Nov 15

Attorney Affirmation

*Amici* biographies

1. **Peter Singer** is the Ira W. DeCamp Professor of Bioethics at Princeton University. Journalists have called him the “world’s most influential living philosopher.” His most influential work has focused on the ethics of our treatment of animals, which is often credited with starting the modern animal rights movement, and his work on obligations to alleviate extreme poverty, which inspired and continues to influence the movement of effective altruism. Key figures concerned with animal welfare, including Jane Goodall and Ingrid Newkirk have said that his book, *Animal Liberation* (HarperCollins, 1975), led them to get involved in the struggle to reduce the vast amount of suffering we inflict on animals. To that end, he co-founded the Australian Federation of Animal Societies, now Animals Australia, the country's largest and most effective animal advocacy organization. In 2021 he was awarded the Berggruen Prize for Philosophy and Culture, a $1 million award given annually to "thinkers whose ideas have profoundly shaped human self-understanding and advancement in a rapidly changing world."

2. Singer is the founder of The Life You Can Save, an organization based on his book of the same name. It aims to spread his ideas about why people in developed countries should be doing much more to improve the lives of people living in extreme poverty, and how we can best do this.

3. Singer’s writings on poverty include: the 1972 essay “Famine, Affluence, and Morality” in which he argues for donating to help the global poor; and two books that make the case for effective giving: *The Life You Can Save* (Random House, 2009) and *The Most Good You Can Do* (Yale, 2015).

4. Singer has written, co-authored, edited or co-edited more than 50 books, including *Practical Ethics*, *The Expanding Circle*, *Rethinking Life and Death*, *One World*, *The Ethics of What We Eat* (with Jim Mason) and *The Point of View of the Universe* (with Katarzyna de Lazari-Radek). His writings have appeared in more than 30 languages.

5. Singer was educated at the University of Melbourne and the University of Oxford. After teaching in England, the United States, and Australia, in 1999 he became Ira W. DeCamp Professor of Bioethics in the University Center for Human Values at Princeton University

6. **Gary Comstock** is Alumni Distinguished Undergraduate Professor of Philosophy at North Carolina State University. He conducts research on ethical questions in the biological sciences. He is especially interested in animal minds and the moral relevance of what's known and not known about the brains and behaviors of nonhuman mammals. In his book, *Research Ethics: A Philosophical Guide to the Responsible Conduct of Research* (Cambridge, 2013), Comstock shows how Peter Singer’s expanding circle metaphor lends coherence to an otherwise disparate set of issues in research ethics.

7. An award-winning researcher and teacher, Comstock's *New York Times* essay, "You Should Not Have Let Your Baby Die," received Honorable Mention in the PEA Soup 2017 Ethics Prize competition. Two years earlier, he was named an NC State Alumni Association Outstanding Teacher of the Year. A coauthor of *Chimpanzee Rights: The Philosophers'* *Brief,* and co-editor of *The Moral Rights of Animals*, Comstock wrote *Vexing Nature? On the Ethical Case Against Agricultural Biotechnology*.

8. For two years, Comstock was ASC Fellow of the National Humanities Center. He continued there as Editor-in-Chief of *On the Human*, one of the Center's online projects. Comstock directed the OpenSeminar in Research Ethics, and is editor of two more books, *Life Science Ethics*, and *Is There a Moral Obligation to Save the Family Farm?* He served on the committee that co-authored the third edition of *On Being a Scientist*.

9. **Adam Lerner** is Lecturer at Princeton University. Previously, he was Assistant Professor/Faculty Fellow in the Center for Bioethics at New York University. He earned his PhD in philosophy from Princeton University, where he earned the Porter Ogden Jacobus Fellowship, Princeton's top honor for graduate students.

10. Lerner’s work lies at the intersection of ethics, metaethics, and moral psychology. In his dissertation, he argued that appreciating the role of empathy in moral inquiry can help us make progress on debates about the strength of our obligations to reduce animal suffering and extreme poverty. He also works on questions in political philosophy, population ethics, and moral epistemology. His work has appeared in venues such as *The Journal of Moral Philosophy*, *Oxford Studies in Metaethics*, *Philosophical Studies*, and *Philosophical Perspectives.*

                 **I.**            **STATEMENT OF INTEREST OF *AMICI CURIAE***

 *Amicus* Peter Singer is the Ira W. DeCamp Professor of Bioethics at Princeton University. His publications in the 1970s are widely credited with creating the philosophical basis of the modern animal rights movement. His work in this area and in the area of our duties to those living in extreme poverty, are some of the most excerpted and reprinted essays in applied ethics anthologies. *Amicus* Gary Comstock, an award-winning researcher and teacher, is Alumni Distinguished Undergraduate Professor of Philosophy at North Carolina State University. His book, *Research Ethics: A Philosophical Guide to the Responsible Conduct of Research*, shows how Singer’s expanding circle metaphor lends coherence to an otherwise disparate set of issues in research ethics. *Amicus* Adam Lerner is Lecturer at Princeton University. His work has appeared in venues such as *The Journal of Moral Philosophy*, *Oxford Studies in Metaethics*, and *Philosophical Studies.* *Amici* specialize in ethics and have particular expertise in the analysis of issues relating to the moral status of animals.

We present ethical reasons that the court should grant the Nonhuman Rights Project’s (NhRP) request for habeas corpus relief for Happy, an elephant. Happy has a basic interest in not being confined, an interest that should be legally protected just as the human interest in not being confined is legally protected. Since the decision in *The Nonhuman Rights Project, Inc. v Breheny* failed to weigh Happy’s interests properly, we ask this body to correct the error.[[1]](#footnote-1)

                **II.**            **SUMMARY OF THE ARGUMENT**

 We argue on consequentialist grounds for the transfer of Happy to an elephant sanctuary. First, we show that satisfying her interest in being transferred brings far greater value than the value achieved by keeping her confined. Second, we show that she has the capacities sufficient for personhood. Third, we show that all persons have a right to relative liberty insofar as they have interests they can exercise only under conditions of relative liberty. Fourth, we show that individuals need not be able to assume social obligations and duties in order to be rights holders. Our argument reflects commitments, as we say, to consequentialist reasoning about moral problems. However, we note in conclusion that influential representatives of the other dominant ethical traditions—the deontological and Aristotelian traditions—reach our conclusion, too. It makes no difference, in this instance, which ethical theory one adopts. On all of them, Happy is a person with an interest in relative liberty entitled to habeas corpus protection.

**III.**            **THE ARGUMENT**

 We argue on consequentialist grounds and, specifically, on utilitarian grounds, for Happy’s release. Contemporary utilitarianism originates in the writings of the 19th century thinkers Jeremy Bentham,John Stuart Mill, and Henry Sidgwick (1,2,2). Today, *amici* Peter Singer is perhaps the most widely recognized proponent of the theory.[[2]](#footnote-2) In his book, *The Expanding Circle*, he argues that altruism evolved because environments selected for humans with strong desires to protect their family and community members. Subsequently people, acting on the basis of reason, can choose, or not, to recognize strangers--who may possess interests very different from their own--as moral equals. This idea, that all persons are equal, is a key utilitarian commitment and explains why utilitarians have consistently defended arguments widely regarded as being on the right side of history.[[3]](#footnote-3) This is especially true in the case of controversies about the legal rights of persons. For example, when African-Americans were treated as slaves, utilitarians provided arguments for abolition long before courts recognized their probity. Again, when women were denied the ballot, utilitarians joined hands with suffragists arguing on behalf of women’s rights. Then again, when lesbians, gay men, and transgender people faced discrimination in employment, utilitarians objected to this rights violation.

This Court faces a new controversy involving the denial of rights to persons. Following earlier consequentialists, we write to argue that the rights of another person, this time a nonhuman person, demand legal protection. Happy’s interest in relative freedom has not been properly weighed by previous courts. We ask this Court to correct these errors.

While Happy remains categorized as property, Justice Tuitt recognizes the inaccuracy of this description. Emphasizing the fact that Happy is a sentient, autonomous being, Tuitt sees that Happy is an individual clearly closer to being a person than a thing. And he understands the legal implications of this fact. As he writes in *Breheny*, “Happy is more than just a legal thing, or property. She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty” (*The Nonhuman Rights Project, Inc. v Breheny* (2020 WL 1670735, [Sup C., Bronx County, Feb. 18, 2020, Tuitt, J., index No. 260441/19, *affd* 189 AD3d 583 [2020])at \*10).

Justice Tuitt’s denial that Happy is property accords with comments made by Judge Fahey in a prior case involving nonhuman animals. There, Judge Fahey observes proclaimsthat “there is no doubt” that chimpanzees are not mere things. Fahey goes on to question “whether the Court was right to deny leave” when the NhRP requested habeas corpus on behalf of the chimpanzee, Tommy (*Matter of Nonhuman Rights Project, Inc. v Lavery*, 31 NY3d 1054, 1058 “(*Tommy*”) 1059 [Eugene Fahey, J., concurring]). In denying that nonhuman persons must be property, both Justice Tuitt and Judge Fahey leave open the possibility that nonhuman animals can be persons. Taking one step further. The 4th Department affirms that it is “common knowledge that personhood can and sometimes does attach to nonhuman entities like … animals,” *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. June 15, 2018) (citations omitted).

We are pleased to see these favorable judicial assessments concluding that elephants and chimpanzees are not property and may be persons. These legal opinions represent the leading edge of the expanding circle. We write to defend the implicit claim that these animals are persons and have, as a consequence of their personhood, a suitably qualified right to liberty. Philosophical reflection leads inevitably to these conclusions.

Since Happy has the capacities required for personhood and is entitled to be treated with respect, the Court cannot dismiss her from consideration for protection under habeas corpus. A decision to deny the appeal on her behalf would carry a grave moral risk. The Court cannot avoid moral risk by deferring judgment. A decision *not* to grant habeas corpus is subject to ethical evaluation just as much as a decision to recognize it. Whatever verdict it reaches, the Court faces the potential of doing wrong. In this case, as we will show, the potential for doing wrong is much greater if Happy’s rights are not protected.

1. **The consequentialist reasoning defended by Peter Singer in *The Expanding Circle* and other work has a consistent track record of being on the right side of history when it comes to controversial decisions about legal rights.[[4]](#footnote-4)**

Most of us have a natural affection for family members. On the basis of our recognition that those outside of our intimate circle have interests like ours, we have gradually come to recognize that our obligations extend to all human beings. The number of individuals whose welfare matters is significantly larger than our earliest thinkers believed. Persons beyond our family, tribe and even nation are persons. Like us, they have basic interests in life and liberty. In *The Expanding Circle*, Singer shows that the circle is even larger than previously recognized because it includes all sentient animals:

The only justifiable stopping place for the expansion of altruism is the point at which all whose welfare can be affected by our actions are included within the circle of altruism. This means that all beings with the capacity to feel pleasure or pain should be included; we can improve their welfare by increasing their pleasures and diminishing their pains (p. 120).(3)

 Singer’s argument for including sentient animals is motivated by his consequentialist commitments. Consequentialism refers to a group of ethical theories that judge actions by their outcomes. What is the best outcome? “Best” is defined in various ways, perhaps most persuasively as the most preferable ratio of benefits to harms for all concerned. (2,3) “Benefits” and “harms” are also defined in various ways, but pain and frustration are harms on every account. Previous rulings accept Happy’s sentience as established fact.[[5]](#footnote-5) [2] The *ethical* question, then, is this. Should Happy’s interests be taken into account as we try to achieve the best outcome? And, if they should, how should they be weighted?

         Happy’s confinement is the cause of her pain and frustration. She is alternately anxious and frustrated, or bored and isolated. Release to a sanctuary would remove these harms and initiate a cascade of goods. In cases where we can prevent grave harms with a minimum of effort, ethical principles dictate that we should do so. If one can save a drowning child simply by reaching down and picking them up, one ought to do so. The obligation to prevent harms is especially acute in cases where significant harms can be prevented or removed at very little cost. The Court has this power in Happy’s case. The harms being visited upon her presently can easily be relieved by transferring her to a sanctuary, and the costs involved in doing so, if any, are minimal. Consequently, as we shall argue, rigorous analysis—based not only on utilitarian foundations but also on the other two moral theories most widely accepted among ethicists—leads inevitably to our conclusion.

*Insert:*

**2.** **All plausible ways of comparing interests--consequentialist and non-consequentialist--imply that Happy’s strong interest in being transferred has greater moral weight than anyone else’s interests in keeping her confined.**

**. . .**

**3. Happy has the capacities sufficient for personhood.**

 A person, according to the Lockean tradition which we endorse, is an autonomous individual with a unified, continuous sense of self. As persons, we have a robust sense of our past and future. The past shapes our personalities—our unique set of beliefs, desires and values—because it consists of events we cannot change. We simply must accept our pasts and learn to deal with them. The future shapes us in a different way; we presumably can change it in light of our goals and aspirations. The fact that the future is open gives our lives a sense of adventure; perhaps we can achieve our dreams. When our future is foreclosed by, for example, being confined, our ability to plan, aspire, and anticipate is taken away.

 Here we say more about what it means to be a sentient, rational, emotional, autonomous individual with memories and projects. On this understanding of persons, the central idea is that persons have certain capacities. They have personalities, unified perspectives on the world reflecting their beliefs, desires, and attitudes. Personalities arise out of social relationships; persons learn to understand themselves only because they are tutored by parents, friends, and teachers. Persons communicate their beliefs and desires in various ways, including vocalizations and gestures, abilities acquired socially. Persons signal their intentions to each other, conveying information, commands, and warnings. Early in development they come to recognize friends and distinguish them from foes. Persons are inherently social. They require the presence and solicitude of others to teach them what it means to be a person.

 Persons are not only social; they are emotional beings who experience happiness, sadness, anger, surprise, disgust, and fear. They are also rational, able to set goals for themselves and form hypotheses about alternative ways to achieve those goals. They also have the ability to understand that the behavior of others is motivated by psychological states similar to their own.(4,5) A person can see the world from another’s perspective, can recognize themselves as a continuing presence in the world, and can come to value their own life for the goods it can hold.

 Happy is a sentient, rational, emotional, autonomous individual with memories and projects. She has a personality, a unified perspective consisting of her particular set of beliefs, desires, and attitudes. An Asian elephant, she is a social being, flourishing best in a hierarchically-structured herd. To exist in herds, animals must negotiate friendly and antagonistic relationships by learning social rules regarding familial and sexual behavior.(6) Happy, therefore, is fundamentally a social being; she learns to understand herself by being taught by her mother and conspecifics. (7) She flourishes in community and is able to communicate her beliefs and desires in various ways, including vocalizations and gestures. To greet friends she curls up her trunk and emits a long groan; to express sadness she generates a high-pitched loud call. Happy acquired these abilities to communicate socially by mastering the tools of signaling. She is able to convey to others information, commands, and warnings.

 Like other elephants, early in her life Happy came to recognize dozens of other elephants and humans as friends or foes.(4) She experiences happiness, sadness, anger, surprise, disgust, and fear. She is capable of offering protection, aid, and comfort to others. (5) She can act rationally, engaging in means-end reasoning (Plotnik et al. at 5116-5120). She can form hypotheses about alternative ways to achieve her ends and then select the course of action she thinks best suited to bring about her goal. She is capable of tool-use, understanding the function of mirrors. (Plotnik et al. [2006]). Like other Asian elephants, she could probably convert a branch into a fly switch, reducing a long branch to a shorter length suited for the task.(6)

 Happy is aware of herself as demonstrated by her passing the mirror mark test (Plotnik et al. [2006]). She may also be aware that her conspecifics have minds, aware, that is, that they are motivated by psychological states similar to her own.(5) For example, observers have seen older Asian female elephants teaching younger females consort behavior. Consort behavior is the female routine of attracting suitable mates by simulating the visual signals of sexual receptivity. Older Asian females who are not sexually receptive are known to teach these behaviors to younger females (Poole affidavit, at #36). Through such student/teacher interactions, elephants may be showing that they recognize themselves and others as conscious beings with their own interests and goals.

 Finally, like other Asian elephants, Happy is able to value her life for the goods it can bring. She is likely also able to grieve over the death of a conspecific for the loss of life it brings (5). As is widely reported in the popular press, elephants encountering dead elephant bodies exhibit behaviors associated with grief. They attend to the lifeless object, caressing it while quietly and slowly moving around it. (7)

 Amicus briefs submitted to this Court document these facts. We emphasize them to underscore the importance of the previous Trial Court’s ruling that Happy is a sentient, rational, emotional, and autonomous individual with beliefs and desires (*see Breheny* at 10\*). We add only that these cognitive capacities suffice to qualify Happy as a *person*, too. Any human being with the capacities just named is undoubtedly a person, even if they lack additional cognitive capacities, such as the ability to act on moral principle. To that capacity we now turn.

1. **Rights holders need not be capable of bearing social obligations.**

 We here discuss an important objection to our view, an objection that forms the basis of the 3rd Department’s rejection of habeas corpus for the chimpanzee, Tommy. The objection is that to be a rights holder one must be capable of agreeing to uphold certain social obligations. We grant for the sake of argument that neither elephants nor chimpanzees can assume social duties. However, we here show that, contrary to the 3rd Department, rights holders need not meet this requirement. Humans who are not moral agents, and, because we have duties towards them, are sometimes referred to as “moral patients.” Moral patients are unable to understand or assume social duties, and yet they do not lack rights.

 The objection is, as we say, a significant one because it has misled many reasonable persons. It demands rebuttal as previous rulings have relied on its misconceptions. The mis-construal of rights stems, in this case, from Cupp’s amicus brief in the Tommy case. There, Cupp mistakenly asserts that the “principles of the social contract support recognizing that legal rights are intertwined with a norm of legal accountability.”[[6]](#footnote-6) Cupp further contends that the concept of rights was created by humans and is “rooted in” and “has force” “only within that world.” Cupp’s mis-construal made its way into the decision in Lavery 1 (2014) when the 3rd Department decided against granting habeas corpus for Tommy on the grounds that Tommy could not assume any duties. Lavery I, citing Cupp, asserts:

While petitioner proffers various justifications for affording chimpanzees, such as Tommy, the liberty rights protected by such writ, the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government (see Richard L. Cupp Jr., Children, Chimps, and Rights: Arguments From "Marginal" Cases, 45 Ariz St LJ 1, 12-14 [2013]; Richard L. Cupp Jr., Moving Beyond Animal Rights: A Legal/Contractualist Critique, 46 San Diego L Rev 27, 69-70 [2009]; see also Matter of Gault, 387 US 1, 20-21 [1967]; United States v Barona, 56 F3d 1087, 1093-1094 [9th Cir 1995], cert denied 516 US 1092 [1996]).

The 3rd Department further relies on Cupp when it claims that:

Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, "rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights" (Richard L. Cupp Jr., Children, Chimps, and Rights: Arguments From "Marginal" Cases, 45 Ariz St LJ 1, 13 [2013]; see Richard L. Cupp Jr., Moving Beyond Animal

In its acceptance of Cupp’s opinions, the 3rd Department accepts a view that is wrong on its face. If the liberty rights protected by habeas corpus were confined to those able to bear societal obligations and duties, then anyone with a severe congenital cognitive impairment would lack liberty rights. Such persons are not now, have never been, and should never be thought to lack the protections of habeas corpus. The error of this line of reasoning lies in its misunderstanding of the relationship between persons, societies, rights, and duties. We explain this misunderstanding here.

 To hold that persons must be able to bear duties and responsibilities betrays a dangerous conflation of the relationships between: 1) the historical path by which persons evolved through time and, 2) the protections democratic societies must guarantee to all their members.

Concerning 1), the way in which persons evolved from non-person animals, it is true that rights did not exist until modern human beings developed language. Persons are, as we say, social beings who can use language to make promises to each other. Until humans with these skills appeared, neither persons nor rights existed. In this sense, rights could not have existed if humans had not begun to use language to contract with each other.

Once evolutionary processes give rise to the first persons, however, that person and every subsequent person has rights. It is not the case that these early persons must wait for societies to create their rights. According to the founders of the contractualist tradition—Hobbes, Locke, and Rousseau--, individuals have *natural rights* even *before* they enter into social contracts. When persons form societies they agree to *surrender* some of their rights in order to form stable governments. One cannot surrender what one does not have. The ability to enter into an agreement and thereby assume social obligations, therefore, is not necessary to have rights. To think otherwise is to commit the genetic fallacy, mistaking the way in which a phenomenon arises through time for its philosophical justification.

 Concerning 2), the protections modern societies create for all their members equally, contractualists hold that laws protect eachmember of society, not just those capable of agreeing to follow the laws. Again, were it otherwise, a society’s most vulnerable members would be at risk. Those unable to understand their responsibilities and duties include children, the senile, and the profoundly cognitively disabled. Despite the implications of Cupp’s view and contrary to the implications of the 3rd Department’s opinion, these persons are rights-holders even though they cannot reciprocate or enter into contracts.

 In sum, Cupp misunderstands the contractualist tradition he invokes. According to that tradition, rights are the basis on which society is constructed, not the creations of society. Societies do not create persons or rights; persons with rights create societies. And societies create legal institutions to protect not only the rights of those who can understand their social obligations but to protect, as well, the rights of those who cannot understand their social obligations.

 We have shown that rights are not “essentially human.” Nor are they confined to individuals who have the *potential* to develop social obligations. If we valued a person because of the potential they had to develop some additional capacities, we would not be valuing them for who they are. We would be valuing them for what they might become in the future rather than for who they are in the present. Such an approach is inconsistent with the idea of the equality of all human beings because it implies that neurally diverse, congenitally cognitively disabled children without the capacity to develop into moral agents are not persons. Such children do not have the potential to develop moral autonomy. However, the fact that an individual lacks this potential is not a reason to exclude them from the circle of protections afforded persons. To think otherwise is counterintuitive and offensive.

 The contractualist understanding of persons, contracts, society and rights is this. Persons have natural rights in virtue of their interests. Seeing the advantages of peaceable coalitions, persons form societies. Societies require *those who are able* to bear obligations and duties while establishing institutions to protect the vulnerable who lack these capacities. This is the principle of equal rights for all, a principle *not* compatible with the reasoning found in Cupp or the 3rd Department. It *is* compatible with the 4th Department’s reasoning when the 4th Department acknowledges that persons need not be capable of being contractors or having responsibilities (4th Dept., Mem. at Part IV). Graves, 163 A.D. 3d 16; Tommy, 31 N.Y.3d at 1057 (Fahey, J., concurring). As Judge Fahey writes, human neonates, like nonhuman animals, cannot bear duties and “yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one’s infant child.” *Id.* [Reference: Breheny 2018 The Nonhuman Rights Project, on behalf of Happy, Petitioner -against-James J. Breheny].

 It is worth pausing a moment here to examine an argument briefly stated in fn. 3, on p. 5 of the judgment in *Tommy.* At the point in which the judgment emphasizes that “Case law has always recognized the correlative rights and duties that attach to legal personhood,” the footnote seeks to repudiate the apparent implication that humans who are unable to reciprocate, or carry out any duties at all, therefore must lack legal personhood. The footnote acknowledges, as of course we all must, that some humans are less able to bear legal duties or responsibilities than others. Then it states:

These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise.

The problem with the passage is simple: the second sentence does not follow from the first. From the fact that human beings *collectively* possess the ability to bear legal responsibility, we are not entitled to conclude that all human beings, whether or not they can individually bear legal responsibility, are entitled to the rights which, as the judgement has just emphasized, have always been recognized as requiring correlative duties. One might just as well argue: “It is undeniable that Americans, collectively, possess the unique ability to elect the President of the United States. Accordingly, nothing should limit the rights of Americans (including children) to vote.”

Such arguments are not valid. We are familiar with many examples of rights without correlative duties, and these examples cannot be explained by an appeal to the collective abilities of humans. Nor can they be explained, might also be attempted, by claiming that certain abilities are typical or characteristic of the species. We should judge individuals by what they are, not by their species. Hence we cannot base the legal rights that beings have on their ability to understand and carry out their duties. We should, instead, base the legal rights of different beings on their interests.

 Happy cannot and, for all we know, does not have the potential to be able to participate in our conversations about promises and obligations. She cannot reciprocate with us or bear legal duties. However, these facts about her, if they are facts, no more eliminate her from the circle of persons than does the fact that some humans cannot contract, reciprocate, or assume responsibilities. The assertion that individuals must be capable of accepting social duties to be persons is a nonstarter. We reject Cupp’s position in unqualified terms and urge an end to this unsound line of reasoning.

1. Happy’s standing is not a matter for legislative debate

One might be inclined to think Happy’s treatment is not unlawful because the legislative branch has not ruled on whether nonhumans can be persons. So to argue is a grave error.While no nonhuman has previously been the recipient of a habeas corpus order, this fact does not prevent Happy from being the first. We have a precedent for an individual who belongs to a group that is not considered eligible for habeas corpus becoming the first individual of that group to receive habeas corpus.A decision by Judge Elmer Dundy is relevant.

Chief Standing Bear was forced by the U.S. government in 1877 to move out of his homeland in Nebraska and relocate to Indian Territory in what is now Oklahoma. His son died on the journey. Intending to bury his son on traditional lands, Standing Bear returned to Nebraska where he was arrested by General George Crook. Standing Bear’s attorneys asked Judge Dundy to grant a writ of habeas corpus to free the Chief. Representing the U.S. government, Crooks’ attorneys contended that Standing Bear “was neither a citizen, nor a person” and, therefore, did not have the rights furnished by the U.S. Constitution. Dundy found against the District Attorney, issued the writ, and wrote the following justification:

… the habeas corpus act describes applicants for the writ as 'persons,' or 'parties,' who may be entitled thereto. It nowhere describes them as 'citizens,' nor is citizenship in any way or place made a qualification for suing out the writ, and, in the absence of express provision or necessary implication which would require the interpretation contended for by the district attorney, I should not feel justified in giving the words 'person' and 'party' such a narrow construction.(8)

When Dundy decided to free Standing Bear, he was granting habeas corpus for the first time to a member of a group the U.S. Congress did not consider to be persons While the intent of the legislators clearly wasnot to include Native Americans, Judge Dundy looked at the facts about the individual before him and rightly applied the law to Standing Bear. His interpretation of the law no doubt surprised many breaking, as it did, with the law's framers’ interpretation of the facts. Nonetheless, Dundy clearly upheld the law as it applied to the facts before him.In his ruling,Dundy did not enlarge the moral circle; rather, he recognized that in the circle were many individuals that the legislative branch previously counted, prejudicially and erroneously,as outside the circle.. Dundy’s application of habeas corpus corrected an unlawful detention. In freeing Standing Bear to return to Nebraska to buryhis son.(9) Dundy ruled on an important question that many wanted the legislature first to debate. Dundy, seeing what would happen to Standing Bear should Dundy defer to the machinations of the legislature, made a courageous decision. Few today would judge him to be on the wrong side of history.

1. **The three most widely accepted moral theories agree on Happy’s case**

We have argued on consequentialist grounds that Happy should be released. However, one need not be a consequentialist to reach this judgment. While no ethical theory enjoys universal acceptance, ethics textbooks tend to recognize three dominant schools of thought: consequentialism, deontology, and the Aristotelian tradition. The Court may not know which of these theories is correct. Fortunately, it does not have to know because, in this matter, all three theories lead to the same conclusion. As shown in other Amicus briefs, prominent representatives of the other views reach our conclusion. Christine Korsgaard, arguing from a deontological perspective, argues for Happy's release on the basis of our duties to Happy. Martha Nussbaum, arguing from the Aristotelian tradition, argues for Happy’s release on the basis of Happy’s capacities.

  These circumstances place the Court in an enviable position. The major traditions in moral philosophy converge on the same judgment. It is unusual to find such convergence among ethics specialists. But this country’s most influential ethicists agree; some nonhuman animals have rights. The grounds of the claim that Happy ought to be transferred are as strong in moral philosophy as the grounds of any claim in this field are likely to be.

1. **U.S. jurisdictions increasingly edge toward recognizing nonhuman personhood**

 In 2015, the Oregon State legislature declared that “Animals are sentient beings capable of experiencing pain, stress and fear;” “Animals should be cared for in ways that minimize pain, stress, fear and suffering;” and, “The suffering of animals can be mitigated by expediting the disposition of abused animals that would otherwise languish in cages while their defendant owners await trial.”[[7]](#footnote-8) (We note parenthetically that Article 13 of the Treaty on the Functioning of the European Union (2016) recognizes elephants as “sentient beings.” So does legislation in France, the Netherlands, New Zealand, Sweden, Quebec and the Australian Capital Territory.[[8]](#footnote-9))A U.S. court has recognized the rights of foreign countries to determine who has standing in proceedings in those countries. In 2021, the U.S. District Court for the Southern District of Ohio recognized the right of Colombia to regard hippopotamuses as persons. Colombia submitted an *Ex Parte* application to depose two U.S. wildlife experts in a case involving methods of sterilization of wild hippopotamuses. The U.S. court applied 28 U.S.C. Section 1782, to allow the Colombian court to conduct discovery in the U.S. In so doing, the U.S. court recognized as plaintiffs "the community of hippopotamuses living in the Magdalena River," and identified them as "'interested persons' within the meaning of Section 1782."[[9]](#footnote-10)  We recognize that what we are seeking in regard to Happy goes beyond the application of Section 1782, but we note this case as a further indication that jurisdictions are edging closer to the recognition of nonhuman animals as persons.

 **IV.**            **CONCLUSION**

 Happy’s interest in relative liberty is being violated. She spends most of her day engaged in stereotypic behavior, swinging her trunk, swaying, flapping, ritualistically lifting her feet. In humans, stereotypic behaviors—fixed repetitive purposeless behaviors such as head nodding, rocking back and forth, and hand waving—are often signs of mood disorders. They are often responses to severe anxiety, depression, or anhedonia resulting from feelings of confinement or isolation. (8) Happy’s interest in relative liberty is equal to any similar interest of a confined human being’s interest in relative liberty. In both cases, a basic right is at stake. To right the wrong and produce the best consequences, the Court should honor the NHRP’s request to move Happy to a sanctuary. (3)

**Bibliography**

1.     Singer P. Animal Liberation. New York Review of Books/Random House; 1975. 336 p.

2.     Bentham J. An Introduction to the Principles of Morals and Legislation [Internet]. Burns JH, Hart HLA, editors. Oxford: Oxford University Press; 1996 [cited 2021 Sep 10]. (The Collected Works of Jeremy Bentham). Available from: https://proxying.lib.ncsu.edu/index.php?url=https://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=12348&site=ehost-live

3.     Mill JS. Utilitarianism ; and, On liberty : including Mill’s Essay on Bentham’ and selections from the writings of Jeremy Bentham and John Austin [Internet]. 2nd ed. Warnock M, editor. Malden, MA : Blackwell Pub., [2003]; 2003. Available from: https://catalog.lib.ncsu.edu/catalog/NCSU4750283

4.     Poole JH, Moss CJ. Elephant Sociality and Complexity : The Scientific Evidence. In: Wemmer CM, Christen CA, editors. Elephants and Ethics: Toward a Morality of Coexistence. Johns Hopkins University Press; 2008. p. 69.

5.     Byrne R, Lee PC, Njiraini N, Poole JH, Sayialel K, Sayialel S, et al. Do Elephants Show Empathy? Journal of Consciousness Studies. 2008 Jan 1;15(10–11):204–25.

6.     Hart BL, Hart LA, McCoy M, Sarath CR. Cognitive behaviour in Asian elephants: use and modification of branches for fly switching. Animal Behaviour. 2001 Nov 1;62(5):839–47.

7.     Poole J. Coming of age with elephants: a memoir. 1st ed. New York: Hyperion; 1996. 287 p.

8.     Wise S. What Happy the elephant deserves: Give the Bronx Zoo’s pachyderm freedom. Daily News [Internet]. 2019 May 26 [cited 2021 Sep 13]; Available from: https://www.nydailynews.com/opinion/ny-oped-what-happy-the-elephant-deserves-20190526-funud7yamnaszd6c33iucif2v4-story.html

9.     Singer P. Animal Liberation. The New York Review [Internet]. 1973 Apr 5 [cited 2021 Sep 15]; Available from: https://www.nybooks.com/articles/1973/04/05/animal-liberation/

10.   Singer P. Practical Ethics. 2nd. Cambridge: Cambridge University Press; 1993. 395 p.

11.   Rachels J. Created from Animals: The Moral Implications of Darwinism. Oxford [England]: Oxford University Press; 1990. 245 p.

12.   McMahan J. The Ethics of Killing: Problems at the Margins of Life. Oxford: Oxford University Press; 2002. 540 p. (Oxford ethics series).

13.   Varner GE. In Nature’s Interests?: Interests, Animal Rights, and Environmental Ethics. New York: Oxford University Press; 1998.

14.   Varner GE. Personhood, Ethics, and Animal Cognition: Situating Animals in Hare’s Two-Level Utilitarianism. Oxford: Oxford University Press; 2012.

15.   Regan T. The case for animal rights. Berkeley: University of California Press; 1983. 425 p.

16.   Korsgaard CM. Fellow creatures: our obligations to the other animals. First edition. Oxford: Oxford University Press; 2018. 252 p. (Uehiro series in practical ethics).

17.   Rowlands M. Animal rights: moral theory and practice. 1st ed. Houndmills, Basingstoke ; New York: Palgrave Macmillan; 1998.

18.   Cohen AI. Contractarianism, Other-Regarding Attitudes, and the Moral Standing of Nonhuman Animals. Journal of Applied Philosophy. 2007;24(2):188–201.

19.   Sapontzis SF. Morals, reason, and animals. Philadelphia: Temple University Press; 1987. 302 p.

20.   Nussbaum MC. Frontiers of Justice: Disability, Nationality, Species Membership. Cambridge, Mass: The Belknap Press; 2006. 487 p.

21.   Nussbaum MC, Sunstein CR. Animal rights : current debates and new directions [Internet]. Oxford: Oxford University Press,; 2004. 338 p. Available from: http://catalog.lib.ncsu.edu/record/NCSU1733038

22.   Nussbaum MC. Working with and for animals: Getting the theoretical framework right. Denver law review. 2017;94(4):609–25.

23.   Midgley M. Animals and why they matter. Harmondsworth, Middlesex, England: Penguin Books; 1983. 158 p. (Pelican books).

24.   Donovan J. Animal Rights and Feminist Theory. Signs. 1990;15(2):350–75.

25.   Donovan J, Adams CJ, editors. The feminist care tradition in animal ethics: a reader. New York: Columbia University Press; 2007. 392 p.

26.   Gruen L. Ethics and animals: an introduction. Cambridge, UK ; New York: Cambridge University Press; 2011. 233 p. (Cambridge applied ethics).

27.   Carruthers P. The Animals Issue: Moral Theory in Practice. Cambridge [England]: Cambridge University Press; 1992. 206 p.

28.   Frey RG. Interests and Rights: The Case Against Animals. Oxford: Clarendon Press; 1980. 176 p.

29.   Frey RG. Utilitarianism and Animals. In: Beauchamp TL, Frey RG, editors. The Oxford Handbook of Animal Ethics. Oxford University Press, USA; 2011. p. 172–97.

30.   Narveson J. Animal Rights. Canadian Journal of Philosophy. 1977;7(1):161–78.

31.   Lomasky L. Is It Wrong to Eat Animals? Social Philosophy & Policy; Oxford. 2013 Jan;30(1–2):177–200.

32.   McCloskey HJ. Moral rights and Animals. Inquiry. 1979 Jan 1;22(1–4):23–54.

33.   Nozick R. Do Animals Have Rights? In: Socratic Puzzles. Cambridge, Mass: Harvard University Press; 1997. p. 305–10.

34.   Steinbock B. Speciesism and the Idea of Equality. Philosophy. 1978;53(204):247–56.

35.   Cohen C. The Case for the Use of Animals in Biomedical Research. New England Journal of Medicine. 1986;315:866–9.

36.   Cohen C. Do Animals Have Rights? Ethics & Behavior. 1997;7(2):91–103.

37.   Cohen C, Regan T. The animal rights debate. Lanham: Rowman & Littlefield Publishers; 2001. 323 p. (Point/counterpoint).

38.   Becker L. The Priority of Human Interests. In: Miller H, Williams W, editors. Ethics and Animals. Clifton, N.J.: Humana; 1983.

39.   George KP. Should Feminists Be Vegetarians? Signs. 1994;19(2):405–34.

40.   Warren MA. Moral Status: Obligations to Persons and Other Living Things. Oxford: Clarendon Press; 1997. 265 p. (Issues in biomedical ethics).

41.   Dombrowski DA. Babies and Beasts. University of Illinois Press; 1997. 221 p.

42.   Dunn L, Rosengard DB. A Dog is not a Stereo: The Role of Animal Sentience in Determining the Scope of Owner Privacy Interests under Oregon Law. Animal Law. 2017;23(451):451–78.

1. *The Nonhuman Rights Project, Inc. v Breheny* (2020 WL 1670735, \*7, \*9–\*10 [Sup C., Bronx County, Feb. 18, 2020, Tuitt, J., index No. 260441/19, *affd* 189 AD3d 583 [2020]) , the Supreme Court, Bronx County (Trial Court), declined to grant habeas corpus relief and order Happy’s transfer to an elephant sanctuary. [↑](#footnote-ref-1)
2. Singer first published his argument in a book review in 1973 (9). Two years later, in *Animal Liberation* (1), he argued that the ideal of moral equality demands that we give equal weight to the like interests of all parties affected by an action. (see also 1993; cf. Rachels 1990; McMahan 2002; Varner 1998, 2012) [↑](#footnote-ref-2)
3. Singer P. *The Expanding Circle: Ethics, Evolution and Moral Progress*. 2nd edition, Princeton University Press, Princeton, 2011. [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)
5. *The Nonhuman Rights Project, Inc. v Breheny* (2020 WL 1670735, \*7, \*9–\*10 [Sup C., Bronx County, Feb. 18, 2020, Tuitt, J., index No. 260441/19, *affd* 189 AD3d 583 [2020]). See also the cases in which the sentience of chimpanzees is unquestioned: *People ex rel. Nonhuman Rights Project, Inc. v Lavery*, 124 AD3d 148 [3d Dept 2014] [*Lavery I*] ; *Matter of Nonhuman Rights Project, Inc. v Lavery*, 152 AD3d 73 [1st Dept 2017], *lv denied* 31 NY3d 1054 [2018] [*Lavery II*]). [↑](#footnote-ref-5)
6. Richard L. Cupp amicus brief, 09/18/2020 SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT, In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus and Order to Show Cause, THE NONHUMAN RIGHTS PROJECT, INC. on ehalf of HAPPY, Index No. 260441/2019 Petitioner-Appellant, Appellate Division -against- Case No.: 2020-02581, JAMES J. BREHENY, in his official capacity as Executive Vice President and General Director of the Bronx Zoo, and THE WILDLIFE CONSERVATION SOCIETY.

1. Bentham J. Anarchical fallacies. In: The Works of Jeremy Bentham, Volume 2 [Internet]. London and New York; 1838 [cited 2015 Jan 4]. Available from: http://search.proquest.com.prox.lib.ncsu.edu/docview/228239216?pq-origsite=summon

2. Mill JS. On Liberty. Agora Publications; 2004.

3. Singer P. The Expanding Circle: Ethics, Evolution and Moral Progress, 2nd edition, Princeton University Press, Princeton, 2011.

4. Plotnik JM, Lair R, Suphachoksahakun W, de Waal FBM. Elephants know when they need a helping trunk in a cooperative task. Proc Natl Acad Sci U S A. 2011 Mar 22;108(12):5116–21.

5. Poole JH, Moss CJ. Elephant Sociality and Complexity : The Scientific Evidence. In: Wemmer CM, Christen CA, editors. Elephants and Ethics: Toward a Morality of Coexistence. Johns Hopkins University Press; 2008. p. 69.

6. Kane LF, Poole J, Granli P, Lee PC, Moss CJ, Williams AC, et al. An Elephant in the Room: The Science and Well-being of Elephants in Captivity. Center for Animals and Public Policy, Cummings School of veterinary médicine, Tufts University; 2009. 315 p.

7. Poole J, Granli P. Mind and Movement: Meeting the Interests of Elephants. In: An Elephant in the Room: The Science and Well-being of Elephants in Captivity. Center for Animals and Public Policy, Cummings School of veterinary médicine, Tufts University; 2009.

8. U.S. ex Rel. Standing Bear v. Crook, 25 F. Cas. 695. [cited 2021 Sep 21]; Available from: https://casetext.com/case/us-ex-rel-standing-bear-v-crook

9. Dando-Collins S. Standing Bear is a person: the true story of a Native American’s quest for justice. Cambridge, MA: Da Capo Press; 2004. 259 p. [↑](#footnote-ref-6)
7. [OR. REV. STAT. § 167.305(1) (2015). Cf. (42)] [↑](#footnote-ref-8)
8. <https://news.vin.com/default.aspx?pid=210&Id=9639465> [↑](#footnote-ref-9)
9. [https://twitter.com/jeffsteinnyc/status/1451017451265744896/photo/1](https://twitter.com/jeffsteinnyc/status/1451017451265744896/photo/1%22%20%5Ct%20%22_blank) [↑](#footnote-ref-10)