
APPELLATE COURT
STATE OF CONNECTICUT

A.C. 41464

NONHUMAN RIGHTS PROJECT, INC., on behalf of
BEULAH, MINNIE, and KAREN

v.

R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM
R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC.

BRIEF OF AMICI CURIAE PHILOSOPHERS*

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U.S. Cases

Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 152 A.D.3d 73 (1st Dept. 2017) 1

Other Authorities

Andrews, K. (2017). "Life in a cage." *The Philosophers' Magazine*, 76 8

Arneil, B.; Hirschman, N. (Eds.) (2016). *Disability and Political Theory*. Cambridge: Cambridge University 6

Bates, L.; Byrne, R. (2017). Affidavit in support of elephant personhood. *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.* (Jan. 25, 2017) 8

Beauchamp, T. L.; Childress, J. L. (2001). *Principles of Biomedical Ethics* (5th ed.). New York: Oxford University 9

Beauchamp, T. L.; Wobber, V. (2014). "Autonomy in chimpanzees." *Theoretical Medicine and Bioethics*, 35(2) 8

Darwin, C. (1859). *On the Origin of Species by means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life*. London: John Murray 2

DeGrazia, D. (2007). "Human-animal chimeras: Human dignity, moral status, and species prejudice." *Metaphilosophy*, 38(2-3) 8

Dennett, D. (1988). "Conditions of personhood." In *What Is a Person?* M. F. Goodman (Ed.). New Jersey: Humana 8

Ereshefsky, M. (1992). "Eliminative Pluralism." *Philosophy of Science* 59 (4) 1

Hobbes, T. (1651). *Leviathan, Or The Matter, Forme and Power of a Common-Wealth Ecclesiasticall and Civil*. Curley, E, (Ed.). Indianapolis: Hackett, 1994 4

Hull, D. (1986). "On human nature," *PSA: Proceedings of the Biennial Meeting of the Philosophy of Science Association*, Volume Two: "Symposia and Invited Papers" 2

Kittay, E. F. (2005). "At the margins of moral personhood." *Ethics*, 116(1) 6

Locke, J. (1698). *Second Treatise of Government*. Indianapolis: Hackett, 1980 4

Moss, C. (2015). Affidavit in support of elephant personhood. *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.* (Oct. 16, 2015) 8

Poole, J. (2016). Affidavit in support of elephant personhood. *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.* (Dec. 2, 2016) 8

Rousseau, J.-J. (1762). *On The Social Contract, Or Principles of Political Right*. In *The Basic Political Writings*, Cress, D. A. (Trans. & Ed.). Indianapolis: Hackett, 2011 4

Silvers, A.; Francis, L. P. (2015). “Human and civil models of rights: Healthy and ill disabled and access to health care.” In *Human Rights and Disability: Interdisciplinary Perspectives*, J.-S. Gordon, J.-C. Pöder, and H. Burckhart (Eds.). New York: Routledge 6

STATEMENT OF INTEREST OF AMICI CURIAE¹

We submit this brief as philosophers with expertise in animal ethics, political theory, the philosophy of animal cognition and behavior, and the philosophy of biology in support of the Nonhuman Rights Project's ("NhRP") efforts to secure habeas corpus relief for Beulah, Karen, and Minnie. Collectively, we have long-standing interests in the ethical and legal duties to animals and share a commitment to rejecting arbitrary distinctions used prejudicially to protect humans without protecting other animals. We submit this brief because of our interest in ensuring the law is applied and interpreted in a manner that is consistent with the best philosophical standards of rational judgment and ethical standards of justice.

ARGUMENT

I. Summary of the Argument

At the heart of this case is whether Beulah, Karen, and Minnie are entitled to habeas corpus relief. As elephants, should they be considered persons protected by the courts as legal rights holders? We believe that if the courts employ a *consistent* and *reasonable* definition of 'personhood' they will find it necessary to extend writs of habeas corpus to Beulah, Karen, and Minnie.

In this brief, we argue that there are a variety of ways that humans (*Homo sapiens*) are 'persons' and that there are no non-arbitrary conceptions of 'personhood' that can *include* all humans legally regarded as persons and *exclude* all nonhuman animals. To accomplish this, we will describe and assess four common conceptions of 'personhood' found in the philosophical literature and similar cases that address the legal status of nonhuman animals

¹ The amici Philosophers were assisted by an attorney for the Plaintiff in organizing and formatting their own work into this brief. No other party has contributed to the cost of preparation or submission of this brief. The amici were not compensated for this brief.

(e.g., *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017)) based on **Species Membership**, the **Social Contract**, **Community Membership**, and **Capacities**.

II. Species Membership

The species membership conception of personhood uses a biological taxonomic classification to determine the proper scope of legal rights and protections. We maintain that species membership alone cannot rationally be used to determine personhood, as the concept of 'personhood' is not a biological one and cannot be meaningfully derived from the species category *H. sapiens*. Species is only one level of biological classification that reflects what is sometimes called the 'Tree of Life.' The great insight of Charles Darwin (1859) was that the differences between species did not reflect the existence of essential characteristics, but instead were the product of a gradual process of natural selection. Natural selection implies that there are no essences nor any set of properties necessary and jointly sufficient for an organism to be a member of a particular species (Ereshefsky 1992; Hull 1986). There are three reasons for this:

1. There are similarities across species. All organisms on the planet are more or less closely related to each other. The more closely related two species are, the more similar they tend to be. However, even distantly related organisms can share important traits through convergent (or parallel) evolution.
2. There is substantial natural variation within each species. (Natural selection can only operate when there is heritable variation in a population.)

3. Species evolve over time, so even if all members of a species share characteristics at one time, this may not be true of their descendants, and is not true of all their ancestors.

When so understood, it is difficult to see why species, or any other taxonomic category, should bear any moral weight. While morally relevant capacities and relationships are typically shared by the members of a particular species (as discussed, *infra*), it is those capacities that are doing the ethical work, not membership in that species. At best, species membership is a heuristic that aids a superficial assessment of moral status.

The NhRP seeks to have Beulah, Karen, and Minnie classified as persons based on the capacities they share with other persons. If persons are defined as ‘beings who possess certain capacities,’ and humans usually possess those capacities, then being human can be used to predict with some accuracy that an individual will have those capacities and thereby be a person. But it is an arbitrary decision to include species membership *alone* as a condition of personhood, and it fails to satisfy a basic requirement of justice: that we treat like cases alike.

III. Social Contract

Opponents of personhood for nonhumans often appeal to social contract theory, arguing that nonhuman animals are not persons because they cannot bear duties and responsibilities. On this interpretation, individuals only become persons when they enter into a social contract and agree to bear certain duties in exchange for rights. The influential social contract theories of the 17th and 18th centuries, which inspired the language and ideals found in the US Constitution, show that this interpretation is mistaken for at least three reasons: (1) not all rights depend on the existence of a social contract, (2) the social contract

does not produce 'persons,' and (3) personhood is not conditional on bearing duties and responsibilities.

Social contract theorists—including Hobbes (1651), Locke (1698), and Rousseau (1762)—maintain that all persons possess 'natural rights' independent of, and prior to, the social contract. These rights include absolute freedom and liberty. Upon contracting with our fellows, we do not suddenly acquire natural rights, but rather give them up, sometimes in exchange for civil and legal rights. Rousseau rejected the idea that the social contract gives us rights, proclaiming, "Man is born free, and everywhere he is in chains" (Rousseau 1762, Book 1, Chapter 1). These chains are self-imposed, forged when we give up our natural rights and freedoms and place ourselves under the authority of another. It is the social contract that chains us.

Hobbes held that the social contract gives us law and morality, not rights. In the act of contracting, we give up all of our rights, save one: the right to life. What we receive in exchange are not new rights, but security and the protection of the sovereign. For Locke, we form societies to protect private property. In transitioning from the state of nature to civil society, we lose our natural rights, including the right to punish those who transgress against our property. The social contract should not be understood as conferring rights, but as creating laws and the duty to obey them.

Social contract philosophers have never claimed that the social contract endows personhood. Social contracts create citizens by conferring citizenship on persons who exist prior to the contract and agree to it. If persons did not exist before the contract, there could be no contract at all. Personhood, therefore, is presupposed as a characteristic of contractors. It follows that all contractors must be persons, but not that all persons must

necessarily be contractors. There can be persons who are not contractors, either because they choose not to contract (e.g., adults who opt out) or because they cannot contract (e.g., infants, children). The US Constitution mentions 'persons' fifty-seven times, but does not define the term. Also, the 14th Amendment distinguishes between persons and citizens. This is consistent with social contract theory, which holds that persons do not depend on the existence of a social contract, but the social contract depends on the prior existence of persons.

It is sometimes mistakenly claimed that to be a person one must be capable of bearing legal rights *and* responsibilities. The NhRP argues that an entity is a person if she can bear legal rights *or* responsibilities. The reason is clear: not all persons can be held accountable for their actions and bear societal or legal responsibilities. Infants, children, and some individuals with cognitive disabilities cannot be held accountable or bear legal or societal duties, but they are persons with legal rights. At issue is not whether elephants can bear legal duties or be held legally accountable for their actions, but whether they have legal rights, like other persons. Personhood itself cannot be conditional on bearing legal duties because being a person is and must be logically prior to bearing duties.

A social contract conception of personhood does not exclude nonhumans, such as elephants, from personhood. Social contract philosophers have consistently maintained that social contracts create citizens out of existing persons. Social contracts do not create the rights, such as bodily liberty, associated with *personhood*. Finally, neither citizenship nor personhood depend on the ability to bear legal duties or responsibilities. Social contract theory cannot and does not rule out the personhood of elephants.

IV. Community Membership

Personhood is sometimes grounded in membership in 'the human community,' providing a way for humans incapable of bearing duties and responsibilities to be legal persons. Under the two most plausible interpretations of this view of personhood—the *Wide* view and the *Narrow* view—Beulah, Karen, and Minnie are members of a community of persons. On the *Wide* view, someone is a member of a community of persons because they are embedded in interpersonal webs of interdependency, trust, communication, and normative responsiveness. Persons are cooperative, interconnected beings who benefit from the love, concern, mutual recognition, purpose, and instruction received from others. We are all dependent on others at some points in our lives, and interdependent at all times.

The *Wide* view, which recognizes that our individual capacities and identities are formed through social interaction, is endorsed by philosophers of disability, who emphasize that individuals with cognitive disabilities are persons because of their embeddedness in social relations (Kittay 2005; Silvers & Francis 2015; Arneil & Hirschman 2016). This holds even when a person cannot bear legal responsibilities. Personhood rights ensure that individuals can form and maintain appropriate social bonds, protecting them from the arbitrary power of others to detain, confine, neglect, or isolate them.

On the *Wide* view, Beulah, Karen, and Minnie are members of human communities. They are embedded in interpersonal webs of dependency, meaning, and care with human persons, and so are part of human communities. First, however inadequate their care and treatment, they are dependent on their keepers for food, water, and shelter, and they interact closely with humans on a daily basis. Second, there is a wider human community that considers them members. This shows that they have been brought into our human

community and embedded in social relationships, and therefore should be protected when others exercise arbitrary power over them. The fact that the elephants are simultaneously the subjects of instrumentalization and the subjects of legal advocacy shows that their membership is disputed. This has also been true for many humans seeking habeas corpus relief. Indeed, one of the functions of habeas corpus is to protect community members who are being treated as things.

Some philosophers see the *Wide* view as too broad, arguing that bona fide membership in the community of persons requires not merely social embeddedness and vulnerability to social exclusion, but also the possession of certain individual capacities. On this *Narrow* view, 'personhood-as-community-membership' requires traits beyond sentience or vulnerability, but less than the capacity to bear legal responsibilities. What *kinds* of traits are these? There are two possibilities: biological or psychological. *Biological* traits are physical traits: having forty-six chromosomes or having human parents, for example. Favoring such traits as having human parents would be a return to the view that only members of the species *H. sapiens* qualify for personhood. As argued earlier, we reject the view that only members of *H. sapiens* qualify for personhood as arbitrary and unsupported by biological science.

On the other hand, basing personhood on additional psychological criteria—mental capacities such as beliefs, desires, and rationality—raises issues that we address in the next section on capacities. The important thing to note is that on either the *Wide* or *Narrow* view, Beulah, Karen, and Minnie are persons.

V. Capacities

On a capacities conception of personhood, having some set of capacities is sufficient, though perhaps not necessary, for personhood. If elephants possess the relevant capacities that qualify humans as persons, we must conclude that elephants like Beulah, Karen, and Minnie are also persons.

Core capacities typically regarded as essential to personhood include autonomy (to act voluntarily or to control behavior in light of preferences or goals), emotions, linguistic mastery, sentience (conscious awareness, sensation, experiencing pleasure or pain), rationality, reflective self-awareness, and reciprocity (e.g., Andrews 2017; DeGrazia 2007; Dennett 1988). Possessing all of these properties is not *necessary* for personhood, for that would exclude some humans who *are* persons (e.g., young children). Instead, to be a person one must have at least *some* of these personhood-making capacities (DeGrazia 2007).

Affidavits submitted by a number of respected specialists show that elephants share many personhood-making capacities with humans (e.g., Bates and Byrne Aff.; Moss Aff.; Poole Aff.). Evidence for self-awareness includes some elephants passing a mirror self-recognition test, as well as their more general awareness of where they fit in their social hierarchies. Elephants plan their foraging activities (demonstrating autonomy and rationality) and have preferred community members or ‘friends’ (emotionality). Elephants can also exhibit concern for, and try to help, community members who are sick or in distress and appear to protect the bodies of those who have recently died (sentience and emotionality).

Autonomy is historically associated with personhood. Philosopher Tom Beauchamp and comparative psychologist Victoria Wobber offer an account of autonomy inclusive enough to capture what we commonly regard as autonomous action: an act is autonomous

if an individual self-initiates an “action that is (1) intentional, (2) adequately informed...and (3) free of controlling influences” (Beauchamp & Wobber 2014). Elephants act intentionally (they can plan and act to achieve goals), and so satisfy (1). They navigate quite complex physical and social worlds, reflecting a “richly information-based and socially sophisticated understanding of the world” (Beauchamp & Wobber 2014), and so satisfy (2). Whether elephants act free of controlling influences will depend on their environment and the options available to them, but there is no doubt that elephants can so act when they find themselves in contexts where they can express their autonomy.

Autonomy is also a cluster concept that brings together capacities to act intentionally (which assumes capacities to form goals and direct one’s behavior) *and* to be adequately informed (which assumes capacities to learn and acquire knowledge through rational processes) (Beauchamp & Wobber 2014). So understood, evidence of autonomy is sufficient evidence of personhood-making capacities. Thus, elephants qualify as persons on autonomy grounds alone.

Autonomy has a direct connection to ethics. Autonomous individuals have a basic interest in exercising their autonomy (Beauchamp & Childress 2001). Diminishing their autonomy through force or coercion violates that basic interest and so qualifies as a fundamental wrong. The NhRP is seeking the release of Beulah, Karen, and Minnie from Commerford Zoo, and their relocation to a suitable elephant sanctuary. An adequate sanctuary not only promises them greater freedom, but a setting where their autonomy is respected. They will have markedly more freedom to roam, explore, and forage, an opportunity to cultivate their social skills within a larger group of elephants, and expand their

goals and preferences (thus, enriching their autonomous capacity), given the greater opportunities afforded them.

The NhRP argues that elephants are autonomous and are persons under a capacities approach to personhood that is already enshrined in law. Affidavits by eminent elephant specialists have attested to the fact that elephants possess the relevant capacities. A commitment to logical consistency and formal justice (that *like should be regarded alike*) requires us to acknowledge that Beulah, Karen, and Minnie qualify as persons.

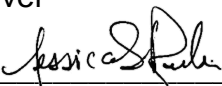
CONCLUSION

Of the four conceptions of personhood employed by philosophers and other courts considering habeas relief for nonhuman animals, Species Membership is arbitrary and must be rejected, while the other three—Social Contract, Community Membership, and Capacities—suggest that Beulah, Karen, and Minnie are persons. This Court should recognize that when criteria for personhood are reasonably and consistently applied, Beulah, Karen, and Minnie satisfy the criteria and are entitled to *habeas* relief.

Dated: Hartford, Connecticut
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CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief complies with all provisions of Practice Book § 67-2, and that on this the 13th day of November, 2018, the foregoing Brief was both mailed and electronically transmitted to the following, together with a copy of the electronic confirmation receipt:

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