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ISSUE ON GREAT APE PERSONHOOD

(To Navigate to Articles, Click on Author's Last Name)

ACADEMIC ESSAY

COMMENTS

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From the Editors

Shawn Thompson is the first to admit that he is not a scientist, and his essay does not pretend to be a science paper. Thompson, rather, makes an attempt to reach across the false divide that was prominently established by C.P. Snow's misguided notion of two cultures, an attitude which pernicioulsy persists across university campuses, popular media, and as shown here in courts of law. In fact, Thompson, working from the foundations of philosophy and legal theory, tries to reach scientists and their thinking in the battle for great ape personhood. Likewise, Thompson relies on Nonhuman Rights Project attorney Steven Wise, who calls on scientists to reach across to the thinking of judges deciding the fate of great apes. Perhaps it's an unfair analogy, but Thompson attempts here to do with primatology what climatologists from several generations tried to do – demonstrate how science is part of and can affect public policy. Thompson shows how what is empirically rational in science is treated differently in the legal arena, and that difference poses a real problem for granting personhood status and other rights to great apes.

Why is the issue of great ape personhood important? That question will be answered, in part, by Thompson's essay. But Tompson can do only so much in 13,000 words. More so, the debate over ape personhood raises moral and ethical questions that have repurcussions for human society and even the health and survival of the biosphere. How should humans treat beings who have similar cognitive and behavioral tendencies? Why should humans care about rainforest ecosystems? We can't touch on all of that here, but issues related to those questions are implied in Thompson's essay.

Sincerely,
Gregory F. Tague, Ph.D., editor
Christine Webb, Ph.D., guest co-editor

Supporting Ape Rights: Finding the Right Fit Between Science and the Law

Shawn Thompson

Don't expect a judge to think like a scientist. It's not how the system works.

The research of scientists has been a crucial component of seeking the rights of intelligent species since animal rights lawyer Steven Wise of the U.S. Nonhuman Rights Project first filed a habeas corpus application for chimpanzees in December 2013.

Wise cobbles together research into intelligent species like apes, elephants and dolphins with affidavits from scientists to use the material for a purpose it was never intended, empirical evidence to support the legal arguments the lawyer is making that a chimpanzee is legally a person.

If just one boldly rational judge will accept a habeas corpus application on behalf of a chimpanzee held in captivity against his will, that would be an acceptance of personhood and a huge advance in ape rights, worth all the years of effort that Wise has poured into this venture. It might also influence the way that humanity thinks about the intelligence of other intelligent beings on this planet.

But scientists don't design research to fit legal principles. For that reason, I want to start a discussion with this article of how research could be designed to fit the legal argument of Wise that a habeas corpus application should apply to a chimpanzee because the creature meets the basic legal principle of autonomy.

To start a discussion like that means a change in thinking about the research. It means adapting research to the area where two very different domains of rationality, science and the legal system, overlap in an uneasy alliance.

I want to start that discussion by describing the differences of the two domains of rationality, by examining the way they interact in court, and by speculating on what type of focus an investigation into the minds of intelligent species might support the legal argument of autonomy. What I will leave to others is the actual design and methodology of this kind of research and the further development of what focus of investigation on the minds of intelligent species would be best. I may offer examples from my observations and from interviews I conducted relating to orangutans and the scientists and zookeepers working with them, but my examples are intended to illustrate the plausibility of conceptualizations of the minds of apes that would be useful legally. I use comparisons between people and apes, both ways, people to apes and apes to people, following the researchers who believe that people and apes are so akin that the difference between them is one of degree, not kind. That, of course, is also a good premise, if it is right, for arguing rights for apes.

To start the discussion, consider that the legal system is designed to make apparently rational decisions based on a priori principles when conclusive empirical evidence is missing. How then is empirical science useful in a domain like the legal system that has a different form of proof and rationality from science? How do we conceptualize in a useful way the overlap and interaction of these two very different realms of thought?

The approach, I will argue, should be to define and study the mental capacities that demonstrate the ability in intelligent species to act autonomously against "controlling influences," a point that I will expand and extend from the 2018 amicus curiae brief in a court case arguing for ape rights by attorney Steven Wise.

My main point is that any research intended to support the rights of intelligent species in court ought to be designed by a scientist who can also think like a lawyer and communicate like a United Nations translator across the confusion of tongues. It's not impossible.

Autonomy and general legal considerations for applying science in court

My understanding of the issues in this article began on a rainy night in seaside Vancouver in 2015 when I had dinner with lawyer Steven Wise of the U.S. Nonhuman Rights Project to discuss his legal strategy for an article I was writing for *Philosophy Now* magazine. What I learned that night also became crucial for the reports I would write over the next three years for the court case of an orangutan in faraway Buenos Aires. Luckily, I had no idea how complicated the legal issues would be and how pursuing rationality too far can take you to a puzzling and irrational place.

Wise has to win a legal argument, not a moral or social or political one, using the specific rules of rationality that apply to the legal system. To do that, he has crafted his strategy in U.S. court around habeas corpus applications and the extensive work done by him and his colleagues digging into the deep underlying legal principle of autonomy, which can trace its roots in Western thinking back to the philosophy of Immanuel Kant (1724-1804). The concepts of "person" and "autonomy" are not clearly defined in the law and in legislation, although they are the underlying premises, as Wise realized. Some of the most precise thinking about liberty and autonomy was done by Kant and so Kant is useful, although judges may not be familiar with his work. The concept of autonomy not only has to be demonstrated and proved to the court, but developed and defined to the court in a way the court will accept under the circumstances. Then a judge, in the words of Wise, has to be encouraged to "imagine" a change in thinking from what is familiar to the judge in terms of the law and culture.

Arguing a case in court is more even complex because, as Wise knows, judges don't all think the same way like some kind of single, rational machine. Judges think in different ways and can make different rulings over the same circumstances. That is why there is such a political battle in the United States in the nomination of a judge to the Supreme Court. For all the mental discipline that judges have, they are also vulnerable to inclinations, biases and self-deception on the bench. The rationality of the legal system has a shadow side of irrationality. The frustration and mental endurance of Wise

is visible in an article he wrote for the *Syracuse Law Review* chronicling his struggle with the irrationality of judges and the legal system. It is the kind of intense legal drama that fascinates a lawyer. A lawyer has to understand the character of the mind of the particular judge listening to the case.

In a habeas corpus application, it is important to make the distinction that Wise is not arguing primarily that a chimpanzee is intelligent, has consciousness and can reason – factors still crucial to the court cases and which scientists have been demonstrating in research – but that a chimpanzee is an autonomous being whose autonomy is related to his intellectual ability, the same point that Kant made more than 200 years ago about rational beings. Autonomous beings, in this argument, meet a certain threshold of being able to choose and act consciously and independently which, says Wise, "ought to be sufficient, though not necessary" to give them rights under a legal system based on liberty and autonomy. Wise cites the legal principle in his 2000 book *Rattling the Cage*: *Toward Legal Rights for Animals* that a person can have autonomy and rights even without cognition, consciousness and sentience. However, animals would not qualify for these legal rights if they are, as some believe, merely a kind of biological mechanism incapable of the intelligence and will power to make independent choices.

For this article, I asked Wise what kind of research on intelligent species would be most useful for him in court, and he replied with comments that add to what he wrote in *Rattling the Cage,* as well as supplying a copy of the crucial amicus curiae brief submitted to support his appeal to the New York Court of Appeals in February 2018 on behalf of the chimpanzees Tommy and Kiko. That amicus curiae brief is an exceptional document for the way that in 41, double-spaced pages it focuses concisely on the legal and scientific issues of personhood for intelligent species. The document is worth reading in its entirety and is available in a URL link to the Nonhuman Rights Project. https://www.nonhumanrights.org/blog/update-motion-philosophers-brief/

Wise is primarily making a legal argument that autonomy is a fundamental judicial value that can be applied to species like chimpanzees. Judges and the defendants in a habeas corpus application are unlikely to argue against the importance of the principle of autonomy, often leaving the evidence undisputed, but declare instead that a chimpanzee simply doesn't meet the criteria, whatever those are. Wise also told me that there is a strategic element in using autonomy apart from the way it is entrenched in the law. "The Nonhuman Rights Project does not make the autonomy argument because it believes that it is the best argument in the abstract. We make the autonomy argument because we believe that the judges highly value autonomy and we always shape our arguments in terms of the principles and values that the judges themselves say they value in their written decisions."

It is thus not a matter of how science defines autonomy, but how the legal system defines autonomy and how the legal system accepts evidence of autonomy. So, how does empirical science support a non-biological, a priori, principle-based legal argument? That's the rub.

One important factor is the reliance of the legal system on witnesses and testimony. The court system relies on what it sees as empirical evidence and on the evidence of experts to interpret that empirical evidence to a high degree of probability beyond what the empirical evidence demonstrates. A scientist speaking to the court system might want to argue in a more complex way that there is not really absolute proof, but empirical evidence that supports a theory or hypothesis, adding a layer of complexity that, while justified, also makes it harder for the court to understand. From the court's point of view, if there is what the court sees as empirical evidence that a person was observed behaving a certain way, it would require a psychological interpretation through an expert witness to help understand if the behavior indicated a strong probability of a specific interior mental state. The court needs the scientist to speak to the court like a lawyer, a scientist and a translator. So Wise said to me, "In the jurisdictions in which autonomy is the critical issue we submit complex affidavits from chimpanzee experts that demonstrate that chimpanzees are autonomous." The scientists do the crucial work of interpretation and make the significant connections, explains Wise. "It is primarily up to them to tie the cognitive characteristics they discuss to autonomy, though sometimes we do it, as well." Consequently, it would be even more useful if research was able to identify and isolate factors of autonomy in the behavior and cognition of intelligent species.

The "mental capacities" legal argument for intelligent species

Wise relies on the affidavits and amicus curiae briefs of scientists and university professors as experts to interpret research for the court. The 2018 amicus curiae brief was the work of seventeen professors from universities in Canada and the United States, including Bernard Rollin, whose work on animal rights and human morality is well known. But the defendant can introduce evidence that contradicts the case of the plaintiff. Cases in court often come down to dueling witnesses, as I saw years ago as a court reporter. However, in a habeas corpus proceeding, there is no live testimony in court; the judge decides which affidavits of the experts are more believable to fit the legal principles that are also being debated by the lawyers. A judge is an expert in the law, not science. The judge does not know that testimony or an affidavit is true in the way that one scientist can assess the truth of the research of another scientist; the judge evaluates the credibility of the testimony or affidavit of an expert based on the credibility and truthfulness of the person and faith in the reputation of science.

The 2018 amicus curiae brief – supporting Wise's request to the New York Court of Appeals to review an unfavorable lower court decision – is an intriguing fusion of science and legal principles and can be used as a guide for what scientists could do in research. The amicus brief cites four general categories often considered in court for personhood: 1. membership in a species as a biological category; 2. the social contract; 3. the social dimension of community membership; and 4. mental capacities. The 2018 amicus brief argues that both of the first two categories, namely species membership like *Homo sapiens* as a strictly biological category and the social contract, are not relevant to personhood. The defendants use the concept of the social contract to argue that chimpanzees can't understand or act according to the moral responsibilities and duties of the social contract. Judges have also ruled against Wise on that basis, although Wise argues that those judges made a legal error. Wise said in a hear-

ing in 2015 for the two chimpanzees Leo and Hercules that the Bern Court held in 1972 that personhood is a matter of public policy, not biology. Courts are in error, says Wise, if they don't follow Bern to make personhood a public policy issue and instead make it an issue of biology. The argument against biology is that it produces arbitrary classifications and distinctions that are not relevant to the legal rights of intelligent species. The 2018 amicus brief says that personhood "is not a biological concept and cannot be meaningfully derived from the biological category *Homo sapiens*. Moreover, species are not 'natural kinds' with distinct essences." The 2018 amicus brief also argues that the social contract is a misunderstood concept and irrelevant to personhood. Thus, research on these first two categories would not be useful for Wise. The brief argues for the third category of membership in a community that intelligent species like chimpanzees meet the criteria, but this is not where Wise wants to put the emphasis because he is focusing on the legal principle of autonomy. Thus research in the third category would have limited use for Wise unless it produced a demonstration of autonomy.

Finally, the 2018 amicus brief argues what for Wise is the most relevant concept and thus the category where research would be the most productive. The final category is mental capacities such as reason, self-awareness, sentience, reciprocity, beliefs and desires, with which autonomy is related. It is here that Wise identifies the legal battleground, to which the defendants and the judge respond. Of the mental capacities, the amicus brief says, "The Nonhuman Rights Project is arguing that chimpanzees are persons under a capacities approach to the concept of personhood. This reflects their view that this concept of personhood is already enshrined in law and that, as it stands, it applies to chimpanzees just as it does to humans. Affidavits by numerous eminent primatologists have attested to the fact that chimpanzees possess the relevant capacities to qualify as persons, and the First and Third Departments have not disputed the facts regarding chimpanzee capacities." More specifically, "The Nonhuman Rights Project's case is based on one particular capacity – autonomy – and this is for good reason. For one, it is a capacity that philosophers have historically associated with personhood. Immanuel Kant's conception of persons is framed in terms of autonomy, such that we can be ends in ourselves." The brief also explains another important reason for concentrating on autonomy, "the concept's direct connection to ethics," which is also found in Kant. "Violating someone's autonomy is widely regarded as a harm," the brief says. I would later apply the same idea of violation of autonomy as harmful in reports I wrote for the court in the case of an orangutan in Argentina.

Then the brief makes an important distinction. "However, Kant's conception of autonomy requires a great deal of cognitive sophistication, as it requires the ability to abstractly consider principles of action and judge them according to prudential values or rationality.... On the Kantian view humans are rarely autonomous, and young children and some cognitively disabled humans would fail to be autonomous actors, despite appearances to the contrary." Thus not all individual human beings are equally autonomous, but they would still deserve rights acquired at a low threshold for autonomy. The concept of low and high thresholds of humans compared to apes is an area of a back-and-forth struggle in the habeas corpus applications. Defendants often argue against the habeas corpus application in terms of a threshold that is so high that it excludes apes. But Wise counters that the high threshold also excludes some categories

of human beings, such as infants and people in a coma. In *Rattling the Cage*, Wise also suggests an intriguing thought experiment on these issues, asking that if a few Neanderthals still existed, would we exclude them from human rights and treat them like chimpanzees. His general argument is that the low threshold of personhood that is fair in including all human beings also includes apes.

So how is Wise using science to define autonomy? Wise filed an affidavit in 2015 by Professor James King that defined autonomy as "behavior that reflects a choice and is not based on reflexes, innate behaviors or on any conventional categories of learning such as conditioning, discrimination learning, or concept formation. Instead, autonomous behavior implies that the individual is directing the behavior based on some non-observable internal cognitive process." The phrase "some non-observable cognitive process" opens up an area of ambiguity that may make the argument vulnerable. Can autonomy be judged on what is observed externally alone or is some internal observation necessary? And what kind of internal evidence of autonomy could be produced?

Three years later in 2018, in the amicus brief of that year, there is a more specific explanation of the way that research fits the legal issue of mental capacities and autonomy: "[T]he well-known U.S. bioethicist and philosopher, Tom Beauchamp, together with the comparative psychologist, Victoria Wobber, have suggested that an act is autonomous if an individual self-initiates an 'action that is (1) intentional, (2) adequately informed...and (3) free of controlling influences.' Beauchamp and Wobber contend that chimpanzees fit their conception and the submitted affidavits previously referenced provide evidence to this effect. Chimpanzees can act intentionally (they can plan and act to achieve goals), and so satisfy (1). They learn how to navigate quite complex physical and social worlds, reflecting a 'richly information-based and socially sophisticated understanding of the world,' and so satisfy (2)." The reference to being "free of controlling influences" is also an essential Kantian principle. The final sentence in this section of the amicus brief is more ambiguous, suggesting an area that research can develop. "Whether chimpanzees act free of controlling influences will depend on their environment and the options available to them, but there is no doubt that chimpanzees can so act when they find themselves in contexts without autonomy-depriving controlling influences." It would be a stronger argument that some chimpanzees can also resist "autonomy-depriving controlling influences." Thus I will argue later in this article that autonomy could be seen clearly and more intensely in situations that have powerful controlling influences, through factors such as innovation and resistance in an individual ape.

The amicus brief continues, focusing cognitive abilities through autonomy as Kant would. "As highlighted by Beauchamp and Wobber, [autonomy] brings together capacities to act intentionally (which assumes capacities to form goals and direct one's behavior) and to be adequately informed (which assumes capacities to learn, to make inferences, and acquire knowledge through rational processes), each of which requires sentience. This means that an autonomous capacity requires other personhood capacities, namely sentience and rationality. So understood, evidence of autonomy is sufficient evidence of personhood. Thus, chimpanzees qualify as persons on autonomy grounds alone."

Possible concepts for developing research into autonomy for use in court

Once we have a definition of autonomy that works reasonably well philosophically, legally and scientifically – which is quite a feat in itself – we want to know how the overlap of science and the law can be conceptualized to guide research to be useful in court. For the purposes of this article, I say again that I am trying to start a discussion on the possible conceptualization of the overlap of science and the law, not trying to determine the methodology of the research or the actual design of the research. My examples are sometimes meant to illustrate the plausibility of the conceptualizations themselves, not to offer conclusive research.

Taking a cue from the 2018 amicus curiae brief, the factor of autonomy – what Wise calls in *Rattling The Cage* a "more objective property" than some other properties – would be crucial to pursue in research, perhaps through the Kantian notion of being able to act freely and consciously against what the brief calls "controlling influences." Kant argued that controlling influences, even including internal ones like emotion and instinct, are contrary to autonomy. The cognitive abilities of human beings allow human beings to resist controlling influences, including emotions, such as love, compassion and empathy, which some scientists and philosophers see as the "moral emotions" from which evolution, biology and culture produce a higher order of human morality. It sometimes seems as though Kant was proposing a supra-rational human being acting on pure reason totally separate from controlling influences even like the "moral emotions," a kind of rational monk isolated in a lonely cell, but Paul Guyer rehabilitates Kant from that impression. Guyer argues in his 2007 book *Kant's Groundwork for the Metaphysics of Morals* that readers should not be misled by the way Kant presents his thought experiments. The reasoning process of Kant, in order to achieve clarity, separates elements that actually interact and support each other. It is the process of analysis in Kant that artificially separates the parts to examine them individually, then puts them back together again, like taking a mechanical watch apart to see how it works. Thus pure reason has primacy and priority over the positive moral emotions, to cultivate and control and apply those supporting emotions in the best way and to prevent them from interfering when that interference would be wrong. Guyer quotes Kant from the *Metaphysics of Morals* saying that sympathy and joy have been "implanted in human beings by nature...to use as the means for the promotion of an active and rational benevolence.... For here the human being is not considered merely as a rational being, but as an animal endowed with reason." So, Kant allowed for a lower threshold of reason and autonomy to accommodate the mass of humanity and still have morality and autonomy. Depending how Kant is interpreted, it seems that he could be used to support or undermine rights on the "animal" side of nature.

Of course, in the case of human beings in the court system, based on a priori legal principles and not empirical standards, human beings don't have to prove they are autonomous, only at times to find ways to escape legal responsibility in certain situations by arguing that they temporarily lost their autonomy and so cannot be held responsible for their actions. Wise says in *Rattling The Cage* that judges are content with both the "potential autonomy" of a human being and "the legal fiction" that "all

humans are autonomous" without the need for empirical proof. It would be an interesting predicament if human beings had to routinely prove that they acted rationally and did not allow themselves to be controlled.

As for the habeas corpus applications for apes and intelligent species, scientists could develop research along Kantian lines to demonstrate that an ape acted against both exterior and interior influences, such as self-interest, immediate gratification, instinct, and social and political pressures.

Four possible conceptualizations to examine autonomy in a strong way might be 1. innovation, 2. altruism, 3. self-control, and 4. resistance, disobedience, or defiance. These are typically disruptions, paradoxes and enigmas and thus difficult to understand and to study with the tools of rationality. Traditionally, as the untraditional Jennifer Nedelsky reminds us in *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, autonomy is a capacity of the individual against the group and exists as a relationship with others, not simply as a form in isolation.

1. Innovation requires a new and autonomous act. It might either be a creative or unique solution to a problem or a creative or unique new application of something already known. It might be most observable in the action of an extraordinary individual rather than a group, maybe the lone Einstein ape or the Karl Marx ape, and so requires individuality and individual differences. An individual may discover or create an innovation, which is then shared in the group and perpetuated, although all the members of the group did not create it. And innovation is highly valued in human culture as part of the value of intelligence. "Innovation has frequently been regarded as a marker of human and animal intelligence, and to depend on domain-general cognitive abilities," according to Simon Reader, Julie Morand-Ferron, and Emma Flynn in their paper, "Animal and human innovation: novel problems and novel solutions." "Indeed, the ability to solve novel problems and to innovate appears in definitions of intelligence, which means that, for some, innovativeness is a defining feature of intelligence." Innovation is already being studied by primatologists in intelligent species in terms of creating tools, developing communication and developing culture. A typical observation is that a group of orangutans on one side of a river develops tools, shares new knowledge and has ways of communicating that a group on the other side of the river doesn't have. This is the approach taken by Carel van Schaik and a group of eight leading orangutan primatologists who published their groundbreaking findings on culture in orangutans in the journal *Science* in 2003. The article identifies "innovation" as an empirical factor to describe the phenomena of observable "variants." The evidence of innovation in this instance is not found by studying a group, but by studying the meaningful differences between groups who don't have contact. Differences in innovation can also be studied in comparison between wild and captive apes. Research by van Schaik and others indicates that the behavior of captive apes is different from wild apes and that innovation may increase in captive apes. It may also be that a conscious original application of existing information, maybe even including the ability to experiment and to attempt to find solutions, is a threshold for autonomy. It may also be that innovation is the work of a group working together as a team over an extended period of time, making small contri-

butions that are remembered and put together later by other apes, to produce an innovation, which might be more difficult to observe. Some ways of thinking may perceive innovation as the domain of individuality and other ways of thinking may see innovation as the domain of a team. Reader, Morand-Ferron, and Flynn survey different concepts of innovation in research, including within a social context. Innovation and autonomy are also found in deliberate use of deception. "Tactical deception in primates...[is] identified many novel behavior patterns," say Reader, Morand-Ferron, and Flynn. In order for deception to work at a conscious level, an ape needs to be aware that it can think differently from another being, including human beings, to manipulate the thinking of that other being. Primatologists have told me fascinating stories of how orangutans worked to deceive human beings. Orangutans and chimpanzees in zoos have been able to deceive human beings and find innovative ways to escape their enclosures.

2. Altruism is another autonomous act. In its purest Kantian form, altruism would not have a benefit or self-interest for the individual who acts altruistically, and would not be an act performed as a commercial transaction for a kind of payment. Maybe the act of altruism would even entail a personal risk or cost to an individual acting against self-interest. For example, aside from the inspiring tale of Tarzan, the *Homo sapiens* raised by a female ape, there are non-fiction examples of an ape protecting a human child. Frans de Waal, whom I interviewed on the issue of ethics in apes, cites an example in his 2005 book *Our Inner Ape: A Leading Primatologist Explains Why We Are Who We Are* of an eight-year-old female gorilla named Binti Jua who came to protect a three-year-old boy who fell into her enclosure in 1996**.** De Waal cites an example from Jane Goodall of an adult chimpanzee who lost his life trying to rescue a small infant from drowning. Even if stronger examples of altruism can be found of apes helping other apes, it might be more compelling in court to give examples of apes helping human beings. As for whether these are really acts of altruism, de Waal stands on the biological side of the argument, similar to the biological perspective of Matt Ridley in his 1996 book *The Origins of Virtue: Human Instincts and the Evolution of Cooperation.* De Waal in *Primates and Philosophers* talks about human morality emerging from emotion, biology and evolution, which are shared with the great apes and developed by humans to a greater degree than the great apes. De Waal makes the case for an "evolved morality," a kind of natural and continuous advancement through stages with "morality as a logical outgrowth of cooperative tendencies" and thus suitable for empirical description. At this point, Kant and science collide and have different perspectives. Science is very efficient at finding continuity, even in change, but from a Kantian perspective, autonomy may incorporate an element of discontinuity, of disruption, of breaking away, which is difficult to identify, particularly in a process of reasoning based on continuity. It should also be noted that while Kant is cited for identifying pure reason as a radical break from nature, he did, as Guyer says, also say that nature had given human beings the moral emotions, which Kant says we should cultivate to strengthen morality.

   How could research be designed to demonstrate a Kantian altruism? The critical point would be to identify when one thing becomes something else that is distinct and different from what it was before. When, for instance, does animal nature be-

come human nature? When does supportive social behavior become altruistic behavior? I asked de Waal in a private interview at a science convention, "Is there a threshold that demonstrates that something is a moral being?" He replied that chimpanzees demonstrate altruism in making sacrifices for the benefit of another ape, but that human morality is "a different level." De Waal says in *A Very Bad Wizard* that chimpanzees have the same moral emotions as human beings, but are not "moral beings in the human sense." For de Waal, in human beings there is a level of reasoning that "distances" them from apes. But, says de Waal in *Our Inner Ape*, "It's impossible to extract from this mixture [of natural tendencies, intelligence and experience in humans and apes] what is inborn and what is not." And so it goes with science and interpretation. An ape can be observed risking his or her life to save a member of another species, but is that done autonomously or under some kind of inner or outer controlling influence? Could sympathy, empathy and altruism have important biological survival value for apes to act that way towards each other which makes the existence of these mental capacities merely a controlling influence? How could research be designed to support in court that an ape acted in a purely altruistic way?

3. For self-control to be demonstrated strongly, it would be an action against immediate self-interest or immediate gratification and would involve planning, cognitive ability and persistence. There is interesting research on self-control in children developed by Walter Mischel and pursued by other researchers, commonly known as the marshmallow test, and also contrasting research by Stanley Milgram that some people are also inclined to obey authority automatically without thinking. In the research into self-control initiated by Walter Mischel, children were offered the choice of the reward of something like a marshmallow immediately or two marshmallows at a later time. The children who have self-control have cognitive strategies to plan and to delay gratification. Apes have also been observed waiting, planning and deferring gratification. Two researchers at Georgie State University, Michael Beran and William Hopkins, applied a kind of marshmallow test for chimpanzees. The research, called the Hybrid Delay Task and published in 2018, measured how chimpanzees were able to wait for a better reward. Benjamin Eisenreich and Benjamin Hayden comment on the research of Beran and Hopkins with chimpanzees saying, "The ability to persist across time in the face of temptation is the key to self-control." I may have seen an example of self-control with apes myself in 2010 when I was allowed into the section of the Taipei zoo where the public does not have access. In that incident, a male orangutan and a female orangutan who both wanted to have sex, denied themselves and resisted biological urges because the two-year-old child with them objected. The male, to vent his frustration, went to a corner and pulled and banged on the fire hoses used for climbing. But that could always be interpreted another way. Was that really self-control or yielding to another controlling influence that has to do with parenthood and social relations? Research that could show in apes some self-control against influences and persistence over time against obstacles might support the argument for autonomy. What would be the strongest way to design research to show self-control in apes?

4. As for resistance, disobedience, or defiance as acts of autonomy, it is a form of behavior we know very well as human beings. When human beings feel they are being controlled against their will and their sense of autonomy is insulted, they often find ingenious ways to resist a much more powerful force. We see that in warfare, in crime, in politics, even in science. We see that at the beginning of Western rationalism in the defiance of Socrates against the state and society in ancient Athens, which resulted in a trial and a death sentence and then a narrative in philosophy ever since trying to understand rationally Socrates the contrarian. The careers of a number of remarkable scientists, including Jane Goodall and Frans de Waal, have been a narrative of resistance against politics, religion, culture and scientific ideologies. Resistance can be overt, or passive but visible (as with Gandhi and civil disobedience), or clandestine (forms of anonymous and sometimes unperceived sabotage). If apes have a sense of autonomy, they would respond to what they feel limits their autonomy in ways they find intolerable. It may be that the more cognitive ability an intelligent being has, the greater its sense of autonomy, and the more pronounced the reaction to a loss of autonomy.

   One of the places where defiance is seen most clearly in human beings and is applicable to apes, is in conditions of harsh captivity, such as prisons, gulags, prisoner of war camps and refugee camps. The disciplines that are well developed in terms of defining and studying defiance in those instance and which may offer assistance in theory are political science, sociology and criminology. Even the harshest systems of prisons and gulags have been unable to stop crime and political protest. Defiance is a factor that can't be controlled. For intelligent species, a zoo is a kind of commercial penitentiary for paid entertainment, although society may now be divided seeing it that way. Nevertheless, I remember interviewing those dealing with captive situations, such as prisoners in penitentiaries, from which I produced a book, and also orangutan keepers in zoos, from which I produced another book. In both cases, prisons and zoos, the power to control the inmate is one sided and extreme. Yet, as I saw, and as others have studied and chronicled, in both prisons and zoos the inmates clearly assert their independence and their will by acts of defiance. In terms of zoos, in the facility in Taipei, in a Taiwanese culture where control and obedience are expected of both people and apes, I learned how the orangutans act out their defiance deliberately, in a way they intended to frustrate their keepers, who had trouble understanding that the orangutans simply didn't respond obediently to power and authority. The orangutans could achieve no obvious benefit in defiance except the frustration of their keepers and the ability to demonstrate their own power and will. My interviews with orangutan keepers in the United States, Australia, the Netherlands, Singapore and Spain, reinforced that interpretation. An orangutan understands what a keeper wants and will help the keeper who treats the orangutan well and oppose the keeper who doesn't. An orangutan will consciously do what the other individual doesn't want because the other doesn't want it. An example would be co-operating voluntarily when the keeper wants the orangutan to transfer to a different area or making the transfer as difficult as possible. As Steven Wise said to me, a chimpanzee may not be able to understand the social contract, but she knows that she doesn't want to be kept in a cage. Defiance is a clear act of autonomy against powerful controlling influences.

Behind the scenes in a much-publicized orangutan court case in Argentina

I used what I learned from Steven Wise to inspire three reports I wrote over 2015-2017 for Judge Elena Amanda Liberatori in Buenos Aires in a case seeking freedom for the orangutan Sandra from the zoo in that city. It was a rare opportunity to witness the development from the inside of an ape rights case that attracted considerable media attention around the world. The court story was followed by major news outlets in the West, including the United States, England and Canada, but, from my perspective on the inside, it was not the process of abstract rationality that might be assumed. It felt like navigating a crowded airline terminal in a foreign country at night with the signs in an indecipherable language. If you make the flight, you feel immense relief.

I knew that there is no magical legal formula that simply causes change to happen in the law through a court case. Change seems to come in the law when an autonomous decision is made, supported by empirical evidence, but not determined wholly by the empirical evidence. For advances in the rights of intelligent species, what is needed is the right conjunction of lawyers like Steven Wise in the United States and Andres Gil Dominguez in Argentina who continue to push the legal boundaries undeterred by the opposition and a judge who is autonomous and courageous. I knew that Liberatori was a good candidate for that. In 2010, she had made other controversial decisions to recognize same-sex marriage and to allow same-sex partners to have children.

I had frank email conversations with Liberatori that allowed me unusual insight into her thinking and the legal process. Her openness and frankness surprised me, after my experience with the reticence of Canadian judges from my time as a court reporter. I knew from email with Liberatori that she had a genuine interest in the rights of the orangutan Sandra and I thought she would only be limited by what she believed that the law allowed her to rule. That encouraged me to be rational and yet bold in the reports I wrote for the court. Like any judge, Liberatori was worried that her decision on Sandra would be overturned on appeal. She commented to me that her decision had bothered many people in Argentina and Spain, which I had seen myself in the way that the attorney general of Buenos Aires had twisted science in questioning the court case in an article he wrote for a newspaper while Liberatori was in the middle of the case. At one point she said to me that she was dealing with a "whole judicial and non-judicial structure" that did not fit "the spirit and commitment that I personally put into this case." She told me that her decision in 2015 to release Sandra from the zoo was "on the edge" or mediating between the two worlds of human and ape that we have been taught to believe are separate. Liberatori said she believes it should be a single world.

The case of the orangutan in Buenos Aires created some political heat for the judge because of what Frans de Waal would call "chimpanzee politics" among *Homo sapiens*. The attorney general of Buenos Aires, Julio Conte-Grand, wrote an opinion piece for the newspaper *La Nacion* in Argentina with the headline "Darwin ha muerto." The attorney general said that the court case was "a death sentence for Darwin's theory" of natural selection and it was making Darwin roll in his grave. This case, the attorney

general said, is a reverse Darwinism where human beings are "inferior" to "monkeys" and "monkeys are descended from human beings." The case was contrary to nature and the divine, he said. There were 429 comments posted to the attorney general's article online. I wondered how much pressure Liberatori felt by the public involvement of the attorney general and the way he could influence a public sentiment ready to be inflamed.

I asked the editor of *La Nacion*, since the court had apparently accepted me as an expert in the case, if I could have equivalent space and position to reply to the attorney general. The editor said no, so my reply was published in another newspaper online in Argentina. Liberatori was following this newspaper battle closely and appreciated my response.

In my too wordy, 1,500-word public response to the attorney general I said that science would survive the trial, that the judge was not killing Darwin, that "evolution is not a system of ethics and evolution should not be used to make ethical decisions."

I brought together two orangutan experts I know personally, Gary Shapiro of the United States and Leif Cocks of Australia, to make an advisory committee of the three of us for the court. I had been invited to participate initially as an apparent expert by the association of lawyers for animal rights in Argentina known by the Spanish acronym AFADA, but I was kept in the dark about the context of legal principles on which AFADA was basing its case and I had no interaction with the other experts used. In this case, I noticed that the court was willing to rely on experts with only academic credentials and textbook knowledge, rather than practical experience of orangutans in the wild and in zoos, like Cocks and Shapiro, which made their participation even more essential. This struck me as a blind spot in the legal process involving intelligent species. It seemed easy for a judge and lawyers and even scientists to assume that all orangutans were an abstraction that could be culled from a textbook and would be exactly alike. I responded to what others said to the court by pointing out instances where a textbook abstraction about orangutans would be contradicted by experience in the field or where textbook contexts for orangutans in the wild would not suit orangutans in captivity. I emphasized the individuality of Sandra and the need to determine that individuality and to respect it.

The reports I wrote for our group of three were supposed to advise on what would be humane conditions, and that is where I thought there was a crack in the door that I could exploit to expand the conditions to what would suit an autonomous intelligent being. The practical choice, although it was less than ideal, was not to free Sandra in the wild as she deserved, but release her to a sanctuary where she could survive. That was because Sandra was bred in captivity and she was not adapted to release in a jungle that was foreign to her. She had no instruction from her mother, like a normal wild orangutan would have, of how to survive as an orangutan in the jungle environment of an orangutan. Because of her captivity with human beings, Sandra hadn't learned how an orangutan survived in an orangutan world. It is exceedingly rare that an ex-captive orangutan has been released in the wild and survived. Leif Cocks is believed to be the first person to have done that, releasing the 14-year-old orangutan Tamara, born in a zoo in Australia, into a reserve in Sumatra. Cocks thought that special conditions would allow Tamara to survive in the jungle unlike other ex-captive orangutans.

What actually happened in the court cases involving the orangutan Sandra has been widely misunderstood and without wishing to be needlessly tedious in this article, let me be at least somewhat tedious with the legal details. AFADA tried first what Steven Wise was doing in the United States, filing a habeas corpus application in Argentina. That habeas corpus application finally failed on appeal in late 2014, but the judges' decision said that "los sujetos no humanos (animales) son titulares de derechos" or that Sandra was "subject of rights." The key phrase meant that even "non-human subjects (animals) are right holders." But, as the information spread from Argentina around the world, the phrase about rights for "non-human subjects" was replaced with the phrase rights for a "non-human person" understood in the context of what that phrase seemed to mean in the pursuit for personhood rights in the common law system of the United States, not Argentina, which is a civil code legal system. In a common law system like the United States, Canada and Great Britain, the ruling of a judge can set a precedent that could be applied to all similar future cases.

The next attempt to help Sandra was a legal action called amparo, the specific type of amparo that seeks a quick solution to urgent circumstances, in this case the possibility of the risk to the life of the orangutan in a zoo. This is the case that Liberatori heard and she quickly dug into it with enthusiasm. It was a case particularly suited to her interest in expanding rights.

Here is how Liberatori summarized in her final decision the argument that AFADA made before her, in a translation from Spanish to English made by the court: "this suit of legal protection against the Government of the Autonomous City of Buenos Aires and the Zoological Garden of the City of Buenos Aires, for '...infringing in a clearly illegal and arbitrary way the right to freedom of movement, the right not to be considered an object or thing susceptible of ownership and the right not to suffer any physical or psychological injury that, as a non-human person and a subject of law the ORANGUTAN SANDRA is entitled to rights…'" But how could the judge use the civil code law in Argentina to issue a ruling on this that she clearly wanted to make despite her knowledge of the opposition there was?

The decision of Liberatori built upon the earlier habeas corpus application for Sandra brought by AFADA in 2014 and other developments in civil codes. In her ruling, Liberatori set a clear context and limitation for her use of the phrase "non-human person." What Liberatori actually said in her decision in late 2015, as translated from Spanish to English by a court-appointed translator, was: "The categorization of Sandra as a 'non-human person' and consequently as a subject of rights should not lead to a rushed and out-of-context statement that Sandra is thus a holder of human people rights... As it is shown, Sandra's legal recognition as a 'non-human person' incorporates a categorization that does not change the one existing in the Civil Code between possessed things and people. This is the solution by the recent reform to the French Civil Code by means of the category 'sentient beings' which connect the obligations by human people towards animals." The judge quoted the argument of AFADA in her decision, "animals, as sentient beings must be able to benefit from some fundamental rights, as the right to life, to freedom not to endure sufferings, that is to say, to the protection of their basic interests."

Liberatori had made a clever legal argument that Sandra is a non-human person under the Argentina Civil Code. The previous ruling was that the orangutan was a subject of rights, thus inherently more than an object or piece of property, although also not a human being. Liberatori explained to me, in my rough translation from Spanish, "The Argentine Civil Code states that you cannot exercise abusive rights, therefore you cannot inflict suffering on a living being." She said that a "novel categorization" of "sentient being" was introduced in the French Civil Code in January 2015. Declaring Sandra as a non-human person, the judge told me, does not mean that she acquires the basic rights of a human being, which is what the Nonhuman Rights Project is attempting to do in the United States. The judge explained that her ruling "incorporates a categorization that does not change the existing [one] in the Civil Code between goods and people. It is the solution of the recent reform of the French Civil Code through the category of 'sentient beings' that connects the obligations of human beings towards animals." The duty of human beings is thus refined in a way that benefits living creatures. In other words, human beings have a duty in the law to be more humane. Liberatori's ruling of Sandra as a sentient non-human person opens a new legal relationship allowed in the Civil Code in the distinction between person and thing in the code. A more correct term might be "sentient thing," but then Liberatori's use of the term "non-human person" may have some weight of its own that opens future legal arguments. "Indeed," the judge said to me, with a patience towards me that I can only admire, "I refer to Sandra as a 'non-human person,' a category like you well said is not recognized in the Argentine Civil Code in which it still persists as a 'thing.' I make this denomination with the purpose of changing prevailing paradigms**,** as a principle of seeing this reality differently and in light of the fact that my word is that of a judge, in charge of the file in which I will have to resolve when the time comes – by procedural rules – both with respect to Sandra's personality – to which I personally have no doubts – as to other technical issues such as her eventual release." The judge told me she took the phrase "non-human person" from a book by Valerio Pocar in Spanish, *The Rights of Non-human Persons*. "A work very valuable indeed," she said. In her final decision, as I had anticipated, the judge cited the issues of autonomy and of suffering as a way to identify the borders of sentience and consciousness. The judge also embraced, like Steven Wise, non-biological arguments, such as the arbitrariness of biological classifications, including the classification of "person," which she called "social constructions," citing Spanish sources. If the classification "person" is a social construction, then a judge like Liberatori could amplify the "construction" in a rational way. Liberatori wrote in her decision that the ruling for Sandra does not change the two legal categories of person and thing, but, as I interpret, opens a new legal relationship between a human being and a sentient being that the judge believes the Civil Code allows. It thus seems that the ruling of Liberatori and the legal status of Sandra as a non-human person under the Civil Code of Argentina is not the same legal status that Steven Wise is seeking for basic personhood rights for a chimpanzee under the common law system of the United States. I will leave it to authentic legal minds to sort out this distinction and make better sense of it than I can.

Sandra was thus granted release from a zoo, with the details yet to be determined in another lengthy and complicated process of transferring her elsewhere, with Sandra unconscious of what was happening. As I had told the court during the case, because

she was born in a zoo and was not psychologically adjusted to be freed in the jungle, she would trade one form of captivity, a zoo, for another form of captivity, a sanctuary, although we all hoped at a higher level of treatment, perhaps even approaching what a zoo-bred, captive-born orangutan should be entitled to in an enlightened world as a non-human person. I knew that even if the judge could not change the legal status of Sandra to personhood rights, the judge could order conditions that would improve the life of Sandra in a way consistent with personhood. That might then help to create a new legal standard for conditions of an ape in captivity.

From Liberatori's decision I could interpret what parts of the reports that I wrote had influenced her by what she paraphrased or quoted. The judge said the sources "indicate that orangutans are thinking, sentient, intelligent beings and genetically similar to human beings, with similar thoughts, emotions, sensitive and self-reflective ones; that they have a culture, a capacity to communicate and a rudimentary sense of right and wrong; an individuality of their own, with a unique history, character and preferences.... The empirical evidence is that orangutans are a thinking, sentient and intelligent species, genetically similar to human beings, with similar thoughts, emotions and sensitivities and self-reflexive."

Then the judge repeated what I had put in the reports to expand the terms for humane treatment of an orangutan in captivity for a being that is autonomous and requires autonomy. I tried to expand the criteria of suffering, knowing that it is an important legal issue, and connected autonomy with issues of suffering. I was using advice on how to design a humane enclosure for Sandra in reverse as an opportunity to define what makes an orangutan autonomous. The advice was based on the premises I wanted accepted and which I knew didn't need to be argued in an order the judge could make to change the conditions of captivity. To be humane, the enclosure would have to be designed in terms of how an orangutan thinks of autonomy, not a human being. For example, physical freedom of movement for an orangutan has a vertical dimension of climbing trees that doesn't apply to human beings. It is thus a loss of freedom to confine an orangutan to a space that is only horizontal and flat. Taking an orangutan out of the trees is like taking a fish out of the water. The judge thus said in translation repeating the reports:

- "Space for orangutans is tridimensional, not bidimensional as it is for human beings... To be deprived of the natural need for space to a serious degree, causes suffering.... Sandra's need for space should be respected."
- "To be deprived of the natural need for privacy, causes suffering."
- "She is a Being with a high level of [consciousness] and sensitivity, loss of freedom and of choice to a high degree, constitutes a form of suffering. Consequently, in human societies revoking freedom and choice is used deliberately as a 'punishment.' Orangutans are highly conscious of power and freedom in relations. They also feel the loss of power and the loss of freedom and they suffer for that..."
- "And that the forementioned must tend to avoid any type of suffering generated [in] her due to man['s] interference in her life; however, given her condition of birth in captivity and that she is a hybrid whose parents are from Sumatra and Bor-

> neo, this accounts for both her existence and her life conditions [that] are the sole result of human manipulation, [and] irreversible... In this last sense, the experts have indicated that 'Sandra is at the same time an individual orangutan, with her unique and own history, character and preferences and, genetically, a member of a species she does not know, and of a species that live[s] in a habitat and a climate that she does not know either... Sandra is a unique person-ape, with her own history, character and preferences that must be respected when making the decision that is most convenient to her.'"

Liberatori concluded her decision with directions expanding the rights of Sandra to conditions suitable for her mental life: "The Government of the Autonomous City of Buenos Aires must guarantee Sandra adequate conditions of [her] habitat and the activities necessary to preserve her cognitive skills." Later, the higher court on appeal avoided discussion of whether Sandra was a non-human person but upheld Liberatori's decision that the living conditions of Sandra be improved. Liberatori was able to order that a technical committee would determine how Sandra's conditions would be improved. My committee and I were not part of the technical committee, but we were asked to comment on its provisions.

One point I wanted to make to the court was that an autonomous being needs the right to decide when to socialize. Orangutans are described as a solitary species in comparison to highly social and political species like chimpanzees and gorillas, but at times they want to associate with other orangutans. The report I wrote for the judge therefore said that Sandra as an autonomous being had a right to make choices and a right to associate or not associate with other orangutans when she wanted.

I thought the judge might balk at an idea that seemed impractical or impossible to achieve. Leif Cocks, with his extensive knowledge of zoos, provided the practical way to apply that. A locking system could be created so that two orangutans could decide individually if they wanted to enter an area together. The gate for each orangutan would allow that orangutan to open that gate onto a shared area. It is thus possible to give a captive orangutan freedom of choice.

Our report even said that Sandra's preferences as an autonomous being should be respected if the decision was whether to send her from the zoo to a sanctuary. What if Sandra preferred captivity where she was to an unknown sanctuary? Does an autonomous being have the right to make bad choices? I used in the reports an example of the autonomy of Sandra that came from a detail in her history. The zoo in Buenos Aires said that it had tried to mate Sandra with an orangutan she knew and put her in an enclosure with the male. But Sandra sat outside in the rain and snow to distance herself from her assigned spouse. I interpreted that as a deliberate choice that indicated autonomy. So, in deciding Sandra should leave the zoo for a sanctuary, should her preferences be considered or is freedom just what human beings decide is best for an ape?

Orangutans can't talk to us and tell us what they want, although in the late 1970s Gary Shapiro had limited success in the jungle of Borneo in teaching a young ex-captive named Princess to communicate in human sign language. If orangutans can't talk to

us, I asked Cocks and Shapiro, how can we argue to the court that it is feasible to understand the preferences of Sandra?

Cocks and Shapiro had the answer right away. So the report said: "Sandra is a unique ape person with her own history, character and preferences that need to be respected in making a decision that suits her. The standard of assessment for her potential for preferences and choice should be a general behavior assessment against normal standards for orangutan behavior, and the identification of known aberrant behaviors in general, such as stereotypical behaviors that are linked to mental health in an orangutan. In addition to this standard of assessment, there is a credible empirical way to assess the preferences and choices of Sandra, as developed by Gary Shapiro (who also taught orangutans sign language in the jungles of Borneo) and by well-known primatologist Biruté Galdikas, who operates a facility without walls for ex-captive orangutans in Tanjung Puting National Park, in Kalimantan, Borneo. The method is to establish a personal rapport with Sandra, which is important for her comfort and cooperation, and to present her with a series of image/object pairs to observe which image/object she more often attends to or interacts with over a period of presentations. Orangutans can learn to point to preferred items with training, but even by repeating the presentation of paired items and observing her consistent behavior, her preferences and choices can be inferred by a compatible and observant human being. This should be done early to determine Sandra's baseline preferences. Sandra's need for freedom and choice needs to be respected."

Finding the next Lord Mansfield sitting on the bench somewhere

In writing this article I tried to confront honestly and rationally the legal issues of arguing in support of ape rights, but that idealistic Kantian approach ignores elements that don't fit well into a purely rational way of thinking. The argument for extending personhood rights to intelligent species has developed through Western rationality as an issue of rationality and intelligence in these species, using a human model for rationality and intelligence. The legal system continues that line of thinking. Thus the price of admission to join the human tribe with all its legal benefits is Western intelligence, which reflects the idealistic image we have of ourselves, despite the prevalence of contrary examples like irrational voting trends that elect irrational and dangerous people who wreak havoc in the world. Are there factors of chance and irrationality that need to be understood in considering how to support ape rights through the legal system?

Consider that Steven Wise of the Nonhuman Rights Project seems to be pursuing the most logical, most ethical, most humane, and best legal strategy available. Why hasn't he won a habeas corpus application yet? He seems to be inching closer, particularly with the glimmer of hope offered by judge Eugene M. Fahey in May of 2018 in a group decision to deny leave to appeal from the New York Court of Appeals. Fahey began by writing, "The inadequacy of the law as a vehicle to address some of our most difficult ethical dilemmas is on display in this matter." The judge said, "I write to underscore that denial of leave to appeal is not a decision on the merits of petitioner's claims. The question will have to be addressed eventually. Can a non-human animal be entitled to release from confinement through the writ of habeas corpus? Should

such a being be treated as a person or as property, in essence a thing?" Then the judge agrees with the legal argument that Wise has been making: "The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus.... [W]e should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect.... The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing."

Yes, that's it. That's what Steven Wise has been arguing. Isn't that a sign of progress? One theme in the narrative of ape rights is the theory of progress in human liberty. We can take heart from that. We look at the persons who were originally disenfranchised in history, from the rise in the experiment of democracy in ancient Athens where there were citizens, slaves and women with different rights. The experiment in democracy in the founding of the United States at a time of slavery is similar. Over time, according to this account of rights, there is progress. Rights have been extended to slaves, women, children, immigrants and so on. And then we project this narrative of progress into the future to convince ourselves that it is inevitable that in time that personhood rights will be extended to other thinking, sentient beings. We use that argument to convince ourselves and to convince others. But the human acceptance is lagging, even with judges and scientists.

When I read the court transcripts of the cases of Steven Wise and marvel at the rational dexterity of his arguments, I also see in the arguments of the opposition some glibness and self-deception. At one point the state lawyer defending against the case for the chimpanzees Leo and Hercules posed a blatant slippery slope argument. He said, "I worry about the diminishment of these rights in some way if we expand on them beyond human beings... You're absolutely opening the possible flood gates...in applications that could affect our society in a negative way." It is amazing that a state lawyer would even argue that it deserves consideration how the privileged would be affected by the expansion of rights. That argument could be used against freeing slaves and giving rights to women and immigrants. It reminds me of the attorney general of Buenos Aires arguing in *La Nacion* that the case of rights for the orangutan Sandra diminishes human beings.

Practically, Wise is aware, as he says in *Rattling the Cage*, that judges are human beings and can be swayed from legal principles by their all-too-human attachment to culture and religion. He knows that the court system is not isolated from the world outside the courtroom and that changing the perception of the legal system alone won't work. He knows that he needs to apply more than pure rationality. Wise says outright in an article for the *Syracuse Law Review* that "a change in public attitude" also has to be created. "Present judges have been raised in a culture that pervasively views all nonhuman animals as 'things'... Present judges are therefore likely, automatically and unconsciously, to be biased against the personhood arguments [the Nonhuman Rights Project] presents – just as they are likely to be biased about race, gender,

sexuality, religion, weight, age, and ethnicity – because our minds have been shaped by the culture around us. In fact, they have been invaded by it... We therefore expected to encounter puzzling and diverse judicial reactions to our early cases. We were not disappointed." "Perhaps," writes Wise on the Nonhuman Rights Project website, "the most unfortunate way in which a court undermines its own fundamental values and principles of justice is when it grounds its decision wholly upon an implicit or explicit bias." A fascinating chronicle of the battle of Wise against irrationality in the court system can be found in the article he wrote for *Syracuse Law Review* and the posting on the Nonhuman Rights Project website, "Letter #1 from the Front Lines of the Struggle for Nonhuman Rights: the First 50 Months."

Wise said in the *Syracuse Law Review* that he knew he needed to find not a "formal judge" but a "principle judge" who would take the risk to rule in a boldly rational way when other judges see only what one judge called "a leap of faith" that he didn't want to make in an ape rights case. Wise writes that the awareness that no member of an intelligent species had ever been declared a person in court would affect judges. There is pressure on judges not to make changes. It is, writes Wise, "a nearly insurmountable problem for common law 'formal judges,' who understand justice as stability and certainty, and who are likely to feel themselves strongly bound by precedent at some level of generality. This is as opposed to 'principle judges,' who understand justice as doing what is right, or 'policy judges' who understand justice as doing what is good. The political obstacles also might be stronger in a state, such as New York, in which judges are elected, depending upon how the voters feel about the judge granting a common law writ of habeas corpus to a chimpanzee." So, part of the legal strategy is to study the character and values of the judges themselves through the documents of their rulings as a kind of legal anthropology of those on the bench.

Wise says that he realized he had to find his own Lord Mansfield, the British judge who ruled in 1772 on the case of a black child named James Somerset, kidnapped in Africa, sold to a merchant in Virginia, moved to London and then hunted down to be recaptured after he escaped, to be shipped to Jamaica and sold in a slave market. Mansfield did alone what was unprecedented at the time, issued a habeas corpus decision for a black slave and changed the law and society. "On June 22, 1772," Wise wrote in the *Syracuse Law Review*, "Mansfield declared that slavery was so 'odious' the common law would not support it and ordered Somerset's release, thereby implicitly abolishing human slavery in England." Thus says Wise, the Nonhuman Rights Project "is seeking its Lord Mansfield, judges whose rational and reflective sides might become aware and powerful enough to allow them to recognize, and struggle to equalize or overturn, their automatic unconscious biases against treating a nonhuman animal as a rights-bearer, the way Lord Mansfield brought himself to hold that blacks were rights-bearers more than two centuries ago. They exist. But many judges will be unable to shake their biases, and so the duty will fall to their children and grandchildren, who are maturing in the new culture that is no longer uncritically accepting of the legal thinghood of all nonhuman animals." Lord Mansfield is like a unique alignment of the stars in the dark night, the good fortune of an unexpected, unpredictable event.

In the same way, when I asked Judge Elena Liberatori how the law could be changed to make Sandra a legal person, the answer was finding the right lawyer and the right judge. The judge replied, "It requires what is actually happening, a lawyer willing to raise these new things in the courts like Dr. Gil Dominguez and judges like me willing to face many things. This is not new for me and I accept the challenges of achieving a better world and that this is not mere words."

Conclusions

That is as far as I can take the discussion at this time. At the risk of being needlessly repetitive, let me be somewhat repetitive and add some more words to the page.

Human beings have the capacity to act rationally and irrationally. From a Kantian perspective where rationality is a form of freedom, not a controlling influence in itself, when we choose to act rationally, we are acting autonomously, to free ourselves from controlling influences, to benefit others, as we ought to do as ethical beings.

As rational beings we ought to make rational arguments for the rights of a fellow intelligent species. There is more to life than just an exploding population of *Homo sapiens* littering and congesting this once spacious and pristine planet. Maybe our ethics should be larger than just our own self-interest as a species.

It is a rational argument that the differences between human beings and apes in biological classifications are arbitrary and yet it is a rational argument that the differences will always be differences. We can't prove that apes are human beings. We can only argue that apes are sufficiently like human beings.

But what does "sufficiently like" mean and how can it be determined? That is a judgment, as Kant would say. It is an autonomous ethical decision. There seems to be no empirical way to determine when different sentient beings are sufficiently alike to justify basic equality. That is the gap in perception, interpretation, belief and judgment that will likely always remain – at least until a boldly rational judge, bolstered by a priori legal principles, makes a decision that influences others. That is the Lord Mansfield factor, always a possibility, always a hope, never assured, an unpredictable event. We wait and wish that the stars will align at the right moment for the next Lord Mansfield to appear.

For a strategy in court based on the legal principle of autonomy, science could lend its weight by paying attention to the conceptual area where science and the law overlap. Research could be designed to define autonomy more clearly and to demonstrate autonomy in a stronger way to the court system. This research would concentrate on what is practical and reasonable to assert without getting lost in the forest of deeper philosophical debate. A judge doesn't need absolute certainty, just a high degree of probability. And a judge will accept expertise in an area that the judge does not possess. The place of science is to add weight to reach the tipping point, but the judge will decide in the end on the basis of how the evidence fits the legal principles that he or she understands and values. A judgment will be made at that time.

In the meantime, while looking for his next Lord Mansfield, Steven Wise continues to pursue his long legal battle using the legal argument of autonomy. So far, more than half of the courts that received a suit from the Nonhuman Rights Project have refused even to grant a hearing. Wise is undeterred. Some human beings just have a capacity for persistence that succeeds where others fail. It is how change and innovation happen.

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CONTRIBUTOR BIOGRAPHIES

Shawn Thompson, is an assistant professor in the department of Journalism, Communication and New Media at Thompson Rivers University, Kamloops, British Columbia, Canada. He is the author of *The Intimate Ape: Orangutans and the Secret Life of a Vanishing Species* and *Letters From Prison: Felons Write about the Struggle for Life and Sanity Behind Bars.* email: sthompson@tru.ca

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