

July 2013

Nonhuman Rights to Personhood

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Nonhuman Rights Project

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Recommended Citation

Steven M. Wise, *Nonhuman Rights to Personhood*, 30 Pace Env'tl. L. Rev. 1278 (2013)

DOI: <https://doi.org/10.58948/0738-6206.1736>

Available at: <https://digitalcommons.pace.edu/pelr/vol30/iss3/10>

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DYSON LECTURE

Nonhuman Rights to Personhood

STEVEN M. WISE

I. INTRODUCTION

Thank you all for joining us for the second Dyson Lecture of 2012. We were very lucky to have a first Dyson Lecture, and we will have an even more successful lecture this time. We have a very distinguished person I will talk about in just a second.

I'm David Cassuto, a Pace Law School professor. I teach among other things, Animal Law, and that is why I am very familiar with Professor Wise's work.

I want to say a few words about the Dyson Lecture. The Dyson Distinguished Lecture was endowed in 1982 by a gift from the Dyson Foundation, which was made possible through the generosity of the late Charles Dyson, a 1930 graduate, trustee, and long-time benefactor of Pace University. The principle aim of the Dyson Lecture is to encourage and make possible scholarly legal contributions of high quality in furtherance of Pace Law School's educational mission and that is very much what we are going to have today.

Charles Dyson was born in August of 1909 and died at the age of 87 in March of 1997. He was well known as a financier, entrepreneur, and philanthropist. He was considered a pioneer in the field of leveraged buyouts, but was best known for his government service. After graduating from Pace Institute—as it was known—in 1930, he began a career in public accounting. Doctor Dyson was a lifelong Democrat who worked for President Franklin D. Roosevelt and served in World War II. In 1954, he founded the Dyson Kissner-Moran Corporation, a New York investment company that has become one of the nation's largest privately held corporations. Pace University's Dyson College of

Arts and Sciences is named in his honor. We are very fortunate to have this lecture series, and we are very fortunate to have with us today Steven Wise.

He will be talking about the Nonhuman Rights Project, which is a very important development in the field of animal law. Steven Wise is one of the biggest reasons there is such a thing as animal law. When I first came to animal law, I was looking for things to read and learn so that I could teach the field. What I found were Steve's books. They were my foundational education in animal law. As I got a little more experienced, I had a few ideas I thought were my own. When I returned to Steve's writing, I found they were his ideas too. But Steven is not just a thinker, he is a teacher. He is a professor at God-knows-how-many law schools, where he teaches animal rights jurisprudence. And he is also a lawyer. He has been active for thirty plus years in litigating animal law cases. Now he is poised to litigate a new kind of animal law case, through his Nonhuman Rights Project. He is doing some of the most important and interesting work in this field and this is one of the most important and interesting fields out there. It is so important there is a documentary film being made about Steven Wise's work with the Nonhuman Rights Project by the legendary filmmaker, D. A. Pennebaker and his wife and partner, Chris Hegedus. Folks of a certain age, including me, will remember Pennebaker's film about Bob Dylan, "Don't Look Back," as well as many others. This lecture is being live-tweeted by a reporter for wired.com on wired science and being webcast all over the world. So please join me in welcoming Steve Wise.

II. DYSON KEYNOTE SPEAKER: STEVEN M. WISE

I was delighted to receive this invitation to speak. It seemed as if I was just here at Pace. I looked back and saw that it was in the winter of 1985. I must have given a really good talk because twenty-seven years later you have asked me back. I have already looked at my calendar and I figure 2039?

David Cassuto: It is a date.

Steven Wise: I am booked for April though. It is going to have to be May, 2039. Call me.

I want to speak to you about the Nonhuman Rights Project. It is something, as David hinted, I have been working on for twenty-five years. There are now, around the country and around the world, some sixty volunteers and staff working on this project. It is something we could only do in the 21st century. We often do not meet each other in person. We Skype, have conferences calls, email, and occasionally fly to various cities and meet in small groups. It is remarkable how much we accomplish by communicating in a virtual way.

I am an “animal slave lawyer.” I have been practicing “animal slave law” for thirty-five years. I do not want to practice “animal slave law” anymore; I want to practice “animal rights law.” When I teach, I do not teach “animal slave law,” I teach “animal rights jurisprudence.” This jurisprudence does not yet exist; it is a jurisprudence that is struggling to come into existence.

Let me draw this pyramid to help explain what the Nonhuman Rights Project is doing. One reason I developed this pyramid—I wrote about it in a *Lewis and Clark Animal Law Review* article a year and a half ago—was law students were telling me they wanted to write an article about “standing” for animals and, could I help them. I would respond that there is no “standing” problem to write about. Nonhuman animals have many legal problems; standing is not one. I decided to write about it so others can understand what we are doing.

When I litigate cases as an “animal slave lawyer” in the interests of nonhuman animals, I am not litigating “animal rights” cases; for nonhuman animals have no rights—they lack legal personhood. They are invisible to the civil law the way a human slave was once invisible in the United States before the passage of the Thirteenth Amendment and in England, before the famous *Somerset v. Stewart* case was decided in 1772, an event so important I wrote a book about it.

To help explain the importance of legal personhood to my classes on “Animal Rights Jurisprudence,” I draw an “Animal Rights Pyramid” with four horizontal lines. It sets out four requirements necessary for any plaintiff to vindicate a legal right. The first and lowest level is literally and figuratively foundational. Does a nonhuman animal or any being have the

capacity to possess *any legal right at all*? This is what the Nonhuman Rights Project is initially focusing on. What arguments might persuade a common law appellate court that a nonhuman animal plaintiff is a legal person, that is, a being with the capacity for possessing any legal right?

Imagine a legal person as an empty “rights container.” The Nonhuman Rights Project is preparing litigation intended to persuade a common law high court that a nonhuman animal, like a human, is a legal person—a “rights container”—an entity with the capacity for legal rights. In a few minutes, I will get to the arguments that support a finding of Level One legal capacity. Once a court agrees with them, we move up to Level Two legal rights.

As Level One asks whether a plaintiff has the capacity to possess any legal right, Level Two asks to what rights is she then entitled? I ask my students to imagine they are holding a pitcher filled with rights, ready to be dripped into the “rights container”—our nonhuman animal plaintiff—and which was determined in Level One. We must justify each right we drip into our “container” to a court.

Once we have dripped in as many rights as a court will agree with, the Third Level asks: does our plaintiff have the private right to assert her cause of action? The cases the Nonhuman Rights Project is considering will assert common law causes of action that do give private rights of action.

We reach Level Four, the top of the pyramid. Level Four “standing” requires the defendant to have committed the act that injured the plaintiff and can be redressed by the court. “Standing” is an issue so unusual that lawyers who represent human beings and other legal persons rarely consider it, for it automatically exists.

What are the arguments for Level One legal capacity and Level Two legal rights? For you gluttons for punishment, I point to my 1998 *Vermont Law Review* article that had over 600 footnotes and was over 100 pages long. Eventually it dawned on me that nobody was reading that law review article, or any of my others. Imagine that! People do not read law review articles. Law review articles do not catalyze social change. I thought trade books might, and so I started writing trade books. *Rattling*

the Cage, in which I argued for the legal personhood and the fundamental rights of bodily liberty and bodily integrity for chimpanzees and bonobos, is substantially my *Vermont Law Review* article in the form of a trade book.

Drawing the Line emerged after people kept asking me, “where do you draw the line in terms of which animals get rights?” I went beyond exploring arguments for the legal personhood of chimpanzees and bonobos to whether other nonhuman animals—elephants, gorillas, orangutans, cetaceans, parrots, corvids, and dogs—should be entitled to legal personhood and, if so, where would one draw the line?

I had long asked myself: what is it that entitles us humans to legal personhood? Why do we have certain fundamental rights? Where do they come from? I had no preconceptions; I wanted to know. I spent six years pouring through books at the Boston University library. They took me past Hammurabi’s Code, to the Hebrews, Greeks, and Romans, through the dawn of English common law, all the way to now. These were not easy books and few people ever checked them out of the library. I would leave them protruding an inch from the stacks. When I returned in a year or three, they would be still be sticking out that inch.

Those books helped me realize that one’s most fundamental rights are intended to protect one’s most fundamental interests and that, in human beings, these were bodily liberty and bodily integrity. Bodily liberty is so important that, if you are a very bad person, you may be punished by having your bodily liberty taken away. Bodily integrity may even be more important. We may not touch other humans without their consent.

Courts recognize that bodily liberty and bodily integrity are fundamental human interests protected by fundamental human rights. What is a *sufficient* condition for having fundamental rights? Not a necessary condition, a *sufficient* condition? I kept bumping into the idea of dignity. Dignity has many meanings. But dignity in the sense of being a quality imbued with intrinsic and incomparable value was something courts, legislators, and international treaties embraced. As I tried to understand what courts meant by dignity, I kept encountering the idea of autonomy.

We humans are, to some important extent, autonomous and self-directed. Judges repeatedly emphasize this. If autonomy is sufficient for fundamental human rights—and if it is not, then what is?—it ought to be sufficient for fundamental rights of nonhuman beings who possess it. I wrestled with defining the minimum level of autonomy sufficient for legal personhood and came up with what I called in *Drawing the Line*, “practical autonomy.”

Practical autonomy has three elements. First, one must be cognitively complex enough to want something. Second, one must be able to act intentionally to achieve one’s desires. Third, one must have a sense of self complex enough so that it matters to whether one’s achieves one’s own goals.

Consciousness is implied in “practical autonomy.” One who is not conscious cannot be autonomous. It is easy for me to realize I am conscious. It is harder to prove someone else is. Indeed I cannot prove that anyone else is conscious. But it should be sufficient to show that the other being, whether mom or mom’s dog, acts as I do when I am conscious. And from an evolutionary point of view, the closer the common ancestry is between any two beings, the more likely it is that their similar behaviors have similar mental causes.

I am conscious. I engage in activities that require consciousness. If a chimpanzee acts the same way, I can reasonably conclude she is conscious too. After all, our last common ancestor lived about six million years ago—not long in evolutionary time—and we have remarkably similar brains and genes.

What are the arguments that—for example—a chimpanzee should have Level Two rights? Two broad categories of common law rights exist, noncomparative rights and comparative rights. Noncomparative rights are rights to which one is entitled because of who one is or how one is put together, without comparing her to someone else. A liberty right is a noncomparative right, and liberty rights are what I have been talking about today.

On the last page of *Drawing the Line* is a chart in which I set out a “scale of practical autonomy” that runs from zero to 1.0 and contains Classes One through Four. I placed my then-six year old son Christopher in Class Four at 1.0. He was not always at 1.0.

He was born at around zero and moved toward 1.0 as he cognitively developed.

I gave four specific examples of Class One great apes and two examples of cetaceans I met—or tried to—in *Rattling the Cage* and *Drawing the Line*. I found Koko the gorilla in California, Kanzi the bonobo in Iowa, Chantek the orangutan in Georgia, and Washoe the chimpanzee in Washington State. I tried to visit two Atlantic bottlenose dolphins, Ake and Phoenix, in Hawaii, but their captor, Professor Louis Herman, refused permission.

I studied each as best I could and read everything I could find in the scientific literature about the cognitive complexity of typical members of their species so I could understand their cognitive complexity.

By the way, I read science books and journals, including *Science* and *Nature*, every week. Every animal rights lawyer should! As lawyers we may spend significant time theorizing about the law, but if we do not understand and cannot present complicated scientific facts about the nonhuman animals in a way that fact-finders understand, we will not win. To do that we must understand who our nonhuman animal plaintiffs *are*.

On my chart, Class One animals run from 0.9 through 1.0. Their autonomy is so powerful it immediately qualifies them for designation as legal persons and entitlement to those fundamental liberty rights that protect their fundamental interests. These Class One animals are not just conscious, they are self-conscious (that is they are conscious that they are conscious), they demonstrate complex abilities to communicate, and some or all the elements of a “theory of mind.”

Humans appear to attain self-consciousness at about eighteen months of age, though it is hard to prove self-consciousness in a nonhuman or in a very young human child. The gold standard is the mirror self-recognition test Gordon Gallup developed in 1978. He first habituated chimpanzees to mirrors. While they were under anesthesia, he placed red dots on their nose or ear. When they awoke, they looked into a mirror. Would they respond to the red dots, and—if they did—would they touch the mirror or their own faces? They touched their own faces. The generally-accepted explanation is they were demonstrating visual self-recognition. They realized the red dots

were on their own faces. For obvious reasons, it took years to figure out how to administer a valid mirror self-recognition test to dolphins. This feat was finally accomplished by Lori Marino, head of the Nonhuman Rights Project's Science Working Group, and Diana Reiss in 2001. Five years later, Diana Reiss was a member of a team that demonstrated a valid mirror self-recognition test in an Asian elephant.

These are not the only complex cognitive abilities Class One animals possess. They demonstrate complex communication skills. I will not call what they do "language" because there is no agreement on what "language" is, but powerful communication is taking place. Phoenix and Ake, the Atlantic bottlenose dolphins, understood sentences with rudimentary grammars comprised of hand signals and whistles. Kanzi uses hundreds of abstract lexigrams. If you speak to Kanzi in English, he understands much of what you say. In one famous monograph, Sue Savage-Rumbaugh compared the linguistic capacities of seven or eight year old Kanzi to a two and a half year old human child. Kanzi understood more language than did the human child. If you know a two and a half year old human child, you know they are no dummies. Neither is Kanzi.

About age four, human children demonstrate "theory of mind." Theory of mind involves the ability to attribute such mental states as beliefs, intentions, and desires to others and to realize that others may have beliefs, desires, and intentions different from our own. They begin to grasp that what others are seeing or thinking may not be the same as themselves.

Theory of mind may be related to mirror neurons. Mirror neurons fire not just when we do something, as most neurons fire, but when we see someone else do it. Some scientists believe mirror neurons may play a part in theory of mind, in understanding the intentions of others, and in empathy, imitation, and language. Chimpanzees and bonobos, and perhaps dogs, have shown they possess elements of theory of mind, while mirror neurons have been discovered in many animals, including macaques.

Class Two animals fall between 0.51 and 0.89 on the scale of practical autonomy. The closer to 0.9 they are, the stronger is the case that they should be treated as legal persons. There are some

extraordinary Class Two animals. One was Alex the African Grey parrot who worked with Irene Pepperburg for over thirty years. On the day I showed up to meet Alex at the MIT Artificial Intelligence Lab, Irene was teaching Alex to read. Though Alex referred to himself both expressly and implicitly, I did not place even a being as cognitively complex as Alex in Class One because he never passed a mirror self-recognition test. That was because he was never given one.

At 0.50, Class Three animals are those we do not know enough about to rationally place them in another class. From 0.49 down to zero, Class Four animals are those unlikely to possess practical autonomy.

Some readers believe I claim that practical autonomy is a *necessary* condition for legal personhood when I actually argue that it is merely a *sufficient* condition. And why do I not argue that sentience is also a sufficient condition? I do not because common law judges will accept autonomy, but not sentience, as a sufficient condition for legal personhood. There is a practical problem with urging sentience as a sufficient condition for legal personhood. Vast swaths of the animal kingdom are sentient. A grant of legal personhood to a chimpanzee, dolphin, or elephant on the ground of sentience could open legal personhood to billions of nonhuman animals we eat. A court would therefore reject legal personhood for the chimpanzee, dolphin, or elephant so as not to open that door. One day animal rights lawyers may make the argument that sentience is a sufficient condition for legal personhood, but that is not where we should begin.

So much for noncomparative liberty rights. Entitlement to a comparative right is determined by comparing you to someone who has that right. The most important comparative right is equality. Equality demands that likes be treated alike and unalikes be treated unlike. I am entitled to a right as a matter of equality because I am sufficiently similar to someone else, in a relevant way, who possesses that right. I am not entitled to it if I am not sufficiently similar, in a relevant way, to someone who has it. However, because each of us is infinitely similar and infinitely different from everyone else, when are we sufficiently similar or dissimilar “in a relevant way?”

This question should ring a bell for you lawyers and law students. This problem lies at the center of the “reasoning by analogy” that makes up much of common law adjudication. Common law judges often feel bound by precedent, though not all of them do, or should. As with any two beings, any two legal cases may be infinitely alike and infinitely different. To decide whether a precedent is sufficiently compelling, judges may try to identify the relevant similarities and dissimilarities between the case before them and cases that might have been decided yesterday, last year, or five hundred years ago. There is no “right answer.” Each judge finds her own “right” answer by filtering the past through the vision of law she has both consciously and unconsciously been constructing from childhood. Judges with different visions of what law is may decide cases in very different ways.

The comparative right of equality has several models. The “Formal Model” is a pure equality. All classifications are permissible and everyone who is alike must be treated alike within each classification. This model permits females or Catholics to be discriminated against, so long as all females or all Catholics are discriminated against.

Like the “Formal Model,” the “Rational Connection Model” requires everyone who shares a relevant characteristic to be treated alike, but it goes a step further and deems arbitrary any action that lacks a rational connection between ends and means so long as a classification furthers a legitimate state interest. Thus, a race-based legislative classification would be acceptable as a matter of equality in a state that pursues a policy of racial segregation.

The Nonhuman Rights Project is not interested in these first two kinds of equality; we are very interested in the “Normative Model” of equality. This demands more than the existence of a rational connection between ends and means. It requires that the criteria used to decide which entities are sufficiently different to be treated differently fit certain moral criteria. It rejects differentiations that burden a plaintiff in a manner that reflects deeply personal social stereotypes that are biologically immutable or changeable only at unacceptable personal costs, and it prohibits classifications that consider morally irrelevant traits.

Where will the Nonhuman Rights Project file its first suits, based on liberty and equality? The good news is we can file suit in any of the fifty states and the District of Columbia. The bad news is we can file in any of the fifty states and the District of Columbia. The Nonhuman Rights Project has spent the last four years making that determination. We have run dozens of legal propositions through all fifty-one jurisdictions and argued about what we have learned and which jurisdiction might be the most legally advantageous. We will identify our final jurisdictions within a year.

I had an epiphany in 2008 while arguing before the Vermont Supreme Court. In that case, I claimed that my client, whose cats had died allegedly through veterinary malpractice, should be able to sue for such noneconomic damages as loss of companionship and emotional distress. In the middle of oral argument, I realized I was involved in a conspiracy with the judges to pretend their decision would be made on strictly legal grounds, when we all knew—but no one acknowledged—that it would not. The Nonhuman Rights Project's Sociology Working Group and Predictive Analytics Working Groups were formed to address this problem.

We have therefore spent a great deal of time not just looking at the law, but looking at the kinds of judges who will be making the law. We do not want to encounter justices who are instinctively hostile to what we are trying to accomplish, and we do not want to encounter justices who view the common law as rigid and cramped.

One reason I wrote *Though the Heavens May Fall* was to show how a great common law judge decides important cases. Lord Mansfield may have been the greatest judge who ever spoke English. Why did he free James Somerset and implicitly abolish English slavery? Lord Mansfield took no cramped view of the common law; as a great common law judge, he thought the common law was forever working itself pure. Great common law judges understand that the common law is a flexible living organism that changes as morality changes and scientific facts and experiences accrue. That is why the Nonhuman Rights Project will use the common law to persuade judges that our

nonhuman animal plaintiff should be entitled to legal personhood and certain fundamental rights.

Common law judges divide into two large categories. There are formal judges, and there are substantive judges. Formal Judges understand justice furthers legal stability and certainty; they look to the past, believe the answers to judicial questions are found in law libraries or on Westlaw or Lexis, and feel bound by precedent, even though different Formal Judges may weigh precedent in different ways.

A “Precedent Rules” kind of formal judge understands that justice is the following of those narrow rules precedents set. English judges are often “Precedent Rules” Judges. In a 1913 case, the Judicial House of Lords even ruled it lacked power to overrule itself, and so it remained until 1965. This is why English law review articles may appear obsessed with determining what is the holding of a case and what is dicta. Lord Mansfield’s inferior replacement, Lord Kenyon, was a classic “Precedent Rules Judge.” “By my industry I can discover what my predecessors have done, and I will servilely tread in their footsteps,” he wrote.

At the other end of the formal spectrum, “Precedent Principle” Judges also see justice as embodying certainty and stability, but view precedents as enunciating binding, such broad principles as liberty and equality—not merely narrow rules.

Substantive Judges, on the other hand, do not look backwards. “Substantive Principle” Judges see the job of justice as doing “right,” while “Substantive Policy” Judges see justice as doing “good.” Substantive Judges may care little, or not at all, about what a law library contains. They value experience, morality, and changing scientific knowledge. “Substantive Principle” Judges and “Precedent Principle” Judges may often rule in similar ways, because they accept the same principles, though for different reasons. The Nonhuman Rights Project is seeking “Precedent Principle” Judges and “Substantive Principle” Judges who share the principles that will lead to legal personhood and fundamental rights for at least some nonhuman animals.

In other words, the Nonhuman Rights Project is seeking common law judges who act like a Lord Mansfield, and who see themselves as partners with Legislatures in their responsibility

for law and justice. These judges are subordinate in the sense that, if what judges say conflicts with what Legislatures say, the Legislatures will prevail. But the common law flourishes in the interstices of statutes and in the spaces that legislatures do not fill. In those spaces, common law judges have a co-equal responsibility with Legislatures to do justice. The Nonhuman Rights Project is not seeking high court judges who will abdicate their sacred duty as common law judges and say, “if you have a problem, take it to the legislature.” We are looking for judges who embrace their solemn co-equal duty to do justice.

I am not saying, in absolute terms, that either Formal or Substantive Judges are right or wrong. But the Nonhuman Rights Project understands that, if we want to persuade judges to extend or change the law to allow for the legal personhood of any nonhuman animal, Precedent Rules Judges will not be open to our pleas, and Substantive Policy Judges may not either. These are judges our opponents desire.

Our Sociology Working Group has identified every known sociological characteristic that academic research has correlated with how a judge rules. Does gender matter, religion, economic status, race, where they went to law school, their career before they were judges, their previous experience with nonhuman animals, or what? How do judges decide?

Our Predictive Analytics Working Group is involved in the long and complex task of developing algorithms that might assist us in better understanding how a judge might rule based upon her judicial writings. Thanks to the work of these two Working Groups, the Nonhuman Rights Project will have some idea of the values of the judges before whom we argue.

So a couple hundred people have spent 30,000 hours preparing for the cases the Nonhuman Rights Project will file in 2013. Whether we win these early cases or lose them, we will press forward, but the time to declare the legal personhood of nonhuman animals has arrived.