

COULD A CHIMPANZEE OR BONOBO TAKE THE STAND?

By
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The federal competency standards for witnesses testifying on the stand are fairly liberal. Witnesses must be able to distinguish right from wrong, understand the concept of punishment, perceive events, and remember those events to communicate them in the future. Chimpanzees and bonobos are able to do all of these things to some degree, and therefore, arguably satisfy the federal competency standards. In some situations, this indicates that these nonhuman apes should be allowed to testify in court, subject to the federal competency and interpreter rules.

I. INTRODUCTION

Chimpanzees and bonobos resemble human beings more than any other living nonhuman animals.¹ Chimpanzee and bonobo DNA is more closely related to human DNA than to the DNA of other apes.² In fact, at least one scientist has proposed that humans are, for all intents and purposes, a third species of chimpanzee.³ One of the highlighted differences between humans and their closest ape relatives is the lack of proof that nonhuman apes can produce complex tools, calendars or religions.⁴ These factors, however, are abstract skills which are not required to establish legal personhood or legal standing. Young

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¹ Sue Savage-Rumbaugh et al., *Apes, Language and the Human Mind* 4 (Oxford U. Press 1998); Dale Peterson & Jane Goodall, *Visions of Caliban: On Chimpanzees and People* 314 (Houghton Mifflin Co. 1993).

² Human and chimpanzee DNA is more than 98.3 percent identical. Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* 132 (Perseus Books 2000).

³ Roger Fouts & Stephen Tukul Mills, *Next of Kin: What Chimpanzees Have Taught Me About Who We Are* 55 (William Morrow & Co., Inc. 1997) (discussing physiologist Jared Diamond's proposal that humans are a different species of chimpanzee). For further reading on the subject, see generally Jared Diamond, *The Third Chimpanzee: The Evolution and Future of the Human Animal* (Harper Collins 1992).

⁴ Savage-Rumbaugh, *supra* n. 1, at 4. For further reading about the "simple" tools made and used by chimpanzees, see Peterson & Goodall, *supra* n. 1, at 41; Jane Goodall, *In the Shadow of Man* 278-79 (Houghton Mifflin Co. 1988); Wise, *supra* n. 2, at 191; A. Whiten et al., *Cultures in Chimpanzees*, 399 *Nature* 682 (1999).

children and many adults would be unable to create a calendar without being taught what it represents, nor is every human religious. In today's society, these things are not mandatory for legal standing or legal personhood,⁵ nor are they required for proof of competency to testify in a court. Rather, the requirements for witness competency are much lower than those scientific factors often used to illuminate the differences between humans and chimpanzees and bonobos. Since the Federal Rules of Evidence do not set up standards that a chimpanzee or bonobo could not potentially meet, the rules do not explicitly deny chimpanzees or bonobos the ability to testify in court.

This note addresses what it would take to allow a chimpanzee or bonobo to testify on the witness stand in federal court. Section II lays out the fundamentals of bonobo and chimpanzee intelligence in the context of what would be required for a witness to be found competent to testify. Section III outlines the present hurdles for a human witness to testify in court. Finally, Section IV applies current knowledge regarding chimpanzee and bonobo intelligence and communicative abilities to the legal requirements for competency to determine whether such nonhumans measure up to the standards for federal witnesses.

II. FUNDAMENTALS OF CHIMPANZEE AND BONOBO BEHAVIOR AND INTELLIGENCE

Bonobos and chimpanzees are capable of experiencing and expressing emotion.⁶ While many animals can learn to do tricks in response to spoken commands, it has been shown that bonobos and chimpanzees go beyond merely responding to verbal commands and actually understand how language works and may be used.⁷ Some chimpanzees and bonobos are able to interpret spoken sentences that they hear for the first time and they can learn to read and use printed symbols to talk to humans.⁸ They have the capacity to deceive and can distinguish truths from non-truths.⁹ Bonobos and chimpanzees have also been shown to remember things in the past and convey those remembrances through language.¹⁰ These discoveries are not new concepts for scientists; Darwin theorized in *The Descent of Man* that apes had the ability to reason and remember, as well as express emotions through communication.¹¹ But recently, and perhaps most importantly, scien-

⁵ See Wise, *supra* n. 2, at 179-81.

⁶ Savage-Rumbaugh, *supra* n. 1, at 4; Wise, *supra* n. 2, at 183. Chimpanzees are known to possess emotions such as sadness, joy, fear, anxiety, and even a sense of humor. Peterson & Goodall, *supra* n. 1, at 314. Furthermore, chimpanzees kiss, embrace one another, and hold hands. *Id.*; Goodall, *supra* n. 4, at 244.

⁷ Savage-Rumbaugh, *supra* n. 1, at 6-7.

⁸ See e.g. *id.* at 7.

⁹ Wise, *supra* n. 2, at 206-07; Fouts, *supra* n. 3, at 46-47, 156.

¹⁰ Savage-Rumbaugh, *supra* n. 1, at 31, 34; Wise, *supra* n. 2, at 183; Fouts & Mills, *supra* n. 3, at 52.

¹¹ Charles Darwin, *The Descent of Man* 105 (photo reprint, Princeton U. Press 1981)(1871); Fouts, *supra* n. 3, at 52.

tists have shown that chimpanzees and bonobos appear to have a theory of mind, show self-awareness, and convey their thoughts and desires through language.¹²

The famous bonobo, Kanzi, broke ground in the area of ape intelligence and comprehension. Kanzi understood complex concepts, not just orders, and he would even question whether things expressed to him by his trainer were true.¹³ He developed and honed his language abilities not from his trainers, but instead in response to growing up around his mother who was being taught the language.¹⁴ Other chimpanzees and bonobos, not just Kanzi, have possessed the idea of purposeful communication.¹⁵

The challenge of humans communicating with chimpanzees and bonobos is not due to the lack of comprehension, intelligence, or communication deficiencies of chimpanzees and bonobos. Nor is it due to the inability for chimpanzees and bonobos to use language. Rather, it is due to a species barrier between humans and the chimpanzees and bonobos. Language and speech are not the same thing; while chimpanzees and bonobos can utilize language and can communicate ideas, they just cannot speak. Because speech is the form of communication most often used by humans, it is difficult for humans to understand species that do not use verbal speech.¹⁶ Each species communicates through a system that is often difficult for other species to understand or imitate. For example, even though an ape can understand spoken language, an ape's vocal tract prevents it from forming human words; similarly, humans have not been able to perfectly imitate the verbal communication utilized by nonhuman apes.¹⁷

In order to bridge this gap, scientists have employed visual communication systems to facilitate interspecies communication. Such systems include pointing to symbols, use of a keyboard, and American Sign Language [ASL] for the apes to communicate to the humans, while still using spoken language to communicate from humans to the apes.¹⁸ Chimpanzees and bonobos have been able to effectively utilize these forms of nonverbal communication, possibly because they have used gestural communication in the wild for millions of years.¹⁹

Nonhuman apes have been able to quickly learn these new forms of communication, combining words and phrases to form new meanings and to expand their communication with humans beyond what

¹² Wise, *supra* n. 2, at 195-99.

¹³ Savage-Rumbaugh, *supra* n. 1, at 8.

¹⁴ *Id.* at 26. Chimpanzees also routinely sign not only to humans, but to other chimpanzees, and have been known to teach sign language to each other. See generally Fouts & Mills, *supra* n. 3.

¹⁵ Savage-Rumbaugh, *supra* n. 1, at 12.

¹⁶ Fouts & Mills, *supra* n. 3, at 26.

¹⁷ Savage-Rumbaugh, *supra* n. 1, at 12.

¹⁸ Fouts & Mills, *supra* n. 3, at 74-75; Savage-Rumbaugh, *supra* n. 1, at 12.

¹⁹ Fouts & Mills, *supra* n. 3, at 97.

they have been “trained” to do.²⁰ These new communication systems have developed in response to the human inability to understand or translate the communication systems established among apes. Therefore, these apes use gestures to cue humans into what they are attempting to communicate.²¹ Washoe, one of the most studied ASL chimpanzees, appears to even understand syntax and grammar, not just how to mimic word symbols.²²

When chimpanzees and bonobos take language “tests” they often come out equal or better than 2 ½ to 3 year-old children.²³ In fact, the methods used to teach apes how to communicate with humans are strikingly similar to the methods used to teach children with mental retardation.²⁴ However, not all scientists have accepted the idea that chimpanzees and bonobos have linguistic skills, as opposed to performative skills.²⁵ This concept is difficult to scientifically determine, but has proven to be a giant hurdle in recognizing the intellectual and communicative abilities of apes.²⁶ These questions have not been answered in the legal or scientific community. However, the dilemma has pushed the envelope of how we define language—either we accept the linguistic continuity between chimpanzees and humans, or we redefine language.²⁷

III. THE CURRENT STATUS OF WITNESS COMPETENCY UNDER THE FEDERAL RULES OF EVIDENCE

For a chimpanzee or bonobo to function as a witness in the United States federal court system, the individual must pass several hurdles from the Federal Rules of Evidence that govern witness testimony. This note focuses on the Federal Rules of Evidence, rather than all state rules, in the interest of brevity, and because many states base their rules of evidence on the federal rules.

A. *Rule 601: General Competency Requirements for Witnesses*

The first general rule of competency for witnesses in the federal courts is Rule 601, which states:

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an

²⁰ Savage-Rumbaugh, *supra* n. 1, at 17–18. Chimpanzees are known to combine signs to creatively describe objects for which they know no symbol. Jane Goodall, *Through a Window: My Thirty Years With The Chimpanzees of Gombe* 22 (Houghton Mifflin 1990). For example, one chimpanzee that was taught sign language described a cucumber as a “green banana;” another chimpanzee referred to Alka Seltzer as a “listen drink;” and another chimpanzee described a Brazil nut as a “rock berry.” *Id.*

²¹ Savage-Rumbaugh, *supra* n.1, at 30.

²² Fouts & Mills, *supra* n. 3, at 102.

²³ Savage-Rumbaugh, *supra* n. 1, at 77.

²⁴ *Id.* at 21.

²⁵ *Id.* at 77.

²⁶ See generally *id.*

²⁷ Fouts & Mills, *supra* n. 3, at 105.

element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.²⁸

The word "person" as it appears in Rule 601 has not been used to prevent any human from testifying as a witness, most likely because all humans are automatically considered "persons" when the term is used in a law. However, prior to the drafting of the Federal Rules of Evidence, some statutes eliminated witnesses from testifying based on factors such as race and religion.²⁹

The drafting of the Federal Rules of Evidence codified the idea that all humans could be witnesses in trials. Rule 601 does not specify any mental or moral qualifications for testifying in federal courts.³⁰ In fact, the drafting of Rule 601 was intended to abolish most of the traditional requirements for competency.³¹ Some courts have not read Rule 601 literally, but rather have construed the rule as creating a rebuttable presumption of a person's competency as a witness.³²

General competency under Rule 601 is a matter of status, rather than a matter of ability. The only two groups of persons specifically rendered incompetent as witnesses by the Federal Rules of Evidence are judges (Rule 605) and jurors (Rule 606).³³ In order to exclude testimony, judges have to go outside of Rule 601 to other rules, such as Rule 602, Rule 603, or Rule 403 to actually exclude a witness.³⁴ Furthermore, an otherwise competent witness under Rule 601 or the common law may be found incompetent and excluded from testifying under Rule 493 in order to promote a social policy, such as protecting the stability of marriage.³⁵

While Rule 601 does not itself provide for exclusion due to mental incapacity or immaturity, the trial judge has discretion for admission of a witness under Rule 601.³⁶ In general, a witness will ordinarily be presumed to have the mental capacity to testify and "[t]rial judges rarely sustain objections to prospective witnesses' competency; a judge will sustain an objection in only an extreme case."³⁷ The capacity to testify may be challenged, however, in three situations: 1) when the proffered witness is an infant; 2) when she is alleged to be insane; or 3)

²⁸ Fed. R. Evid. 601 (West 2000).

²⁹ See e.g. *People v. Hall*, 4 Cal. 399, 399 (Cal. 1854) (interpreting Act Concerning Civil Cases § 394 to mean that non-white persons could not testify for or against a white person).

³⁰ Fed. R. Evid. 603 Advisory Comm. Note (West 2000).

³¹ Edward J. Imwinkelried, *Evidentiary Foundations* 25 (4th ed. LEXIS L. Publ. 1998).

³² *Id.*

³³ *U.S. v. Phibbs*, 999 F.2d 1053, 1069 (6th Cir. 1993).

³⁴ *Id.*

³⁵ See Imwinkelried, *supra* n. 31, at 26.

³⁶ Fed. R. Evid. 601 Advisory Comm. Note (West 2000).

³⁷ Imwinkelried, *supra* n. 31, at 30.

when she is alleged to be intoxicated.³⁸ The mental capacity of the witness under these circumstances is determined by the trial judge as a preliminary question of fact.³⁹

Because it deals with the credibility and weight of testimony, rather than competency, the question of mental incapacity or maturity is particularly suitable to jury decision, subject to judicial authority to review the sufficiency of the evidence.⁴⁰ The standards for moral qualification in practice consist of essentially evaluating a person's truthfulness, usually in the form of a voir dire examination to impress upon the witness her moral duty to testify accurately.⁴¹ However, in *United States v. Mayans*, it was reversible error in violation of 28 U.S.C.S. §1987 (an act governing when an interpreter may be appointed) when the trial court insisted on evaluating the defendant-witness's language skills in the course of the trial itself and in view of the jury since consequences of miscomprehension would have been grave.⁴²

Like the federal system, the states tend to favor admissibility, and any evidence of incompetency goes to the weight of evidence and credibility, rather than admissibility.⁴³ At common law, a prospective witness must possess four abilities to be found competent. The witness must be able to do the following: 1) observe and perceive; 2) remember; 3) relate the narrative to the court in some manner, and; 4) recognize a duty to be truthful.⁴⁴ If a witness lacks one or more of these abilities, she is deemed incompetent to be a witness.⁴⁵

1. Infancy⁴⁶

A very young infant is incompetent to understand the nature of an oath or to narrate with understanding any facts she has seen. Courts have struggled with the question of the age of competency—some setting the age at 7, 10, or 12, while others do not have any presumption.⁴⁷ There is such a great difference in the mental growth of children that it has proved nearly impossible to set a proper age limit.⁴⁸ Therefore, before a witness is permitted to testify, the court should be convinced of two things: 1) that she understands the nature of an oath and the possible consequences of lying; and 2) that she pos-

³⁸ John R. Waltz & Roger C. Park, *Evidence: Cases and Materials* 683 (9th ed., Found. Press 1999).

³⁹ *Id.*

⁴⁰ Fed. R. Evid. 603 Advisory Comm. Note (West 2000).

⁴¹ *Id.*

⁴² *U.S. v. Mayans*, 17 F.3d 1174, 1180 (9th Cir. 1994).

⁴³ See e.g. Ala. R. Evid. Advisory Comm. Note (West 2001); Alaska R. Evid. 601 (1994).

⁴⁴ Imwinkelried, *supra* n. 31, at 25.

⁴⁵ *Id.*

⁴⁶ Since it is unlikely that chimpanzees and bonobos will be compared to intoxicated witnesses, this Note addresses only infancy and mental derangement as challenges to competency available under Rule 601.

⁴⁷ Imwinkelried, *supra* n. 31, at 26.

⁴⁸ Waltz & Park, *supra* n. 38, at 683.

esses the capacities of observation, recollection and communication.⁴⁹ The witness must also be mature enough to offer an intelligent statement regarding the events she witnessed.⁵⁰ The trial judge makes the decision of competence after talking with the child, observing the child, and in some cases, speaking to the child's minister or priest regarding the sufficiency of the oath.⁵¹

In some jurisdictions, the legislature has enacted statutes providing that a child witness is automatically competent in child abuse prosecutions or that the alleged child victim is a competent witness.⁵² In such jurisdictions, there is no need to demonstrate the child's competency and she is permitted to testify.⁵³

2. *Mental Derangement*

Mental derangement can also disqualify a witness from testifying. However, insane witnesses may still be competent if they can pass two tests: "1) knowledge and appreciation of the obligation of an oath and the consequences of testifying falsely"; and 2) the ability to tell an intelligent story about what took place.⁵⁴ If the witness is mentally deranged at the time of the event, but not at the time of trial, that fact may be brought in to affect credibility, but not competency to testify.⁵⁵

B. *Rule 602: Personal Knowledge Requirement for Witnesses*

Once a person is found to be competent to testify under Rule 601, the witness also has to demonstrate she possesses personal knowledge regarding the issue about which she is testifying. In order to possess personal knowledge, as mandated by Rule 602, the witness must show that she could and did perceive that about which she is testifying.

C. *Rule 603: Oath and Affirmation Requirements for Witnesses*

After a witness is found competent and in possession of personal knowledge, under Rule 603, the witness must declare that she "will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty" to speak truthfully.⁵⁶ This rule presently retains flexibility for "religious adults, atheists, conscientious objectors, mental defectives and children."⁵⁷ This flexibility is in the form of an

⁴⁹ Imwinkelried, *supra* n. 31, at 25.

⁵⁰ Waltz & Park, *supra* n. 38, at 683.

⁵¹ *Id.*; Imwinkelried, *supra* n. 31, at 26.

⁵² See e.g. Ohio R. Evid. 601 (limiting child competency hearings to only those less than ten years of age). Compare Tex. R. Evid. 601 (permitting competency hearings for all children to determine if the child has "sufficient intellect" to testify).

⁵³ Imwinkelried, *supra* n. 31 at 26.

⁵⁴ Waltz & Park, *supra* n. 38, at 683.

⁵⁵ *Id.*

⁵⁶ Fed. R. Evid. 603 (West 2000).

⁵⁷ *Id.*

affirmation, rather than an oath, which "is simply a solemn undertaking to tell the truth," for which no verbal formula is required.⁵⁸ For example, an affirmation does not need to include the words "solemnly" or have the witness raise a hand and swear to God that she is telling the truth.⁵⁹ Instead, what is required is any statement indicating that the witness is impressed with the duty to tell the truth and understands that she can be prosecuted for perjury for failure to be truthful.⁶⁰ The purposes of an oath are two-fold in the federal courts. The first is to bind the conscience of the witness. The second is to make the witness amenable to prosecution if she gives perjured testimony.⁶¹

D. Rule 604: Requirements for Interpreters

When a witness is unable to communicate verbally, intelligibly, or in English, the court may appoint or grant an interpreter for the witness. Rule 604 governs the quality of interpreters, requiring the interpreter to be subject to the provisions of the Rules "relating to qualification as an expert and the administration of an oath or affirmation to make a true translation."⁶² The interpreters must be qualified experts under Rule 702.⁶³ The implementation, appointment and compensation of interpreters are governed by Federal Rule of Civil Procedure 43(f) and Federal Rule of Criminal Procedure 28(b).⁶⁴ Similarly, 28 U.S.C. § 1827(d)(Court Interpreters Act) allows district courts to appoint interpreters and determine their competency.⁶⁵

1. General Requirements

In both civil and criminal cases, a party offering a witness with a language problem will generally have to supply an interpreter and pay the interpreter's fee.⁶⁶ Presumably, an indigent criminal defendant may compel the government to pay the fee.⁶⁷ In civil cases, the trial court has the power under Rule 70 to appoint an interpreter, assess the fee against one of the parties, or to provide for payment of the fee from the court's funds.⁶⁸ In the case of an indigent defendant, the appointment of an interpreter is one that is constitutionally required

⁵⁸ *Id.*

⁵⁹ *Moore v. United States*, 348 U.S. 966, 531 (1955); *Gordon v. State*, 778 F.2d 1397, 1400 (D. Idaho 1985).

⁶⁰ *Gordon*, 778 F.2d at 1400.

⁶¹ *Wilcoxon v. United States*, 231 F.2d 384, 387 (D.N.M. 1956).

⁶² Fed. R. Evid. 604 (West 2000).

⁶³ Fed. R. Evid. 702 (West 2000).

⁶⁴ Fed. R. Civ. P. 43(f) (1996); Fed. R. Crim. P. 28(b) (1975).

⁶⁵ See *United States v. Miller*, 806 F.2d 223, 224-25 (10th Cir. 1986); (28 U.S.C. 1827 is the Court Interpreters Act which allows and sets the guidelines for appointments of interpreters in federal court).

⁶⁶ See 28 U.S.C. 1827(g)(4).

⁶⁷ See 28 U.S.C. 1827 (d)(1).

⁶⁸ Alaska R. Evid. Commentary 604 (2000).

under certain circumstances.⁶⁹ A handicapped person—i.e. one that is deaf, mute, or possesses a speech impairment—has the same right to an interpreter as a person speaking a foreign language.⁷⁰ The question of whether a witness can comprehend the proceedings and communicate effectively with counsel hinges on a variety of factors; the trial judge thus has wide discretion under the Court Interpreters Act.⁷¹

2. Availability of Family Members as Interpreters

The general policy of allowing interpreters to testify on behalf of a witness is to find a neutral interpreter who takes an oath of sincerity. However, in situations where a member of the witness's immediate family is the only, or the most feasible, option for the interpreter, courts have allowed that family member to serve as an interpreter.⁷² In *U.S. v. Ball*, the Fifth Circuit determined that it was appropriate for the trial court to look at the nature of the witness's handicap and the availability of a wholly disinterested person when determining if a man's wife could function as his interpreter.⁷³ Similarly, in *U.S. v. Addonizio*, the Third Circuit determined that a wife, absent any obvious motive to distort her husband's testimony, could function as an interpreter.⁷⁴

IV. HOW A CHIMPANZEE OR BONOBO MEETS THESE REQUIREMENTS

A. The Requirement of Personhood

The concept of legal "personhood" has been debated prolifically throughout U.S. history. The definition is always shifting, and, for example, has gone from all white male citizens to include all humans. The term "person" contained in Rule 601 and other rules of evidence is not defined, but it does not explicitly exclude nonhumans from testifying. The rationales for and against calling a chimpanzee a "person" in the Federal Rules of Evidence are numerous and beyond the scope of this note. It is worth noting, though, that such advances in defining who and what can be a person and who can testify have been historically resisted throughout legal history. In *People v. Hall*, the Supreme

⁶⁹ See *U.S. v. Sanchez*, 928 F.2d 1450, 1455 (6th Cir. 1991). The 5th and 6th Amendments to the U.S. Constitution provide for access to counsel. The denial of an interpreter is considered, in some circumstances, a denial of access to effective counsel, in violation of the 5th and 6th Amendments. The Court Interpreters Act does not create new constitutional rights for defendants or extend constitutional safeguards. *U.S. v. Joshi*, 896 F. 2d 1303, 1309 (11th Cir. 1990).

⁷⁰ Alaska R. Evid. Commentary 604 (2000); 28 U.S.C. 1827 (d)(1)(B).

⁷¹ See *U.S. v. Febus*, 218 F.3d 784, 791-92 (7th Cir. 2000).

⁷² *U.S. v. Ball*, 988 F.2d 7, 10 (5th Cir.1993); *U.S. v. Addonizio*, 451 F.2d 49, 68 (3d Cir. 1971).

⁷³ 988 F.2d at 10.

⁷⁴ 451 F.2d at 68.

Court of California resisted pressure to allow a Chinese man to testify stating that,

The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls. This is not a speculation which exists in the excited and over-heated imagination of the patriot and statesman, but it is an actual and present danger.⁷⁵

These same protests will undoubtedly be raised if the argument is made that chimpanzees and bonobos qualify as “persons” under Rule 601. Despite this challenge, looking at the requirements for competency, one can see how close chimpanzees and bonobos come to being able to fulfill the substantive requirements of witness competency. Logically, allowing nonhuman testimony does not automatically require that they be given other rights—all that is determined is whether their testimony is considered reasonably reliable. However, to some individuals, such a finding of reliability could signal a step towards “equal rights of citizenship,” especially given the fact that non-white people were allowed to testify and were then later given full rights of citizenship.⁷⁶

However, setting aside these “slippery slope” arguments, if one looks at the four substantive standards for competency,⁷⁷ chimpanzees and bonobos arguably satisfy them. Chimpanzees and bonobos are able to observe and perceive events that occur in front of them, remember past events, relate information to other individuals, and recognize the difference between truth and falsehood.⁷⁸ It is important to note, however, that while chimpanzees and bonobos meet some level of these four requirements, they have not been shown to rise to the level of an adult human witness. For example, nonhuman apes can remember some things, but it is unknown how much they remember.⁷⁹ Also, while it can be argued that certain chimpanzees and bonobos can tell the difference between truth and falsehood of a certain event, it is unknown (and difficult to prove) whether that individual understands the larger notion of telling the truth.⁸⁰ Therefore, while a nonhuman ape may be able to correct a falsehood presented to her, she may not be able to understand the importance and relevance of telling the truth in every context, or that the human court system imposes a duty of honesty upon her. To disqualify a chimpanzee or bonobo from testifying, one would need to compare the individual ape to one of the disqualified human witnesses.

⁷⁵ 4 Cal. 399, 404 (1854).

⁷⁶ This analogy obviously is an imperfect one considering the many perceived and actual differences between human and non-human apes.

⁷⁷ See *supra* Section III A.

⁷⁸ See Savage-Rumbaugh, *supra* n. 1, at 6–7; Wise, *supra* n. 2, at 206–07; Fouts & Mills, *supra* n. 3, at 47, 156. See generally Section II.

⁷⁹ See Savage-Rumbaugh, *supra* n. 1 at 31, 34.

⁸⁰ See *id.*

B. Are Chimpanzees and Bonobos Comparable to Infants?

Linguistically, chimpanzees and bonobos have been compared to human children.⁸¹ While many scientists balk at this sort of comparison,⁸² it may be useful to employ the comparison when arguing that a chimpanzee or bonobo could testify in court. While the comparison linguistically is usually around the 2 ½ to 3 year range, the comparison morally, physically and intellectually can be taken much further. In jurisdictions where children under the age of 7 have been allowed to testify, strong arguments could be made that the mental and moral development of an individual chimpanzee or bonobo is comparable to those child witnesses.⁸³

One requirement for an infant to testify is the understanding of an oath and the possible consequences of lying. It is presently impossible to scientifically prove that a bonobo or chimpanzee would understand the consequences of lying. This is especially true since the human punishment for perjury is equal to the quality of life that many of these nonhuman apes already endure.⁸⁴ It is difficult to threaten a captive chimpanzee with imprisonment for failing to tell the truth. But, setting the punishment threats aside, it is similarly difficult to know if a young child is able to understand the consequences of lying, aside from her insistence that she does. Therefore, if one could get the chimpanzee or bonobo who is to be a witness to express that she understands the consequences of lying, the nonhuman ape may have a chance at being found competent. An argument could be made, however, that in saying that she understands the consequences of lying, the chimpanzee either: 1) does not understand what she is asserting; or that 2) even if she does understand, she may be lying. But it is important to note that this argument could also be made for children, and even adult, witnesses.

Significantly, there is scientific evidence indicating that nonhuman apes are able to deceive humans and thus appear to at least basically understand the nature of truth and lies.⁸⁵ This lends support to the assertion that chimpanzees could understand the concept of truthfulness in the capacity as a witness. However, it is difficult to determine the full complexity of their understanding, especially without any advantages or disadvantages present—such as food or physical punishment.

⁸¹ *Id* at 77.

⁸² *Id*.

⁸³ It is important to recognize that mental development and the ability to use language are not the same thing. Someone (human or non-human) may speak like a three-year-old, but be able to reason in a much more sophisticated way. To confuse the two is to confuse the level and ability of expression with the level and ability of thinking.

⁸⁴ For further reading on the life and hardships of captive chimpanzees, see generally Peterson & Goodall, *supra* n. 1; Wise, *supra* n. 2.

⁸⁵ See Fouts & Mills, *supra* n. 3, at 47, 156.

C. *Are Chimpanzees and Bonobos Comparable to the Mentally Infirm?*

An opponent of a chimpanzee or bonobo testifying could feasibly compare the nonhuman ape to the mentally infirm. While this comparison is generally inaccurate,⁸⁶ if such a comparison were made, the same tests would apply to determine if the chimpanzee or bonobo would be able to testify—whether the ape had the knowledge and appreciation of the oath and whether the ape was able to tell an intelligent story regarding events that occurred.⁸⁷ The latter factor would depend upon the capacity in which the ape was testifying to determine whether she would be considered able to relate what happened appropriately. For example, if the question was, “who hurt you?” the ape would have little difficulty answering the question to the satisfaction of the judge. However, if the question was, “what happened next?” it may be difficult for the chimpanzee or bonobo to appropriately respond. Therefore, there may be some instances in which the testimony of a chimpanzee or bonobo witness would be reliable enough for a jury to hear, but this same witness might not be able to give further testimony on other matters. In general, however, Rule 601 allows testimony if it could be at all helpful, and the limiting factors on competency—such as the fact that the witness is not human—should go to the weight of the evidence, rather than the admissibility of the testimony.

D. *Are Chimpanzees and Bonobos Able to “Perceive” to Satisfy Rule 602?*

Under Rule 602, the chimpanzee or bonobo witness would have to demonstrate that she could perceive the event about which she is testifying.⁸⁸ Technically, it may not be possible for a nonhuman ape to have “personal knowledge” if she is not legally a “person” under the law. Despite this technicality, science demonstrates that nonhuman apes do have the ability to perceive and retain knowledge.⁸⁹ Obviously, chimpanzees and bonobos can observe what goes on around them and relate those events to the future.⁹⁰ Yet, to recognize this ability as equivalent to human perception would culturally and legally require a

⁸⁶ This comparison is inaccurate because the humans in this category are deficient from what is considered standard and the genetic inheritance is faulty relative to standard human genetic inheritance. Bonobos and chimpanzees, on the other hand, are not similarly deficient; rather they are different because they have different genetic material.

⁸⁷ See Waltz & Park, *supra* n. 38, at 684.

⁸⁸ A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Fed. R. Evid. 602 (1999).

⁸⁹ See *supra* Section II.

⁹⁰ See Savage-Rumbaugh, *supra* n. 1, at 31, 34; Wise, *supra* n. 2, at 206–07; Fouts & Mills, *supra* n. 3, at 45–47.

significant mental leap for many human individuals. Thus, it is necessary to determine precisely what such nonhuman observation must be "equivalent" to. Perhaps observations and resulting testimony would be "equivalent" to human testimony only in the sense that it is basically reliable, while still not being considered "equivalent" in many other senses. As such, it may be possible to allow a nonhuman ape's testimony for the fact of some particular event happening without demanding that the nonhuman witness understand the relevance of that event occurring.

E. Is it Possible to Affirm that a Chimpanzee or Bonobo Recognizes the Purpose of an Oath or Affirmation?

A chimpanzee or bonobo does not have the capacity to verbally exclaim that she understands the purpose of an affirmation.⁹¹ However, this is not required for deaf or mute witnesses⁹² and an interpreter could ask the question and have the nonhuman ape respond in ASL or other means. But, as previously stated, it is impossible to know with certainty that the nonhuman ape recognizes the penalties of lying in a legal system to which she has not ever been a part. Of course, it follows that we can never know with certainty that every human witness understands the meaning of the oath, or is not simply lying when she claims to understand it. Therefore, the troubles affirming that a nonhuman ape recognizes the purpose of an oath or affirmation are analogous to the troubles which are present with human witnesses.

F. Could a Court Appoint an ASL Translator for a Chimpanzee or Bonobo?

A chimpanzee or bonobo can communicate in the same manner that other competent, but verbally challenged, humans communicate. Therefore, it would be within the discretion of a trial judge to appoint an interpreter should an ape be allowed to testify on the stand. Typically, a neutral disinterested party should function as the interpreter.⁹³ Thus, if the individual chimpanzee or bonobo used ASL to communicate, a neutral ASL signer could be used as an interpreter. However, in a case where the chimpanzee or bonobo communicates in a non-traditional manner, the only feasible interpreter might be the nonhuman ape's trainer. While it would depend on the case, the odds are that the trainer would have an interest in the outcome of the case. This interest may not necessarily disqualify the trainer as the interpreter, depending perhaps on the level of interest involved. For example, a trainer charged with a crime who wants to call a chimpanzee to the stand to testify on her behalf would probably not be able to serve as the interpreter. Since the rules do not explicitly exclude members of a

⁹¹ Fouts & Mills, *supra* n. 3, at 26.

⁹² Fed. R. Evid. 603 Advisory Comm. Note (West 2000).

⁹³ *U.S. v. Ball*, 988 F.2d 7, 10 (5th Cir. 1993); *U.S. v. Addonizio*, 451 F.2d 49, 68 (3d Cir. 1971).

family, and courts allow interested parties and family members to serve as interpreters,⁹⁴ it is possible for the nonhuman ape to have a familiar person as the interpreter.

V. UNDER WHAT CIRCUMSTANCES WOULD ONE WANT A CHIMPANZEE OF BONOBO TO TESTIFY?

The issue of nonhuman apes testifying in court has not arisen yet in the federal court system. This may be due to the fact that there are so few chimpanzees or bonobos who can communicate with humans, no one has been brave enough to challenge the fundamental notion of personhood in the witness capacity, or there has not been an occasion for a nonhuman ape to testify regarding something which she has observed or experienced. So, when may a situation arise prompting a chimpanzee or bonobo to take the witness stand?

A. *A Chimpanzee or Bonobo as a Witness to a Crime*

The best chance of getting a nonhuman ape on the witness stand would be if a chimpanzee or bonobo witnessed a crime and could communicate facts of that crime to another person. In this scenario, the nonhuman ape need not understand that a crime had been committed—but rather just be capable of giving reliable, relevant information. The courts prefer live testimony⁹⁵ when dealing with a crime and would therefore probably be more open to the possibility of a nonhuman testifying if she was a witness to the crime.⁹⁶ Additionally, if the chimpanzee or bonobo had evidence that would help the defendant, that defendant's due process rights might be violated if the evidence was excluded from the trial. If nonhuman ape testimony in this scenario was available, the fact that the witness was not human should go to the weight of the ape's testimony.

B. *A Chimpanzee or Bonobo Testifying on Her Own Behalf to Protest Action Being Taken Against Her*

It would be a more difficult scenario if a chimpanzee or bonobo testified on her own behalf to protest some action which either had been, or was going to be, taken against her. Since chimpanzees and bonobos are considered property at this point in time in the American legal system,⁹⁷ the system itself poses challenges for allowing a "thing" to testify when the Rules of Evidence obviously call for a "person." The present push by academics to allow limited personhood to some nonhuman animals may change this position in the future, but at this point in time a "thing" generally may not testify on its own behalf because

⁹⁴ *Ball*, 988 F.2d at 10; *Addonizio*, 451 F.2d at 68.

⁹⁵ "Live testimony" refers to a witness testifying who was present at the time of the crime.

⁹⁶ Fed. R. Evid. 602 Advisory Comm. Note (West 2000).

⁹⁷ *Wise*, *supra* n. 2, at 3-4.

property usually does not retain an interest separate from the interest of its owner.⁹⁸

VI. CONCLUSION

Chimpanzees and bonobos are not considered legal persons. However, it is feasible that a chimpanzee or bonobo could meet the substantive standards for qualifying as a competent federal witness. Chimpanzees and bonobos are able to communicate, they can distinguish right from wrong, and they understand the concept of punishment. These nonhuman apes can also perceive events and remember those events to then communicate in the future.

The famous anthropologist Louis Leakey responded to chimpanzees using tools by stating, "Now we'll have to redefine tools, redefine Man or accept the chimpanzee as Man."⁹⁹ Similarly, in order to prevent chimpanzees and bonobos from taking the stand in a courtroom, courts may have to either redefine competency, arbitrarily define personhood, or find that chimpanzees and bonobos are competent to testify in court.

⁹⁸ See generally Wise, *supra* n. 2.

⁹⁹ Fouts & Mills, *supra* n. 3, at 105.

