

4-1-2018

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Recommended Citation

Angela Fernandez, "Legal History and Rights for Nonhuman Animals: An Interview with Steven M. Wise" (2018) 41:1 Dal LJ 197.

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Angela Fernandez*

Legal History and Rights for
Nonhuman Animals: An Interview
with Steven M. Wise

This article offers a window into the recent work of the Nonhuman Rights Project (NhRP) and its quest to secure legal personhood for cognitively advanced nonhuman animals (chimpanzees, elephants, and orcas). Law & History Professor Angela Fernandez interviews Nonhuman Rights Project founder Steven Wise about the work of his organization, setting the litigation strategy of the Nonhuman Rights Project against the background of Wise's historical work on the 1772 British case that ended slavery in England, Somerset v. Stewart. The conversation Fernandez has with Wise ranges across the most recent decisions of the Nonhuman Rights Project cases, what has happened since the making of the documentary about the group's New York chimpanzee litigation Unlocking the Cage (2016), and reflections on issues that will be of interest to animal law lawyers.

Cet article offre un aperçu du travail récent du Nonhuman Rights Project (NhRP) et sa quête en vue d'obtenir le statut de personne morale pour les animaux (chimpanzés, éléphants et orques). Angela Fernandez, professeure de droit et d'histoire, s'entretient avec Steven Wise, fondateur du Nonhuman Rights Project, au sujet du travail de son organisation, en établissant la stratégie en matière de litiges du Project dans le contexte du travail historique de Wise dans l'affaire britannique Somerset c. Stewart (1772) qui mit fin à l'esclavage en Angleterre. La conversation que Fernandez a eue avec Wise porte sur les décisions les plus récentes dans les affaires du Nonhuman Rights Project, les événements qui se sont déroulés depuis la réalisation du documentaire sur le litige mené par l'organisation au sujet des chimpanzés à New York intitulé Unlocking the Cage (2016), et fait part de réflexions sur des questions qui intéresseront les avocats en droit animal.

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- I. *Background on the New York chimpanzee cases*
- II. *Changing the animal/changing the jurisdiction*
- III. *Standing in Canada and the United States*
- IV. *Fiat Justitia, ruat coelom—let justice be done though the heavens may fall*

I recently had the opportunity to sit and talk at length with Steven Wise, founder and president of the Nonhuman Rights Project (NhRP) at the Oxford Centre for Animal Ethics Summer School on “Animal Ethics and Law: Creating Positive Change for Animals.”¹ The first evening of the Summer School featured a screening of the documentary film *Unlocking the Cage*, which follows the NhRP’s litigation efforts in 2013–2014 on behalf of four chimpanzees in New York State.² I had just finished an article on the film and the power of the visual in arguments for nonhuman animals and was curious to get Wise’s views on developments in the NhRP cases since the film was released in 2016, to hear about NhRP’s future plans, and to discuss what implications there might be in these developments for Canada.³

Characteristically gracious and generous with his time and thoughts (a policy Wise says he learned from Jane Goodall), our conversation ranged over several issues and areas of interest, landing eventually on a shared passion for legal history. At Boston University Law School, where Wise went to law school, legal historian Dan Coquillete was “by far the most influential law professor on me,” Steve recounted.⁴ “The books from his course are the only books I still have from law school.” “He taught me not to be afraid of using older materials to see where the common law came from.” The NhRP’s approach is steeped in the history of the common law, specifically *habeas corpus*. Wise explained that the group’s litigation strategy is modelled on *Somerset v. Stewart*, the famous 1772

1. Wise initially founded the Center for the Expansion of Fundamental Rights in 1996. He changed the name to the Nonhuman Rights Project in 2012.

2. *Unlocking the Cage*, 2016, directed by Chris Hegedus & D.A. Pennebaker.

3. See Angela Fernandez, “Already Artificial: Legal Personality and Animal Rights” (forthcoming in Jody Greene & Sharif Youssef, eds, *The Hostile Takeover: Human Rights after Corporate Personhood*, University of Toronto Press).

4. Interview of Steven M. Wise by Angela Fernandez (23 July 2018) conducted at the Oxford Centre for Animal Ethics, Fifth Annual Summer School, “Animal Ethics and the Law: Creating Positive Change for Animals” (22–25 July 2018). All subsequent quotes without a footnote are to this interview.

Lord Mansfield decision outlawing slavery in England, which Wise wrote a book about in 2005, *Though the Heavens May Fall*.⁵ As Steve put it, “I wrote the book to learn how to prosecute civil cases for nonhuman animals.”

I knew that the *habeas corpus* strategy was inspired by the Somerset case.⁶ I was also aware of the centrality of slavery to Wise’s thinking about nonhuman animals. For example, Wise often compares the unthinking use of nonhuman animals to slaves in Greek and Roman societies: “No one ‘ever gave a thought to slaves [...] Everywhere the way of life depended on them. One cannot say they were accepted as such, for there was no acceptance. Everyone used them; no one paid attention to them.’”⁷ I realized speaking with him that the parallels to the Somerset case were more literal than I realized (and probably than most people familiar with his work would think) and it would be helpful and illuminating to parse this out with more care, which this article does in its last section, after providing some background on the New York chimpanzee cases, an update on where the organization is going, and some points of special interest to Canadian animal lawyers.

More specifically, the article is structured around four topics, which Steve and I discussed in our interview: (i) the New York cases and their positive and negative rulings (Part I); (ii) the group’s decision to change the animal and litigate elephant cases (Part II); (iii) standing in animal law cases in Canada and in the United States (Part III); and (iv) the ways in which the NhRP litigation maps onto *Somerset v. Stuart* (Part IV). As Steve put it in our interview “where you are makes no sense unless you understand how we got there.” I start from the premise that Wise’s work is great legal history in-the-making and it is therefore important to understand where he and his ideas are coming from.

I. *Background on the New York Chimpanzee Cases.*

I began the interview with Wise by asking to what extent damaging rulings on the NhRP cases would be controlling in New York and in other states. “Which ones?” he asked with a twinkle in his eye.

5. Steven M Wise, *Though the Heavens May Fall: The Landmark Trial that Led to the End of Human Slavery* (Boston, MA: Da Capo Press, 2005).

6. See, e.g., Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Boston, MA: De Capo Press, 2000; 2nd ed. 2014) at 49-50. See also Steven M Wise, “Hardly a Revolution—The Eligibility of Non-Human Animals for Dignity-Rights in a Liberal Democracy” (1998) 22:793 *Vt L Rev* at 813.

7. Steven Wise, “The Legal Thinghood of Nonhuman Animals” (1996) 23:471 *Boston College Env’tl Aff L Rev* at 489. Also quoted in Wise, *Rattling the Cage* at 31; Steven M Wise, *Drawing the Line: Science and the Case for Animal Rights* (Cambridge, MA: Perseus Books, 2002) at 14.

Probably most damaging has been a decision by Justice Karen K. Peters in the Third Judicial Department issued in December 2014, captured in the film in hostile oral argument about whether *habeas corpus* relief would be available to Tommy, a chimpanzee owned by a man named Patrick Lavery, who kept Tommy in a dark room in a warehouse on a used trailer lot in Fulton County.⁸ Relying on *Black's Law Dictionary*, among other sources, this judgment denied relief to Tommy on the grounds that he was unable to bear the correlative rights and duties that attach to legal personhood and only persons (as in human beings) are entitled to *habeas corpus* relief.

The other adverse precedent (also addressed in the film), this time from the Fourth Judicial Department, related to Kiko, a chimpanzee who like Tommy was a former film actor, and whose owners were keeping him in chains in a cement storefront in Niagara Falls. Here the court ruled in early 2015 that a *habeas corpus* application was not appropriate because Kiko was not going to be completely liberated by being moved to Save the Chimps sanctuary, the organization that would be able to provide these chimpanzees with chimpanzee-appropriate lives.⁹

The NhRP were denied leave to appeal for both Tommy and Kiko's cases by the New York Court of Appeals on 1 September 2015.¹⁰ In June 2017, the First Judicial Department took its turn denying relief for both Tommy and Kiko.¹¹ The judge, Justice Troy K. Webber, wrote that there were no changed circumstances warranting fresh consideration of their situation. She affirmed the Third Department's decision about Tommy, pointing out that the new affidavit evidence submitted by constitutional law professor Lawrence Tribe on historical animal trials were not from modern times and not from New York and did not show that animals can bear duties. Responding to the point that neither infants nor comatose individuals can be expected to exercise legal duties or responsibilities, yet they still have rights, Webber J. wrote—"these are still human beings,

8. *People ex rel. Nonhuman Rights Project, Inc. v Lavery*, 2014 NY Slip Op 08531 [124 AD3d 148] (App Div, Third Department).

9. *Matter of the Nonhuman Rights Project Inc., v Presti*, 2015 NY Slip Op 00085 [1300 CA 14-00357] (App Div, Fourth Department).

10. *People etc. ex rel. the Nonhuman Rights Project Inc.*, 2015 NY Slip Op 83136 (Court of Appeals Motion Decision). For the sake of brevity, I skip here a bevy of challenges and attempts to appeal that included refiling of affidavit evidence so that the cases could be given fresh consideration in 2016, which are listed in the timelines of both Tommy and Kiko's cases on the NhRP website.

11. *Matter of Nonhuman Rights Project, Inc. v Lavery*, 2017 NY Slip Op 04574 [152 AD3d 73] (App Div, First Department).

members of the human community.”¹² The judge also affirmed the point used to deny Kiko relief by the Fourth Department.¹³

Leave to appeal to the New York Court of Appeals was denied by the First Department in early 2018.¹⁴ And then on 8 May 2018 the New York Court of Appeals itself denied the motion.¹⁵ The decision was unanimous but Justice Eugene Fahey wrote a concurrence “to underscore that denial of leave to appeal is not a decision on the merits of petitioner’s claim. The question will have to be addressed eventually [by the highest level of court in the state, as opposed to the individual Judicial Departments]. Can a non-human animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing?”¹⁶

In a remarkable and lengthy concurrence, Fahey J. addressed Tommy’s case, calling out the First Department on its speciesism: “The Appellate Division’s conclusion that a chimpanzee cannot be considered a ‘person’ and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species.”¹⁷ “I agree with the principle that all human beings possess intrinsic dignity and value,” Fahey J. writes, “but, in elevating our species, we should not lower the status of other highly intelligent species.”¹⁸ He goes on to ask: “Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question,” to be decided by a source like *Black’s Law Dictionary*, “but a deep dilemma of ethics and policy that demands our attention.”¹⁹ Citing to Tom Regan’s *The Case for Animal Rights*, Fahey J. says “we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect.”²⁰ Fahey

12. *Ibid* at 3.

13. Other damaging points included denying the analogy of animal legal personhood to corporations, stating that examples of legal persons in other countries (a river in New Zealand and deities in India) were not relevant to the United States and New York, arguing that neither the United States or New York constitutions were intended to include nonhuman animals in the right to liberty nor was the New York *habeas corpus* statute meant to extend beyond human beings, and noting the status of captive chimpanzees in New York State was a matter for the legislature. *Ibid*.

14. See *In re Nonhuman Rights Project Inc. v Lavery*, 2018 NY Slip Op 61538 (App Div, First Department).

15. *In the Matter of Nonhuman Rights Project Inc. v Patrick C. Lavery*, 2018 NY Slip Op 61538 (App Div, First Department) [Lavery and Kiko, Fahey concurrence].

16. *Ibid* at 2.

17. *Ibid* at 4.

18. *Ibid*.

19. *Ibid* at 5.

20. *Ibid*.

J. also addressed the point about complete liberation in Kiko's case, clarifying that *habeas corpus* can indeed be used to transfer someone from one institution to another more appropriate one.²¹ He noted his own "struggle" and second thoughts about whether he should have voted to deny the NhRP's motion for leave to appeal in 2015 given the "profound and far-reaching" nature of the question whether a nonhuman animal has a fundamental right to liberty protected by *habeas corpus*.²² Relying on the "simple either/or proposition" of whether a party is a "person" or a "thing," he wrote, "amounts to a refusal to confront a manifest injustice."²³

When Wise spoke about the Fahey concurrence after the screening of *Unlocking the Cage* at the Oxford Summer School, he was very excited about it. It was just two months old. It was the first time a judge from the Court of Appeals, the state's highest court, or any judge from any American high court, had written anything about the substance of the cases—it had emerged from, as Wise put it, a heated "intellectual street fight" amongst the New York Court of Appeals judges, and it was undeniably favourable, which Wise believes leaves the law in New York in a positive place, and he spoke about filing another New York case in the fall of 2018. NhRP announced in October they have filed a petition of common law writ of *habeas corpus* on behalf of a new client, Happy, an elephant being held alone in captivity at the Bronx Zoo.²⁴

It must be noted that Justice Fahey was not very keen on the personhood argument advanced by Wise and the NhRP. "The better approach," Justice Fahey writes, "is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by *habeas corpus*."²⁵ Wise believes that there are two important things to point out. First, if one has a right (e.g. to liberty) then one is by definition a person. Second, the *habeas corpus* statute only allows a "person" to invoke it. The base of the argument for the NhRP is that chimpanzees are persons under the law.

This statement by Justice Fahey is probably evidence of the reaction judges, like most everyone else, have when they hear that the NhRP fights to extend personhood to certain nonhuman animals, often rising to the level of outrage. This is so even though as lawyers we should be

21. *Ibid* at 6.

22. *Ibid* at 6-7.

23. *Ibid* at 6.

24. Nonhuman Rights Project, "First elephant to pass mirror self-recognition test; held alone at the Bronx Zoo" (November 2018), online: <www.nonhumanrights.org/client-happy>.

25. *Ibid* at 4.

perfectly capable of hearing the idea that just as we give legal corporations personhood status perhaps some nonhuman animals (who certainly have more human-like characteristics than a company) should also be given the already artificial status of legal personhood. No heartbeat is required. The law gives legal personhood to corporations, to municipalities, to ships, to rivers, and to important religious artefacts, as the NhRP repeatedly points out in its arguments, briefs, and submissions. Wise emphasizes that this is a public policy decision that is made as a matter of moral principle.

Justice Barbara Jaffe, the Supreme Court judge who felt herself bound by the *Lavery* decision in the case of Hercules and Leo, two research chimpanzees being held at Stoneybrook University for whom the NhRP also sought *habeas corpus* relief around the same time as Tommy and Kiko, is the only one of the New York judges to date who seems to have fully grasped the point. She wrote, summarizing the NhRP's arguments that "the law accepts in other contexts the 'legal fiction' that nonhuman entities, such as corporations, may be deemed legal persons."²⁶ This "is a matter of policy and not a question of biology."²⁷ Justice Jaffe understood legal personhood in the terms NhRP urges, namely, that this is about "who counts under our law."²⁸ And she discussed the point that NhRP always urges, namely that slaves, women, and children were also historically excluded from the category of legal personhood.²⁹ She concluded by discussing same-sex rights, noting that the pace of change in which truths to one generation come to be seen as oppression to the next may now be accelerating for new groups.³⁰ The fundamental idea behind the work of the NhRP is that as times change, the common law should be evolving to keep up. "The issue of a chimpanzee's right to invoke the writ of habeas corpus is best decided, if not by the Legislature," Jaffe J. writes, "then by the Court of Appeals, given its role in setting state policy."³¹

Justice Webber's 2017 decision from the First Department rejected the analogies to corporations and rivers or deities in other countries. Justice Fahey's 2018 concurrence did not address either of the points explicitly. Whether that concurrence can be taken as over-ruling the First Department (and Third Department on Tommy and Fourth Department on Kiko) or

26. *The Nonhuman Rights Project Inc. v Stanley*, 2015 NY Slip OP 25257 [49 Misc 3d 746] (Supreme Court of the State of NY, NY County), online: <<https://www.nonhumanrights.org/content/uploads/Judge-Jaffes-Decision-7-30-15.pdf>> at 21-22 [Jaffe Decision].

27. *Ibid* at 22.

28. *Ibid* at 23. See also Saru M Matambanadzo, "Embodying Vulnerability: A Feminist Theory of the Person" (2012) 20:1 Duke J Gender L & Pol'y 45 at 45-46, cited by Jaffe, *ibid* at 25.

29. *Ibid* at 23.

30. *Ibid* at 32-33.

31. *Ibid* at 31.

whether, given the unanimity at the New York Court of Appeals to refuse the appeal, the points Fahey J. made in his concurrence leave the lower level Department rulings intact is a complicated question.³² Wise indicated in our interview that the NhRP has engaged a law firm to assist them in delving into these intricacies for their further suits in New York.

The owners of Hercules and Leo, the New Iberia Research Center at the University of Louisiana, agreed in 2016, at the time *Unlocking the Cage* was first being screened, to send them, along with 218 other chimpanzees, to a sanctuary called Project Chimps!³³ Hercules and Leo finally arrived on 21 March 2018.³⁴

II. *Changing the animal/changing the jurisdiction.*

The NhRP started filing cases in 2017 in Connecticut on behalf of three zoo elephants, Beulah, Karen, and Minnie owned by the Commerford Zoo in Goshen, Connecticut. I asked Wise if he thought that changing the animal would make a difference in terms of how controlling the rulings from New York would be. It might. But more importantly, Wise emphasized, the group is responding to feedback they received while litigating the chimpanzee cases, specifically, the charge that the comparison between chimpanzees and slaves is racist.

Now Wise was adamant that this charge of racism is unfounded. However, he recognizes that challenges to the slavery of chimpanzees, given the deep and dark history of human slavery in the United States, might make some people mistakenly think you are comparing chimpanzees to African Americans.

Racist Victorian science popularized by the human zoos of the European and North American world fairs and other expositions of the late nineteenth and early twentieth centuries, explicitly reinforced the presumed connection between skin color and county of origin with stages of primitiveness. There are cases like Otto Benga, a pygmy man from the Congo, who was put on display in the monkey house at the Bronx zoo in

32. Justice Jaffe's decision explains how *stare decisis* works as between the different New York courts—the Supreme Court level where she sits, the intermediate appellate level in its four departments, and the Court of Appeal. See *ibid* at 27-32.

33. See Lauren Choplin, "Nonhuman Rights Project Chimpanzee Clients Hercules and Leo to Be Sent to Sanctuary" (3 May 2016), *Nonhuman Rights Blog*, online: <<http://www.nonhumanrightsproject.org/2016/05/03/nonhuman-rights-project-chimpanzee-clients-hercules-and-leo-to-be-sent-to-sanctuary/>>.

34. See David Grimm, "U.S. chimp retirement gains momentum, as famed pair enters sanctuary," (21 March 2018), *Science*, online: <<http://www.sciencemag.org/news/2018/03/us-chimp-retirement-gains-momentum-famed-pair-enters-sanctuary>>.

1906 after he performed in the 1904 St. Louis World Fair.³⁵ Pygmies were often discussed in the scientific literature as the “missing link” between humans and apes.³⁶

There are at least three scenes in *Unlocking the Cage* that deal with the racism concern. The most dramatic is when the presiding judge in the hearing of the Third Department in Tommy’s case, Justice Peters, gets angry at Wise and says to him, “I have to tell you. I keep having a difficult time with your using slavery as an analogy to this situation. I just have to tell you.”³⁷ And when Wise persists, she says “my suggestion is you move in a different direction.”³⁸ Wise says he is still not sure what exactly this exchange was about. Peters J. did not speak to it in the written reasons but it most likely relates to the racist concern. The second moment in the film occurs when a journalist in a media scrum after the *Lavery* hearing questions Wise (in something of an outraged tone) about whether he compared Tommy’s condition to slavery.³⁹ And the third time occurs when a skeptical African American talk show host interviews Wise and brings up the 3/5ths compromise and the history of slavery in the United States.⁴⁰

Marjorie Spiegel calls the discussion of human slavery and nonhuman animals “the dreaded comparison.”⁴¹ Why is it so dreaded? The truth is that it is not usually a complement to be compared to a nonhuman animal (any of them), given the low regard in which they are generally held and the terrible ways in which they are treated. And those with identities or belonging to groups that have been historically discriminated against, legally and socially, might well resent the comparison. Race in particular is extremely sensitive given the manifold ways in which deeply seated racism continues to have such pernicious material effects in the United States. That does not mean, however, that the issue of nonhuman animal slavery should not be discussed. The analogy to slavery generally is not disposable for the NhRP given the centrality of autonomy to liberty and the writ of *habeas corpus*; however, Wise explains that there is certain amount of trial and error involved in the NhRP’s litigation strategy and

35. See Bill Demain, “In 1906, the Bronx Zoo Put a Black Man on Display in the Monkey House,” (9 April 2012), *Mental Floss*, online: <<http://mentalfloss.com/article/30399/1906-bronx-zoo-put-black-man-display-monkey-house>>.

36. See *The Human Zoo: Science’s Dirty Secret*, 2009, directed by Srik Narayanan.

37. *Unlocking the Cage*, *supra* note 2 at 1:01:25-35.

38. *Ibid* at 1:01:46.

39. *Ibid* at 1:02:47-1:03:09.

40. *Ibid* at 51:20-33.

41. See Marjorie Spiegel, *The Dreaded Comparison: Human and Animal Slavery* (NY: Mirror Books, 1996).

chimpanzees raise the charge of racism in a sharp way that elephants likely will not.

“No one has compared African Americans to elephants,” said Wise in our interview. “And people have a soft spot for elephants,” who like chimpanzees and orcas have extraordinarily complex social and emotional lives.

Wise discussed ways that the NhRP would be making their evidentiary presentations on the complex lives of their nonhuman clients more sophisticated. Their elephant expert, Joyce Poole, has embedded videos in her affidavit that show the elephants doing the things she discusses as she explains the behaviors and what they mean. And for the Orca cases the group plans to bring, the NhRP is in discussions with orca scientists who have the capacity to fly drones with virtual reality cameras mounted on them to capture the orcas’ behavior for use in court and legislatures. Such visuals will help the affidavit evidence come to life.

So how is the switch in animal and jurisdiction going so far? Not so well, Wise concedes. “But they will learn.” The judge in the first decision from the Connecticut Superior Court denied the claim for the Commerford Zoo elephants as both lacking in subject matter jurisdiction and as frivolous.⁴² The judge, Bentivegna J., denied the NhRP’s motion to reargue in early 2018. NhRP appealed and filed a “motion for articulation,” which the judge responded to on one point. They have filed a second *habeas corpus* petition that is currently being considered by another judge.⁴³

Wise emphasizes that this is the first time the NhRP has been told it does not have standing to argue on behalf of the imprisoned animal. A *habeas corpus* claim cannot be made by the imprisoned person and so must, of necessity, be made by a third party, any third party. Any claim is not frivolous simply because it has not been done before in that state.

An attorney and teacher of legal ethics who served as Connecticut’s Chief Disciplinary Counsel for a decade is filing an amicus curiae brief in the Appellate Court and has filed a supporting affidavit in the second trial court.⁴⁴ If the cases in New York are any indication, this is an issue that at least two of its judges (Justice Barbara Jaffe and Justice Eugene Fahey) think is of great import and needs to be addressed on its merits and from a policy perspective given the liberty interests it engages. Indeed, in an

42. *The Nonhuman Rights Project Inc. v R. W. Commerford & Sons Inc.*, 2017 WL 7053738 (Conn Sup Ct).

43. See timeline set out online: Nonhuman Rights Project <<https://www.nonhumanrights.org/clients-beulah-karen-minnie/>>.

44. See online: Nonhuman Rights Project <<https://www.nonhumanrights.org/content/uploads/Dubois-affidavit-NhRP-elephant-rights-case.pdf>>.

environment where the states think of themselves as, and in fact are, legally distinct jurisdictions, there is an argument that comity strongly suggests that one state (Connecticut) should take what another state (New York) has said about the issues of nonhuman animal standing and legal personhood, at least for the purposes of satisfying the *de minimus* threshold that these issues are serious issues for adjudication.

A judge of the New York Court of Appeals has said that the question whether “an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do” has “the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her” is “a deep dilemma of ethics and policy that demands our attention,”⁴⁵ whether a nonhuman animal has a fundamental right to liberty protected by *habeas corpus* is a “profound and far-reaching” question,⁴⁶ and that the refusal to confront the simplistic legal thinghood of nonhuman animals “amounts to a refusal to confront a manifest injustice.”⁴⁷ These statements strongly indicate that the issues the NhRP raises should not simply be dismissed as frivolous in other states. And if standing has not been an issue in New York, then it would out-of-step for Connecticut to refuse to engage with the merits on that ground.

III. *Standing in Canada and the United States.*

I was especially keen to ask Wise about how his personhood arguments for nonhuman animals might play out in Canada. Two trial level decisions about nonhuman animals that have garnered a lot of media attention in recent years, the Ikea Monkey Case and Anita Krajnc’s unsuccessful prosecution for giving water to an overheated pig on its way to slaughter, were decided by judges who went out of their way to say that the nonhuman animals were property not persons.⁴⁸ Those reactions, if typical, do not bode well for a personhood approach here.

45. *Lavery and Kiko*, Fahey concurrence, *supra* note 15 at 5. The NhRP has pointed out that the definition of “person” relied on by the Third Department from *Black’s* was due to an error that its editor-in-chief has acknowledged *Black’s* made and who promised the error will be fixed in the next edition to read that legal personhood has been consistently defined in terms of the capacity for either “rights or duties” rather than “rights and duties.” See online: <<https://www.nonhumanrights.org/client-tommy/>>.

46. *Ibid* at 6-7.

47. *Ibid* at 6.

48. See *Nakhuda v Story Book Farm Primate Sanctuary*, 2013 ONSC 5761 at para 4 (“the monkey is not a child. Callous as it may seem, the monkey is a chattel, that is a piece of property. The court may apply only property principles when considering the issues in this case”); *R. v Kranjc*, 2017 ONCJ 281 at paras 35, 37 (“by law in Canada, pigs are not persons and they are property”; “In passing, I note that dogs and cats and other pets are property too, and not persons”). See “Already Artificial,” for a more detailed discussion of Darwin’s case. Neither decision was appealed.

It must be noted that in neither of those cases was the animal legal personhood argument advanced explicitly by the lawyers in the case, probably because they anticipated that hostile reaction.⁴⁹ Wise says that it took the NhRP many years to construct its personhood arguments. Even today they would not take a case involving a pig or a Japanese macaque, which are much less winnable on personhood arguments than cases involving chimpanzees, elephants and/or orcas. The NhRP believes that once personhood has been established for these nonhuman animals, they will be better able to proceed to other species.

The other point to make about Canada is that in a country with a unitary court system, a direct argument for nonhuman animal legal personhood could be very dangerous. If the argument is rejected by a provincial Court of Appeal and is appealed to the Supreme Court of Canada and rejected, that will serve as the governing law for many years to come. It is a risky approach with a high price for loss, in just the same way that is was for other civil rights movements in the 1980s and 1990s such as same-sex rights for Canadian couples.

Wise understood the concern immediately, as I am sure he knew, that in Canada we have a pyramid shaped system, like the United Kingdom he was quick to add. It is very different in the United States where there are, as Wise put it, “essentially fifty different little pyramids” for each of the states. Each sees itself as and is a jurisdiction unto itself. So, for instance, Justice Bentivegna in Connecticut did not refer to any of the New York cases when he dealt with the petition for the Commerford elephants. The NhRP can lose in one state and keep going from state to state. It plans to do just that. It has, as we saw above, already started litigating on behalf of elephants in Connecticut and New York and will move to elephants and orcas in California state courts as soon as there is a whale sanctuary that can take orcas from places like SeaWorld, so they can live in sea pens rather than swimming pools.

49. In *R. v Kranjc*, the topic of pigs as persons came up because one of the expert witnesses on pig cognition raised it. In *Nakhuda*, the child issue was probably raised because Nakuda referred to the monkey Darwin as her child and herself as his mother in specific media coverage referred to by the judge (an online chat Nakuda hosted with the *Toronto Sun*). The lawyers for the sanctuary did not make a “best interests” argument, language used in custody and others disputes involving children, probably because they expected it would not be well received. This is despite the fact that there is jurisprudential support for a best interests test in Canada. See Lesli Bisgould, *Animals and the Law* (Toronto: Irwin law, 2011) at 154-157. See Jaffe J.’s decision for a summary of case law in New York establishing that pets are no longer mere property, they are family members, and judges have used “best interests” and “well being” in deciding disputes about their custody or guardianship in cases of divorce precisely because basic ownership is an impoverished and inadequate approach. See Jaffe Decision, *supra* note 26 at 24-25.

This last point is important, as the Ontario government certainly worried about where Kiska, the orca at Marineland, would go if they brought in a ban on cetacean captivity, in keeping with the growing consensus that aquarium and entertainment parks with their tricks and concrete tanks are no place for these animals. The legislation banned the possession or breeding of any new orcas in 2015.⁵⁰ The Park Board in Vancouver has voted to ban the Vancouver Aquarium from acquiring any new whales or dolphins and from using certain cetaceans in its live shows.⁵¹ There is also a documentary, *Vancouver Aquarium Uncovered*, which like *Black Fish*, has helped bring the situation at that aquarium—particularly in relation to its beluga whales and dolphins—to public awareness.⁵² The Canadian Senate has finally passed a ban on the use of cetaceans for entertainment purposes.⁵³

The other important point to make about the Canadian context, one which Wise was quick to raise, is that Canada uses the British rule for attorney fees, as opposed to the American rule where generally each side pays its own costs. The British costs rule means that the loser pays the costs of both sides absent public interest standing. The general rule for costs in Canada would make it extremely difficult for any Canadian group to do what the NhRP does, namely, sue again and again, expecting to lose many times before they start winning. As Steve put it, “it’s part of our strategy to make our personhood arguments again and again, as we believe that the judges’ repeated exposure to them will make it more likely that they will understand the strength of both our facts and our legal arguments and eventually come on board,” as Justice Fahey did. “The first time they hear the arguments they just want you to go away. But then they start to think. Or at least some of them do.”

50. See Bill 80, *Ontario Society for the Prevention of Cruelty to Animals Amendment Act*, 1st Sess., 41st Leg., Ontario, 2015 (assented to 28 May 2015).

51. See Wendy Stueck, “New Whales, Dolphins Banned from Vancouver Aquarium” *Globe and Mail* (May 16, 2007), online: <<https://www.theglobeandmail.com/news/british-columbia/park-board-approves-by-law-banning-whales-dolphins-at-vancouver-aquarium/article35004004/>>.

52. *Blackfish*, 2013, directed by Gabriela Cowperthwaite; *Vancouver Aquarium Uncovered*, 2016, directed by Gary Charbonneau, online: <<https://www.youtube.com/watch?v=hs4FtZSLyc8>>. The film documents that despite claims to make education and conservation a priority, the Aquarium had in fact spent zero dollars on those goals, they have an extensive beluga breeding program when they claimed they had no breeding program, its “rescue” dolphins were in fact obtained from the Japanese drive hunt, which kills scores of dolphins and captures some to sell to aquariums, the 9/10 infant mortality rate for their beluga whales was much higher than in the wild, and there is no evidence that any research that has been done at the aquarium in fifty years has helped any wild populations. On the Taiji dolphin drive hunt, see *The Cove*, 2009, directed by Louie Psihoyos.

53. See John Paul Tasker, “Senate passes bill that would ban whale, dolphin captivity in Canada” *CBC News* (24 October 2018), online: <<https://www.cbc.ca/news/politics/tasker-whale-dolphin-captivity-canada-senate-bill-1.4876136>>.

Some Canadian animal law advocates such as Anna Pippus, director of Farmed Animal Advocacy at Animal Justice Canada, argue that public interest standing is a promising way to litigate on behalf of nonhuman animals.⁵⁴ Public interest standing—and a reversal of the usual costs rule may be granted if the case raises a “serious issue,” it has been established that the group seeking standing is directly affected or, if not, has “a genuine interest” in the litigation, and if there is no other “reasonable and effective” way to bring the issue before a court.⁵⁵ An important nonhuman animal case could certainly meet those qualifications.

Pippus has argued in a debate with Wise that “being property and being persons aren’t mutually exclusive.”⁵⁶ Wise says he agrees with Pippus: “If a person is simply an entity that has the capacity for legal rights, it would be theoretically consistent for a nonhuman animal person to have say the right to bodily integrity but not the right not to be considered property, though the NhRP would hammer away at that property status.” Another way of putting this point is to say that nonhuman animals are both property and persons (as they are entitled to certain rights), and as such, a case brought under public interest standing would be an opportunity to recognize this.⁵⁷ Pippus points out that the Chief Justice of the Alberta Court of Appeal Kathy Fraser argued in her dissent in a case about Lucy, a lone elephant held at the Edmonton Zoo, “it arguably remains an open question whether the common law has now evolved to the point where, depending on the circumstances, an animal might be able to sue through its litigation representatives.”⁵⁸ Pippus points out that Canadian public

54. See Leah Edgerton (posting a debate between Steven Wise, Maneesha Deckha, and Anna Pippus), “What is the Most Effective Way to Advocate Legally for Nonhuman Animals?” (29 August 2016), online: Animal Charity Evaluators <<https://animalcharityevaluators.org/blog/what-is-the-most-effective-way-to-advocate-legally-for-nonhuman-animals/>> [“Wise, Deckha, Pippus Debate”].

55. See *Thorson v Canada (AG)*, [1975] 1 SCR 138, 43 DLR (3d) 1; *MacNeil v Nova Scotia (Board of Censors)*, [1976] 2 SCR 265, 55 DLR (3d) 632; *Borowski v Canada (Minister of Justice)*, [1981] 2 SCR 575, 130 DLR (3d) 588; *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236, 88 DLR (4th) 198.

56. Wise, Deckha, Pippus Debate, *ibid*.

57. Cass Sunstein often points out that certain nonhuman animals do indeed already have rights. See, e.g., Cass R. Sunstein, “Enforcing Existing Rights” (2002) 8 *Animal L* 1; Cass R. Sunstein, “Introduction: What Are Animal Rights?” in Cass R. Sunstein & Martha C. Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (New York: Oxford University Press, 2004) 3 at 5. (“If we understand ‘rights’ to be legal protection against harm, then many animals already do have rights.”) See Angela Fernandez, “Not Quite Property, Not Quite Persons: A ‘Quasi’ Approach for Nonhuman Animals” (forthcoming in the *Canadian Journal of Comparative and Contemporary Law*).

58. See *Reece v Edmonton (City of)*, 2011 ABCA 238 at 143.

interest rules have been further liberalized by the Supreme Court of Canada since Lucy's case was dismissed in 2011.⁵⁹

"If the animal sues in its own name wouldn't that presuppose they are a legal person," Wise asked. Yes, I suppose it would. Wise elaborates: "if one accepts that a person is an entity with the capacity for legal rights then the possession of a legal right necessarily requires the possessor of that right to be a person." That seems to be different than the animal having human representatives or guardians empowered to sue on its behalf, the approach that the NhRP have taken in the *habeas corpus* law suits. Although the "next friend" or guardian idea resurfaces inescapably, as the animal obviously cannot come into court and argue for him or herself. Courts would be using a legal fiction to make the nonhuman animal the plaintiff in suit much the same way as a corporation is listed in a style of cause even though it cannot speak without human representatives. Wise says that the NhRP would invoke the same procedures that would be used on behalf of a human incompetent to argue those cases.

Either an animal suing in their own name (with the help of human representatives) or bringing a suit in the name of the animal organization (on behalf of the animal) is very different than the situation American animal advocates like the Animal Legal Defense Fund found themselves in historically when suing in federal court. Standing rules in these early animal law cases in federal courts in the United States held that individual humans had to come forward and prove that *they* were harmed by, for example, seeing the animal in captivity, rather than proving a harm to the animal. Groups were told they needed to prove that there was "an injury in fact" to the human individual who was bringing the law suit forward.⁶⁰

59. See *Canada (AG) v Downtown Eastside Sex Workers United Against Violence*, 2012 SCC 45. This case concluded that the three considerations are not a "checklist" and that a flexible approach using a purposive balancing of all three factors was needed, especially with regard to the third requirement given its impact on members of marginalized groups and their ability to take part in legal conversations due to a lack of resources and other factors on important social issues. See Dana Phillips, "Public Interest Standing, Access to Justice, and Democracy under the Charter: *Canada (AG) v Downtown Eastside Sex Workers United Against Violence*" (2013) 22:2 Const Forum Const 21 at 28 (arguing that the contextual factor should be made explicit: "Does the public interest litigant represent a disadvantaged or marginalized group?").

60. An "injury in fact" requires a plaintiff to have a personal stake in the outcome that is "concrete and particularized" and "actual and imminent" in a personal and individual way (although an "aesthetic" interest can be read broadly). These prudential rules fleshing out Article III "case and controversy" standing are intended to send an injury that is "pervasively shared" to the political branches, preclude third parties from exercising the right and interests of others, and the injury must fall within the "zone of interests" protected or regulated by the federal statute. See Danny Lutz, "Harming the Tinkerer: The Case for Aligning Standing and Preliminary Injunction Analysis in the Endangered Species Act" (2013–2104) 20:2 Animal L at 319–321.

An important 2004 case by the 9th Circuit in California, *Cetacean Community v. Bush*, held that there was another route under the federal rules, namely, a lawsuit could be brought on behalf of the animal, as long as there was evidence that the federal statute in question intended to confer standing on nonhuman animals.⁶¹

The NhRP is against filing law suits in federal court, as People for the Ethical Treatment of Animals (PETA) continue to do despite their unsuccessful 2011 case arguing that SeaWorld was violating the 13th amendment rights of their captive orcas.⁶² Wise was very direct about PETA decisions to go to federal court: “Federal standing jurisprudence is unprincipled, the decisions often arbitrary. It is a bad idea right now because the United States Supreme Court is not, at this time, prepared to recognize rights for nonhuman animals.” He pointed to the recent California decision filed for Naruto, the selfie monkey, by PETA under the *Federal Copyright Act*.

This case was brought in Naruto’s name by PETA as “next friend” against the photographer who owned the camera Naruto took the photos on who, along with the wildlife publisher claimed ownership of the photos, arguing that Naruto was the “author” of the photographs.⁶³ Two of the three judges in dismissing the appeal at the District level urged for 9th Circuit *en banc* reconsideration of *Cetacean Community*, expressing in strong terms their desire to see it overruled.⁶⁴ Such an overruling would take away what little direct Article III standing there is for nonhuman animals.

In discussing the Naruto case, Wise noted that the judges concluded that PETA had abandoned Naruto by settling separately with Slater to have the adverse District Court ruling vacated in order to protect its own institutional interests, which caused them to question the good faith behind its “next friend” status.⁶⁵ Also Slater and his publisher were awarded attorney’s fees and costs on appeal.⁶⁶

“Federal court is a no-go right now, for many reasons,” Wise says and he hopes PETA will realize that and stop suing there.

61. See *Cetacean Community v. Bush*, 3 F. 3d 1169, 1175 (9th Circ. 2004).

62. *Tilikum v Sea World Parks and Entm’t, Inc.*, 842 F. Supp. 2d. 1259 (S.D. Cal. 2012). See online: <https://en.wikipedia.org/wiki/Nonhuman_Rights_Project> (explaining Wise’s opposition to the 2011 PETA lawsuit).

63. See *Naruto v Slater*, 2016 WL 362231 (United States District Court, N.D. California). See online: <<https://cdn.ca9.uscourts.gov/datastore/opinions/2018/04/23/16-15469.pdf>>.

64. Justice Bea noted that their three-judge panel was “bound by the precedent set in *Cetacean Community* until and unless overruled by an *en banc* panel [of the 9th circuit] or the Supreme Court.” See *ibid* at 6. Both judges who wrote (Bea and Smith) invited such an over-ruling. See at n. 5 and n. 7.

65. See *ibid* at n. 3. See also n. 11 in Justice N.R. Smith’s concurrence.

66. See *ibid* at 18.

IV. *Fiat Justitia, ruat coelum—let justice be done though the heavens may fall.*

Wise explained in the interview that he thinks there are three kinds of judges. First, there are those who would not liberate a chimpanzee if the animal appeared in court and delivered her own argument. He points to the 1875 case of Lavinia Goodell, who brought a petition in the Supreme Court of Wisconsin to be admitted to the bar, from which she was excluded on the grounds that she was a woman, and her lawyer specifically noted that his oral argument had been written by Goodell, all to no avail.⁶⁷ The Chief Justice held that she was not to be admitted even if she could clearly operate in the role of a lawyer. Like deep sexism, deep speciesism is not really amenable to contrary proof or evidence. In terms of the nonhuman animal argument, only humans can have rights and that is that, these judges will think.

Secondly, there are judges who are what Wise calls “passively sympathetic.” They might be inclined to look upon the arguments favourably but given the passive role of a judge, taking cases and only those cases that appear before them, they might never hear a case involving the rights of a nonhuman animal. Thirdly, there is the in-between category of those judges who are open minded and will consider the argument, any argument, on its merits. He thinks the NhRP has run into two or three such judges in the second or third categories in the New York Chimp litigation (like Justice Jaffe and Justice Fahey), which he thinks is pretty good given the pervasiveness of speciesism and the rampant implicit bias against the personhood of nonhuman animals that most judges almost certainly share at this time. In his view, what judges in the second and third categories need is a way to talk without embarrassment to those in the first no-way category at their next judicial function. This is a very bottom-line (but probably accurate) appraisal of the situation. There is also the issue of legal outs for judges or courts that have ruled against nonhuman animal claims and might be inclined to change their mind after hearing the arguments or those of their peers again.

So when Lord Mansfield freed James Somerset on a writ of *habeas corpus* on 22 June 1772, in which of the three categories did he fall? Obviously not the first. Was he “passively sympathetic”? Well, he might have been, but it seems unlikely that he was eager to rule that slavery in England was illegal.

67. *In the Matter of the Motion to admit Miss Lavinia Goodell to the Bar of this Court*, 39 Wis. 232 (1875).

Wise describes how Mansfield's court regularly returned impressed slaves to their masters under writs of *habeas corpus* as long as the master could prove the person was his slave, when really the slave ought to have been freed, the property claim notwithstanding.⁶⁸ Rather than ruling that England's laws admit of no such property, as the lawyers for a kidnapped black man in the case of *Lewis v. Stapylton* urged, Mansfield refused to sentence the kidnapper, Stapylton, who failed to prove he owned Lewis and Lewis was a slave.⁶⁹ Lewis was now safe and Mansfield thought that was enough.⁷⁰

Even if Mansfield was not eager to outlaw slavery in England, he must have been somewhat open-minded, as outrageous as his behavior was in refusing to sentence Stapylton. Wise explains that Mansfield could have denied the petition on behalf of James Somerset on the grounds that Somerset's three "godparents" who filed the suit were strangers to the situation between Somerset and his American owner Charles Steuart.⁷¹ In other words, Mansfield was ambivalent about the institution of slavery—"torn," Wise writes, "by the odiousness and plain immorality of English slavery and the obvious fact that the slave trade enormously benefitted British merchants and planters as well as the Crown."⁷² Wise contends that Mansfield's "ambivalence [was] vividly demonstrated on 28 November 1771, when he outrageously rid himself of Stapylton's case early in the day, then saddled himself with Somerset's case that evening."⁷³

Why seven months later did Mansfield abolish slavery in England? It is difficult to say. The West Indian slavers who had taken over Steuart's litigation argued that freeing a slave who simply landed in England and breathed English air would result in the liberation of between 14,000 and 15,000 English blacks, which meant a loss of a million pounds of property.⁷⁴ Lord Mansfield was *the* commercial judge *par excellence*. It would have been extremely difficult for him to ignore these economic consequences given the way that he valued stability and certainty in property law.⁷⁵

68. *Though the Heavens May Fall*, *supra* note 5 at 94-96.

69. See *ibid* at 108-109.

70. *Ibid* at 110.

71. *Ibid* at 115 ("Except in unusual circumstances, judges usually refused to consider petitions filed by strangers and, if some busybody managed to haul a prisoner into court, he might be sued. Mansfield could have ruled Somerset's three godparents strangers to the case and refused to issue the writ, but he did not.") The three godparents were Thomas Walkin, Elizabeth Cade, and John Marlow. *Ibid* at 10.

72. *Ibid* at 210.

73. *Ibid*.

74. *Ibid* at 183.

75. See *ibid* at 77.

A ruling to free Somerset would disrupt aspects of the slave trade by making it unsafe for merchants and others from the colonial world to come to England with their slaves. Why? Well, there was now the risk that the slave might there be freed and they would lose their property. Such a ruling was not in step with the commercial custom Mansfield was so keen on developing and rationalizing and bringing into the common law. While slavery was not expressly legal in England, the British Parliament had been long regulating the slave trade and granting concessions to slave traders that encouraged them and confirmed ownership property in slaves through such things as the Navigation Acts.⁷⁶ But disrupt commercial expectations Mansfield did, damn the consequences, captured in the Latin maxim Wise uses for the title of his book: *Fiat Justitia, ruat coelom*, let justice be done though the heavens may fall.⁷⁷

Wise explains that there were probably a combination of factors at play in Lord Mansfield's decision to free James Somerset. First, there was persuasive argument that human slavery like polygamy or an incestuous marriage, was so odious it would not be recognized by the laws of England. The ownership of other human beings was not like the despotic ownership of a man's cats, dogs or horses.⁷⁸ Secondly, there was Mansfield's fondness for his mulatto niece Dido Elizabeth Belle, who was also his slave, which must have played a role – and she was apparently pushing him to free Somerset.⁷⁹ Thirdly, Mansfield was a great judge and great judges need great cases to decide and it was clear that the lawyers and abolitionists involved in Somerset's case were going to make sure this case did not just go away. As Wise puts it, "Mansfield was concerned for his place in history; he wanted to be remembered as the great judge he was. Great judges defend freedom, not slavery."⁸⁰ There was also, fourthly, the justice of James Somerset's individual case and the consequences to him if the *habeas* petition failed.

Wise explains that Steuart had actually turned over the control of his case to the West Indies slaving interests, in return for them paying all his

76. See *ibid* at 33-34.

77. *Ibid* at 173, 176.

78. *Ibid* at 160, 168.

79. See *ibid* at 183-184, 78-79. Wise writes that "[s]ome speculated that Dido had even badgered him into, though it is hard to believe a child could accomplish that." *Ibid* at 183. I would personally not underestimate the power of a child to persuade, especially on a moral question, which they see and argue for in simple and strong terms. Dido would have been about nine years old in 1772. My nine-year old has recently convinced me that my vegetarianism should extend to include fish, her favorite animal.

80. *Ibid* at 215.

costs. They now refused to allow Somerset to go free.⁸¹ That solution (a bit like what the New Iberia Research Center decided to do with Hercules and Leo) would have been the easiest way to see justice done for Somerset as an individual without disrupting the wider slave trade. As Stuart's travelling companion and trusted manservant, Somerset had been treated by him as a favorite, or a kind of pet, what pet generally meant in the eighteenth century.⁸² Stuart took him all over British North America (e.g. Boston, New York, Philadelphia, Williamsburg) due to Stuart's work as the receiver general of customs. He purchased Somerset silk, stockings, ribbon and gave him money.⁸³ Such treatment may have felt to Mansfield not very different from the way he and the rest of his family were towards Dido, who, along with his other (white and legitimate) niece Lady Elizabeth Murray, were family favourites, not likely to have been held in such high favour had Lord Mansfield and his wife not been childless.⁸⁴ The abrupt change in James Somerset's status might have been an injustice Mansfield could relate to, as if Dido had suddenly, after a life of privilege, been thrown out in the world where he knew she was at risk of being enslaved by someone else. We know he worried about this, as he took steps to ensure that would not happen after his death.⁸⁵

While not legally free, Somerset had enjoyed a *de facto* freedom it would now be cruel to take away from him. Moreover, the punishment Stuart ordered once Somerset ran away was sale and deportation to the West Indies to re-enter the brutal sugar cane plantation system. This punishment would have probably been insisted upon by those who were now backing Stuart's case, who would also wish to deter other slaves in London from running when they had the opportunity to do so. It would be unpredictable as to what kind of person the new owner would be

81. See *ibid* at 155. (On 21 May 1772, Mansfield asked if the West Indies interests were indeed backing Stuart and he was told yes. Wise explains that these slavocrats had contacted Stuart and offered to pay his costs. And on June 15th Stuart communicated to a Boston friend and lawyer involved in the case—coincidentally named James Murray—that “[t]he West Indian planters and merchants have taken it off my hands; and I shall be entirely directed by them in the further defence of it”).

82. Kasey Grier explains that “pet” was originally used to describe “an indulged or spoiled child; any person treated as a favorite” and that in the eighteenth century writing about pet animals almost always used the word “favorite” instead of “pet.” Grier writes: “This usage suggests the most fundamental characteristic of pet keeping, the act of choosing a particular animal, differentiating it from other animals.” See Katherine C. Grier, *Pets in America: A History* (Chapel Hill: University of North Carolina Press, 2006) at 6.

83. *Though the Heavens May Fall*, *supra* note 5 at 4.

84. See *ibid* at 143 (painting of the two cousins on the unnumbered opposite page).

85. Wise explains that Mansfield took pains to make sure that no one could ever claim Dido as a slave, confirming her freedom in his will in 1782, leaving her £100 a year after his wife's death and leaving her another £500 the following year. See *ibid* at 183-184.

and people often faced high chances of death during the voyage or soon after arrival from back-breaking work and deplorable living conditions, as it was cheaper to work slaves to death and replace them than to look after them.⁸⁶ This fate was a plainly terrifying prospect and one of which Mansfield was well aware.

Unlike Lewis, who could continue to live in England as a free black man despite Mansfield's refusal to sentence Staplyton, Somerset would be the very opposite of safe if he lost his case. Given Mansfield's connection to Dido those consequences would have been real to him in a way they would not otherwise have been. Slavers who wanted a different outcome for those like Somerset would need to go to Parliament and obtain a statute expressly permitting slavery in England. Without it, there was no law authorizing slavery in England.⁸⁷

Wise writes at length in the book about Granville Sharp, the "extraordinarily persistent" ordinance clerk, who worked tirelessly to abolish slavery in England.⁸⁸ Sharp, an animal lover and pacifist, held a range of bigoted views about Catholics and Quakers, and he did not think that black people were the intellectual and moral equals of whites, explaining why, like other abolitionists, he "failed to press for full equality, but employed 'a be-kind-to-animals paternalism.'"⁸⁹ However, Sharp's labours and writings, including his legal researches, were crucial to Somerset's success.

Wise's persistence is much like Sharp's. And Wise often says that the NhRP is looking for a Lord Mansfield, a judge who is not afraid to take a position against nonhuman animal slavery and to change his or her mind, as Mansfield did, in order to do the right thing. So, for instance, Wise wrote at the end of *Rattling the Cage*:

The decision to extend common law personhood to chimpanzees and bonobos will arise from a great common law case. Great common law cases are produced when great common law judges radically restructure existing precedent in ways that reaffirm bedrock principles and policies. All the tools for deciding such a case exist. They await a great common law judge, a Mansfield, a Cardozo, a Holmes to take them up.⁹⁰

86. Slave catchers located Somerset fifty-six days after he ran away and was, on Stuart's order, shackled and thrown aboard a ship bound for Jamaica, where he was to be resold. See *ibid* at 10-11. See Randy M Browne, *Surviving Slavery in the British Caribbean* (Philadelphia: University of Pennsylvania Press, 2017).

87. *Though the Heavens May Fall*, *supra* note 5 at 182.

88. See *ibid* at 31-36, quote at 32.

89. *Ibid* at 35.

90. *Rattling the Cage*, *supra* note 6 at 270.

However, “if these early cases are brought at the wrong time, in the wrong place, or before the wrong judges, they may strengthen the Great Legal Wall [separating humans from nonhuman animals].”⁹¹

“Exuding self confidence and intellectual vigor,” Wise wrote in *Though the Heavens May Fall*, Mansfield “was unafraid to correct his own errors ... When other judges expressed surprise, Mansfield told them, ‘It is, after all, only showing the world that you are wiser today than you were yesterday.’”⁹² “History is filled with judges of two minds [and] judges who changed their minds.”⁹³

In *Unlocking the Cage* Wise described the New York chimpanzee cases as the first salvo in a war to free nonhuman animals.⁹⁴ He writes about the *Somerset* case in the same terms:

Whether Sharp initially believed *Somerset*’s was the right case at the right time before the right judge, he was now fully committed to assisting in every way he could. Even if *Somerset* was freed, it would be just one skirmish in the war that was building to end English, then colonial, slavery, and finally the entire African slave trade.⁹⁵

Wise ends the book by noting that “*Somerset*’s principles have begun to radiate beyond humanity, as some lawyers are insisting today that at least the most cognitively complex nonhuman animals should no longer be treated as slaves.”⁹⁶ We can now see what he means when he says he wrote the book in order to learn how to litigate cases for nonhuman animals and why he sees the NhRP cases as “the end of the beginning” of the struggle to end nonhuman animal slavery.⁹⁷

91. Steven M Wise, “Animal Thing to Animal Person—Thoughts on Time, Place, and Theories” (1999) 5 *Animal L* 61 at 68.

92. *Though the Heavens May Fall*, *supra* note 5 at 73.

93. *Ibid* at 214.

94. See *Unlocking the Cage*, *supra* note 2 at 28:03.

95. *Though the Heavens May Fall*, *supra* note 5 at 147.

96. *Ibid* at 225.

97. See *Unlocking the Cage*, *supra* note 2 at 1:28:10-30.

DALHOUSIE LAW JOURNAL

Volume 41

Number 1

Spring 2018

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