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ISSUE ON GREAT APE PERSONHOOD

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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 scientific paper. Thompson, rather, makes an attempt to bridge the false divide between natural science and humanistic disciplines that was prominently established by C.P. Snow's misguided notion of two cultures, an attitude which perniciously persists across university campuses, popular media, and as shown here in courts of law. 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 awaken the thinking of judges deciding the fate of great apes. Perhaps it's an unfair analogy, but Thompson attempts to do with primatology what climatologists from several generations tried to do – demonstrate how science is part of and can dramatically 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 in the question of 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, the comments, and his reply to those comments. But Thompson can do only so much in 13,000 words. Is Thompson's emphasis on Kant, rationality, and autonomy the only approach to ape personhood? No, as evidenced from some of the responses to his essay in the comments section.

More so, the debate over ape personhood raises moral and ethical questions that have repercussions for human society and even the health and survival of creatures in the entire biosphere. For example, how should humans treat beings who have similar cognitive and behavioral tendencies? Do "similarities" really matter in terms of equal rights? 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 and addressed from a variety of perspectives and disciplines in the accompanying comments. In fact, some commentators express doubt that any "like us" argument in the fight for ape rights is effective since its near anthropomorphism ultimately excludes many other species, creates a false hierarchy and, therefore, neglects biodiversity. Thompson's reply digs deeper into that concern and offers clarity about the need for a personhood argument.

We are grateful to Professor Thompson for his very fine essay and thank all the contributors who agreed to comment. As in past issues since this is an international journal, we have permitted contributors and commentators to use British spelling and their own citation system. We hope readers enjoy this important and timely issue.

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. courts 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 even more 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 often 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 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 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 hearing 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 classifica-

tions and distinctions that are not relevant to the legal rights of intelligent species. The *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 the 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? 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 focuses 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 on 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 contributions 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. “Tac-

tical deception in primates...[is] identified [in] 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 become 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 others, 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 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 Georgia 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 ca-

reers 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 instances 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 in 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 cooperating 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 emails 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 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 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 a “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. 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 which 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 Borneo, 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 personape, 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 orangu-

tan. 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 the *Syracuse Law Review* and the posting on the Nonhuman Rights Project website, “Letter #1 from the Front Lines of the Strug-

gle 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.

Bibliography

- Amicus curiae* on behalf of Tommy submitted to the Court of Appeals, New York State. 162358/15 and 150149/16. Compiled Feb. 23, 2018.
- Article 70 hearing for a writ of *habeas corpus* on behalf of Hercules and Leo in the Supreme Court of the State of New York county, civil branch, part 12, 152736/2015, May 27, 2015.
- Beauchamp, Tom L. and Victoria Wobber. “Autonomy in chimpanzees.” *Theoretical Medicine and Bioethics*, 35 (2). 2014. 117-132.
- Beran, Michael J. and William D. Hopkins. “Self-Control in Chimpanzees Relates to General Intelligence.” *Current Biology*. 2018; DOI: 10.1016/j.cub.2017.12.043.
- Cavalieri, Paola and Peter Singer, eds. *The Great Ape Project: Equality Beyond Humanity*. New York: St. Martin’s Griffin, 1993.
- Conte-Grand, Julio. “Darwin ha muerto.” *La Nacion*, Aug. 25, 2015.
- De Waal, Frans. “Lessons From Our Primate Relatives,” in *A Very Bad Wizard: Morality Behind the Curtain, Nine Conversations by Tamlar Sommers*. San Francisco: McSweeney’s, 2009. 65-83.
- . *Our Inner Ape: A Leading Primatologist Explains Why We Are Who We Are*. New York: Penguin, 2003.
- . Stephen Macedo and Josiah Ober, eds. *Primates and Philosophers: How Morality Evolved*. Princeton: Princeton University Press, 2006.
- Eisenreich, Benjamin R. and Benjamin Y. Hayden. “Cognitive Science: Persistent Apes Are Intelligent Apes.” *Current Biology*. 2018 February 19; 28(4): R160–R162. doi:10.1016/j.cub.2018.01.020
- “Evidence For Orangutan Culture.” Duke University Science Daily. Jan. 7, 2003. www.sciencedaily.com/releases/2003/01/030107073934.htm
- Fahey, Eugene W. Motion 268. State of New York Court of Appeals. 2018-268. May 8, 2018.
- Guyer, Paul. *Kant’s Groundwork for the Metaphysics of Morals*. London: Continuum, 2007.
- King, James. Affidavit of James King at 3–4, Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery, No. 162358/2015. N.Y. Sup. Ct. N.Y. Cty., NYSCEF No. 31. Filed Dec. 2, 2015.
- Liberatori, Elena. Decision in the case of the orangutan Sandra re Association of officers and lawyers for the rights of animals and others against GCBA about legal protection. Court of the city of Buenos Aires. A2174-2015/0 Oct. 21, 2015.
- McNall, Scott G. *Cultures of Defiance and Resistance: Social Movements in 21st-Century America*. New York: Routledge, 2018.
- Mischel, Walter. *The Marshmallow Test: Mastering Self-Control*. New York: Little, Brown and Company, 2014.
- Nedelsky, Jennifer. *Law’s Relations: A Relational Theory of Self, Autonomy, and Law*. New York: Oxford University Press, 2011.
- Reader, Simon M., Julie Morand-Ferron and Emma Flynn. “Animal and human innovation: novel problems and novel solutions.” *Philosophical Transactions of the Royal Society B*. Feb. 29 2016. doi: 10.1098/rstb.2015.0182
- Ridley, Matt. *The Origins of Virtue: Human Instincts and the Evolution of Cooperation*. New York: Penguin, 1996.
- Sherman, Lawrence William. “Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction.” *Journal of Research in Crime and Delinquency*. November, 1993. doi: 10.1177/0022427893030004006.
- Thompson, Shawn. “When Apes have Their Day in Court.” *Philosophy Now*. Issue 111, Dec. 2015/Jan. 2016. 26-29.
- . “El procurador que lamenta la muerte de Darwin.” *Pagina 12*, Sept. 29, 2015.
- Van Schaik, Carel P, Marc Ancrenaz, Gwendolyn Borgen, Biruté Galdikas, Cheryl D. Knott, Ian Singleton, Akira Suzuki, Sri Suci Utami, and Michelle Merrill. “Orangutan Cultures and the Evolution of Material Culture.” *Science* 03 Jan. 2003: Vol. 299, Issue 5603, pp. 102-105. doi: 10.1126/science.1078004
- Wich, Serge A., S. Suci Utami Atmoko, Tatang Mitra Setia, and Carel P. van Schaik. *Orangutans: Geographic Variation in Behavioral Ecology and Conservation*. New York: Oxford University Press, 2009.
- Wise, Steven M. *Rattling the Cage: Toward Legal Rights For Animals*. New York: Basic Books, 2000.
- . “Letter #1 from the Front Lines of the Struggle for Nonhuman Rights: The First 50 Months.” Nonhuman Rights Project online. <https://medium.com/@NonhumanRights/letter-1-from-the-front-lines-of-the-nonhuman-rights-projects-struggle-for-the-rights-of-nonhuman-b053b100af25>
- . “Introduction to Animal Law Book.” *Syracuse Law Review* Vol. 67:1.

C O M M E N T S: Responses to Shawn Thompson

Gary L. Shapiro

What kind of research would best support an animal rights lawyer seeking personhood status for his client? Professor Shawn Thompson asks this question because he wishes to support animal rights lawyers seeking to free imprisoned great apes with the kind of evidence that would hold up in court. It is a vexing and complex matter of legal alchemy: how to transubstantiate an “animal thing” into an “animal person.”

Thompson is no stranger to disenfranchised hominids. He has written on incarcerated humans (*Letters from Prison* 2002) as well as caged and uncaged orangutans that have lost their freedom and continue to lose their forest homeland (*The Intimate Ape: Orangutans and the Secret Life of a Vanishing Species*, 2010). No surprise he was drawn to the case of the caged orangutan Sandra several years ago along with Leif Cocks and me, to form a team of experts to testify on her behalf in a celebrated case in Argentina.

Thompson does a wonderful job of explaining Sandra’s story, but not before he covers some important ground on the complexities of law and science in cases that have sought personhood status for chimpanzees in the United States. He covers the work of animal rights lawyer Steven Wise and his efforts to seek *habeas corpus* relief for two chimpanzees, Tommy and Kiko. Those efforts have not yet yielded freedom for the two great apes, but the legal dialog has been sharpened awaiting the right judge to take the moral leap to grant these two sentient beings personhood status and sanctuary in Florida.

Thompson examines the *amicus curiae* brief filed by Wise’s Nonhuman Rights Project in early 2018, in response to an unfavourable lower court decision regarding Tommy and Kiko. The *amicus* brief cites four general categories often considered in court for personhood: membership in a species as a biological category; the social contract; the social dimension of community membership; and mental capacities. The first two, biological and social contract, would be extremely difficult to argue in favour of great ape personhood. Yet even with strong examples for the second two general categories, community membership and mental capacities, Wise has been focusing on the principle of autonomy to make his case for personhood. Autonomy, according to bioethicist and philosopher Tom Beauchamp and comparative psychologist Victoria Wobber, would be inferred from actions an individual self-initiates that are (1) intentional, (2) adequately informed, and (3) free of controlling influences. Wise has relied on the testimony from experts on the sophisticated cognitive domains of chimpanzees to support the case for autonomy. For example, behaviours observed experimentally or anecdotally that show goal formation, self-directed tendencies, as well as the capacity to learn, make inferences and acquire knowledge, would strengthen the autonomy argument. According to Wise, evidence of autonomy is “sufficient evidence of personhood.”

Thompson continues to build upon this notion that researchers could look at autonomy through some conceptualizations including innovation, altruism, self-control, and re-

sistance, disobedience and defiance. He examines the implications of each concept, and it seems clear that clever researchers could come up with various experimental or observational scenarios to illustrate examples of each by individual and groups of chimpanzees. That, however, is not Thompson's task.

Nevertheless, Thompson's essay is a call to action, and one that is deftly constructed to address the need to build more scientific ammunition for animal rights lawyers who are arguing for great ape personhood status. It is a matter of time before the right judge comes to a bench in the United States where he or she will agree to hear the issues and rule in favour of the non-human person. In the meantime, a possible "low hanging fruit" strategy would include providing compelling evidence to animal rights lawyers in other countries, such as Austria, Switzerland, and New Zealand where recent laws in the latter country have conferred sentient status to all animals. It would make sense to network among international animal rights lawyers to advocate for great apes, cetaceans and elephants in countries where more progressive judges sit on the bench. Great ape personhood would, as in the case of Sandra in Argentina, become established to a limited degree, then expand and deepen to full personhood status over time. As the world became more open to the idea through social media networks, it would migrate eventually to more conservative countries, such as the United States, where the legal conversion would be inevitable.

We owe it to our great ape cousins to continue the fight to "punch the hole in the wall," as Steve Wise has said, to allow those animals who are treated as things to pass through this illusory barrier and become legal persons. It will be a true testament of our humanity to take this bold step.

Notes

Beauchamp, Tom L. and Victoria Wobber. 2014. "Autonomy in chimpanzees." *Theoretical Medicine and Bioethics*, 35 (2). 117-132.



Beyond the Personhood Paradigm

Nicolas Delon

Shawn Thompson's target article provides a fascinating insight into judicial activism for the recognition of the legal personhood of great apes, focusing his discussion on Steven Wise's Nonhuman Rights Project (NhRP) and reports he wrote over 2015-2017 for a court case in Buenos Aires, Argentina, seeking release from a zoo for the orangutan Sandra. Thompson describes both the philosophical underpinning of a legal battle and the concrete obstacles faced by plaintiffs. His thought-provoking picture of courts is one of conflicting commitments: rational legal frameworks and reasonings *and* irrational biases, prejudices and inclinations. Thompson sketches what scholars of jurisprudence would dub a "realist" account (Leiter 2017), depicting judges as deeply influenced by mundane factors, social and economic norms, but also moral and political commitments, and different views of policy. Hence, it should be no surprise that courts – even "policy" (vs. "formal") judges – do not respond fully predictably and

rationally to philosophical arguments. I don't think they should be expected to, given that philosophy doesn't point in one single direction and that the purview of scientific expertise is more limited than Thompson suggests. Even Thompson cites Wise's acknowledgement that the law should not rest on biological facts. My response to Wise's and Thompson's strategy is two-fold: 1) personhood is neither strictly determined by cognitive facts nor fruitfully construed in Kantian terms, and 2) personhood is not what matters when it comes to animal protection. To conclude, 3) I hint at an alternative, or complementary, avenue for change.

1) Autonomy that matters

Many philosophers doubt that other animals have the metacognitive abilities required for robust autonomy. They cannot reflect on their desires, aims and conceptions of the good. Even authors who argue for animal rights (e.g. Alasdair Cochrane, Christine Korsgaard) claim that animals lack autonomy. I, however, think they have an interest in freedom because they can be autonomous in another sense. While fascinating in their own right, Thompson's "conceptualizations" of autonomy – innovation, altruism, self-control, and resistance/defiance – risk raising the threshold for autonomy higher than needed. They could be evidence of autonomy (sufficient criteria), but they are not necessary.

Why think that robust autonomy is necessary for captivity to be harmful? As many authors have noted (e.g. Gruen, Donaldson and Kymlicka), just like with disabled humans and children, animal autonomy can be construed *relationally*. On this view, animals make choices about what to do, when, where and with whom to do it, when allowed to. And, while freedom from external control matters, expecting complete removal from influences and dependency would undermine *anyone's* claim to autonomy. Contextual freedom of options is constitutive of a good life and captivity interferes with it. This doesn't presuppose the robust form of autonomy used by Wise, NhRP, and Thompson. By the same token, freedom applies to a much wider range of animals. Perhaps the capacity for culture, language, or self-consciousness makes captivity worse for apes, elephants and cetaceans. But if animals are to have a right to liberty, it can be grounded on less demanding grounds than robust autonomy.

While NhRP's case centrally rests on autonomy, the authors of *The Philosophers' Brief* build a broader base according to which chimpanzees are persons on all defensible accounts of personhood. One such account rests on 'community': personhood is "something that we achieve through development and recognition within a community of persons." This account, I believe, is a more promising route to personhood (Delon, ms). *If* personhood is the path to rights that NhRP wants to pursue, they need to shift away from the narrow individualist cognitive paradigm. But I want to shift away from the personhood paradigm itself. Captivity, when it hampers agency, undermines the material conditions constitutive of a good life, the physical and social environment central to flourishing, from access to territory, resources, mates and companions to opportunities for play and exploration. This is not just true of very cognitively sophisticated animals, nor does this require person-characteristic autonomy (Delon 2018a).

2) Personhood is not what matters

My rejection of the personhood strategy has two prongs. First, why should we take personhood as the determining criterion of legal protection? As acknowledged in *The*

Philosophers' Brief (Andrews et al. 2018), there are at least four conceptions of what grounds legal personhood, two of which they find acceptable – community membership and cognitive capacity. The authors argue, rightly, that chimpanzees like Tommy and Kiko meet the criteria for each conception. Judges should rationally recognize that these animals are persons, barring an unacceptable conception of personhood based on either social contract or biological membership. What these disagreements show is that personhood is not an uncontroverted intuitive ground for legal protection. The law stipulates who counts as a person independently of philosophical conceptions to which judges are reluctant to be hostage. As Thompson suggests, judges often operate with a roughly Kantian conception of autonomy regarding personhood. But this undercuts the strategy. For Kantian autonomy is very restricted (e.g. Korsgaard does *not* rest her case for animal rights on autonomy). It's unclear if any *human* being is ever so autonomous, much less any nonhuman animal. Whatever problems plague the social contract approach seem to plague the Kantian approach. So, the autonomy that matters for protection against wrongful captivity is not that which grounds personhood.

This leads me to the second prong: *priority*. In terms used by effective altruists for cause prioritization, a given area has a certain importance, neglectedness, and tractability. Assessing these requires a broader perspective. Ninety-eight percent of the animals with whom we interact in some way in the U.S. are farm animals, the overwhelming majority of which are poultry (Wolfson and Sullivan 2004). These animals have no meaningful legal protection in most U.S. states, let alone federally. The personhood strategy turns priorities on their head by focusing on an extremely narrow subset of animals, whose treatment, if deplorable, is better than that of factory farmed chickens. Moreover, farm animals receive proportionally less attention than both companion animals and animals held captive in zoos, circuses, and labs. Finally, we have only patchy evidence that the current strategy has delivered significant goods beyond even a handful of individuals, let alone their conspecifics and members of other species. Wise often seems to imply that personhood rights will open the gate for wider reforms (as a *necessary step*), while trying to reassure judges that the scope of his pleas is restricted. One problem is that, if not anthropocentric, Wise's strategy is prone to evoke the idea that apes matter insofar as they are *like us* (Nussbaum 2018). Something chickens are less prone to. But you can't have it all. Either the scope of the case is restricted, but then NhRP cannot expect to help other animals, or it's not, but then judges are nowhere near being convinced. For now, anyways, the spillover effects remain to be seen.

Two concessions are in order. First, the Argentinian case in which Thompson took part bears promise. Second, Animal Charity Evaluators, a cost-effectiveness-focused meta-charity, has designated NhRP as a "standout charity" because of its potential to improve animal lives. But, to the first point, Thompson himself notes that Judge Liberatori's decision in the orangutan Sandra's case is largely qualified, if only because Argentina is not a Common Law country: "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...[It] does not change the [categorization] existing in the Civil Code between possessed things and people." Judge Liberatori alludes to the inclusion of the category "sentient beings" (not persons) in the French Civil Code. The point is: personhood isn't required,

at least at this stage, as a necessary step toward increased protection. As for the second point, ACE's doubts overlap with mine. It is unclear how well the personhood strategy can carry over to billions of other lives. On the other hand, one could imagine that implementing basic humane protections for farmed animals would have a dramatic impact, but doing so necessitates changes in *social norms* (Delon 2018b).

3) Social norms

As noted by Thompson, NhRP made some recent progress despite repeated setbacks. Many activists have cheered on the opinion of an Associate Judge on New York's Court of Appeals as a harbinger of change. The Court refused to hear NhRP's motion for further review of a lower court decision on behalf of Tommy and Kiko. But Judge Fahey noted: "While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing," while urging the court to engage with the necessary public policy debate.

Are we observing a change in attitudes? Can a judge's opinion have significant influence on institutions susceptible to change? Lori Gruen (2015) and Martha Nussbaum (2018), among others, have expressed skepticism about NhRP's strategy, albeit on different grounds. My claim is, although a precedent would not be trivial, a single court's decision would hardly affect the treatment of a wide range of cognitively complex species, much less most farm animals.

Is pitting the judicial strategy against social norms a false dichotomy? The former *could* foster social change. Yet we can also surmise that a court's decision or judge's opinion are mostly *symptoms* rather than *causes* of change. We beg the question in assuming that courts are effective causes, rather than reflections, of change underway (Rosenberg 2008). The law is a mirror, however imperfect, of shifts in attitudes and behavior. But absent such shifts, the law remains weak. If the deck of attitudes and behaviors is heavily stacked against animals, "the boundaries of the legal community" are unlikely to expand (Leiter 2013) *on judicial grounds alone*. The capacity of courts to produce social change is disputed. Gerald Rosenberg (2008) has argued against the prospects of social reform through litigation and purported to demonstrate that the women's rights, pro-choice, civil rights, and marriage equality movements did not make widespread progress through courts. Judicial rulings cannot enable significant change unless it is already underway or also supported by the Executive and Legislative branches. Social movements, Rosenberg suggests, should direct their resources to political mobilization, grassroots organizing, and other forms of activism. Rosenberg's argument should at least give us pause when considering a decades old strategy that has so far been stonewalled. Fortunately, we need not choose between social change and advocating for nonhuman rights in courts.

References

- Andrews, Kristin, Comstock, Gary, Crozier, G. K. D., Donaldson, Sue, Fenton, Andrew, John, Tyler, Johnson, L. Syd M., Jones, Robert, Kymlicka, Will, Meynell, Letitia, Nobis, Nathan, Pena-Guzman, David M. & Sebo, Jeff. 2018. *Chimpanzee Rights: The Philosophers' Brief*. Routledge.
- Delon, Nicolas. 2018a. Animal agency, captivity, and meaning. *The Harvard Review of Philosophy* 25:127-146
- Delon, Nicolas. 2018b. Social norms and farm animal protection. *Palgrave Communications* 4: 139. <https://doi.org/10.1057/s41599-018-0194-5>

- Delon, Nicolas. Personhood, species, and community (manuscript).
- Donaldson, Sue and Kymlicka, Will. 2011. *Zoopolis: A Political Theory of Animal Rights*. Oxford University Press.
- Gruen, Lori. 2015. *Entangled Empathy*. Lantern Books.
- Leiter, Brian. 2013. The boundaries of the moral (and legal) community. *Alabama Law Review* 64: 511-531.
- Leiter, Brian. 2017. The roles of judges in democracies: a realistic view. *U of Chicago, Public Law Working Paper* No. 637. <http://dx.doi.org/10.2139/ssrn.2935415>
- Nussbaum, Martha C. 2018. Working with and for animals: getting the theoretical framework right. *Journal of Human Development and Capabilities*, 19:1, 2-18
- Rosenberg, Gerald. 2008 [1991]. *The Hollow Hope: Can Courts Bring About Social Change?* 2d edition. The University of Chicago Press.
- Wolfson, David and Sullivan, Marian. 2004. Foxes in the henhouse: Animals, agribusiness, and the law: A modern American fable. In C. R. Sunstein and M. C. Nussbaum, eds. *Animal Rights: Current Debates and New Directions*. Oxford University Press.
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Science in the Court: Animal Behaviour and Non-human Personhood

Elise Huchard

The recognition of non-human personhood could have profound implications for our relationship to the natural world, by encouraging the creation of a legal status recognizing the intrinsic value of some non-human entities, such as ecosystems or animals. Animals have interests, in the sense that things can be good or bad for them, and whether things are good or bad for them depends on their own perceptions (Korsgaard 2013). The recognition of legal personhood for (non-human) animals is a means to ensure that these interests are duly considered, by granting them basic rights – such as the right to life, freedom and not to be tortured. To some, animals should be protected by law, but using the legal personhood status is not the way to go (e.g., Cupp 2015). Court cases fighting for the recognition of non-human personhood nevertheless have the laudable ambition of highlighting the shortcomings associated with the bipolarity of most contemporary legal systems, which only admit two categories: things that can be used as mere means to someone else’s end, or persons who are ends in themselves. The latter status is automatically and exclusively granted to humans (though it has historically left some humans out), and there is little leverage to confer legal protection to non-human entities. The existence of anti-cruelty laws in many legal systems embodies the mainstream idea that animal welfare is worthy of protection for its own sake. However, without any other form of legal protection, it is easily disregarded in the face of ‘more important’ things (Donaldson and Kymlicka 2011; Korsgaard 2013). Requesting legal personhood for animals is thus a pragmatic approach to open a breach in a legal world divided into persons and things, even though it’s not necessarily the only legal avenue to increase the protection of animals’ interests.

The existence of court cases requesting legal personhood for animals should be of interest to scientists studying animal behavior like myself, because lawyers arguing such cases, as pioneered by Steve Wise, have used the results of behavioural research as a key component of their files (Wise 2000; Thompson 2019). In recent decades, studies on the cognitive, emotional, and social capacities of other species have blurred tradi-

tional divisions structuring historical discussions on human specificities – including the opposition between nature and culture (e.g., Laland and Galef 2009), between animal objects and human subjects (e.g., Bekoff 2000; Bekoff, Allen, and Burghardt 2002; de Waal 2009), and between instinctive and rational actions (e.g., Hurley and Nudd 2006; Reader, Morand-Ferron, and Flynn 2016). These findings have fed the parallel development of animal ethics, the field of philosophy concerned with the moral status of animals, which is expanding to the point that many major contemporary ethicists have addressed this topic (e.g., Singer 1975; Regan 2004; Nussbaum 2009; Donaldson and Kymlicka 2011). Court cases on animal personhood actually represent a legal extension of these ethical developments, which may lead to further legal and political ramifications down the road. As animal behaviour scientists, we may thus face increasing pressure to generate or review knowledge that can feed philosophical debates of direct legal and political relevance to the moral status of animals. While many of us may find such expectations stimulating, we may also feel unprepared and uncomfortable to jump into such debates, for the sake of preserving our scientific objectivity, or on the basis that scientific results are devoid of normative value. Yet, it is often difficult, in practice, to generate knowledge and escape subsequent questions regarding its relevance to society.

In this context, the essay of Professor Shawn Thompson (2019) has a lot to offer to scientists who wish to explore the intersection between philosophy, science and the application of the legal concept of personhood to (non-human) animals. In a clear and thought-provoking text, he delivers a fascinating testimony of how lawyers build court cases, focusing on the exact nature of empirical evidence typically valued by judges. He first sets the stage with a thoughtful description of the profound cultural divides in the way science and justice assess and treat empirical evidence, before revealing strategic tips on the use of evidence in the legal battlefield pioneered by Steve Wise and colleagues in the United States (Wise 2000). He subsequently identifies critical gaps in the scientific knowledge needed to instruct legal cases, and goes as far as proposing concrete research directions to fill them. He finishes by reflecting on his personal experience acting as an expert for the court of Buenos Aires, which in 2015 made use of *habeas corpus* to consider release of a captive female orangutan from a zoo into a sanctuary – a judgment which remains a historical victory of this legal front.

Research findings in animal behaviour have proved critical for building such legal requests. One may nevertheless wonder, based on Thompson's considerations, whether science has the potential to inform future cases any further. Thompson indeed delineates a relatively narrow area of focus which consists in gathering empirical evidence indicative of legal 'autonomy,' a key underlying principle in traditional definitions of legal personhood – one rooted in Kantian philosophy and relating to an individual's free will (Korsgaard 2013). Empirical approaches around such a concept pose a major challenge because it is not directly amenable to a falsifiable demonstration (in the epistemological sense) as it is difficult to confirm subjective mental states in (non-human) animals.

Although evidence suggestive of autonomy appears particularly relevant to the concept of legal personhood (Thompson 2019), building cases on such basis comes with the inconvenience that sufficient evidence might often be hard to gather, so that the

number of eligible species is restricted and might be biased towards those that are best studied or most closely related to humans. It may ultimately be suitable that the institutional defense of animals' interests relies on a more inclusive and less anthropocentric criterion, such as sentience, which might also be more amenable to empirical studies, and is more consistent with major theories in animal ethics (Singer 1975; Donaldson and Kymlicka 2011; Francione 2006). The use of such a criterion would facilitate the application of a precautionary principle wherever sufficient evidence is lacking, so that an absence of evidence is not, in practice, treated as an evidence of absence (Birch 2017).

Nevertheless, the choice of the 'autonomy' criterion has been constrained by legal institutions so far, and Thompson argues that empirical limitations in the study of autonomy could be partially overcome by documenting a capacity for innovation, altruism (in the Kantian sense, which implies a conscious decision), self-control, or an ability to resist or disobey – a suite of traits that are suggestive of free will, and 'the legal principle of autonomy.' More generally, ethological studies that use concepts rooted in classical philosophy and referring to mental states that are not directly observable would benefit from an interdisciplinary effort associating scientists and philosophers to (i) establish more inclusive definitions (i.e., applicable to study animals) that are not devoid of their initial meaning nor of empirical traction, (ii) reflect on the most efficient empirical approaches, and (iii) discuss what may represent sufficient evidence of the existence of such phenomena.

Thompson points to another way where scientific input could be useful in legal debates: by synthesizing and interpreting published evidence for the court. Unlike scientific experts who regularly intervene in court cases and are well aware of the legal culture, such as criminologists or psychiatrists, behavioural scientists are generally unprepared for such an exercise. Thompson's text will be a vital source of information to those from whom such expertise may be requested. More generally, reviewing and communicating scientific findings for a lay audience is a crucial responsibility of scientists – because who else can? – and scientists working on animal behaviour may expect to be increasingly solicited on broad ethical questions regarding human-animal interactions given the growing public interest in this conversation, and the common perception that specialists of animal behaviour are well-positioned to inform it.

Overall, Thompson's essay proposes an example of how scientific results in animal behavior have been used to inform theoretical and applied ethics including legal developments, which can in turn inspire new research questions. These interdisciplinary interactions revolve around questions related to animal emotions, subjectivity and cognition, which have long been left aside by many scientists because such topics were seen as excessively challenging to address empirically, not to mention potentially controversial, due to a prevailing fear of anthropomorphism in the disciplinary culture (de Waal 1999). Changes in society now push our research community to re-examine some underlying assumptions in our methods, as well as to develop the interdisciplinary dialog required to tackle the challenges set by the study of animal mental states to the highest scientific standards.

References

- Bekoff, Marc. 2000. *The Smile of a Dolphin: Remarkable Accounts of Animal Emotions*. Discovery Books.
- Bekoff, Marc, Collin Allen, and Gordon M. Burghardt. 2002. *The Cognitive Animal: Empirical and Theoretical Perspectives on Animal Cognition*. MIT Press.
- Birch, Jonathan. 2017. “Animal Sentience and the Precautionary Principle.” *Animal Sentience* 2:16-1.
- Cupp, Richard L. Jr. 2015. “Focusing on Human Responsibility Rather Than Legal Personhood for Non-human Animals.” *Pace Environmental Law Review* 33:517.
- Donaldson, Sue, and Will Kymlicka. 2011. *Zoopolis: A Political Theory of Animal Rights*. Oxford UP.
- Francione, Gary L. 2006. “Taking Sentience Seriously.” *Journal of Animal Law and Ethics* 1: 1.
- Hurley, Susan, and Matthew Nudd. 2006. *Rational Animals?* Oxford UP.
- Korsgaard, Christine M. 2013. “Personhood, Animals, and the Law.” *Think* 12 (34): 25-32. <https://doi.org/10.1017/S1477175613000018>
- Laland, Kevin N., and Bennett G. Galef. 2009. *The Question of Animal Culture*. Harvard UP.
- Nussbaum, Martha C. 2009. *Frontiers of Justice: Disability, Nationality, Species Membership*. Harvard UP.
- Reader, Simon M., Julie Morand-Ferron, and Emma Flynn. 2016. “Animal and Human Innovation: Novel Problems and Novel Solutions.” *Philosophical Transactions of the Royal Society B* 371 (1690): 20150182. <https://doi.org/10.1098/rstb.2015.0182>
- Regan, Tom. 2004. *The Case for Animal Rights*. U California P.
- Singer, Peter. 1975. *Animal Liberation*. Ed. 2015. Random House.
- Thompson, Shawn. 2019. “Supporting Ape Rights: Finding the Right Fit Between Science and the Law.” *ASEBL Journal* 14(1): 3-24.
- de Waal, Frans B.M.. 1999. “Anthropomorphism and Anthropodenial: Consistency in Our Thinking About Humans and Other Animals.” *Philosophical Topics* 27 (1): 255-80.
- . 2009. *Primates and Philosophers: How Morality Evolved*. Princeton UP.
- Wise, Steven. 2000. *Rattling the Cage: Towards Legal Rights for Animals*. New York: Basic Books.
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The Problem with the Personhood Argument

Zipporah Weisberg

The premise of Shawn Thompson’s article – that empirical science is often undermined and/or inadequately represented in a legal context – is compelling. To demonstrate the need for a new conceptual framework that is legible both to scientists and practitioners of law, Thompson focuses mainly on the struggles that Steven M. Wise, the head of the U.S. Nonhuman Rights Project (NhRP), which campaigns for legal personhood for great apes, elephants, dolphins, and whales, has faced upon filing *habeas corpus* applications in United States courts on behalf of great apes. Thompson also draws on his own experience of participating in a project that sought personhood for Sandra, an orangutan held in captivity in Argentina.

Thompson argues that the schisms between the scientific and legal conceptions of autonomy, not to mention the fact that “a domain like the legal system has a very different form of proof and rationality from science,” have made communicating across disciplinary divides (and ultimately arriving at judgments in favor of granting personhood to apes) an unnecessarily convoluted process. He maintains that to avoid arriving at the inevitable impasses, “a change in thinking about the research” is needed. Rather than compiling bits and pieces of scientific evidence that happen to illustrate great apes’ autonomy, as Wise has had to do thus far, scientific research could be shaped at the outset with the legal argument for personhood in mind.

On one hand, reframing research according to Thompson’s suggestion could be an important intervention into two systems that are apparently at odds with each other when it counts the most and when the stakes are highest (i.e. when they involve an animal’s wellbeing). If scientists shaped their research into great apes’ behaviour in ways that had direct relevance to the legal conception of personhood, perhaps the research would be more convincing to judges and therefore more likely to sway their opinion in favor of great apes. On the other hand, as Lori Gruen points out, most research conducted on great apes has been destructive to the animals themselves, whether due to the invasive nature of the research and/or to the conditions in which the animals are kept, and the deleterious psychological, social, and emotional impact these conditions have on them.¹ If the new approach to research that Thompson posits is ultimately aimed at improving the lives of great apes, he should also insist that any research designed to advance personhood for these animals should be done in non-invasive ways and in non-oppressive environments, such as sanctuaries or in the wild, where the flourishing of individual apes and their communities are in no way compromised.

An even more fundamental concern is that while research organized along these (non-invasive and observational) lines could be useful to advancing rights for great apes (or the other animals NhRP defends) in immediate and practical terms, it nevertheless runs the risk of perpetuating other species divides, namely by creating other ‘others’ who do not demonstrate the same human-like capacities that great apes (or elephants, dolphins, and whales) do. Thompson states outright that he is “following the researchers who believe that people and apes are so akin that the difference between them is one of degree, not kind” which, he concludes is “a good premise, if it is right, for arguing rights for apes.” Thompson refers to apes as ‘fellow intelligent species’ and claims that apes ‘are sufficiently like human beings’ to warrant legal entitlement to relative (or ideally, total) freedom. This ‘like us’ position is also the one taken by Steven M. Wise and the NhRP. While on its website the NhRP states that its main goal is to “secure legally recognized fundamental rights for nonhuman animals through litigation, legislation, and education,” its campaigns focus solely on great apes, elephants, dolphins, and whales *because* of their human-like cognition, self-awareness, and (practical) autonomy.²

But the question must be asked: why should having human-like cognition, self-awareness, or autonomy be required for an animal to be entitled to protection from physical and psychological torture, sexual assault, and murder? While Wise, Thompson, and others are well-intentioned and could make a difference in the lives of some individual animals (and perhaps other members of the species they defend), their approach is fundamentally flawed. Defending some select animals’ rights on the basis that they are similar to human beings in morally relevant ways is a very dangerous road to take. For a start, it fails to recognize how other animals’ characteristics and ways of being are meaningful and ethically relevant *in and of themselves*, without reference to human characteristics and experience. The ‘like us’ position creates a difficult and often impossible set of criteria for other animals to meet – impossible because they are derivative of specifically human capacities or characteristics and/or conceptions of what certain capacities or characteristics entail (such as, human-like intelligence, self-awareness, and autonomy) and it privileges some species over the majority

of others, including those who are tortured and killed in the billions in the factory farming and medical research industries, among others.³ In the words of Taimie L. Bryant, “the similarity argument promotes pernicious hierarchical ordering of nonhuman animals based on their relative proximity to humans.” Bryant calls instead for an “anti-discrimination” approach in animal advocacy that, among other things, is based on “promoting respect for the diversity of animals” and accommodating their needs and desires accordingly.⁴

The goal should not be to try to, as it were, squeeze (some) other animals into the ethical circle by virtue of their human-like self-awareness, cognitive abilities, and autonomy. The goal should be to explode existing assumptions about what counts ethically in the first place. The richness and complexity of all nonhuman animal life should be recognized *on its own* terms and animals’ ethical (and legal) status should be radically transformed accordingly – with their particular forms of flourishing, with their particular needs, ethically (and legally) meaningful because they are meaningful to them, in mind. Other animals should be granted the right to freedom from harm and freedom to thrive on the basis of who *they* are and what is important to *them*, not on the basis of how they compare to who *humans* are and what is important to *us*. Humans do, of course, happen to share with other animals some of the most ethically (and legally) relevant needs and desires: to maintain our physical integrity and freedom, to not be confined, tortured, abused, neglected, or killed, to live freely in environments that promote flourishing, to eat nourishing food, to seek pleasure, love, and friendship, to socialize, to play, to nurse and raise our young, and so on. But the point is that these and other important features of animal life should not be deemed significant because they are also features of human life.

In response to these criticisms of personhood, one might argue that if only as a strategic measure the personhood approach is justified, at least in the short term. If one must penetrate into an unabashedly anthropocentric set of institutions to make a positive difference in the lives of long-suffering creatures such as chimpanzees and orangutans, why not play the proverbial game according its own rules? Why not focus on species that are the most like humans to win over the public as a first step towards opening their minds to the possibility of granting personhood to other animals? Or, if still uncomfortable with the anthropocentrism implicit in the above argument, one might turn to Gary Francione, who argues that sentience (as opposed to cognition, self-awareness, or autonomy) is a sufficient basis for granting personhood to animals who are currently deemed property under the law.⁵

Another problem with the personhood approach to animal advocacy is that the line between the biological category of ‘human’ and the conceptual category of ‘person’ are often conflated (by the media, by members of the public, and even by leading voices on both sides of the debate). This leads to a certain panic that the distinct (evolutionary, ontological, ethical, and legal) status of the human being could somehow be threatened or undermined.⁶ Of course, this panic is often itself the product of speciesism and human supremacism, which asserts that human beings occupy an ontologically (and therefore ethically and legally privileged) position over and above all other animals and beings.

Most importantly, as Maneesha Deckha notes, the legal personhood for animals should be abandoned as a goal because it is steeped in “exclusionary” and “reductive” biases. Throughout its history the concept of personhood, with its rationalist bent, has traditionally excluded women and people of color admitting, until relatively recently, only white men into its fold. While personhood is no longer limited to white men, it will be forever marred by these constitutive prejudices, it is therefore an unlikely vehicle for progressive change.⁷

Ultimately, while Thompson raises an interesting question about how enabling science and law to communicate more effectively might make it easier to secure rights for great apes, the personhood argument upon which he relies, and its ‘like us’ bias, seem to carry more risks than benefits for advancing apes’ and other animals’ rights.

Notes

1. Gruen, Lori. “Rethinking Personhood: Recognizing sameness and valuing difference,” Paper presented at “Personhood beyond the Human Conference,” Yale University, December 7, 2013. Available at: <https://www.youtube.com/watch?v=MGh5qgZ6wZs>
2. “Objectives,” Nonhuman Rights Project, December 1, 2018. <https://www.nonhumanrights.org/who-we-are/>
3. “Litigation,” Nonhuman Animal Rights Project, December 1, 2018, <https://www.nonhumanrights.org/litigation/>
4. Bryant, Taimie L. “Similarity of Difference as a Basis for Justice: Must Animals Be Like Humans to Be Legally Protected from Humans?” *Law and Contemporary Problems*, vol. 70, n. 1, *Animal Law and Policy*, winter 2007, p. 210. 207-254.
5. See Francione, Gary L. *Animals as Persons: Essays on the Abolition of Animal Exploitation*. New York: Columbia University Press, 2008. Columbia University Press.
6. Gruen, “Rethinking Personhood.” See also, Cupp, Richard L. “Gorilla’s Death Calls for Human Responsibility, not Animal Personhood,” *The Conversation*, June 3, 2016. <https://theconversation.com/gorillas-death-calls-for-human-responsibility-not-animal-personhood-60360>
7. Property Status?” in John Sorenson and Atsuko Matsuoka, eds. *Critical Animal Studies: Toward a Trans-Species Social Justice* (London: Rowman & Littlefield, 2018), pp. 213-214. 209-233.

Missing the Apes of the Trees for the Forest

Carlo Alvaro

The debate over ape personhood is of great social and moral importance. For more than twenty-five years, attorney Steven Wise has been arguing that animals who have cognitive complexities similar to humans should be legally granted basic rights of autonomy. In my view, granting personhood status and other rights to great apes are attainable goals. But how should we go about it? My worry is that Thompson’s suggested strategy relies on Kantian ethics, in particular on Kant’s notion of autonomy. In fact, I am worried about Kantian ethics in general because of its influence on morality and ultimately on our legal system. The problem is that Kant’s ethical system is rather strict because, accordingly, only those beings that have a rational nature can constrain us morally. By rational nature, Kant referred to one’s capacity to govern one’s self by autonomous, rational choice. Humans are rational beings and thus are morally important; they are ends-in-themselves because they are autonomous and capable of un-

derstanding and legislating moral laws. Of course, not all humans are rational. There are the so-called marginal cases, small children, the feeble minded, and more, who are not autonomous. We may speculate as to what Kant might have thought of such individuals, but he never addressed the issue. Unfortunately for animals, Kant regarded them as mere means to our ends because they cannot govern themselves by autonomous rational choice. For Kant, Animals are objects without intrinsic moral value. In his *Lecture on Ethics* (1779), Kant said: “But so far as animals are concerned, we have no direct duties. Animals are not self-conscious and are there merely as the means to an end. That end is man” (Kant, 239-241). Consequently, humans do not have direct moral obligations toward animals.

Some Neo-Kantians argue that the view propounded by Kant can still speak in favor of animals. For example, Christine Korsgaard argues that Kant conflates two conceptions of “end-in-itself.” One is the source of normative claims recognized by all rational agents. And the other is someone who is able to give force to a claim by participation in morality. Animals cannot be ends-in-themselves in the second sense because they lack rationality and autonomy. But it does not follow that animals cannot be ends-in-themselves in the first sense: “there is no sense in which they can obligate us” (Korsgaard, 21).

Korsgaard points out that as rational beings, we do not legislate, for example, against being lied to, being injured, being cheated on, etc., *only* because we are autonomous and rational beings, but also – perhaps most importantly – because bad things can assault our animal nature. In other words, “we object to pain and torture or injury because they are bad for us as animal beings” (28). Kant himself held that respect for our rational nature involves respecting our animal nature. This is the ground for his arguments about our duties to ourselves, our self-preservation, the enjoyment of food, and sex. In the *Metaphysics of Morals* (1797), Kant discusses duties to ourselves as animal beings with respect to our animal nature. He covers the duties not to commit suicide, not to maim or disfigure oneself, not to masturbate, and more. Also, in *Religion within the Boundaries of Mere Reason* (1793), Kant argues that our animal nature is one of three “original predispositions to good in human nature” (Kant, 74).

Thus animal nature is important. However, did Kant overlook the implications of his own principle regarding animals? I think not. Having an animal nature may be a sufficient condition for having direct duties to other rational beings – but not a necessary condition. Our animal nature is, after all, “attached” to, comes with, a rational nature; but animals (according to Kant) are completely devoid of a rational nature. There is no clear textual evidence that Kant overlooked the possibility that animal nature be a source of normativity. Furthermore, there is no textual evidence that Kant would regard animal nature *alone* as important enough to regard animals as ends-in-themselves.

The fundamental problem with Kant’s moral view is that it is ultimately concerned with notions of obligation and right conduct. The problem is the very conception of morality as a set of universal and authoritative norms by which all moral agents are categorically obligated to follow. My position is that such a conception of morality is defective; it is the very reason why nowadays animal advocates and lawyers have to

fight for animal rights. Deontology (and consequentialism as well, by the way) tells us to view the world from an individualistic point of view where one calculates what is right. Morality in my view is not about ourselves and how we use our individual reflections to derive categorically imperative norms. Rather, it is about relationship, care for others, and compassion. Thus, I question the concept of granting personhood on the basis of whether the animal in question is human-like.

My feeling about duty morality and the Kantian concept of autonomy is that they seem plausible in theory, but fail in practice. Our moral outlook toward the environment, I want to suggest, has been disciplined by deontic (and utilitarian) principles. Such theories force us to accept the false dichotomy of individuals as rational or not rational; and make us wonder about our rational duty toward others. If we employ this kind of ethic to frame our moral questions, we find ourselves arguing abstractly about duty and rights, while missing other important aspects of morality, such as compassion, care, relationship, and the acquisition of good moral character. Thus, I do not find it surprising that we currently face an environmental crisis and that we have to prove that animals are morally important.

An alternative approach to morality is virtue ethics. Virtue ethics is primarily focused on good moral character. It suggests that we should approach morality by doing what is honest, charitable, compassionate, and do not do what is dishonest, uncharitable, and callous. Knowing right from wrong first requires cultivation of our moral character. We should acquire virtues such as temperance, justice, and compassion, and practice temperate, just, and compassionate acts, at the right time and for the right reason. If the virtue ethics approach is right, we should abandon deontic and consequentialist principles and do what we can to acquire those virtues, and teach them to our children, in the hope that future generations may revert the environmental damage that has already been done and the speciesist bias that society has toward animals. In my view it is a virtuous character – and not the Kantian notion of autonomy – that will enable us to regard all animals as morally important and not as property.

Works Cited

- Kant, Immanuel. 1785. *The Groundwork for the Metaphysics of Morals*, Mary J. Gregor (trans.), Cambridge: Cambridge University Press, 199.
- Kant, Immanuel. *Lectures on Ethics*. Louis Infield, trans. (New York: Harper and Row, 1963).
- Kant, Immanuel, “Religion within the Limits of Reason Alone” in *Religion and Rational Theology*, Cambridge University Press; Revised ed. edition (2001).
- Korsgaard, C. “Kant’s Formula of Universal Law.” *Pacific Philosophical Quarterly* 66/1-2 (1985): 24-47.

Peter Woodford

Let me first thank Shawn Thompson for his thoughtful and fascinating essay that takes us to the front lines in legal battles over protections for apes. I am grateful for the opportunity to comment, and here I would like to focus on the concept of autonomy and on both the promise and peril of tying this notion too closely to the philosophy of Immanuel Kant in considerations of animal rights.

Thompson's article presents a fascinating account of the interplay of science, legal reasoning, and the legal system as all of these institutions face complex questions about how we ought to treat other animals. Thompson's title highlights that the significant relationship he wants to explore is between science and the law, but I think from his article it is clear that philosophy has an equally central role to play as well. Thompson's account focuses on a very particular strategy for gaining legal recognition of animal rights, namely, through a *habeas corpus* application on behalf of apes held in captivity. Taking this strategy forces one particular concept to become crucial to the case for the legal protection of animal welfare: the concept of *autonomy*.

As Thompson shows, one reason the concept of autonomy is crucial is that legal protections justified on grounds of autonomy already exist. This holds open the possibility that the freedom and welfare of apes should *already* be guaranteed as a logical extension of current law, without new legislation being necessary. Thompson remarks that autonomy has become crucial to how central figures in the battle for animal rights, such as Steven Wise, "craft a legal strategy."¹ Thus, it often appears as though Thompson accepts that this "strategy" is merely *instrumental*, in the sense that it is chosen because it is likely to be effective given current institutional circumstances, and not because it is necessarily the *right* or *best* way to understand why animals ought to have legally protected rights. Since I am not an expert in the law, I cannot comment on whether pursuing rights for animals through *habeas corpus* and under the legal protection of autonomy is, indeed, the optimal strategy for achieving the desired result most quickly. But I can say something about why autonomy has been thought to matter for morality and the law. Of course, the law is not identical to morality, and not all things that we might consider morally wrong are legally prohibited and vice-versa; the difference between the two is another topic that raises deep and important questions. But since the law is an instrument through which morally right relations between people – and in this case between humans and animals – can be established through *coercion* and threat of punishment, understanding the role of autonomy in moral philosophy can be a good guide and prelude for making the legal case.

Thompson presents the central legal question that judges are to consider clearly: Are animals autonomous, according to the definition of the law? But what is the legal definition of "autonomy"? As Thompson shows, there seems to be no universally agreed upon definition, and this is where judges and lawyers look to experts, which include both scientists and philosophers, to provide such definitions and to show when different organisms fall under this definition. Indeed, in Thompson's article there appear to be multiple candidate definitions of autonomy, and the legal debate has taken the shape of defenders and critics of animal rights arguing over which one ought to guide our legal decisions. Since experts do not agree about what autonomy is, individual judges are left in the position of having to decide whether to make a controversial ruling that may be overturned later on.

One expert that is often appealed to in questions of autonomy is the philosopher Immanuel Kant. Thompson refers to Kant frequently and shows us that Kant's writings in moral theory seem to have some authority in legal considerations of animal rights under *habeas corpus*. This is understandable given that the concept of autonomy be-

came central to moral philosophy largely through Kant, and Kant’s understanding of autonomy and of morality in general is still quite compelling to many thinkers today.

The problem I see is that Kant’s notion of autonomy is something of a double-edged sword for discussions of animal rights. This is because Kant did not think that non-human animals were *autonomous*.² For Kant, autonomy is essentially the capacity for *normative self-governance*; it is the capacity to conceive of and to act according to an “ought” that legislates universal norms that dictate what anyone should do. It is the capacity that is called upon when one makes a claim on how others should behave, and so too in the construction of a legal system and the reflection on whose rights it *should* protect and recognize. Thus, autonomy – as the capacity to legislate *at all*, and to *self-legislate* – is not foremost an answer to the question of what is required to “count” as a being whose interests matter. It is rather the concept that helps us understand what makes *us* beings who are *subject to the norms of morality*, norms that demand of us that we respect the interests of others.

Kant’s notion of autonomy is an answer to the question of who “ought” to behave morally, who should be held responsible and subject to praise and blame or sanction and punishment for their actions. Of course, no one in these legal debates seems to be arguing on the basis of autonomy that we should start holding animals responsible for their bad behavior, or that animals *should* behave morally, and this reflects an implicit acceptance of the difference between humans and other animals that Kant is trying to point to with his notion of autonomy. Even given how complex we are discovering that the lives of non-human animals are, it is highly questionable that we should think that they have or exercise this capacity for normative self-governance. Of course, we should notice here that many humans also do not exercise this capacity either temporarily or permanently, for example children or those with forms of mental disability.³

Given Kant’s notion of autonomy, it seems easily defensible that I, and any judge who might be ruling according to Kant’s criterion of autonomy, might justifiably doubt that apes have the capacity to make laws, to act according to “oughts,” and to recognize the moral standing of others. This appears to be a reason why the decision to grant autonomy to apes is controversial, and why there is a looming worry that judicial decisions could reasonably be overturned. Nonetheless, leading scholars of Kant’s moral theory have persuasively argued that Kant himself recognized (even if there are passages that suggest otherwise) that animals do not need to have autonomy in his sense in order to have moral standing, in the same way that he thought it immoral to treat children or the mentally disabled any way that one pleases simply because they may lack, temporarily or permanently, the capacity for normative self-governance.⁴ Of course, there are also scholars who see Kant’s notion of autonomy as not simply neutral with respect to the case for animal rights, but inimical to it.⁵ However, if we accept the argument that, even for Kant, *autonomy* may not be the best criterion for whose interests “count” in a moral sense, then what is? While this a crucial question for making the case that Kant’s philosophy is not inimical to animal rights, it would lead into details of Kant’s thought that are not necessarily relevant to the point I want to make here.⁶

Thompson lists a variety of notions of autonomy that are different from Kant's. Thinkers like Victoria Wobber, Tom Beauchamp, Steven Wise, and Jennifer Nedelsky have also informed how judges and advocates think about autonomy. Their proposals include the recognition that animals have interests and desires, that they can either suffer or flourish, that they represent the world in various ways, that they can have subjective experience and even a sense of self of some sort, and that they are subjects of a life, who *lead* a life in a meaningful sense. Again, these clearly need not require the capacity for normative self-governance, and these criteria seem much easier to establish in many diverse species. Indeed, while not being full-blown normative self-governance, these are also the kinds of capacities that scholars of Kant argue were significant for his own recognition of the moral status of animals.⁷ It is also clear that these definitions of autonomy open up far more space for scientists to inform discussions of animal ethics because scientists who study particular species are best positioned to understand the conditions in which they suffer or flourish, what their interests are, and what conditions allow them to freely lead their life.

A lesson that I take away from Thompson's informative article is that a serious hurdle exists in legal battles for animal rights that draw on the concept of autonomy, and that hurdle is Kant. As I have tried to show here, this is unfortunate given that a strong case to be made on Kantian grounds for the legal protection of animals, only this is not justified through the protection of their autonomy. Therefore, it seems as though the best strategy for moving forward may be to leave Kant out of the legal definition of autonomy altogether, or perhaps to take on this issue directly and argue to judges and lawyers that Kant's thought is misused if it is used to deny moral or legal standing to non-human animals. For, as Kant thought, it is not because animals are autonomous that they possess "rights," but rather because *we* are autonomous, self-legislating and moral beings that we understand it to be right to prevent, by means of the law, the unnecessary harm of other creatures.

Notes

1. Shawn Thompson, "Supporting Ape Rights," 4.
2. Christine Korsgaard, "Morality and the Distinctiveness of Human Action," in *Primates and Philosophers: How Morality Evolved*. Frans B.M. de Waal with Robert Wright, Christine M. Korsgaard, Philip Kitcher, and Peter Singer. Edited by Stephen Macedo and Josiah Ober (Princeton: PUP, 2006), 98-119.
3. The issue of Kant's controversial attitudes about race are also relevant here, as he also did not recognize certain non-European humans as having the capacity for autonomous agency.
4. Christine Korsgaard, *Fellow Creatures: Our Obligations to Other Animals* (Oxford: OUP, 2018).
5. See, for example, Carl Cohen, "Do animals have rights?" *Ethics and Behavior* 7/2 (2007): 91-102.
6. For a detailed answer to this question and a persuasive Kantian case for animal rights, although again not on the grounds of animal autonomy, see Korsgaard, *Fellow Creatures*, 2018.
7. Korsgaard, *Fellow Creatures*, 141ff.

Dustin Hellberg

Thompson's is an interesting and thought-provoking article. Unfortunately, I doubt that there will ever come, as the author suggests, a Lord Mansfield to rule in favor of apes' personhood. This is not because the author has made a less salient case or that the issue does not warrant such weighty considerations. A few of the stumbling blocks

for any argument of this sort are as follows: descriptive v. normative qualifications, essentialist v. anti-essentialist theorizing, and is v. ought debates. I will focus primarily on the descriptive v. normative issue for the sake of space. Let me first praise the sprawl of the article for trying to set boundary conditions that overlap these epistemologically disparate ideas/methods. I believe that they may be related in theory, but the methods themselves can only be confederated in the loosest of ways. This particular difficulty will inevitably remain the biggest hurdle in such hybrid analyses.

The fascinating thing about the ‘hard’ sciences is that they are more nebulous in their origins than most people care to admit. This is not to say that they are *ad hoc*, however. In seeking to describe the universe (or world, or species, etc.) in ever-more accurate ways, science must remain descriptive as much as possible. But there are normative value judgments that either precede or follow scientific discoveries, hunches and stirrings in the mind that are not descriptive in their origins, but must be held out, once theorized, as objectively and descriptive as possible. When the author seeks to mix the codices of law, philosophy, and science, the descriptive and normative are suddenly thrust together. That there must be a continuum between ape and human practices is true, but can we make a checklist of a species’ demarcations from one to the next and then use that taxonomy as a bridge of similarity? Here, I mean a legal checklist. Would we not simply choose the criteria that best suit our starting hypothesis and ignore the rest? This is fair (often unfortunately) game in the humanities, but I doubt that it would work in a hybrid legal/scientific setting. For example, if we define personhood merely by descriptive function rather than legal potential we radically blur the distinctions we must have in order to establish legal intention and culpability. Would we then put on trial the chimpanzee that bites a human’s face in the same way that we would hold a human responsible who bites a chimp’s face? We can hold the human to blame for harming the animal because the human has past/future rational awareness, has at least some rational understanding that such action is wrong and the human possesses the possibility for self-controlled behavior outside a laboratory setting. The ape has many similar proto-human characteristics, all fascinating to study from ethology, but these characteristics are descriptive functions of an evolved similarity between our species, not normative aspects of our legal statutes or cultures. An ape cannot defend another ape in court. Or, in a more abstract line of questioning, does an ape have dignity? Is the autonomy of the ape relational to the past and future status of the legal community in which it finds itself? While I truly sympathize with the author’s intentions, this first bulwark already looms.

At the article’s end, the author says, “Maybe our ethics should be larger than just our own self-interest as a species.” Animal cruelty laws already exist, though our stewardship of the planet and the life on it is tragically negligent in too many ways to enumerate. If ethics relate intentional action to past precedent (in the individual and community) to present behavior in order to curtail undesirable future action, then again, I cannot see that ape personhood could be extended through something like an ape’s autonomy. It’s not that apes can’t act autonomously or that they don’t have individual personalities. Autonomy in this legal and philosophical sense relates to intentional action in the setting of public and civic norms, not to conditional-only situations out in the wild. It’s not that apes can’t advocate for themselves in the way that a brain-dead human can’t. It’s that the ape can’t potentially advocate for itself except via a proxy in

human civic institutions. Someone in a vegetative coma, were he or she not in such a coma, could undertake intentional action, after which we may judge his or her behavior ethical or unethical. The category-shaving of what is ethical or moral or good or just is not at issue in this sense. The author's appeal to Kant may not help. He would outright dismiss an ape's ability to be a rational moral agent, no matter how autonomous that ape may be.

Is it unfair to extend Kant's categorical imperative to an orangutan? Maybe. However, could the orangutan act in such a way as to will the consequences of its action to be a universal law? Again, it seems to me, that potentiality is at issue. That humans may act irrationally and that an orangutan cannot act rationally is not equitable. If our boundary criterion remains autonomy (or rationality), then where do we draw the line for inclusion into personhood? Dolphins would have at least as much claim. Humans have an ethical and moral responsibility to act in ways least detrimental to our co-inhabitants of this planet, and that argument doesn't seem to require extending legal personhood to our primate cousins who cannot make their own case. They should definitely share in Kant's kingdom of ends, but the demarcations will remain blurry so long as descriptive and normative definitions are brought together. As the author says, "We can't prove that apes are human beings. We can only argue that apes are sufficiently like human beings." A glance at the news will certainly make one wonder whether some human beings are sufficiently like human beings, but that, again, doesn't mean that the inability of humans to sometimes act rationally (or ethically, morally, etc.) relates to an ape's incapacity to act rationally.

An ape's freedom is not an extension of its identity as a rational and intentionally-oriented individual set inside a civic and legal community. Would we put a chimp on trial for killing a rival male from a neighboring group? The author has attempted a dizzyingly difficult feat and is to be lauded for this. By advocating for our evolutionary relatives, the author's argument draws more attention to how we, as humans, ought to act as individuals, ought to behave as communities and ought to respect the frail and puzzling mystery of life on our lonely ball of rock that spins through the great dark.



C-ape-able of Deciding Personhood?

Jennifer Vonk

Clearly, the legal ramifications of great ape personhood are of critical importance in the current climate. Apes have suffered greatly at the hands of humans, both in terms of habitat loss and extermination in the wild and through the practice of captivity. Fortunately, issues of animal welfare have reached the forefront of captive species management discussions and an increased awareness of the destruction humans wreak on the environment has led to increased conservation of natural habitats. Thompson takes an interesting and useful approach by attempting to translate science regarding ape minds into useful rhetoric for legal decisions regarding ape personhood. He skillfully articulates the challenges of applying science in an arena where scientific evidence is subservient to the oxymoron of subjective rationality.

This goal to inspire a scientific approach to operationalizing autonomy is worthwhile. Beyond the legal debate on ape personhood, the result could inform the evolutionary trajectory of conscious awareness and intelligence, and provide insights regarding the pressures that were likely in place to select such capacities. Thompson raises the right questions but provides few answers. In fairness, he made it clear that these are questions for scientists. However, it would have been ideal to mine more heavily the rich wealth of information from comparative researchers in making recommendations for future researchers and legal enforcers alike.

Thompson stresses the importance of autonomy or the power to make “independent choices” in defining personhood. However, it is never really clear what the choices should be independent of. Even human choices are not made “independently.” Indeed, the argument over whether humans exhibit free will continues to rage (e.g., Willoughby, et al., 2018). Thompson astutely hones in on a disconcerting aspect of King’s (2015) autonomy definition – the idea that behavior is directed on “some non-observable internal cognitive process.” The question of how to measure internal processes is one that continues to plague comparative psychologists despite decades of research directed precisely to this question. Thompson cites Beauchamp and Wobber’s (2014) definition of autonomy that includes the components, “intentional, adequately informed and free of controlling influences.” However, it seems that “intentional” and “free of controlling influences” are related, if not dependent, processes. Furthermore, any act/decision is controlled by both external and internal factors, such as personality traits and genes, making it impossible to argue that any person is free of such influences.

Later, Thompson introduces the concepts of sentience and rationality to the definition of autonomy, but it is not clear how these concepts fit Beauchamp and Wobber’s definition. Sentience is defined inconsistently across disciplines (Duncan, 2006), while the question of whether animals exhibit rationality has been hotly debated (e.g., Hurley & Nudds, 2006). It seems that the ‘adequately informed’ component requires metacognition, and ‘intentionality’ requires planning though neither construct is discussed. I agree with Thompson that innovation, altruism, self-control, and defiance are related to autonomy. However, although he briefly alludes to Beran and Hopkins’ (2018) work on self-control, the methodology and implications are not evaluated. Thompson could have written a more impactful piece by providing some explicit guidelines for how future research can appeal to legal arguments.

Thompson suggests the simple and popular two-alternative-forced choice test for assessing preferences in orangutans (and other nonverbal beings) where differential attention or looking is measured rather than explicit choices. However, Thompson neglects to consider that other species may not view two-dimensional images as representations of real life objects or environments. Extensive work on this topic reveals mixed results – even for apes (Watanabe & Aust, 2017). Furthermore, it is difficult to imagine two-dimensional representations that could adequately convey differences between a captive orangutan’s current zoo habitat and her yet unexperienced sanctuary option. It is also commonplace but dangerous to assume that sanctuaries always provide better environments for animals than zoos do.

It is interesting that the attorney general of Buenos Aires would claim that a court case decision in favor of an orangutan would sound the death knell on Darwin's theory of evolution. Quite the contrary – Darwin is immortalized for his work suggesting that differences between humans and other species were “of degree rather than of kind,” thus advocating the idea of continuity between humans and other species, especially with other apes. Clearly, it is misinformed to talk of humans as descended from monkeys or monkeys from humans given that all extant species evolved from a common ancestor, not from each other. The goal should never be to show superiority or inferiority on the basis of an evolutionary lineage but rather to show differences that are relevant to decisions that need to be made. Although Thompson references his lengthy response to the attorney general in which he made the valid point that “evolution is not a system of ethics...and...should not be used to make ethical decisions,” he misses an opportunity to invalidate such arguments here. Furthermore, there are some common biases that permeate Thompson's discussion that are troublesome. I struggle to understand why arguments about reducing suffering and designing spaces ideal for different species should be specific to apes.

One issue not addressed by Thompson is that of ownership. It is the case that any captive animal must have a human caretaker or spokesperson in order to live safely within human society. So if we grant personhood, autonomy – however we define it – to nonhumans, who is responsible for them and for implementing the decisions made by the courts? It seems somewhat naïve, or at least premature, to eschew the concept of nonhumans as property of humans. Admittedly, the discussion of the type of change that is required to overthrow reliance on precedence and imagine a better world – one in which humans do not deem themselves superior to all other species – can only become a reality if a movement to change perceptions is initiated by autonomous, informed and intentional decisions. Perhaps my favorite line of the piece is “Maybe our ethics should be larger than just our own self-interest.” Interestingly, this quote pertains not just to decisions humans make regarding other species, but the decisions that they make regarding each other as well. Perhaps one day we will overcome our own biases and self-interest and choose equality for all.

References

- Beran, Michael J. and William D. Hopkins (2018). Self-Control in chimpanzees relates to general intelligence. *Current Biology*, doi: 10.1016/j.cub.2017.12.043
- Beauchamp, T.L. & Wobber, V. (2014). Autonomy in chimpanzees. *Theoretical Medical Bioethics*, 35: 117. <https://doi.org/10.1007/s11017-014-9287-3>
- Duncan, I. J. H. (2006). The changing concept of animal sentience. *Applied Animal Behaviour Science*, 100(1-2), 11-19. doi:<http://dx.doi.org/10.1016/j.applanim.2006.04.011>
- Hurley, S., & Nudds, M. (2006). The questions of animal rationality: Theory and evidence. In S. Hurley, & M. Nudds (Eds.), *Rational animals?* (pp. 1-83) Oxford University Press, New York, NY. doi:<http://dx.doi.org/10.1093/acprof:oso/9780198528272.003.0001>
- King, James. Affidavit of James King at 3–4, Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery, No. 162358/2015. N.Y. Sup. Ct. N.Y. Cty., NYSCEF No. 31. Filed Dec. 2, 2015.
- Watanabe, S., & Aust, U. (2017). Object and picture perception. In J. Call, G. M. Burghardt, I. M. Pepperberg, C. T. Snowdon & T. Zentall (Eds.), *APA handbook of comparative psychology: Perception, learning, and cognition (vol. 2)* (pp. 117-140) American Psychological Association, Washington, DC. doi:<http://dx.doi.org/10.1037/0000012-006>
- Willoughby, E. A., Love, A. C., McGue, M., Iacono, W. G., Quigley, J., & Lee, J. J. (2018). Free will, determinism, and intuitive judgments about the heritability of behavior. *Behavior Genetics*, doi:<http://dx.doi.org/10.1007/s10519-018-9931-1>

Edwin J.C. van Leeuwen and Lysanne Snijders

“Knowledge is power, but only wisdom is liberty.”

— Will Durant

Shawn Thompson’s essay provides an inspiring and thought-provoking perspective on the legal fight for acknowledgement of the fundamental right to bodily liberty for autonomous species, in this case great apes. Thompson specifically calls upon science to assist the Non-Human Rights Project (NhRP) in their groundbreaking explication of possibly the most embarrassing “blind spot” of our time: regarding (autonomous) animals as “things.”

Central in Thompson’s treatise is the question: ‘How can research be designed to define autonomy more clearly and to demonstrate autonomy in a stronger way to the court system?’ Here, Thompson’s emphasis, in line with the NhRP, is on chimpanzees – the species with which humans share more than 98% of their DNA, and for which an impressive body of affidavits with respect to their capacities and propensities has already been compiled by world-leading contemporary primatologists. We scientists progressively understand the intricate and intelligent modes in which chimpanzees perceive and act in this world as ends in themselves, even to the extent that we conclude that the differences between the human and chimpanzee species are merely one of degree, not kind. For example, chimpanzees are self-aware, empathize with victims of violence, plan for the future and mourn their dead. Yet, these insights do not mean a thing for chimpanzees’ fundamental rights if we cannot translate them into terms that speak to the court.

Thompson, therefore, outlines four domains in which research could synchronize with the court, also by him referred to as the “Pillars of Autonomy”: innovativeness, altruism, self-control and resistance. Thompson rightfully points out that current evidence already speaks to chimpanzees’ capacity to innovate beyond what is endowed upon them by genetic and environmental influences – a capacity that illustrates chimpanzees’ pro-active being-in-the-world. With respect to the other domains, the current evidence might be equally substantial, although more examples may better serve the purpose of the whole endeavor: convincing the judge that chimpanzees are sentient, autonomous *beings*, who can be ‘wronged.’

In an attempt to provide more convincing examples, thereby following Thompson’s emphasis on the importance of scrutinizing beings’ behavior in light of their susceptibility to “controlling influences,” we *would* point to chimpanzees’ rational decisions against group pressure (anti-conformist), their ability to restrain themselves from choosing immediate rewards when future rewards may be superior, and their unyielding stubbornness when they *choose* to mourn their loved ones in the face of both conspecific pressure (i.e., the group moves on) and human efforts to control the scene (i.e., luring the chimpanzees away in order to be able to retrieve the body from the enclosure). We *would*; if it wasn’t for the emerging picture that it is apparently insufficient to provide evidence of beings’ ability to act autonomously in the world for the plea for basic rights to be honored. In fact, judges do not appear to question that

chimpanzees have the capacities to be considered as autonomous beings. So where does that leave science?

Lacking the potentially fruitful possibility to sit down with the judges and directly ask them what evidence would sway them in favor of granting basic rights to non-human beings, we follow Thompson's advice and contemplate on how best to translate scientific insights into legal language. One strategy could be to apply the scientific method to understand the legal system itself, or particularly, how judges think, evaluate and decide. We could, for instance, conduct experiments in which judges are blinded to the identity of the *habeas corpus* applicant: what would it take for the judge to consider the applicant as "person"? Which prerequisites for personhood would turn out to be fundamental? By exposing the considerations crucial to judges' rulings in favor of personhood, such experiments could guide the endeavor of pleading for non-human rights in the real courtroom. A related scientific application could entail the scrutiny of judges' previous rulings in relevant cases by means of established tools for qualitative research (e.g., based on the "grounded theory") or even sophisticated algorithms designed to detect logical patterns in written text. This "know thy opponent" approach might generate valuable insights that can be used for expediently formulating the legal arguments accompanying the *habeas corpus* filings.

Additionally, it might be worth contemplating how one might build measures into the legal system to make judgments more objective, e.g., in regard to the identity of the applicant. Law and science both aim to be rational and objective, but where science has introduced double blind peer review (i.e., the identities of all stakeholders involved remain anonymous), Law may still be tainted by the (implicit) biases that humans invariably possess. Such biases do not merely come in conspicuous forms like speciesism, but can also subtly jeopardize objectivity through tendencies to decide conservatively rather than liberally. For a judge to rule *against* a non-human *habeas corpus* filing means to go-with-the-flow, to reiterate the status-quo. For a judge to rule in *favor* of this same *habeas corpus* filing means to stand out, to risk not only strange looks by fellow judges, but possibly also society's scorn more generally.

Another strategy by which science could aid the fight for non-human animal rights might, therefore, be to portray the effects of granting fundamental rights to (certain) chimpanzees on society's functioning. "Will my ruling cause a ruckus?" may plausibly be a question floating through judges' minds while contemplating the *habeas corpus* plea for chimpanzees. Fear for consequences or even repercussions is a deep-seated trait in social species, including – or perhaps better said: especially for – humans, and may thus represent an (implicit) bias in decisions with potentially high-stake ramifications. By modeling the socio-economic effects for different versions and magnitudes of judges' rulings, we may be able to, implicitly, weigh down the angst component contributing to judges' current tendency towards conservative decisions. Effectively, we would create a situation in which less bravery is required to rule in favor of non-human rights by illustrating just how "normal" a society could function in which some or even all autonomous species have been granted fundamental rights. It's perhaps not the way a court of law should work, but in pursuit of identifying one of the most embarrassing "blind spots" of our time, we may be justified in applying some unconventional approaches.

In conjunction, our suggestions in line with Thompson’s advice to calibrate the scientific enterprise with the legal system could hopefully serve as an impetus to generate a more encompassing “think-tank” with the aim to explore the poignant issue of transforming the legal status of (autonomous) non-human animals from “things” to “persons.” With an open mind, and in unison with all people regardless of (scientific) background, we may go beyond mere *knowledge* on the extent of a being’s sentience toward *wisdom* with respect to the living force that binds us.

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Leif Cocks

This essay is an insightful analysis by Shawn Thompson. In particular, his comparison between scientific and legal principles, surrounding such words as ‘person’ and ‘autonomy’ are noteworthy. His insight can only benefit the quest for non-human rights. As a knowledgeable ‘outsider,’ Thompson brings a unique and insightful perspective linking two disciplines – law and science. Most profoundly Thompson exposes an important fallacy. That is, how the basis of human rights, used to exclude non-humans, is based on an idealist image of ourselves, a supra-rational human acting on pure reason, that in reality few humans live up to. In other words, we hold a falsely high threshold for rights that in reality would exclude many, if not most humans. Importantly, Thompson also exposes the intellectual weakness of those who often argue against the expansion of rights, whether to a different race, sex or species – that is, how the expansion of rights would reduce the rights of those who currently gain privilege from the denial of their rights to others. Like Thompson, I hope that with a new generation that this moral and intellectual conceit will become so obvious that it will be finally consigned to the history books.

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How to Resist Anxiety When You Write an Overly Ambitious Article about Science, the Law and Animal Rights

Response to Comments, by Shawn Thompson

In reply to the comments to my article, maybe I should explain why I don’t feel anxious about the expediency of employing science to win legal rights for autonomous species like apes, elephants and dolphins.

Yes, it is a big world of animal rights, with many different living creatures who deserve fair treatment.

And, yes, autonomous species should not be valued just by how they are like human beings. I would somewhat playfully suggest instead that human beings should be valued by how they are like apes and have written elsewhere about how useful it is to understand our ape kin to get some clarity in our own lives. Those somewhat playful comments aside, apes and human beings have some startling similarities and some startling differences. In court, the argument that apes are “like” human beings rather

than unlike human beings is a legal argument for equality. Creatures who are alike deserve to be treated alike. It would be a more difficult argument to propose that creatures who are different, deserve, on the basis of their differences, to be treated alike. We don't have to accept a simple notion of similarity to recognize that it may be useful as an argument to persuade those who need a justification they believe is reasonable. Personally, I think it would be more reasonable to value autonomous species on terms detached from the interests of human beings, as part of one larger and harmonious community of living creatures. The primatologist and philosophers whom I revere are the ones who understand how intelligent species are not mere reflections in the mirror of human nature and who have the courage to take that position against popular sentiment despite the consequences.

And yes, two hundred years ago the philosopher Immanuel Kant (1724-1804) may have dismissed animals for not being rational, self-conscious or autonomous, although he also classes human beings as animals, but animals with the capacity for reason. And yet I would argue that the usefulness of Kant is still alive now in that his ideas can surely accommodate new information, such as evidence that intelligent species are self-conscious and autonomous that was produced after his death. We can imagine that Kant is reasonable enough to accept new evidence and to allow his thought to be adaptable.

But, mainly, for the purposes of my article, I took the position that it is important to pick your battles, your time and your place. Steven Wise of the U.S. Nonhuman Rights Project has done that and the basis of my article comes from what I learned from him. Wise has found an ingenious way to use the legal system to possibly win personhood rights for autonomous species using the rules of rationality of that legal system. After my conversation with Wise in 2015, I realized that I had to grapple with Immanuel Kant, however unwilling I was to do that. I have now read more about Kant than I would ever wish to, making far less progress than would justify the effort. I blame Steven Wise totally for that ordeal.

But why personhood rights? Some comments to my article argue that personhood rights are not the best protection for animals. Some comments talk about the alternative of the legal protection of legislation against cruelty to animals. And one of the objections in the comments is that a legal focus on winning rights for autonomous species neglects the rights of all other animals.

When I put these additional issues to Steven Wise while he was taking a break from court in December in San Francisco, he responded by email that personhood rights are valuable for autonomous species for the same reason that human beings put the highest value on them. "They are the best protection," Wise said, "for nonhuman animals in the way that personhood is the best protection for human animals. That is why both the Universal Declaration of Human Rights says in Article 6 that 'Everyone has the right to recognition everywhere as a person before the law' and why the International Convention on Social and Political Rights says in Article 16 that 'Everyone shall have the right to recognition everywhere as a person before the law.' Without recognition as a 'person' no one has the capacity for the legal rights that protect them. Personhood," says Wise, "is the foundation for rights and enforceable protections." Wise

then playfully challenges anyone who doesn't believe this point to demonstrate their principles by surrendering their personhood rights.

I didn't spend time in my article examining the benefits of legal personhood focused as I was on how to adapt science to create stronger support in court to win a *habeas corpus* application for autonomous species. But, in response to the comments, it is worth observing that the opponents in court to a *habeas corpus* application for intelligent species also argue in support of the alternative of existing animal welfare or anti-cruelty legislation. They argue for anti-cruelty legislation because they know how much more limited it is and less threatening to the status quo than personhood rights. Yes, more effort could be made to expand anti-cruelty legislation, but, practically, there is likely a significant limit to the extent of rights that could be won by changing this legislation.

The issue of anti-cruelty legislation was discussed in late December 2018 in connection with an elephant named Happy in an article by Brandon Keim posted online at *The Atlantic* magazine. The case of the elephant is an example that what seems cruel treatment to some, seems to be a ridiculous sentimentality to others. Wise, in his court cases, describes the conditions suffered by intelligent species in a way that reflects the greater capacity for suffering in the context of consciousness and personhood. Wise argued in a *habeas corpus* hearing before The New York Supreme Court in December 2018 that the forty-seven-year-old Asian elephant who was held in a kind of solitary confinement at the Bronx Zoo deserves her freedom. "The proceeding," says Wise, "was the world's first *habeas corpus* hearing on behalf of an elephant and the second *habeas corpus* hearing on behalf of a nonhuman animal in the U.S., both of which were secured by the Nonhuman Rights Project. In our argument, we focused on why an autonomous being such as Happy is a legal person with the fundamental right to bodily liberty protected by a common law writ of *habeas corpus*." It is a crucial legal point that the principles of the law protect liberty and autonomy. "Courts," Wise told me, "value autonomy and it should therefore be protected wherever it is found." Keim's article reviews the progress of anti-cruelty legislation in the United States from a misdemeanor decades ago, to a felony, but that progress is limited. To make that point, Keim quotes Chris Green, the executive director of Harvard Law School's Animal Law and Policy Program, as saying, "In the vast majority of jurisdictions, if someone beats your dog to death in front of you, all you can sue him for is the cost of buying another dog." Keim adds that "Animal-welfare laws also depend on government intervention. Citizens can't file suit on behalf of animals they don't own. Animal-welfare laws fall short of actual rights." Keim cites a news release after the December hearing (which is awaiting adjudication in 2019) from the owner of the Bronx Zoo, the Wildlife Conservation Society, that the Nonhuman Rights Project lawsuit over the elephant is "an academic exercise" intended to "promote their radical philosophical view of 'personhood.'" Keim says the society insists that the way Happy is held in captivity in the zoo complies with the existing animal welfare standards. In response, Wise, with the disciplined focus of a lawyer, says that the Nonhuman Rights Project insists that the manner in which Happy is being treated at the Bronx Zoo is "irrelevant to the issue of whether she may be illegally imprisoned, just as it would be irrelevant to the issue of whether a human being may be illegally imprisoned." Even if the elephant were being treated well, that does not justify incarceration.

In contrast to animal welfare legislation, personhood rights, if they were won in court for autonomous species, would likely begin with the right to bodily liberty, which was one of the three rights proposed in A Declaration of Great Apes (1993) promoted by the Great Ape Project. The other two rights proposed were the right to life and the prohibition of torture. Anti-cruelty legislation does not go that far. In general, anti-cruelty legislation serves the interests of human beings by allowing animals to be killed, imprisoned and deprived of a full and meaningful life. Personhood rights go beyond the limited concept of cruelty, beyond what is merely convenient for human beings, beyond the limited legal duties of human beings to animals, to a type of basic equality. This equality is radical and shocking to those who believe in the unrestricted rights of human beings to do what they want to the rest of the natural world.

My proposal was based on an expedient use of science and the law to support the initiative of Steven Wise and a team of lawyers working through the Nonhuman Rights Project to accomplish the unthinkable, a radical change to extend to other living creatures the basic rights that human beings have reserved for themselves alone. That would not only be a legal victory and a moral victory, but a huge symbolic victory for a change in the perception of the relationship between human beings and the natural world. Society in general might find this kind of a decision in court baffling and incomprehensible. But the law can be a mirror, as it was with Lord Mansfield ruling against slavery, that reflects a future towards which we should want to strive.

So, I don't feel anxious about the expediency of using the rational systems of either natural science or the law that I might not agree with or an obscure philosopher from two hundred years ago that I struggle to understand, to get justice for intelligent species now. Win this battle first, then move on to the next battle, to gradually enlarge the ethical treatment of living creatures.

As I said, my proposal was "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."

Kant is credited with helping us see the crucial role that the principle of autonomy should play in understanding the essence of a human being and the means to act ethically. Some thinkers even credit Kant with "inventing" autonomy.

Kant's principle of autonomy, as animal rights lawyer Steven Wise realized, also underlies the rationality of the legal system and thus opens a way to argue for rights of intelligent species as autonomous creatures. But that is not proposing to actually argue Kant in court, where a lawyer might be surprised to face a judge who is also a scholar of Kant. It is also not proposing that the whole of Kant's philosophy should be the circumference of the argument. Instead, studying Kant would be useful to help sharpen specifically the understanding of how autonomy could be argued in court and how research could be designed to support an argument of autonomy in intelligent species. There are scholars of Kant like Paul Guyer and J.B. Schneewind who could develop this better than I can.

Steven Wise used an *amicus* brief in court in 2018 that helps define how 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.’” The idea that autonomy is “free of controlling influences” is also a principle of Kant. The 2018 brief specifically mentions Kant.

Building on concepts like this that are explained in more detail in my article, I proposed four possible conceptualizations as a starting point in a discussion of how research might be designed to support an autonomy argument in court: 1. innovation, 2. altruism, 3. self-control, and 4. resistance, disobedience, or defiance. I should emphasize again that this was intended as the starting point of a discussion, with some specific examples to stimulate discussion. I was not anxious about the provisional nature of this proposal or the possibility that others could develop other conceptualizations that would also support a legal argument of autonomy. There are scientists who can develop this better than I can.

I cautioned that the four possible conceptualizations I offered “are typically disruptions, paradoxes and enigmas and thus difficult to understand and to study with the tools of rationality.” If true autonomy is a radical departure and break from what is known, like dark matter or dark energy or black holes or the origin of time, it may be hard to explain and accept in terms of what is known. But, then, this kind of a concentration in research might also open new frontiers in understanding other species.

Some comments to my article raised doubt that intelligent species can be autonomous and self-governing in the Kantian sense, or that they can make moral decisions, which, as Wise says, is also true of a huge proportion of human beings “who are not autonomous in the Kantian sense.” The question of autonomy in apes has fascinated me for years and it is a question I often ask scientists and zoo keepers who work directly with orangutans. The answers I hear are yes, orangutans can make moral decisions, which is why I put altruism on the list to investigate. As well, Jane Goodall, for one, claims in *The Great Ape Project: Equality Beyond Humanity* (1993) that chimpanzees are “capable of true altruism.” For human beings, including scientists, that will likely always be a debatable point, but at least it deserves genuine consideration. Meanwhile, the Nonhuman Rights Project has already supplied hundreds of pages of affidavits from respected chimpanzee and elephant scientists that assert that chimpanzees and elephants are indeed autonomous. If Wise and the Nonhuman Rights Project win the battle for autonomous species in court, it would also be a crucial enlargement of the principle of autonomy for us to absorb beyond its current narrowly human scope.

I also spent some time, in an article with an apparent focus on rationality, on the irrational side of the court system, which Steven Wise knows well, and how progress through the court system needs to consider that irrationality as well in order to win in court through the good fortune of finding the boldness of a courageous judge, the next Lord Mansfield.

What I called an “overlap” between the different domains of rationality in natural science and the law, some commentators, quite rightly, called, in stronger language, either a “false divide” or a “schism.” The point is that there may be irreconcilable differences between the rationality of the two domains of natural science and the law, but I also don’t feel anxious about this intellectual problem at the moment, simply because it does not seem to be an issue in court. Besides, conflict and difference may be an engine of innovation and creativity. Harmonizing the different rational domains might impoverish us. Out of their clash, might come new ideas.

Yet, I have to admit that I am not without anxiety at all. At sixty-seven years of age and teaching in university a younger generation that is absorbed in its own autonomies, I think too much about using time wisely. I have trekked through the jungles of Borneo to see the orangutans who are disappearing as a species from the planet. It is incredible to watch these fellow creatures in a tropical forest where they make their own decisions in a life that they fit to themselves. Among the marvels I have seen—and would miss – are the unique acrobatic pleasures of orangutans, their affinity for humor and laughter, their deep and uncanny curiosity. The people who know these things about orangutans know orangutans as individuals and not just abstract objects for the human intellect. I am anxious about the loss of this, about the path of the extinction of species down which we are travelling at a terrible speed. The clock is ticking. The victories that may come will be too little, too late. And for those anxieties of time and of extinction I have no answers.

Bibliography

- Amicus curiae* on behalf of Tommy submitted to the Court of Appeals, New York State. 162358/15 and 150149/16. Compiled Feb. 23, 2018.
- Cavalieri, Paola and Peter Singer, eds. *The Great Ape Project: Equality Beyond Humanity*. New York: St. Martin’s Griffin, 1993.
- Guyer, Paul. *Kant*, 2nd edition. New York: Routledge, 2014.
- Keim, Brandon. “An Elephant’s Personhood on Trial.” *The Atlantic* online, Dec. 28, 2018. <https://www.theatlantic.com/science/archive/2018/12/happy-elephant-personhood/578818/?fbclid=IwAR20ezfyCJ3-wKvwNv8AJUMrIIHBH87iCZzsbnUQQNK6-oL93eKvqUM1vM>
- Schneewind, J.B. *The Invention of Autonomy: a history of modern moral philosophy*. Cambridge: Cambridge University Press, 1998.
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Continuing in this effort to cross disciplinary boundaries, it is anticipated that an upcoming issue will focus on consciousness, but there is no open call for papers at this point.