



Voiceless Animal Law Talk: Episode 1 – Legal Personhood for Animals

PODCAST TRANSCRIPT

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This engaging and informative 30-minute educational podcast discusses the arguments for/against granting legal personhood status to animals with some of the world's foremost legal experts on the topic.

Interviewees include:

Professor Steven Wise, lead attorney and founder of the Nonhuman Rights Project (USA);

Joyce Tischler, founder of the Animal Legal Defense Fund (USA);

Professor Richard Epstein, New York University (USA);

Dr Erin O'Donnell, Senior Fellow at University of Melbourne (AUS).

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Introduction

Voiceless Animal Law Talk – a podcast by Voiceless, the animal protection institute.

Narrator

Welcome to the first episode of Voiceless Animal Law Talk. I'm Meg, and I'm here with my colleague Sarah.

Narrator

And we're the Animal Law and Education Managers at Voiceless.

Narrator

In this episode, we'll be exploring the complex and fascinating concept of granting legal personhood to nonhuman animals. Traditionally, we conceive of a legal person as being a human being or the proxy of a human being, like a corporation. However, increasingly around the world there's been debate and discussion about changing the property status of animals to that of legal persons with rights. Today we'll be discussing the work of Professor Steven Wise. He's the lead attorney and founder of the Nonhuman Rights Project in the US. The Nonhuman Rights Project – or, the NhRP – are trying to change the common law status of a number of animals, such as great apes, elephants, dolphins, and whales from 'things' to 'legal persons'. And he's doing this by bringing litigation on behalf of individual animal plaintiffs.

Narrator

And although the NhRP's cases are currently before the courts, the campaign for legal personhood for animals actually began decades ago when the animal law movement was just beginning. So to find out more about the early days of animal law, we caught up with Joyce Tischler. Joyce is the founder of the Animal Legal Defense Fund in the US, which she started in 1979. It's now the biggest animal law organisation in the world, which has led to many people affectionately referring to her as 'the mother of animal law'.

Joyce Tischler

"I met Steve Wise in 1981. There was a conference, the very first what was called an animal rights law conference. It was held in New York City in November of 1981 and Steve came from Boston and I came out from California, from San Francisco. And then a variety of other people joined in, David Favre I met also at that conference, and a number of other people who as a result of that conference we formed a national board, which was laughable at the time because there were so few of us in the movement there really wasn't a movement as yet, but we formed a national board and Steve Wise was on it and David Favre was also on it and the two of them began to talk about rights before the rest of us did. Now we all came into the movement having read Peter Singer's Animal Liberation and then moved onto Reagan as well, so we were rights-based, we were thinking about rights and trying to apply it to animals and so we were starting with a blank slate in some ways and looking to other movements to try to help us get our grounding. In the early 90s, Steve and David wrote their first law review article on legal rights for chimpanzees, it's never been published and they took it to the Vermont Law School Law Review and the Law Review refused to publish it. It was too radical."

"I think that, and this might sound like I'm making excuses, but when you start a movement first you experience ridicule and you experience people ignoring you because obviously you're crazy. The next stage is that you experience discussion. So Steve has actually pushed into the stage of scholars, academics, people of real note are discussing this. Some of the leading constitutional scholars in the United States have talked about it, written about it, had discussions with Steve and debates with Steve. Some of them oppose the idea of legal rights. Some really accept it. So, he has been able to bring about a worldwide discussion about the capacities of animals. About the intellectual capacities, the social capacities, a deeper understanding of who they are, by themselves not as defined by us for our needs."

Narrator

In 1995, Steven Wise founded the Nonhuman Rights Project, as a civil rights organisation whose mission is to gain legal rights for nonhuman animals. He had been working as an animal protection lawyer for years, but found that the property status of nonhuman animals was actually a barrier to achieving real protection.

Steven Wise

“So I began the Nonhuman Rights Project, specifically in order to begin to prepare litigation and then litigate cases in which I would attempt or the Nonhuman Rights Project would attempt to establish legal rights and legal personhood for nonhuman animals.”

“What our goal is in kind of an overall way is that we want to make sure that every nonhuman animal who ought to have legal rights, who ought to be a person, is a person. And that they then ought to have the legal rights that are appropriate to the kind of being they are.”

Narrator

So in the eyes of the law, nonhuman animals are classified as property, or things owned by a person. Many animal lawyers argue that it is this ‘thinghood’ of nonhuman animals that actually entrenches their suffering. So to remedy this, they suggest that nonhuman animals should instead be afforded personhood. As Joyce explains –

Joyce Tischler

“Personhood is a legal concept, if you are a person and you have rights, you matter. The law has to accord you certain protections. If you are not a person and if you are property, as animals are throughout the United States and throughout the world, then you don't matter and you can be used and abused and exploited in any way imaginable. The only thing that protects you is potentially cruelty laws or certain welfare protection laws, but those as we have all learned are always trumped by the needs and interests or even the convenience of human beings.”

Narrator

So, Steve and the Nonhuman Rights Project have actually taken the problem to court, in an attempt to get recognition of legal personhood for specific animal plaintiffs. So far, they've already brought cases on behalf of Tommy, Hercules, Leo and Kiko, all chimpanzees who've been held in captivity. We asked Steve why he chose to focus on the common law, rather than seek legislative reform.

Steven Wise

“We use the common law for several reasons. Perhaps the most important one is that the fact of the legal thinghood of all nonhuman animals is a common law idea. So we want to go in front of judges and tell them that you judge or your predecessors, that you judges are the ones who designated all nonhuman animals as legal things under the common law and so we are now here to persuade you that you are wrong and that you have the power and indeed the responsibility to change the common law when experience shows you ought to and morality changes as scientific evidence accrues, and we are ready to present evidence to you that scientific evidence has accrued and it is clear that nonhuman animals at least some of them should have legal rights based upon the scientific evidence we give you and that they also should have rights as a result of the change in the moral status of nonhuman animals or that morality that people have in general in the centuries since you first made nonhuman animals legal things.”

Narrator

Steve also explained the importance of achieving recognition of rights in legislation down the track. So eventually, the NhRP would like to build upon common law victories with legislation to actually protect and support those rights recognised by the courts. But he explained that the current animal welfare legislation is inadequate, because it is premised on the basis that animals are things under the law.

Steven Wise

“When you try to legislate within that area, you are confined by the fact that the legislators believe and understand that nonhuman animals are things, and that they are slaves. Therefore, you can't expect legislators to do very much, they're not going to make a radical break with two and a half centuries now of a reigning paradigm of nonhuman animals being legal things who don't have any capacity for rights. We need to first break through that paradigm, break out of that paradigm, form a new paradigm of nonhuman animals being persons, who have the capacity for rights, including fundamental rights that protect their fundamental interests.”

Narrator

However, some people are skeptical of this approach and suggest that ‘rights’ may not be the appropriate mechanism for improving animal protection.

Richard Epstein

“I am absolutely convinced that the path for improvement of the position of animals who do have sensation and therefore whose utility in some sense counts even if they are not human beings does not lie through the nonhuman rights movement but lies through a sensible protective device which only sapient human beings can design on the one hand and administer on the other.”

Narrator

Richard Epstein is a Professor of Law at New York University, and he’s been debating the issue with Steve Wise for many years. He disagrees with the approach taken by the Nonhuman Rights Project, and he disagrees with their assumption that a rights-based approach is appropriate and necessary for improving animal protection.

Richard Epstein

“So what it is is that the nonhuman rights side of this business is done through guardianship arrangements so it’s one set of human beings representing a series of animals against other human beings and that strikes me in many ways as a very different kind of inquiry. So to me the basic question of nonhuman rights doesn’t seem to get the discussion off in the right direction but rather kind of prejudices the thing in a way which says well we know that these animals are in fact rights bearers so the only question we have to figure out is which rights they have rather than the question of whether or not a rights paradigm works for animals at all.”

Narrator

Richard doesn’t agree with the adoption of a rights paradigm, arguing that there are more effective and appropriate ways to achieve protection for animals. For example, through animal welfare laws and anti-cruelty legislation. Instead, he favours retaining the property status of animals, and believes that this status may in fact have some benefits to offer.

Richard Epstein

“There are many animals which are assets of enormous value and if they are left without human ownership they may often put adrift and at sea and be vulnerable to attack by other animals and by natural forces by diseases and so forth... I think of the owner of an animal often having a view that they have fiduciary duties with respect to the animals in question.”

Narrator

We asked Steve Wise whether he considered property status to confer any benefits to nonhuman animals.

Steven Wise

“Well anyone who argues to me that it would be better for nonhuman animals to be legal things rather than legal persons, I would then suggest to them that they may want to give up all of their legal rights and become a thing. So far I haven’t had anyone want to take that offer up. And it’s not surprising because when you are a thing you are a slave, and nobody wants to be a slave, and no non-human animal wants to be a slave.”

“The scientific facts that are being generated about who nonhuman animals are, what kind of beings they are, what kind of minds they have, is increasing. And the data that’s coming out makes it clear that they are far more cognitively complex than we ever imagined, and way more cognitively complex than people ever imagined when common law judges first began to say that they were simple things who could not have a capacity for rights.

Narrator

Scientific evidence is at the core of the NhRP’s work. To date, they have selected plaintiffs who belong to species that they can prove are autonomous beings, such as chimpanzees and elephants.

Steven Wise

“So far, we have focused on chimpanzees, on elephants and we are also going to begin focusing on orcas. But those are really the three kinds of nonhuman animals that we are beginning with, and the reason we do that is that we have seen that the jurisdictions we are litigating in greatly, perhaps supremely, value the characteristic of autonomy. And autonomy means that a nonhuman animal or a human animal who is autonomous is able essentially to choose how to live his or her life, and we see that judges believe that their job is to allow autonomous beings to live autonomous lives unless there is a good reason why they shouldn't. To date, those autonomous beings have only been human beings, but we don't see why it should be restricted to human beings. That wherever autonomy is we argue to the judges that autonomy should be protected.”

Narrator

And importantly, Steve emphasizes that while they argue that autonomy is sufficient to claim legal rights, it's definitely not necessary in order to have rights.

Steven Wise

“One of the reasons that we are one hundred percent positive that autonomy is not a necessary condition for legal rights is there are hundreds or millions or even billions of human beings who have all kinds of legal rights who are not autonomous. So, therefore there must be other reasons for having rights other than autonomy.”

Narrator

This raises another question: what else might be required in order to claim rights? In one of the NhRP's cases, the court said that Tommy the chimpanzee was incapable of holding rights, because he was unable to uphold duties and obligations. Professor Richard Epstein spoke to us about the perceived connection between rights and duties.

Richard Epstein

“When humans disobey any applicable law dealing with the murder or killing of another human being or even rules that deal with sanctions for cruelty to animals and so forth, we always think do they have sufficient capacity in order to stand trial? Do they know the nature of the wrong and the charges against them? And we always come up with the answer that rarely they do not, but most of the time they do. If you applied that standard with respect to any other species on the face of the globe... I don't think you could talk about a morality which is independent of evolutionary forces.”

Narrator

A lot of people have contested the argument that personhood can only be claimed by entities capable of both exercising rights and upholding duties. The Nonhuman Rights Project actually objected to the court ruling that held that this was required, because they pointed out that the legal definition of person that was used by the court had been incorrectly cited, and in fact, the original definition stated that a legal person could have rights or duties. We asked Joyce Tischler about this point of law.

Joyce Tischler

“I think the law does not support that assumption that you can't have rights without having responsibilities. And there are groupings of humans who have rights without responsibilities.”

Narrator

As Joyce notes, various human beings, such as human infants for example, are classified as legal persons which means that they have legal rights despite the fact that they are unable to exercise duties and obligations.

Steve explains that a person is really just a 'rights container', or you could conceive of it as a vessel for rights, and that chimpanzees, elephants and orcas are all capable of being vessels too.

Steven Wise

“We are litigating and fighting for the personhood of at least some species, say chimpanzees. So, personhood means just that they have a capacity for rights. It would be theoretically possible for a court to rule that our chimpanzee client for example is a person who has the capacity for rights, but the judge does not agree that the right that we are asking for the chimpanzee

should be accorded her. So there you could have the case end with the judge agreeing that a chimpanzee is a person with the capacity for rights. But as of yet, she doesn't have any. So, you have to view personhood as kind of like an empty vessel. It's simply a capacity, and once that capacity is established, then you then begin trying to determine which rights ought to be within that capacity. Which rights should a chimpanzee who now has the capacity for rights, have? So we are beginning with the single right, the fundamental right to bodily liberty.”

Narrator

Although the NhRP are trying to first establish the right to bodily liberty for their animal clients, they do plan to argue for further rights in subsequent litigation.

Steven Wise

“Once we get judges to agree that the chimpanzee, say, should have the right to bodily liberty then the next case will be 'well how about bodily integrity'. And what we do is move, as the common law does move, kind of slowly, evolutionarily, and we argue right by right, species by species.”

Narrator

Steven explains that he's not seeking the right to vote or the right to education, or other similar uniquely 'human' rights for nonhuman animals.

Steven Wise

“They are not entitled to those things that are not appropriate to them but would be appropriate to human beings. Just like they wouldn't be entitled to rights that might be appropriate to orcas. What we do is litigate, we don't litigate for human rights for chimpanzees. We are trying to determine what are chimpanzee rights, what are elephant rights, what are orca rights, what might be dog rights, so we are trying to litigate those rights that are appropriate for each species.”

Narrator

And in some parts of the world, rights have even been considered and assigned to other kinds of natural entities. We caught up with Dr Erin O'Donnell. She's a Senior Fellow at the University of Melbourne, and her PhD explored the implications of using a legal person to represent the aquatic environment. She explained to us what it means to grant rights to natural objects and ecosystems.

Erin O'Donnell

“I think legal rights for nature is more aligned with how we grant rights to many marginalized and otherwise silenced members of human society. So we can think about granting rights to children, and granting rights to the mentally ill, that don't necessarily depend on their ability to uphold particular duties, but for whom we think there should be the basis of rights regardless. So, I think legal rights for nature is a way of articulating who we think matters and why they matter. So, it doesn't necessarily have to be linked to correlative duties, and it doesn't necessarily have to be linked to the capacity to speak. I think you need to make sure that there is somebody who speaks on behalf of that entity and that you align the interests of the guardian as closely as possible to the interests of the river or the animal or whatever, to make sure that they are required and responsible to act and to speak purely on behalf of that, the river or the ecosystem.”

Narrator

Erin here is talking about what is referred to as 'the guardianship model'. So this is where a human or a group of humans become responsible for upholding the rights of a nonhuman entity, who cannot otherwise act for themselves.

Erin O'Donnell

“The idea of giving legal rights to nature and to natural objects probably stems back to Chris Stone's article in 1972, where he was really trying to tease out 'what would it actually look like and why would it matter if natural objects started to have rights of their own'. And his line of thinking in that context was to say, 'legal rights and legal personhood mean that the natural object can actually then start to advocate for its own self and the impacts to

that natural object don't have to be considered through the lens of how they have affected humans, but we can actually directly assess any damages or impacts to the river or to the ecosystem or to the animal, rather than just thinking about what do those damages actually mean for the humans who use that river or animal or ecosystem. So that was sort of a big theoretical leap at the time. It was laughed at, it was on the fringes of the law for a very long time, but in 2008 it started to get picked up again in a more mainstream way and Ecuador actually granted rights to nature across the entire country as part of its Constitution. And in creating those rights, they also created the capacity for any citizen in Ecuador to take action if those rights were infringed. So, they said 'nature has legal rights, and any citizen now has legal standing to go to court if they think those rights have been infringed'."

Narrator

And since then, a number of jurisdictions have granted legal personhood to natural entities. So in New Zealand, for example, legal personality has been extended to both a national park and to a river. This was a result of the Treaty of Waitangi Settlements between the Government and the Maori People of New Zealand, and it actually triggered headlines around the world. So as Erin points out:

Richard Epstein

"That was seen as a fundamental shift in the way that people interact with rivers; in the way that the law constructs the relationship between people and rivers; and I think the idea of a river as a self-contained natural object. It's something that has very clear identifiable boundaries, it's clearly not a human construct, it was also a natural object that the Maori People had had a strong relationship with for hundreds of years, and to them the river was an ancestor. It had always been a form of person. So using legal personhood in that way was much more pluralistic from a legal perspective, and a way of recognising Maori relationship to river as well as the intrinsic values of the river itself."

Narrator

Professor Richard Epstein contends that the granting of legal rights to rivers or other natural bodies is actually more accurately conceptualised as invoking what is called the public trust doctrine.

Richard Epstein

"Well I basically regard the sort of rhetorical ploy that a river has a personality as something of a bad joke, because if rivers have personality then streams start to have personalities, then cesspools start to have certain personalities and so forth. What we really are saying when we give them quote unquote personality is that there is some individual or some group who has standing in order to make sure that the river is going to be protected. Protected against what? Well I mean, does the river have the right to be protected against natural disasters, or only against human intervention? What we really are going on under these circumstances is to say that there are certain natural resources which are in public trust, we then have to figure out what devices are going to be used to protect these resources from what kinds of situations. And that's a perfectly conventional notion and indeed the public trust doctrine which deals with the same issues goes back a very long time. It was not a roman doctrine, but essentially once you decide that a river is property which is held in common – by what you mean is that everybody has access to it and nobody can exclude it – it then becomes a question of is universal access going to be sufficient to deal with a resource like that if it gets soaked over or be polluted or something of the sort? You quickly discover that the answer is no. And so before we gave a river personhood what we did is we created a public trust doctrine. And said that the government now has the duty to protect these things."

Narrator

On the other hand, Erin makes a distinction between the concept of the public trust doctrine and legal personhood.

Erin O'Donnell

“For me, it fundamentally comes down to the philosophy underlying it. So public trust is really useful, but again it's underpinned by the idea that these environmental values exist for people. So, governments or various bodies hold them on trust for the public. But, what legal rights say is the rivers, nature, animals, whatever we give those legal rights to, are now the centre of that equation. Their rights matter intrinsically. And that shift into a much more eco-centric approach I think is really fundamental and it is still fairly radical in the way that the law perceives the environment.”

“If we think about it more broadly than just the ability to go to court, what you can create with legal rights is a real voice in policy-making and the ability to actually represent the specific interests of the river or of the animal or the ecosystem in a way that is much more direct and much more focused on what those specific interests are and it just steps away from viewing the environment through the lens of what it does for humans.”

Narrator

Some people have concerns that granting rights to nonhuman entities, like rivers or animals, may threaten or detract from human rights. Steve Wise disagrees, and argues that rights are not a zero sum game.

Steven Wise

“Yes indeed, we do view it in that way, that if humans arbitrarily deprive nonhumans of rights to which they ought to be entitled, in any kind of a rational or just system then their arbitrary or irrational refusal to grant them those rights will then undermine the basis for our own fundamental human rights. That is indeed true. The idea that giving rights to non-human animals will then deprive humans of those rights, that somehow rights are a zero sum game. We simply reject that they aren't. We are quite concerned about the fact that that kind of argument is an argument that humans have used against each other for centuries and it always leads to dark immoral irrational arbitrary places. So, we have now seen that even though men did not want to give women rights, when women received their rights, it didn't deprive men of rights. The only rights it would deprive men of is the right to exploit women. When white people finally gave rights to people of colour we saw that it did not take away their rights, except their rights to exploit those people of colour. So you don't need to worry that humans who have rights are going to lose their rights from nonhumans that get them except to the extent that it will forbid them from exploiting them, from enslaving them. And those kinds of rights we shouldn't have in the first place.”

Narrator

Professor Epstein queries where we draw the line with rights, and he basically asks ‘if we protect the big animals, what do we do about all other life forms at the other end of the scale, like bacteria?’ He suggests that ultimately all humans draw the line somewhere.

Richard Epstein

“And so if they are going to draw the line somewhere else, I think I'm going to draw it where it really, really matters, which is between human beings and everybody else.”

Narrator

He argues that most people in human society don't agree with the idea of granting personhood to nonhuman animals.

Richard Epstein

“This is so far removed from the way in which people think that I just regard this as kind of a bizarre thought which is occupied by a half a dozen philosophers and rejected by billions of other people, many of whom do have sensitivities for animals and some of which do not.”

Narrator

However, reflecting on the growing number of successful cases of personhood around the world, Steve Wise is still hopeful.

Steven Wise

“So you have India, you have Columbia, you have Argentina, you have New Zealand, these are all beginning to give legal rights and personhood either to nonhuman animals themselves or to natural objects. So the world is changing and judges in the United States and elsewhere are going to have to change with it.”

“I wrote a book called *Though the Heavens May Fall* that talks about the famous slave case of *Somerset v Stewart* in 1772 where Lord Mansfield who was Chief Justice of the Court of Kings Bench ruled that slavery was so odious that the common law would not support it, and abolished slavery in England through that judicial decision. Other people did not do that, and the legal history or the history of morality as well looks very kindly on Lord Mansfield, because he really did the right thing and it does not look kindly upon all the judges who did not have the moral courage to do the right thing.”

Narrator

Joyce agrees, noting the complex relationship between changing social and legal values.

Joyce Tischler

“There is this interesting balance between how society changes and how the law changes. You don't really know at all times which is going to come first, and we need to remember that judges are part of society. They reflect society, and so if you can convince a judge that a chimpanzee should be able to live in a way that comports with his or her own wellbeing and not be exploited solely for human purposes, you need to convince the society around that judge.”

Narrator

And already some members of the judiciary are becoming more receptive to the concept. And one New York Court of Appeals judge stated in a 2018 case that a chimpanzee is ‘not merely a thing’. Steve classes this as an important development for the movement.

Steven Wise

“It was a terrific success! Again, Judge Fahey is the first high court judge at any level within the United States of all the state high courts and our federal high court to actually issue an opinion as to the merits of our case and he said that we are essentially correct. And we have always been extraordinarily confident that we are correct.”

Narrator

More countries around the world are beginning to accept that natural entities and nonhuman animals have an intrinsic value. The personhood movement is gaining momentum. And the Nonhuman Rights Project is showing no signs of slowing down. In fact, they're already beginning to prepare their next litigation in California, and they've already filed a number of lawsuits in the state of Connecticut on behalf of elephant clients, claiming that they too are entitled to bodily liberty and should be freed to live their lives in a sanctuary.

Narrator

These cases are happening as we speak, and Steve expects to see change very soon – even within the next couple of years, as judges, individuals and broader society begin to critically question the legal status of nonhuman animals.

Steven Wise

“So this thing is kind of coming down the track like a locomotive and as I sometimes say to people, you know, the first 30 years I think have been the toughest. I think things are going to get, are already getting a lot easier.”