Can Elephants Be Persons?

Personhood for Happy would create a legal precedent and framework for granting fundamental rights to nonhumans in the future.

Sarah Kasbeer Dissent magazine Summer 2019 https://www.dissentmagazine.org/article/can-elephants-be-persons

If Happy the elephant were allowed to live a natural life in the wild, she would likely spend her days roaming miles of tropical forest and plucking fruit and leaves from trees with the finger-like tip of her trunk. She would have grown up as part of a complex social system, in which elephant calves are doted on by older siblings, cousins, and aunts. By age forty-seven, Happy would likely have already raised multiple calves of her own. She would trumpet with excitement at the other members of her herd and call to potential mates using infrasonic rumbles that travel long distances, inaudible to the human ear.

But Happy does not do any of this. She currently lives alone at the Bronx Zoo. And recently, she has become the subject of an unusual custody battle that could result in her release. In 2018, an advocacy group called the Nonhuman Rights Project (NhRP) filed a writ of habeas corpus (Latin for "produce the body") on Happy's behalf, and, for the first time, a court heard the case for an elephant's legal personhood and subsequent right to bodily liberty. Previous habeas petitions by the NhRP, designed to challenge the captivity of chimps, have been unsuccessful. But the arguments have succeeded in furthering the debate around whether animals—especially those proven to have high levels of cognition—should qualify as more than just "things" under the law.

Elephants have a knack for demonstrating that they think, feel, and remember—in a way humans can easily understand. Famous for ritualized expressions of grief, they have been observed covering deceased family members with leaves and dirt, touching their bodies, and even visiting their gravesites. The elephant's trunk, a combination nose and upper lip that contains 40,000 muscles, is capable of expressing compassion and annoyance in a human-like manner through affectionate touches and playful shoves. An elephant can even apparently communicate an aversion to captivity, by pulling at the rope around its neck or stuffing leaves into the bell on its collar to avoid being easily found for the start of a logging shift.

If Happy could return to the wild now, she would likely face an entirely new set of threats. In the last century, the elephant population in Asia has declined dramatically. Approximately 45,000 remain, many of which have been forced into captivity for the tourism and logging industries, or are used by panhandlers in cities like Bangkok to beg for money or food. Their habitats have been destroyed by deforestation, slash-and-burn agriculture, and human settlements that choke off critical migration routes. Due to the fragmentation of forests and lack of natural corridors connecting them, elephants trample and raid human crops in their search for food and water. Humans retaliate with violence, further squeezing what has already become a dwindling habitat.

In the larger scheme of things, one might argue that Happy doesn't have it all that bad. Captured in or around Thailand along with six other calves in the 1970s, she was sold to a now-defunct California corporation called Lion Country Safari. She was transferred to the Bronx Zoo in 1977, where she lived with a companion elephant, Grumpy (also named after one of Snow White's seven dwarfs), for twenty-five years. In 2002, the zoo's other elephant duo, Patty and Maxine, charged Grumpy, who failed to recover from her injuries and had to be euthanized.

In the wild, Asian elephants spend their entire lives in matrilineal groups made up mostly of females. The males leave during adolescence to form loose bachelor herds. To replicate natural social conditions, the Association of Zoos and Aquariums recommend that females in captivity be kept in groups of three or more. After Grumpy's death, Happy was then paired with another young female, Sammy—also euthanized after suffering from a liver disease, the third elephant to die at the Bronx Zoo in four years. A week after Sammy's death, the zoo announced it would phase out its elephant exhibit all together, limiting Happy's prospects for a new partner anytime soon.

In 2012, the New York Post ran a story about Happy's lonely predicament, which gained traction with animal rights and wildlife conservation groups. In response, the zoo maintained Happy had "auditory and tactile" contact with the other elephants, and was not—as petitions that had begun circling the internet suggested—in "solitary confinement." The interest in her plight grew in 2015, when the organization In Defense of Animals placed the Bronx Zoo in its "hall of shame," listing it among the ten worst zoos in the country for elephants. Happy has now lived alone for over a decade.

In the last quarter of the twentieth century, scientists began amassing evidence about the spectrum of animal sentience. Their findings supported Darwin's theory of evolutionary continuity, that differences between species were differences in degree—not in kind. In 2005, researchers studying the evolution of cognition gave the elephants at the Bronx Zoo the mark test for mirror self-recognition (MSR), a behavioral indicator of self-awareness. A 2001 study had demonstrated MSR in dolphins, an attribute previously thought to be associated only with humans and primates. Scientists theorized MSR correlated with "higher forms of empathy and altruistic behavior." Because elephants have large brains and exhibit attentiveness to the needs of others, they were the next logical species to test.

Animals with MSR tend to pass through four stages: 1. Social response (which can be aggressive displays), 2. Physical inspection of the mirror itself (checking behind it), 3. Self-directed behavior (examining parts of their own bodies), and 4. The mark test, in which a mark is painted on an otherwise imperceptible area of the body to see if the animal will spontaneously touch it in front of a mirror. None of the Bronx Zoo elephants fell for the illusion of "another elephant," but only Happy passed through the final stage. When faced with her reflection, she used the tip of her trunk to touch a white "X" that had been painted on one side of her

head, while ignoring a clear “X” painted on the other, demonstrating that she was responding to the representation of herself and not something she felt or remembered.

Because Happy passed the litmus test for MSR, her species was added to a growing list of animals capable of demonstrating self-awareness. In front of the mirror, self-aware species act a lot like humans. Chimps groom parts of their body they could not see without a mirror; dolphins have been observed examining their genitals. Maxine the elephant pulled one of her ears forward to look at it from different angles. The implications of self-awareness, however, could extend beyond visible, physical aspects to include an ability to reflect on private thoughts and autobiographical experiences. If Happy is lonely, she may have the ability to dwell on it.

Renowned conservationist Daphne Sheldrick, who helped rescue and rehabilitate over 150 orphaned African elephants over the course of her lifetime, called them the most “emotionally human” of all land mammals. They possess strong social bonds and have been known to console each other with reassuring touches. In a gesture that may be akin to handholding, an elephant will place its trunk in a companion’s mouth. They experience affective empathy and emotional contagion, responding to the distress of another with distressed symptoms of their own: standing with their tails pointed straight out while vocalizing rumbles, trumpets, and roars.

It has long been said that to anthropomorphize—ascribe human characteristics to animals—while intuitive and enjoyable, is unscientific and misguided. But given the recent research into animal consciousness, what was once considered a cardinal sin of ethology has since returned to favor, so long as it’s implemented responsibly. Some scholars now argue that we can use our human experiences to create testable hypotheses about animal behavior. Anthropomorphic empathy has been a driving force in improving conditions for zoo animals—granting them more space, companions, and “enrichment” toys.

The urge to anthropomorphize is a common psychological tendency, triggered by experiences such as recognizing the existence of a face, perceiving movements as lifelike, and making eye contact. We are predisposed to identify with the objects of our anthropomorphism, whether animal or robot, and only through a subsequent cultural judgment do we “correct” this impulse and downgrade their moral standing. While we cannot rely solely on intuition to make inferences about why animals behave the way they do, to ignore it entirely would amount to “anthropodenial.” The term was coined by Frans de Waal, primatologist and co-author of the MSR study at the Bronx Zoo, to describe the pervasively harmful idea that animals do not have inner lives worthy of our consideration—an idea that has allowed their brutalization and inhumane treatment to continue for centuries.

A few years ago, I sat in an off-road vehicle in Masai Mara, Kenya, watching a family of wild African elephants trek down a hill toward a stretch of grassland. In the background, a rocky escarpment dotted with pine-colored acacia trees rose above the savannah. Two elephant calves were traveling side by side, but when they got to a small embankment, the larger one climbed easily down while the smaller one stood atop it and squealed. The calf’s mother seemed to hear his cries, but kept browsing for food, plucking up clumps of greenery and stuffing them in her mouth. Two other females came to the aid of the baby instead, guiding him down with their trunks.

There was something relatable about this scene—the desire to do what your slightly older cousin is doing while your exasperated mother ignores your pleas. In an ideal world, this is the kind of behavior zoos could show us. It could cause us to become more empathetic toward our nonhuman neighbors. But zoos rarely have the resources to give animals like elephants the space or companions they need to move and socialize as they would in the wild. The education that zoos claim to provide the public is inaccurate at best. The editors of Scientific American argued in 2014 that elephants don’t belong in zoos at all.

Inappropriate climate aside, the Bronx Zoo, operated by the Wildlife Conservation Society, should be one of the better zoos for elephants. The facility receives over 2 million visitors a year to its well-maintained 265 acres. It was the subject of The Zoo, a documentary series that aired in 2017 and 2018 on Animal Planet and explored what it takes to care for over 6,000 animals. One episode highlights how they’ve modernized their elephant husbandry practices from a circus-style “free contact” method to “protected contact,” in which the animals are separated from keepers by barriers and motivated with positive reinforcement.

In the episode, which has been criticized by animal rights groups for whitewashing Happy’s conditions, Bronx Zoo director Jim Breheny admits that the future of ethical captivity for elephants is to keep them in multi-generational herds. Although captive breeding may create a healthier social environment, it also raises new ethical considerations. Who will actually benefit from forcing entire elephant families to live out their lives in confined spaces, never knowing the freedom or hardship of the wild?

Despite having lived in New York City for over a decade, I had never been to the Bronx Zoo until I learned about Happy and decided to visit her. I started in the JungleWorld exhibit, where I felt a familiar tinge of shame at the casual cruelty on display. Both children and adults pounded on the cracked glass to provoke reactions from the small monkeys inside, who looked back intently from their perches, their tails hanging down from tree branches. A grizzly bear meandered about in an outdoor habitat nearby, enjoying the September sun. I stopped to watch his shaggy brown outline before breezing by a family of giraffes, almost missing the orange head of a tiger peeking up through the shrubbery.

To see the elephants, you take a twenty-minute monorail ride that overlooks their single-acre enclosure, open from May to October. As my car approached a grassy incline, I could make out a lone brown elephant at the top of the hill. From afar I couldn’t identify her, but the conductor confirmed the solitary pachyderm was indeed Happy. The edges of her ears were pink, as if they’d been dipped in Easter-egg dye, with blotches of brown skin peeking through like oversized freckles. The monorail doesn’t stop, so my eyes scanned the trees, hoping to get a good look at her through a clearing. She appeared almost childlike standing next to an oversized log, flapping her ears and swinging her trunk. My on-demand access to a fifteen-second glimpse of Happy’s captive existence hardly seemed worth a lifetime of her freedom.

Two days after my visit, the NhRP filed a writ of habeas corpus on her behalf, asking a judge to recognize her “personhood” and subsequent common-law right to bodily liberty. Personhood, their attorneys argue, should be interpreted not as a synonym for human being, but as a container for civil rights. Even U.S. corporations have achieved some of the privileges and duties associated with legal personhood, including the ability to sue and be sued, to own property, and to enjoy some First Amendment protections.

Happy’s circumstances cannot be rectified with animal welfare statutes, which mostly only prevent “unnecessary suffering.” And since she’s not a legal person, she lacks the standing required to become the plaintiff in a lawsuit. If granted, a habeas petition requires the agent of the detainment to show up in court and defend its legality—a method that has been previously employed to force the issue of personhood. In *Somerset v. Stewart*, attorneys successfully used it to challenge slavery laws in eighteenth-century Great Britain.

Over the last two hundred years in the United States, the definition of legal personhood has expanded to include slaves, indigenous people, women, and children. Could certain animals be next? Although the NhRP is only asking the court to recognize one right for Happy—bodily liberty—neither full nor partial rights for a nonhuman would be entirely unprecedented. In 2017, courts in two U.S. states began considering the well-being of cats, dogs, and other animals in divorce proceedings, blurring the lines between person and property. The same year, New Zealand granted the Whanganui River full legal personhood, including all of the "rights, duties, and liabilities of a legal person." Two legal human guardians were appointed to advocate on its behalf. And in 2015, a court in Argentina declared a zoo orangutan named Sandra "una persona no humana" and ordered her released into the custody of a sanctuary.

Success in Happy's case would require finding a judge sympathetic enough to be the first in the United States to grant personhood to an animal. Although her guardianship would be determined by the courts, the NhRP has recommended Happy be released to the Performing Animal Welfare Society (PAWS) in San Andreas, California, a sanctuary that could provide care for her on a property of more than 2,000 acres, where ex-performing and abused elephants forage freely and choose their own social partners.

According to the Bronx Zoo, Happy shows no signs of physical or emotional distress and is closely bonded with her human caretakers. Zoo spokespersons have suggested that she also might not get along with new elephants, and that a cross-country move poses risks to her health. But an affidavit filed by the preeminent research scientist Joyce Poole lays out examples of half a dozen elephants—some with noted "aggression" issues likely due to captive circumstances—who have been successfully moved long distances and integrated into sanctuary populations. Poole noted that some of Happy's behavior, like the trunk swinging I observed, was likely a stereotypical response to an environment that doesn't meet her physical and emotional needs.

A 2016 study of over fifty Asian elephants in sanctuaries in Thailand, most of whom had previously been used for captive performance, riding, or work in the logging industries, found that between one-third and one-half exhibited symptoms of human-like PTSD, including mood disturbances (anxiety and aggression), tension-reducing repetitive behaviors, and fear of the trauma-related stimulus. Scientists have long reported an epidemic of PTSD in wild African elephants, stemming from decades of violent culling, poaching, maternal separation, and capture for captive trade. Slaughtering the adults is the easiest way to separate a calf from the herd, and elephants that suffer formative traumas during the first year of their lives have shown a reduced ability to handle stressful situations later on.

A court in Orleans County, New York, heard oral arguments for Happy's right to liberty in December 2018. The case stalled when the judge granted the zoo's motion to transfer proceedings to Bronx County, which could prove less sympathetic. At the time this article went to press, the courts had not yet announced whether they would hear the petition. Since Maxine was also euthanized in November, after suffering from an illness for a year, Happy's situation feels even more urgent.

Although personhood seems like a good option to those who believe animals should have fundamental rights, it is a fraught legal and philosophical concept—with implications for reproductive rights and ethical issues with artificial intelligence. What level of consciousness qualifies a "person" as such? Self-awareness in humans only begins at around age two, and some theories of personhood based on cognitive, emotional, and psychological capacities would actually include select animals while excluding some humans, such as infants and comatose adults. Even the court's definition of who constitutes a legal person is vague and can seem arbitrary.

The NhRP's first client, a retired performing chimp named Tommy, was found living alone in a cage in a cement shed on his owner's used trailer lot. Fulton County courts ruled that Tommy could not be a legal person entitled to habeas relief because: 1. A chimp is not human, 2. A chimp cannot participate in the human social contract, and 3. A chimp cannot bear the responsibilities and duties associated with personhood. (The NhRP disagreed that any of these were prerequisites for legal personhood or even accurate premises.) Although Judge Eugene Fahey of the New York Court of Appeals upheld the ruling, he conceded that "the issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. Ultimately, we will not be able to ignore it."

Personhood for Happy would create a legal precedent and framework for granting fundamental rights to nonhumans in the future—a step in the right direction for those of us who believe animals deserve more than just protection from unnecessary suffering. As our understanding of the animal psyche evolves, so must our definition of what ethical treatment looks like.

In 1982, the Bronx Zoo held a birthday party for Patty's newborn calf Astor, whose floppy ears and rambunctious behavior had already endeared him to zoo patrons. Back then, Happy and Grumpy regularly gave rides and performed for shows that a keeper at the time referred to as "strictly educational." At the party, Grumpy lost a tug-of-war to the Fordham University football team. There was a special birthday cake for Astor made from Italian bread, apples, carrots, and flowers. A few months later, Astor, the three-foot elephant calf, died from a heart condition.

It's unlikely that, say, an arachnid would have been given such an impressive birthday celebration, or been memorialized in the New York Times as "mischievous" and "inquisitive." One of the downsides to anthropomorphism, besides self-indulgence, is that it tends to favor those like us—mammals and other vertebrates. Ironically, "speciesism," a form of discrimination often cited by animal rights groups that assigns a different value to different species, also serves as a basis for an argument against personhood for nonhumans. If we give an elephant rights, what does that mean for the rest of the animal kingdom?

There will always be resistance to recognizing the need to rethink our relationship to the world around us—to admit we got it wrong before we got it right. Personhood as a legal concept may not be appropriate for all beings. But to deny it to one simply because we do not wish to grant it to all is illogical. We are already engaging in an extreme form of speciesism by placing our own need to dominate the planet's resources above of the rights of other species to exist. The least we could do is use our ability to navigate complex ethical dilemmas—our so-called human exceptionalism—to address injustice by whatever means possible. There is no one-size-fits-all solution, only the best option in a given situation. For Happy, it's an elephant-shaped container for civil rights.