

DISMANTLING THE BARRIERS TO LEGAL RIGHTS FOR NONHUMAN ANIMALS*

By
STEVEN M. WISE**

Jerom's Story

Jerom died on February 13, 1996, ten days shy of his fourteenth birthday. The teenager was dull, bloated, depressed, sapped, anemic, and plagued by diarrhea. He had not played in fresh air for eleven years. As a thirty-month-old infant, he had been intentionally infected with HIV virus SF2. At the age of four, he had been infected with another HIV strain, LAV-1. A month short of five, he was infected with yet a third strain, NDK. Throughout the Iran-Contra hearings, almost to the brink of the Gulf War, he sat in the small, windowless, cinder-block Infectious Disease Building. Then he was moved a short distance to a large, windowless, gray concrete box, one of eleven bleak steel-and-concrete cells 9 feet by 11 feet by 8.5 feet. Throughout the war and into Bill Clinton's campaign for a second term as president, he languished in his cell. This was the Chimpanzee Infectious Disease Building. It stood in the Yerkes Regional Primate Research Center near grassy tree-lined Emory University, minutes from the bustle of downtown Atlanta, Georgia.

Entrance to the chimpanzee cell room was through a tiny, cramped, and dirty anteroom bursting with supplies from ceiling to floor. Inside, five cells lined the left wall of the cell room, six lined the right. The front and ceiling of each cell were a checkerboard of steel bars, criss-crossed in three-inch squares. The rear wall was the same gray concrete. A sliding door was set into the eight-inch-thick concrete walls. Each door was punctured by a one-inch-hole, through which a chimpanzee could catch a glimpse of his neighbors. Each cell was flushed by a red rubber fire hose twice a day and was regularly scrubbed with deck brushes and disinfected with chemicals. Incandescent bulbs hanging from the dropped ceiling provided the only light. Sometimes the cold overstrained the box's inadequate heating units, and the temperature would sink below 50°F.

* Address at The Great Hall, Faneuil Hall, Boston, Mass. (Feb. 8, 2000) (videotape on file with *Animal Law*). The information in this address may be found in Steven M. Wise, *Rattling the Cage—Toward Legal Rights for Animals* (Perseus Books 2000).

** Author, *Rattling the Cage—Toward Legal Rights For Animals* and numerous other law review articles regarding granting legal rights to nonhuman animals; President, Center for the Expansion of Fundamental Rights, Inc., Boston, Mass.; President, Wise & Slater-Wise, P.C., Boston, Mass.; teaches "Animal Rights Law" at Harvard Law School (Lecturer at Law, 2000), Vermont Law School (Adjunct Professor since 1990), and John Marshall School of Law (Adjunct Professor since 1999).

Although Jerom lived alone in his cell for the last four months of his life, others were nearby. Twelve other chimpanzees—Buster, Manuel, Arc-tica, Betsie, Joye, Sara, Nathan, Marc, Jonah, Roberta, Hallie, and Tika—filled the bleak cells, living in twos and threes, each with access to two of the cells. But none of them had any regular sense of changes in the weather or the turn of the seasons. None of them knew whether it was day or night. Each slowly rotted in that humid and sunless gray concrete box. Nearly all had been intentionally infected with HIV. Just five months before Jerom died of AIDS born of an amalgam of two of the three HIV strains injected into his blood, Nathan was injected with 40 ml of Jerom's HIV infected blood. Nathan's level of CD4 cells, the white blood cells that HIV destroys, has plummeted. He will probably sicken and die.

The Ancient Greeks denied reason, intellect, thought and belief to every nonhuman animal, and sometimes even the ability to perceive, remember, or experience. Nonhuman animals were nothing but robots. They were wrong. Certainly bonobos (pygmy chimpanzees) and chimpanzees, such as Jerom, are conscious, probably self-conscious, are aware of their surroundings, feel pain and suffer. They act intentionally. They solve problems insightfully. They understand cause and effect. They use and make tools. They live in diverse cultures. They imitate, cooperate, and flourish in rough and tumble societies so political that they are routinely dubbed "Machiavellian." Given the appropriate opportunity and motivation, they can teach, deceive, self-medicate, and empathize. They can learn symbols, words, and numbers. They can count, perhaps to ten. They can add simple numbers and even fractions. They can mentally share the world with humans and others of their own species. They symbolically play.

They absorb words like sponges and three-year-old children. Enculturated by humans, they can understand spoken English at the level of a three-year-old, without being taught. The bonobo, Kanzi, has shown, for example, that when one ball lies before his eyes and another sits in the bedroom, he can differentiate one request to "go get the ball that's in the bedroom" from another to "take the ball to the bedroom." They produce human language like a two-year-old, and the language they produce appears marked by a proto-grammar.

They form complex mental representations. Jane Goodall tells us that Gombe chimpanzees can locate individual trees and termite mounds within an eight to twenty-four square kilometer range. New research reveals that they can mentally represent what others are thinking, especially other chimpanzees and bonobos, in the way that a three and perhaps even a four-year-old child can. In his recent, stunning book, *The Feeling of What Happens*, the neuroscientist, Antonio Damasio, ventures that chimpanzees and bonobos have what he calls an "autobiographical self," a permanent sense of self, stuffed with memories, that allows one a sense of identity over a long period of time and the ability to remember the past, plan for the future, and link them both to the present.

Their minds can also be enculturated and socialized not just by members of their own species, but by human beings. Any doubter should consider the primatologist, Roger Fouts' "Breakfast with Lucy." For months, Fouts, who tutored Lucy, a chimpanzee, in American Sign Language (ASL) at her Oklahoma home would arrive at 8:30 every morning. "Lucy," Fouts said, "would greet me at the front door, give me a hug, and show me into the house. While I sat in the kitchen, [she] would go to the stove, grab the teakettle, and fill it with water from the kitchen sink. She did all this chimpanzee-style, by jumping from counter to counter. After getting two cups and tea bags out of the cupboard, she would brew the tea and serve it like the perfect hostess. Then her ASL lesson would begin."

That humans, bonobos, and chimpanzees share so many advanced cognitive abilities is hardly remarkable when you consider that we share about 99.5% of our working DNA and that a mere fifty genes may account for our mental differences.

But every nonhuman animal, from Lucy to Lassie, is a legal thing. Understanding how this came to pass will help us engage in what Oliver Wendell Holmes, Jr., writing just over on Beacon Hill, called the "deliberate reconsideration" to which every legal rule must eventually be subjected. Studying the law of different legal systems, Professor Alan Watson has concluded that "to a truly astounding degree the law is rooted in the past."

The most common sources from which we quarry our law are the legal rules of earlier times. But when we borrow past law, we borrow the past. Legal rules that may have made good sense when they were fashioned may make good sense no longer. Raised by age to the status of self-evident truths, they may instead perpetrate ancient ignorance, ancient prejudices, and ancient injustices that may once have been less unjust because we knew no better.

The earliest known law is preserved in cuneiform on Sumerian clay tablets. Four thousand years old, these simply assumed that humans could own both nonhuman animals and human slaves. Not until the nineteenth century was human slavery abolished in the West and every human formally cloaked with the legal personhood that signifies eligibility for basic legal rights. Modern thinking about the justice of the "legal thinghood" of nonhuman animals began as slavery was flickering. Yet we, and only we, among the million species that comprise the animal kingdom, are legal persons, entitled to bodily integrity and bodily liberty, those basic legal rights that form a legal suit of armor around our bodies and our personalities and without which we could scarcely flourish. And so the final brick of a great legal wall, begun millenniums ago, was cemented into place. Today, on one side of this legal wall, reside the natural "legal persons": all the members of a single species, *Homo sapiens*. Even our trivial interests are jealously guarded. If you doubt this, sit in on any Small Claims session of the Boston Municipal Court.

But on the other side of this wall lies the refuse of an entire kingdom: all the other animals, chimpanzees and bonobos, turtles and trout, cattle, frogs, and eagles. They are legal things. Because of their "legal thinghood," their most basic and fundamental interests can be intentionally ignored, trampled, and routinely abused at human whim. During the American Civil War, President Lincoln was said to have spurned South Carolina's Peace Commissioners with the statement, "As President, I have no eyes but Constitutional eyes; I cannot see you." In this way, their "legal thinghood" makes nonhuman animals invisible to civil judges.

"All law," said one Roman jurist, "was established for men's sake." And why not? Everything else was. The Ancient Greeks claimed that plants were made for animals and animals made for us and that men were by nature superior to women and that slaves lived for their masters. Horses existed to labor for us and the pig was created for slaughter. Professor Owen Lovejoy thought this "Great Chain of Being," with those below made for those above, "one of the most curious movements of human imbecility."

But most of this nonsense cannot be laid to the Ancients. When Shakespeare was alive, it was claimed that apes and parrots had been put on earth to make us laugh. The year that Washington was born, we were informed that the tides had been created to move ships in and out of ports. Half a decade before the American Civil War, the California Supreme Court barred Chinese witnesses from testifying against whites in court because they were a race "whom nature has marked as inferior and who are incapable of progress or intellectual development beyond a certain point." Two years later, the United States Supreme Court wrote in the infamous Dred Scott case that, at the time of the American Revolution, blacks were thought to exist so far below whites in the scale of created beings that they had no rights that whites were bound to respect. In 1965, a Virginia judge upheld a statute that forbade marriages between people of different races because "Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. . . . The fact that He separated the races shows that he did not intend for the races to mix."

These beliefs about the purposes of horses and oxen, women and races, ocean tides and pigs, parrots, slaves, and apes may appear to be unconnected, but they are not. These believers heard the universe whisper that it had been divinely designed for a single end—themselves. It was not just that we were different from every other animal, but that our value was radically incommensurable with the value of anything else. We humans like to hear that. The Ancient Greeks and Romans heard it. So did the Hebrews and Medieval Christians. But the world that spawned the "legal thinghood" of every nonhuman animal is not our world. It is not *the* world. We know now that the universe in which they believed was imaginary, collapsed beneath a staggering weight of evidence provided by a process of which they knew almost nothing—science. My twelve-year-old daughter, Roma,

understands nature more truly than did the authors of the Five Books of Moses or Plato. Today, the great majority of scientists understand that the universe was not designed for the benefit of human beings; it was not designed at all!

Yet these hoary ideas play a critical role in perpetuating the “legal thinghood” of nonhuman animals. They were the death of Jerom! For the teaching that all law was made for humans, implicit throughout ancient Western law, was incorporated by Justinian into his immensely influential legal codes. Eventually it was absorbed into the legal writings of the great lawyers, judges, and commentators of the English common law and received nearly whole by their American descendants. While philosophers and scientists have recanted, the law has not. The belief that Jerom was somehow placed on this earth for us was what allowed us to torture and kill him.

Upon encountering this great legal wall, one is initially awed by its thickness, its height, and its history of success at all levels of law in maintaining the legal apartheid between humans and every other animal. But its foundations have rotted, for they are unprincipled and arbitrary, unfair and unjust. Its greatest vulnerability is to the unceasing tendency of the common law “to work itself pure,” to borrow from Lord Mansfield, the great English judge so instrumental in crushing human slavery in England. Once great injustice is brought to their attention, common law judges have the duty to place the legal rules that are its source alongside those great overarching principles that have been integral to Western law and justice for hundreds of years—equality, liberty, fairness, and reasoned judicial decision-making—to determine if, in light of what they believe to be true facts and modern values, those rules should be changed.

But if chimpanzees and bonobos are to have basic legal rights, where do they get them? Well, where do we get ours? Nobel Prize-winning Nigerian playwright, Wole Soyinka, recently wrote that one of the best ideas of the last thousand years was that “certain fundamental rights are inherent in all humans.” Soyinka thought that these “human rights” spring from “intuition.”

But “human rights” are bottomed on firmer stuff. They had better be. Simply assigning them to every human may accord with Soyinka’s intuition, the intuitions of most modern judges and legislators, and mine. But many came to regret that their “human rights” were entrusted to the intuitions of Hitler, Stalin, Pol Pot, and Mao Tse Tung. Better we tether “human rights” to some more objective property, because otherwise they inevitably degenerate into articles of faith, fashions that move in and out of favor, and values that can compete with genocide in the political marketplace.

Harvard Professor Orlando Patterson says that today liberty “stands unchallenged as the supreme value of the Western world.” But liberty can mean opposite things. During the Civil War, Abraham Lincoln said that “the shepherd drives the wolf from the sheep’s throat, for which the sheep thanks the shepherd as a liberator, while the wolf

denounces him for the same act as the destroyer of liberty.” Or in Sir Isaiah Berlin’s words, “Freedom for the pike is death to the minnow.” Negative liberty is the liberty of the minnow and the sheep and the emancipated slave. It’s what we would have wanted for Jerom. Positive liberty is the liberty of the pike and the wolf and the slavemaster, a “freedom to.” It is the liberty of those who killed Jerom.

The basic law of nearly every modern nation protects the fundamental negative liberties to bodily integrity and bodily liberty. The Nuremberg Charter, under whose authority the Nazi leaders were prosecuted, allowed mass murder and enslavement to be prosecuted “whether or not in violation of the domestic law of the country where perpetrated.” That is why in his opening speech at the Nuremberg trials, Justice Jackson, the chief prosecutor, argued that the “real complaining party . . . (was) Civilization.” Torture is not allowed. Slavery is not allowed. This is the teaching of liberty.

Basic rights protect basic interests. Most fundamentally, autonomy generates the dignity that produces the basic legal rights to bodily integrity and bodily liberty. These “dignity-rights” form the core of liberty. But the autonomy that judges respect need not be complex. We need to be conscious, have the capacity to desire, act intentionally, and have a sense of self that allows us to experience our lives as being lived by us. Jerom had it. We need not have advanced mental abilities such as a moral sense or a sense of justice. If we did, hundreds of millions of humans would be ineligible.

But it is not autonomy that gives humans dignity-rights, as you might think. It is being human. Consider what occurred on the floor of the United States House of Representatives on February 6, 1837. John Quincy Adams rose to speak. The former President, who spoke in this very hall, asked the Speaker to rule on whether consideration of a petition from twenty-two black slaves was forbidden by the gag rule enacted to forbid just such anti-slavery petitions. Cries for Adams’ expulsion rang out. The patience of many a slave-holder with Adams, who could produce an unending stream of abolitionist petitions, expired. Waddy Thompson, Jr., a combustible South Carolinian, thundered on the House floor that “slaves have no right to petition. They are property, not persons; they have no political rights, and even their civil rights must be claimed through their masters. Having no political rights, Congress has no power in relation to them, and therefore no right to receive their petitions.” His fellow South Carolinian, Henry Laurens Pinckney growled that “he would just as soon have supposed that the gentleman from Massachusetts would have offered a memorial from a cow or horse—for he might as well be the organ of one species of property as another.” To this Adams replied, “Sir . . . if a horse or a dog had the power of speech and of writing, and he should send [me] a petition, [I] would present it to the House.”

Lloyd Weinreb, a Harvard Law School Professor, says there exists “a single uniform rule that the category of persons is coextensive with the class of human beings: All human beings are persons, and all per-

sons are human beings." On the other hand, Professor L.H. Sumner, a philosopher at the University of Toronto, thinks it "quite inconceivable that the extension of any right should coincide exactly with the boundary of our species. It is thus quite inconceivable that we have any rights simply because we are human." Thompson, Pinckney, and a majority of the Dred Scott Court would have thought Weinreb's statement too sweeping: blacks were both human beings and legal things. Adams implied it was too narrow if it excluded writing horses and talking dogs.

Both the law professor and the philosopher are correct. Weinreb accurately describes what the law is. But Sumner tells us what the law ought to be, for the identity of legal persons with human beings is inconceivable, in the sense that it is irrational or incredible. Though we have chimpanzees and bonobos who have remarkable minds, our differences may remain too large for many to appreciate our similarities. We can remedy that by trying to imagine creatures whose minds are even more similar to ours. But once we didn't have to imagine. They lived just over the mountain, down the river, and across the valley. The split from our common ancestor occurred five or six million years ago. One branch led to chimpanzees and bonobos. The other led to the hominids, those erect bi-pedal primates that include you and me and the other species of the genera: *Homo*, *Australopithecus*, *Ardipithecus*, and *Paranthropus*. For perhaps 100,000 years, we may have lived alongside both *Homo erectus*, who had a brain two-thirds the size of ours, were good craftsmen and sailors, who used primitive symbols, and Neandertals, whose brains were larger than ours, who fashioned even more sophisticated tools, and possibly, even probably, spoke a rudimentary language, and developed complex cultures. Imagine that a hardy band of Neandertals tomorrow descends from the mountains of Spanish Andalusia or a tribe of *Homo erectus* emerges from the mists of Java, where they have lived isolated for 3000 generations. May we unhesitatingly capture and exhibit them, breed and eat them, and force them into lethal biomedical research, as we forced Jerom, just because they are not us? Wouldn't we care who they were? The dignity-rights of chimpanzees and bonobos should be granted or withheld in the same way as for *Homo sapiens*, Neandertals, and *Homo erectus*. If we arbitrarily deny basic legal rights to any deserving creature, we place our own most cherished rights in jeopardy.

Enough of liberty. That other pillar of Western justice, equality, also demands the legal personhood of chimpanzees and bonobos. In 1988, as Jerom languished in the small, windowless, cinderblock cell within the Yerkes Regional Primate Research Center with eight more pain-wracked years to live, Yerkes' director, Frederick King, co-authored an article with three Yerkes colleagues in the prestigious journal, *Science*. His justification of the routine, and sometimes lethal, invasions of the bodily liberties and bodily integrities of primates on the ground of their mental and physical similarities to humans will shock any believer in equality. What King utterly failed to understand

was that equality destroyed anywhere threatens equality everywhere. That is why, at the outbreak of civil war, Abraham Lincoln told Congress that “[i]n giving freedom to the slave, we assure freedom to the free.” King’s unembarrassed advocacy of using raw power to exploit nonhuman primates because they are like us rests on a claim that is arbitrary, unprincipled, and corrosive to equality, which requires that likes be treated alike. The equality rights of chimpanzees and bonobos must be determined by comparing them to others who already have rights. If alikes are treated differently, or if unalikes are treated the same, for no good and sufficient reason, equality is violated.

Some have argued that the issue is actually one of kind. Many humans lack such advanced mental abilities as a sense of justice or morality. But, this argument goes, the abilities of the advanced should be imputed to every human, regardless of actual abilities. But this assumes that we should determine how an individual is to be treated, not on the basis of her qualities but on the basis of the qualities of others. You get straight “A”s; I go to Harvard. I jump thirty feet; you go to the Olympics. You look like Elle MacPherson; I get a modeling contract. Unsurprisingly, many people are bothered by this kind of argument.

This does not mean that racial or sexual affirmative action is always wrong or should be illegal. Something like Cohen’s notion of group benefits is occasionally used to correct the effects of prior discrimination in the United States. But group benefits stir intense controversy even in racial affirmative action plans that are anchored in the laudable desire to correct ancient discrimination and achieve racial equality for a long-oppressed minority. But, outside of apartheid-era South Africa or Nazi Germany, group benefits have never been used as a sword instead of a shield.

Some humans—infants, very young children, babies born without major parts of their brains, the severely mentally retarded, and those in persistent vegetative states—are awarded basic legal rights even though they lack autonomy. I applaud this. But if judges recognize the basic rights of these humans, then reject the same rights of chimpanzees and bonobos with much greater autonomy, they act perversely and their decisions cannot be defended except as acts of naked prejudice. At some point the disparity between the “legal thinghood” of a mentally complex chimpanzee or bonobo and the legal personhood of profoundly retarded humans or babies born without brains becomes completely indefensible.

The destruction of the “legal thinghood” even of chimpanzees and bonobos, our closest cousins, will involve a long and difficult struggle. It is the nature of great change to stimulate great opposition. But their anachronistic “legal thinghood” cannot be defended in a society that values equality, liberty, fair play, and rationality in judicial decision-making.

Of course, everything depends upon some knowledge of the inner worlds of chimpanzees, and anyone who has struggled with the protean nature of consciousness and mind knows that we can never know

for sure that even other humans are conscious. As Professor Martha Nussbaum has written, we are only left with “a choice only between a generous construction and a mean spirited construction.” Our choice will not only have a profound impact upon chimpanzees and bonobos, but upon ourselves, for it will either affirm or undermine our commitment to our own most basic principles.

