that have been fought over in recent years.'*

His first chapter still begins:

*"All animals are equal – or why the ethical principle on which human equality rests requires us to extend equal consideration to animals too."*

Third, I ask how you felt when I mentioned these quotations? Australians are notoriously uncomfortable with rights talk, except when it's about our own personal interests.

How do we feel when we are asked to make decisions on general principles, such as the rights of children? (I hear your arguments for the parental right to 'smack'); the rights of women? (scary); of Aboriginal and Torres Strait islander peoples? (the Intervention sounded so urgently necessary). How

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<sup>1</sup> [www.moirarayner.com.au](http://www.moirarayner.com.au)

<sup>2</sup> Singer, Peter. *Animal Liberation*, Second edition. Jonathan Cape, London 1975, 1990

about the rights of members of religious cults or sects, or Muslims or Scientologists? The rights of asylum-seekers and other aliens? Has anyone seen Peter Jackson's science fiction movie, District 9, about the rights of aliens who were oppressed by white and black citizens of Johannesburg? 'Aliens' used to be what we called anyone who wasn't from our tribe, family, village, or geographic locale.

What about the rights of Neanderthals versus Homo Sapiens? Recent genetic research indicates that we interbred with them, millennia ago, before we wiped them out. Hutus versus Tutsis? Endangered marsupial bat versus the rights of developers and shareholders? Aboriginal children's rights to an education versus improving the bottom line of the state economy? (Jeff Kennett thought they didn't rate until the Victorian Full Supreme Court ruled otherwise, under the Equal Opportunity Act's anti-race discrimination provisions two years after he shut it down.<sup>3</sup>)

As soon as we start talking 'rights', we start perceiving conflict and getting anxious, because accepting that others have 'rights' affects our own comfort, shakes up our values and complicates our personal choices.

How can I recognise the right of my child to dignity and bodily integrity, and then smack her for being 'naughty'? How could I recognise the rights of a captured chimpanzee to live in a relatively safe and comfortable and non-restrictive environment, and then inject him with the HIV virus to see how long it might take an experimental vaccine to save or kill him? Or respect the right of a krill-eating whale to life, and then allow a commercial fisherman to harpoon and electrocute him to sell his carcass to gourmands?

## 2. What are legal rights?

Legal rights are rules that have sanctions if they are broken. We are all, for example, legally obliged not to invade the body or personal space of another without their consent. We are all entitled to physical liberty, and can't enslave or kidnap each other.

But no non-human animals have these rights under Australian law.

How do we decide who is entitled to rights? In Steven M. Wise's 'Magna Carta for animals', Rattling the Cage<sup>4</sup> he summarises some of the obstacles to acknowledging rights of non-persons:

1. In Somerset's Case<sup>5</sup>, a little boy captured in Africa, sent to Virginia on a slave ship in 1749 and bought by a customs officer there, escaped after 22 years of servitude when he was shipped to England, but was recaptured but, while his owner held him on board a ship bound to return him to America, a bunch of do-gooder anti slavers took out a writ of Habeas Corpus on his behalf.

Lord Mansfield let him go stating that:

*"The state of slavery is of such a nature, that it is incapable of now being introduced by Courts of Justice upon mere reasoning or inferences from any principles, natural or political; it must take its rise from positive law".<sup>6</sup>*

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<sup>3</sup>For a description of the case see Rayner, M. Rooting Democracy – Growing the Society We Want, Allen & Unwin 1997

<sup>4</sup> Wise, Steven M, Rattling the Cage: towards legal rights for animals, Chapter 11. Profile Books, 2000. Jane Goodall called it the 'Magna Carta'.

<sup>5</sup> Somerset v. Stuart 20 Howell's State Trials 1 (K.B.) 1772

There was no such law, yet it took more than another half century for the slave trade to be outlawed in the British Empire.

2. In 1846 Dred Scott petitioned a St Louis court to declare himself and his family 'free' after many years of slavery. The Missouri Supreme Court ruled against him on the ground that to rule otherwise would overthrow and destroy its sovereignty at the whim of Northern abolitionists.

Six years later the US Supreme Court ruled in a separate federal case<sup>7</sup> initiated by Mr. Scott that he and his family were not citizens but “[b]eings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect . . .” – Dred Scott was an item of merchandise.

3. In 1991 a dolphin called Kama sued his captors, an Aquarium, through his next friends, a number of animal protection organisations, in a federal court.<sup>8</sup> Federal Procedural Rules did not exclude non-human entities or forms of life, according to the court, from being heard. Kama had, however, to have a domicile. He had, in fact, two. The reason his case did not proceed was because the states in which he was deemed to be domiciled did not recognise his status, or permit a suit by a non-human.

Can you imagine a US court denying an escaped victim of a genocidal regime any right to a remedy for being kidnapped and subjected to cruel and inhumane treatment, because the offending nation's laws, like Nazi Germany's, did not recognise his right to sue?

In other words, rights' existence depends on social attitudes. 'Rights' have been recognised when society demands this. Societies' demands change. So far, rights seem to be reluctantly attached to outsiders and only within our own species.

Why is this still so?

It is not, apparently, because the would-be rights holder has no capacity to claim their right: courts have found that sometimes a right is so important that a duty must be found to protect it and a person in whom the responsibility rests to act on it.<sup>9</sup>

Nor is it, apparently, because an animal has no cognitive capacity. In **Marion's case**,<sup>10</sup> Justice Brennan of the High Court said that even a profoundly intellectually and physically disabled young woman had the right not to be sterilised without consent, even if she were not able to formulate the claim, because it is such a fundamental human right not to be subjected to a painful and permanently disfiguring invasion of one's bodily integrity.

It is not, apparently, even necessary that a court-recognised rights-holder have a body of their own.

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<sup>6</sup> From Van Cleve, George, *Somerset's Case and Its Antecedents in Imperial Perspective*, *Law and History Review*, Vol. 24, No.3, Appendix 1. Transcript of Lord Mansfield's Judgment in Somerset's Case As Reported in General Evening Post, London June 21–23, 1772 available online at: <http://www.historycooperative.org/journals/lhr/24.3/cleve.html>

<sup>7</sup> Dred Scott v. Sandford 60 U.S. 393 (1856)

<sup>8</sup> Citizens to End Animal suffering and Exploitation v. The New England Aquarium 836 F. Supp. 45

<sup>9</sup> MacCormack N. *Children's Rights: a Test-Case*, in *Legal Rights and Social Democracy: Essays in Legal and Political Philosophy*. Clarendon Press. Chapter 8, PP 154-156. 1982

<sup>10</sup> *Secretary, Dept of Community Services and Health v JWB and SMB* (1992) CLR 218

In 2000 an English court, determining whether or not to authorise the intended separation of ‘Siamese’ twin babies, necessarily ending the life of one in order to preserve the life chances of the other, authorised the procedure on the ground that ‘Mary’, having no reasonable prospect of survival independent of her stronger sibling who ‘owned’ the vital organs within her part of a single, shared body, was a ‘parasitical attachment’ to the body of that sister. On review the appeal court held that ‘Mary’ was human, and thus entitled to respect for her right to life, which led to what amounted to a charade of life-preserving treatment at the time of separation.<sup>11</sup>

In the US Supreme Court’s judgment on 21<sup>st</sup> January 2010<sup>12</sup> in the ‘citizenship case’, it appears that civil rights may even be attributed to the legal fictions known as corporations who were in that case endowed with the inalienable ‘right’ to lobby and donate to political organisations and causes, despite lacking any bottom to kick, or heart to feel.

Legal rights belong to persons and even, apparently, legal fictions called ‘persons’.

My argument is simply that there is no logical reason why an animal, especially one with whom we can communicate, should not be a ‘person’ in cases where humans seek to take away the basic rights of freedom to bodily integrity, bodily liberty and freedom from fear. What are the actual obstacles to providing ‘standing’ – in decision making and in courts – for their rights when far greater powers are seeking to suck him down or lock her up, or deprive them of their most basic rights?

At its least, a legally recognised human right means liberty in the sense of ‘freedom from’ – that is, freedom from limitations on bodily integrity and freedom from deprivation of liberty, assault or fear of assault, and from servitude or slavery - perhaps best expressed as the right to be left alone.

At its next level a human right means ‘freedom to’ – that is, to make choices, such as whether or not to become pregnant, to bear children, and to share equally in opportunities among one’s peers.

A ‘claim’ of a right is an assertion that one being is entitled to limit the liberty of another, who has a duty to act or not act in one way or another. What is unusual about human rights today is that even when a being does not have the capacity to make a claim, the law is now prepared to find a duty to consider and if necessary protect and promote those rights.

If we enjoy such protections ourselves, why not extend that protection to the animals with whom we share the earth?

#### **4. How did human rights become part of the rule of law?**

I became a human rights advocate as a child, when I swore (as a very little one) that I would always remember what it felt like to be told what to do and physically pushed around without anyone asking or considering my feelings.

I became an animal rights advocate when I extended that privilege to my dog. I could see the ‘dependency’ relationship gave me responsibilities to care for others. However it really came alive when, having asserted that I was very concerned for animals, domesticated and ‘companion’ animals in general and particularly my own dog, my cousin pointed out my hypocrisy when the said dog leaped up and pinched my piece of cake and I whacked her on the nose.

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<sup>11</sup> See Appel, JM. [Ethics: English high court orders separation of conjoined twins](#). J Law Med Ethics. 2000 Fall;28(3):312-3.

<sup>12</sup> [Citizens United v. Federal Election Commission](#) No 08-205 21<sup>st</sup> January 2010. Available online.

I learned something about power, and its attractiveness to those who don't have much of it themselves. I was five.

Nonetheless my concern for my dog was such that my mother once asked me whether, if the family dog (Smutty, named after my father's jokes) and my father (whom I adored) were both heading down a major river to go over a vast waterfall, which one would I save? It was my first ethical challenge and I allegedly failed it, because I voted for Smutty, 'because Dad can swim'.

I had learned something important about rights and responsibilities at a very early age.

Historically, the industrial revolution caused such an upheaval in civil society (local, agrarian, family and land-holdings based) that many of the ancient impediments to the exercise of tyranny against individuals: the outrage of a local community, the moral restrictions of some religions, and the presence of constables and shire reeves, to name some – dissipated.

The early 19<sup>th</sup> century marked the first of specific social actions to protect the obvious victims of large-scale shift in the structure of economic life, at the cost of traditional small-scale local values. These began with pragmatic concerns about the effects of poverty on social order in the cities, and in the UK, whence Australia inherited most of its legal and social structures, laws were created to limit the oppression of those whose efforts were necessary to keep the Industrial Revolution rolling.

The first court decisions allowing contributions to societies devoted to preventing cruelty to animals to be recognised as 'charitable' were based on accepting the argument that empathy for abused animals developed and nurtured the 'charitable' impulse to care for dependent and vulnerable, endangered and injured human beings. The first British laws prohibiting and punishing cruelty to and abandonment of children followed the model of anti-cruelty statutes which enabled volunteers to take action against those who wilfully hurt or maimed horses, the principal means of transport. Then came the glacially slow recognition that there was a social necessity to empower women to own their own property, vote in some elections (presuming that wives and daughters would vote as their powerful male relatives directed), and only gradually (due to the increasing numbers of women who had to work for a living) permitting women to at least assume a place (I will not say 'their rightful place' for it is obvious that women have still not done so) in professions such as nursing, teaching and management with equal opportunities to equal pay and rewarding careers.

Then in the new societies reshaped by war and upheaval in northern America, Europe and other parts of the developing world, it became apparent that racism and gross inequality in society was linked to unrest, disorder and unstable markets and thus political and social systems. Over the 20<sup>th</sup> century in particular, anti-racism laws became seen to be necessary and, ultimately, morally unavoidable. The tragic outcome arising from the lack of the rule of law, and lack of protections of unpopular groupings of human beings from discrimination, persecution and extermination on racial, religious and 'eugenics' theories tainted by disproportionate honour to majority might, made it obvious that preventing people from becoming non-rights holders was essential for the stability of any human society.

The origin of all 'rights' movements – the (slavery) abolition movement; the opposition to cruelty to animals which preceded that of cruelty to children; the movement to acknowledge the rights of workers, of women, of racial minorities – and the move to formal recognition of the right to equality of all human beings – is empathy.

We can imagine and therefore share the actual or foreseeable pain of the other; and we can imagine a future in which something we have seen might happen to us or those we care about.

The secondary support for 'rights' movements is pragmatism: in a society where 'rights' are denied to some, in which those with power make all the decisions, without acknowledgement and accommodation of other points of view, such a society becomes dangerously unstable.

That is why membership of the Council of Europe depends on each member nation having a domestic human rights protection regime.

A third reason for the growing recognition of human rights is the human experience, put so well by Lord Acton in 1870, in response to a correspondent's attempted justification of the then Pope's declaration of papal infallibility on the basis that the Pope was a man of great public, moral stature, who would use such power wisely:

"I cannot accept your canon that we are to judge Pope and King unlike other men with a favourable presumption that they did no wrong. If there is any presumption, it is the other way, against the holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you super-add the tendency or certainty of corruption by full authority. There is no worse heresy than the fact that the office sanctifies the holder of it." <sup>13</sup>

The fourth reason is societal.

Over the last sixty years we have become more familiar with the notion that certain fundamental rights are inherent in all humans. The basic rights of bodily integrity and bodily liberty seem intuitive to humans because we have a concept of autonomy – the very basis of all Common Law.

That is why the basic rule of human society, that no one may touch or threaten to touch my person without my consent, underlies the most basic of assumptions of the rule of law. One cannot be treated with dignity, if we have no autonomy: ask any child, who has been smacked in a car-park, or a woman who has to hide her bruises when she comes in to work.

Our assumption that we may deal physically with animals without regard for their bodily integrity and freedom lies in the perception that they have no autonomy, but what we lend them.

It also presumes that self-awareness underlies our human right, and that animals lack such self awareness. But what dog-owner has failed to perceive her companion's wounded dignity when subjected to discipline or locked away from social contact? There is now a wealth of evidence that primates and mammals can 'speak', remember, suffer loss, and grieve.

Besides, Courts in the UK, the US and Australia have respected the 'autonomy' rights of even severely mentally handicapped people, including infants and children, when irreversible procedures such as turning off life support systems, and sterilisation or bodily changes to make them more amenable to care, are proposed.

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<sup>13</sup> No citation necessary: it's in every book of quotations, and comes from Lord Acton's private correspondence.

I have already mentioned High Court Justice Brennan's reminder that even a profoundly intellectually handicapped woman had the right to retain her reproductive organs which right had to be considered when sterilisation was proposed by her doctors and carers.

American courts have repeatedly found that even dependent, disabled individuals with no cognitive ability are nonetheless entitled to certain basic rights, such as the right to be kept in conditions of reasonable care and safety and in a reasonably non-restrictive confinement.

The philosopher Kant described autonomy as (my paraphrase) the ability to understand what others can and ought to do when I need to decide what I ought to do. Understanding that, I can analyse whether it would be right to act one way or the other, bearing in mind that I should act as I would want others to act (not quite, 'do as you would be done by' but sufficiently like for these purposes). My capacity to make this assertion is what makes me autonomous.

But that can't be why human beings have 'rights' and animals don't. Most of us (the human animal) act on automatic pilot, or simply to achieve our desires: we don't consciously consider Kant's categorical imperative. We are not Kant: we're just folks. Most of us would be denied 'rights' if true autonomy were the litmus test, or even wisdom - courts acknowledge 'human rights' of people who, for example, want to represent themselves in courts, though they have, by definition, a 'fool for a client'.

So far, courts have by and large asserted that though all humans are autonomous, all non-human animals are not. This leaves the animals acutely vulnerable to exploitation and abuse – for example, experimentation on primates, dogs (those most sociable of beings) and even rats – among God's most intelligent creatures.

## **5. A rights approach to animal/human relationships**

That is why I say that it is time to adopt an explicit rights approach to animal/human relationships, and to start it by changing the perception that animals are merchandise and resources, whose lives and fertility are ours to exploit.

If 'rights' are premised on empathy, even with the suffering of those who are incapable of expressing it, then if we ask and expect it for ourselves, we should offer and give it to other sentient beings.

There are two simple steps we should begin to take.

### ***a. Change the language***

The first step to shifting a settled perspective is to change the language in which we refer to our fellow creatures.

I was outraged when the then Minister for Immigration, Mr. Ruddock, referred to Shayan, the little Iranian boy who had been rendered mute by the atrocities he had witnessed in immigration detention, as 'it'. It was obvious what he was doing. We do the same every day when we talk in that disembodied way about our pets and agricultural animals.

I propose that we should always refer to animals<sup>14</sup> by the signifiers of importance in our own, human society, as 'he' or 'she'. Just to begin with.

I propose that we should begin to talk in terms of an animal's right to have its basic rights and 'freedoms from' at the very least articulated and considered when formal decisions, such as changing the ways pounds operate, are proposed.

That means someone has to speak up for the animals.

***b. Pass laws that legitimate advocacy of animal rights***

It took equal opportunity laws first instituted in Australia in 1977 to change comfortable attitudes to women's ongoing discrimination, and Deborah Wardley's win against Ansett in the courts, which heretofore had not recognised her right of action, for big business to notice that society had changed.<sup>15</sup>

Because of the important negative effect of silencing a rights holder –uneducated women who are not entitled to work or go about in public except with the permission of a male relative, for example – I propose that there should be a legal dimension of rights for animals – that is

(a) a legislative or judicial statement that animals do have rights and people have duties to recognise and protect them, and

(b) a means of enforcing them, and redress provided for any breaches.

It is our job to assemble the building blocks of 'human rights' into statements about the dignity rights of non-human animals, and to convince fair-minded people that it is more than time to recognise and act to end our own tyranny over the animals with whom we share the planet.

This isn't bleeding-heart liberalism. It is simply, "quite inconceivable that the extension of any right should coincide exactly with the boundary of our species. It is thus quite inconceivable that we have any rights simply because we are human."<sup>16</sup>

Finally, in doing this in Australia we would not be trail-blazers. There are already some instances of intelligent, systemic advocacy for animals. In one Swiss canton, for example, its local government has appointed an advocate for animals who has the right to be heard on their behalf in litigation. So far the Swiss citizenry has eschewed the opportunity to make such advocacy available more widely, and has even prohibited the building of more minarets in its towns, perhaps indicating a temporary swing to the right. But we may hope. In California, a lengthy campaign ended in 2008 with the passage of California Proposition 2: the prevention of Farm Animal Cruelty Act, after appalling revelations about cruelty to sick and injured animals unable to stagger to be slaughtered in the Hallmark/Westland Downer Scandal.<sup>17</sup> If we know and can empathise with the avoidable suffering of animals, people are perhaps surprisingly willing to act to protect them.

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<sup>14</sup> I should make it clear that for the purposes of my argument 'animal' includes not only mammals like ourselves but aquatic mammals, birds, reptiles and fish and I am open to argument about the eventual inclusion of the billions of insects with whom we live in intimate contact.

<sup>15</sup> Wardley v Ansett Transport Industries (Operations) Pty Ltd 1979 EOC 92-002, and Ansett Transport Industries (Operations) Pty Ltd v Wardley (1980) EOC 92 003

<sup>16</sup> Sumner L.J. The Moral Foundation of Rights 206. Oxford University Press, 1987

<sup>17</sup> Lovvorn Jonathan R. and Perry. California proposition 2: a watershed moment for animal law. 15 Animal L. 149 2008-2009.



## 6. A way forward

I hope I've put my case well enough. Let us engage in this business. Let us not give animal producers and exporters and food and livestock companies the overpowering voice on animal welfare.

My final appeal is for feminists once again to stand up for the dignity and respect for the rights of others, animals included, to life, liberty and the pursuit of happiness. Women have after all shared their experience of biological determinism. All of us feel pain, fear, loss and grief. Dignity is all or nothing: hear me roar.

### Recommended Further Reading

Gaita, Raimond. The Philosopher's Dog. The Text Publishing Company 2002

Kinley, David ed. Human Rights in Australian law. The Federation Press 1998

O'Neill, Nick, Rice and Douglas, Retreat from Injustice. Human Rights law in Australia. Second edition. The Federation Press 2004.

Singer, Peter and Dover Save the Animals. 101 easy things you can do. Angus and Robertson 1991.

Singer, Peter. Animal Liberation Second Edition Jonathan Cape, London 1990

Wise, Steven M. Rattling the Cage. Perseus Books 1999