

## *STEVEN WISE TRIBUTE, PART II. FIRST STEPS ON THE PATH FORWARD*

### TRIBUTO A STEVEN WISE, PARTE II. LOS PRIMEROS PASOS DE SU FUTURA TRAYECTORIA

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#### **ABSTRACT**

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Steve Wise set the intellectual grounds for his future efforts with the NhRP beginning in 1987 with the drafting of a law review article on chimpanzees. The many questions that arose and were answered in that process set the initial path for creating change within the legal system for chimpanzees. Within a decade the compass in his mind had found the direction of true north that propels him on his path forward in the law.

#### **KEYWORDS**

Personhood; standing; legal rights; chimpanzees' interests; judicial barriers.

#### **RESUMEN**

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Steve Wise sentó en 1987 las bases intelectuales, para su futuro trabajo en el NhRP, mediante la preparación de un artículo sobre los chimpancés destinado a ser publicado en una revista jurídica. Las numerosas cuestiones que fueron surgiendo, fueron encontrando respuesta durante esos años en los que abrió las puertas al conjunto de medios, que generaron los necesarios cambios para los chimpancés dentro del ordenamiento jurídico. A lo largo de una década, la brújula de su mente encontró el verdadero norte que impulsó su camino en al ámbito jurídico.

#### **PALABRAS CLAVE**

Persona; legitimación procesal; derechos legales; intereses de los chimpancés; barreras judiciales.

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David Favre

I am able to provide some firsthand information about the development of Steve Wise's vision as he moved through his life. We met at the "First National Conference on Animal Law" at Brooklyn Law School in 1981.<sup>1</sup> The next year we both became founding Board members of what would become the Animal Legal Defense Fund. We worked together for 20 years within that organization and remained friends until his untimely death.

During the 1980's the Board of ALDF dealt with the fundamental issue of – are we a law firm open to taking cases that are brought to our attention or do we seek out what we think would be important opportunities to enhance the status of animals within the legal system? In time we saw that the urgency of the immediate, and request from other organizations for legal help would squeeze out all our limited time and resources and not necessarily promote our long-range goal of enhancing the visibility of animals in the legal system. How should and could we seek changing the legal status of animals?

First, should ALDF go to the courts or the legislature seeking legal rights for animals? As a modest organization and with the limitations on lobby spending imposed by the Internal Revenue Code, the legislature seemed an island too far to even try an approach. So, the courts were to be the focus of our consideration. What should be the approach within the judiciary system? At that time no one had yet suggested how this might happen.

During 1987 Steve and I decided to use the drafting of a law review article as the mechanism by which we could organize our thoughts and suggest a path forward. The use of the courts requires the identification of a plaintiff, and initially we thought there should be a focus on the requirements of plaintiff standing. We clearly wanted to have a lawsuit in which the animal was the plaintiff, not a human on behalf of an animal, as the acceptance of an animal as a plaintiff is the clearest statement asserting an animal's legal right.

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<sup>1</sup> TISCHLER, J. A Brief History of Animal Law Part I (1972-1987), *Stan. J. Animal L. & Pol'y* 1 (2008) 21, 23.

Thinking about possible plaintiffs immediately moved us away from the ethical perspective on rights which usually considers animals in large categories or perhaps all animals together. A plaintiff is an individual being. (A corporation is considered a single individual notwithstanding 1000's of shareholders. A city is a single individual not withstanding all of its citizens.) A case brought on behalf of all the mammal of the United States would not work.

During our discussions we came to realize that standing was not the threshold question rather it was the existence of personhood for the plaintiff. All the cases and legal scholarship discussing standing presumed that the human or other entity was a legal person capable of holding some legal right, but almost no discussion concerning who qualifies as a legal person (personhood)<sup>2</sup> We quickly came to understand that animals were not perceived as legal persons, and therefore would never have standing in a lawsuit. So that will necessarily be the first legal battle, within the courts. First comes personhood and then issues of standing.

Just who among the animals might be called upon to be the test case for establishing personhood? Well, what would be the strongest case to bring to a judge. If the argument for personhood is based upon showing that the plaintiff, like a human, is deserving of this legal statute to protect human like interests, then the chimpanzee should be the focus on consideration. This conclusion, however, contains inherent contradictions with ethical analysis. Other individuals in the world of ethics might disagree with seeking legal rights by comparison with human capabilities, arguing all animals have their own dignity, independent from any comparison with human capabilities. Steve set aside the ethical perspective, which we both agreed with as a general matter, to adopt a path most likely to persuade judges to change a fundamental principle of the legal system, that only humans counted.

The idea that law exist to protect the interests of individuals had been developed by the jurisprudence of Rosco Pound, Dean of Harvard Law College.<sup>3</sup> Seeking to use this path forward raises two questions. What is an interest and do many/most/some of those interests exist with chimpanzees? We both assumed strong parallels existed but would have to turn to science to support the position. For example, we presumed that a chimpanzee, just like a human, has an interest in being free from the infliction of pain.

Chimpanzees were an obvious and superior choice from the beginning. With nearly identical DNA the chimpanzee is our close cousin. Also, at this time the amazing work

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<sup>2</sup> FAVRE, D. *Animal Law, Welfare, Interest, and Rights* (3rd ed.), Wolters Kluwer (2020) Ch 10, pp.379 –432.

<sup>3</sup> POUND, R. *Jurisprudence*, West Law vol. 3, ch. 14 (1959).

of Jane Goodall and others showed the complexity of chimpanzee societies.<sup>4</sup> Also at this time the work of Roger & Debbi Fouts with the chimpanzee Washoe revealed that chimpanzee had a high capacity to communicate with humans and a rich emotional life parallel to humans.<sup>5</sup> Penny Patterson was also showing the same human capacities for gorillas.<sup>6</sup>

Both Steve and I had undergraduate degrees in science. We had learned the power of accepting new ideas and information to inform future action is a cornerstone of science. Likewise, the power of truthful information before a court should direct outcome. It would be possible to build a substantial, science-based information base that supports the proposition that chimpanzees hold many of the same interests and abilities as humans, and therefore deserved to receive some level of protection within the legal system by acknowledging that they are legal persons. Exactly which legal rights chimpanzees might claim once they received personhood was not sorted out at this point.

Some other factors supported the use of chimpanzees. The chimpanzees in the United States for the most part had unique names identifying each individual, thus making it easy to transform into plaintiffs. Additionally, they are not wildlife of the US, thus a large set of laws do not apply. Nor do they have large economic interests who would resist a change of status as might happen with goats or pigs.

Next question was under which set of circumstances the courts might have the authority to expand the concept of personhood to include animals. Most individual rights arise out of legislation or a constitution. The argument had to be that under a particular statute or constitutional provision the legislature or drafters must have meant to include animals as persons. This did not seem like a winner as he could not think of any legislation or constitutional provision where that fact pattern existed. But, under the Common Law principles judges did have the capacity to create or expand legal principles. Since many of the topics that previously were within the common law have been overtaken by legislative action, it would be necessary to find a cause of action that still existed within present day Common Law which was also free from superseding legislation. The choice of *habus corpus* would not occur until some years later.

This seeking of a Common Law cause of action also had the consequence of focusing on state law rather than federal law. The federal law is a delegation from the sovereign states of the United States, and the states did not delegate common law jurisdiction to

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<sup>4</sup> See, GOODALL, J. *Chimpanzees of Gombe, Patterns of Behavior*, Harvard Univ. (1986). Also see the works of Debbi Fouts who worked with the chimpanzee named Washoe, showing her amazing capacity to communicate with humans.

<sup>5</sup> FOUTS, R. & MILLS, S. *Next of Kin: What Chimpanzees Have Taught Me about Who We Are*, Morrow, William & Co., Inc. (1997).

<sup>6</sup> PATTERSON, F. *The Education of Koko*, Holt Rinehart & Winston (1981).

the federal government. So federal judges would not have the capacity to change the application of laws, they are strictly limited to determinations of what the legislature wished to accomplish with specific legislative language. The search would have to be at the state law level. The reality that 50 states contained a great diversity of principles and powers for the legislature was not something grabbed with at this point of time.

Approaching the end of this drafting project, we were approached by Peter Singer in 1991 for the possibilities of drafting a chapter for a forthcoming book about chimpanzees that he and Paola Cavalieri were putting together. As it progressed the scope was expanded to cover all the great apes. The book would present the creation of a Great Apes Project and contain a Great Apes Declaration. The central point of the initiative is the “Declaration on Great Apes”, which sought to join humans with the other great apes in a “community of equals” and by securing three basic rights for all great apes: 1. The Right of Life; 2. The Protection of Individual Liberty; 3. The Prohibition of Torture.

We drafted a chapter that reflected our thoughts that we were developing for our law review article. We went through a number of edits of the chapter with Professor Singer and were excited to be a part of his book. However, it ultimately became clear that his vision for what we should focus upon was not in tune with the approach we were taking. We argued in our draft chapter that seeking a broad set of legal rights for great apes was going to fail at that point in time. We rejected a focus on criminal law, instead seeking changes in the civil law as described above. For example, the right to be free from bodily harm, as a civil matter. This was very counter to the point the book sought full legal equality between the species. If it was illegal to murder a human, it should also be illegal to murder a chimpanzee. In the end the editors of the book decided we were not a good fit and rejected our chapter. Our hopeful pragmatism did not fit with the sweeping tone of their objectives. This was an important lesson for our thinking. Philosophy is great for gathering and promoting big ideas, but implementation in the real world is much more difficult and only lawyers might find a path through the maze of the law.

Our final draft of the law review article was entitled “The Legal Rights of Chimpanzees to Be Free from Battery and Enslavement.” The first lines of the article:

This article argues for the right of the common chimpanzee (*Pan troglodytes*) and the pygmy chimpanzee (*Pan paniscus*) to be free from battery and enslavement. Using both a comparative and noncomparative analysis, the article seeks to establish that these animals have legal interests just as human beings do, and that the right to be free from pain and suffering follows from those interests just as it does for human beings.

This article was submitted to a law review but was never published. At this time, I was appointed to the position of Interim Dean of the Detroit College of Law and could no longer give this project time and attention. Steve, however, was just starting his own path of research and writing.

During the remainder of the 1990s he did significant research on the science of the nature of chimpanzees and began working the Jane Goodall. In August of 1995, Steve and Jane Goodall submitted a proposal to the Senior Lawyers Division of the American Bar Association for a joint presentation at the 1996 Annual Meeting of the American Bar Association. Steve wrote in the proposal that Dr. Goodall will present “both a dignified and entertaining lecture and slide presentation about what is known about the nature of chimpanzees... Attorney Wise will discuss the nature and sources of fundamental rights and the common law. He will further explore the jurisprudence question as to whether the natures of chimpanzees should entitle them to possess such fundamental rights as bodily integrity and personal liberty.” Perhaps the operative word in this proposal is “dignified”. Steve was trying to establish the idea of rights for nonhuman animals as a serious legal topic and not an idea to be mocked. The proposed presentation was approved. The presentation was subsequently turned into a publication.<sup>7</sup>

His consideration of personhood also was developed, and the history of legal rights further delved into with an additional law review article.<sup>8</sup> But he was about to break out of legal scholarship and address the general public.

In 1993 he shared with me a five-page fax of a book outline containing 19 chapters. It was the beginning of what would become *Rattling the Cage*. He had realized that the social and intellectual context in which judges lived needed to become aware of the issues and information that he would later present to the court. It was seven years of continuing research and writing that would result in his totally public master plan for lawsuits to follow.

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<sup>7</sup> GOODALL, J. & WISE, S.M. Why Chimpanzees are Entitled to Fundamental Legal Rights, Joint Presentation to Senior Lawyers Division of the American Bar Association, August 2, 1996, reprinted in *Animal Law* 3 (1997) 61.

<sup>8</sup> WISE, S.M. The Legal Thinghood of Nonhuman Animals, *Boston College Environmental Affairs Law Review* 23/2 (1996) 471. WISE, S.M. Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy, *Vermont Law Review* 22 (1998) 793.

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