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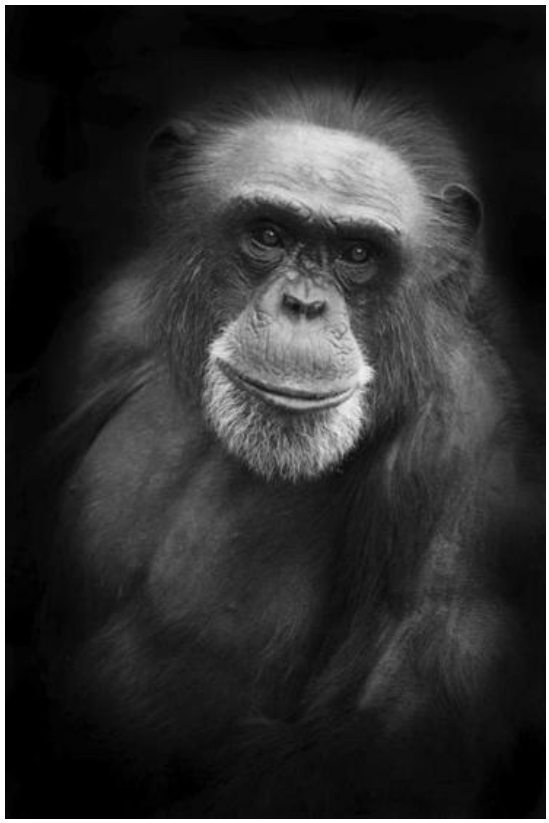
The Boston Globe

Ideas

Should chimpanzees have legal rights?

The 'animal personhood' movement believes dolphins, great apes, and elephants deserve to be able to sue — and now it has a plaintiff.

By Chris Berdik | GLOBE CORRESPONDENT JULY 14, 2013



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SOMEWHERE IN AMERICA—its lawyers won't say where—a chimpanzee is about to have its day in court.

In the next few months, an animal advocacy group called the Nonhuman Rights Project plans to file a case on behalf of its first animal client. It has already chosen the plaintiff, a captive chimp, on whose behalf it plans to file a writ of habeas corpus and ask a state court judge to grant the chimp's liberty.

Their goal is to win animals a toehold in the world of legal rights—a strategy that is the culmination of more than two decades of writing and legal work by lawyer Steven Wise and an allied group of attorneys, scientists, and animal activists. They hope to have an animal declared a "person" in a court of law, breaking down a legal barrier between humans and other species that has

Over the last century, animals have enjoyed a steady march in legal protections. Once treated no differently than inanimate objects, today they can't be abandoned, beaten, or deprived of food, shelter, or veterinary care. Despite these protections, however, animals are still legally considered property. And for Wise and others, given what we now know about the biology and inner lives of animals, this is no longer a tenable distinction. It is time, they argue, to grant at least some species fundamental rights such as the right to life and freedom from captivity—and the surest way to accomplish that is for those animals to join human beings as legal persons.

Critics say legal personhood for animals is misguided, and even dangerous. They foresee a slippery slope in which a tightening web of rights starts to cripple scientific progress not just on life-saving medical research, but also on such goals as species conservation. Even within the animal-rights movement, the idea is controversial.

But Wise's strategy is an imaginative solution to a quandary that bedevils animal advocates: how other species should be treated in a legal system that lumps everything into the categories of persons or things. As we learn more about animal intelligence and emotional complexity, these activists say, it is becoming clearer that the law needs a new way to talk about animals, whether that involves a special property designation just for animals or complete animal liberation from human use.

Wise, for his part, contends that legal personhood for a limited number of species—at least in the short term—is the most defensible and effective solution. Though it's possible that this first case will be tossed out of court, he is prepared to bring more cases on behalf of other animals, which he believes will be turning points in the long expansion of who, or what, deserves inherent rights before law.

"For 30 years, I've been an animal slave lawyer," says Wise. "I want to be an animal rights lawyer."

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THE IDEA OF ANIMALS standing before a judge might seem far-fetched, but there is actually a long history of putting animals on trial, particularly in medieval Europe. Farm animals that killed humans were tried and hung for murder; vermin were sued for destruction of crops. While there were no animal plaintiffs, there were animal defendants, and many had lawyers. A handful even beat the rap.

In modern times, the norm has been quite different. American courts have traditionally treated animals as property, legal things without interests or rights of their own. For example, if your beloved family dog is killed by a negligent driver or tainted food, most states limit liability to the dog's market value. Only a few states allow the family to claim any emotional distress damages over the death. Although animals do enjoy layers of protections that began accumulating with 19th-century animal cruelty laws¸ some animal rights advocates, including Wise, have a fundamental concern that no matter how many protections animals receive, as long as they stay property, they're subject to human use and control, essentially invisible to the law as individuals.



HARRY HORENSTEIN

Animal law is a rapidly expanding patch of legal ground. It hardly existed in the early 1980s, when Wise began litigating on behalf of aggrieved pet owners and similar plaintiffs. At that time, according to one recent journal article, the idea that animals might be anything more than property was so laughable that lawyers who suggested it at bar association meetings were met with hooting, mooing, and barking. In 2000, when Wise taught the first animal-law course at Harvard, it was only the 11th law school to offer such a course. Today, the subject is taught at more than two-thirds of all law schools in the United States.

The cause is driven, in part, by new discoveries about animals' cognitive and emotional complexity that have blurred the bold lines traditionally drawn between humans and other species. Some animals are now known to exhibit a number of qualities once thought exclusively human, such as self-awareness, abstract thought, and altruism. In his 2002 book, "Drawing the Line," Wise proposed a new standard that he called "practical autonomy," a sliding scale based on an animal's sense of self and volition, which could give courts a measuring stick to determine whether an animal should be granted any rights of personhood. As he construed the test, elephants, dolphins, great apes, and a few other species would clearly pass. "We're not dealing with beings who are the same as we are cognitively, but they're certainly in the same ballpark," Wise says.

Seeking legal "personhood" for such animals, he points out, is not the same as saying they are human. Courts have already granted personhood to nonhumans—perhaps most famously to corporations, which have the right to enter into contracts, to sue and be sued, and to exercise free speech. In the republic's early years, overstretched admiralty courts deemed ships to be legal persons, in order to expeditiously deal with mishaps between vessels with mostly absentee owners. The ship was responsible, and its value determined liability for damages. That designation remains today, a law review noted, "quite simply because it works."

"In law, a legal person is really just a rights container," Wise says. What rights go in that container is a separate question. Four-year-old children don't have the same rights as adults; a ship and a human are treated quite differently in court. For animals, Wise has certain rights in mind: specifically, the right of liberty and bodily integrity. In practical terms, this could mean that people could petition a court to free a qualifying animal from a zoo, or ban its use for food, entertainment, or medical research.

Though no court has yet backed this notion, the world has made a few moves in Wise's direction. In May, India's government declared dolphins to be "nonhuman persons" and banned their captivity for entertainment. In June, the US Fish and Wildlife Service took a different approach to protecting chimps, recommending that captive chimps be listed as "endangered" along with their wild brethren, which would bar research that wasn't in the interest of the chimps themselves. That same month, the National Institutes of Health announced it would retire most of the chimps at its facilities and would no longer fund biomedical research on the species, following the lead of every other developed nation.

"Chimpanzees are special creatures," NIH director Francis Collins told The New York Times following his agency's decision. They possess "similarities to ourselves that are quite breathtaking."

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EVEN FOR THE MOST human-like animals, however, the barriers to animal personhood remain formidable. First and foremost is the longstanding belief in human uniqueness, one reflected in major religious traditions and the country's founding documents. It is humans, after all, who are "endowed by their Creator with certain unalienable rights." Even without invoking God, much of society assumes that humans should have a unique legal status among living creatures. As the federal appeals judge

Richard Posner once wrote in a debate over animal rights published in Slate, we don't grant humans special status based on an IQ test but out of "a moral intuition deeper than any reason that could be given for it and impervious to any reason that you or anyone could give against it."

Many scientists, meanwhile, warn that granting legal personhood to animals would thwart research that saves human lives. Others worry about animals themselves. Steve Feldman, spokesman for the Association of Zoos and Aquariums, says that keeping and breeding animals in captivity is sometimes the only way to safeguard a species. Opponents of captivity, he argues, too often ignore the reality of habitat loss, global warming, hunters, and poachers threatening species in the wild.

"We need to study these animals to help them," says Feldman. "There are some people who believe that animals should be free, including free to become extinct."

In the legal realm, Wise's standard has been criticized as too fuzzy to justify a new definition of personhood. Richard Epstein, a University of Chicago law professor and an opponent of expanding animal rights, wrote in a critique shortly after "Drawing the Line" was published that "practical autonomy" is so malleable that it could accommodate nearly any species. "Unless an animal has some sense of self, he cannot hunt, and he cannot either defend himself or flee when subject to attack," Epstein wrote. He also suggested the idea is hypocritical for embracing any boundaries whatsoever, calling it "an explicit speciesist approach, complete with arbitrary distinctions."

Other objections to Wise's argument come from proponents of animal rights. Why must animals be "like us" to have rights, they ask? Many agree with Peter Singer, the philosopher and bioethicist who wrote the seminal book "Animal Liberation" (1975). Sentience, they say, the ability to experience subjective sensations, including pain and suffering, should be sufficient to grant another creature basic rights.

Some think we need a new category altogether. David Favre, who teaches animal law at Michigan State University, says that rather than shoehorn animals into either the same legal category as tables or humans, we should establish a new legal category, "living property." It would give animals limited rights through legislation that, for example, could require that the best interests of pets be represented in divorce cases, or that for-profit sales of certain species be outlawed. There are already a few examples: Animals can own property in states that allow them to be the beneficiaries of trusts, and the

abused dogs at Michael Vick's Bad Newz Kennels were assigned a guardian ad litem to represent them in court. Critically, however, Favre's solution would keep animals as property. And for Wise, that isn't good enough.

As for the speciesist claim and the philosophical debates, Wise says he wouldn't rule out any animal from one day joining the personhood club, but his current goal is simply to notch a win in court. "Philosophers can spin out any theories they want," he says, but "at the end of the day, nobody says you win or lose."

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WISE, WHO GOT HIS LAW DEGREE from Boston University and now works in Florida, sees his campaign in historical terms. He has written books not only on animal rights but also the early antislavery movement. His legal and moral touchstone is the famous case of James Somerset, a slave freed in London when a judge, Lord Mansfield, granted a 1772 habeas petition brought on his behalf. Somerset was thus transformed from legal property into a legal person, six decades before the British Parliament abolished slavery by statute and nearly a century before America did so constitutionally.

Wise contrasts his incremental, common law approach to the brash case PETA made in 2011, when it sued Sea World in federal court on behalf of the park's orcas. PETA claimed that the animals were being held as slaves in violation of the 13th amendment, which abolished slavery.

The case was almost immediately dismissed by the federal judge on the grounds that the amendment was clearly about humans. Wise and company fume about the suit, which they say was ill considered. ("I don't usually throw temper tantrums," Wise says. "But I did in this case.") The only saving grace, as far as Wise et al. are concerned, is that the judge's dismissal didn't directly rule that orcas could not be "persons."

To avoid a similar stumble, Wise and his allies have spent years searching for the state most likely to harbor a Lord Mansfield, the sort of judge willing to chart new legal territory. When they got down to three states, in February, they started searching for a plaintiff.

Their choices were limited to a handful of species known to score high on practical autonomy, which included elephants, chimpanzees, cetaceans (dolphins, orcas, and other marine mammals), and African gray parrots. But there were other considerations, too.

For instance, they'd have a stronger case with a charismatic animal being kept in what Wise calls a "dire" living situation, so that pretty much ruled out the parrots. In addition, they would need to have a wildlife sanctuary lined up to adopt their plaintiff if they prevailed. The lack of such sanctuaries for cetaceans ruled out dolphins and orcas. Likewise, while they were zeroing in on an elephant plaintiff this spring, neither of the two elephant sanctuaries in the United States had any more room. That left chimps.

To avoid tipping off the chimp's owner, they won't disclose the identity of their plaintiff until they are ready to go to court this fall. Armed with affidavits from scientists, including Jane Goodall, about chimps' capacities, they will argue that their plaintiff deserves a right to liberty, and that its captivity is a violation of that right.

Win or lose, they plan to bring more habeas petitions on behalf of other animals, hoping to win enough small victories to lay a foundation of precedent for animal personhood. It's unlikely to be a quick and easy fight, but Wise says he accepts that he's in the animal-personhood game for the long haul. "This is a long-term, strategic, open-ended campaign," he says.

Chris Berdik is a journalist in Boston. His book, "Mind Over Mind," was published in 2012 by Current, an imprint of Penguin.

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