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THE ELEPHANT IN THE COURTROOM

A curious legal crusade to redefine personhood is raising profound questions about the interdependence of the animal and human kingdoms.

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Advocates of animal rights want the Bronx Zoo to release Happy, an elephant smart enough to recognize herself in a mirror. Illustration by Gérard

DuBois



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According to the civil-law code of the state of New York, a writ of habeas corpus may be obtained by any “person” who has been illegally detained. In Bronx County, most such claims arrive on behalf of prisoners on Rikers Island. Habeas petitions are not often heard in court, which was only one reason that the case before New York Supreme Court Justice Alison Y. Tuitt—Nonhuman Rights Project v. James Breheny, et al.—was extraordinary. The subject of the petition was Happy, an Asian elephant in the Bronx Zoo. American law treats all animals as “things”—the same category as rocks or roller skates. However, if the Justice granted the habeas petition to move Happy from the zoo to a sanctuary, in the eyes of the law she would be a person. She would have rights.

Humanity seems to be edging toward a radical new accommodation with the animal kingdom. In 2013, the government of India banned the capture and confinement of dolphins and orcas, because cetaceans have been proved to be sensitive and highly intelligent, and “should be seen as ‘non-human persons’ ” with “their own specific rights.” The governments of Hungary, Costa Rica, and Chile, among others, have issued similar restrictions, and Finland went so far as to draft a Declaration of Rights for cetaceans. In Argentina, a judge ruled that an orangutan at the Buenos Aires Eco-Park, named Sandra, was a “nonhuman person” and entitled to freedom—which, in practical terms, meant being sent to a sanctuary in Florida. The chief justice of the Islamabad High Court, in Pakistan, asserted that nonhuman animals have rights when he ordered the release of an elephant named Kaavan, along with other zoo animals, to sanctuaries; he even recommended the teaching of animal welfare in schools, as part of Islamic studies. In October, a U.S. court recognized a herd of hippopotamuses originally brought to Colombia by the drug lord Pablo Escobar as “interested persons” in a lawsuit that would prevent their extermination. The Parliament of the United Kingdom is currently weighing a bill, backed by Prime Minister Boris Johnson, that would consider the effect of government action on any sentient animal.

Although the immediate question before Justice Tuitt was the future of a solitary elephant, the case raised the broader question of whether animals represent the latest frontier in the expansion of rights in America—a progression marked by the end of slavery and by the adoption of women’s suffrage and gay marriage. These landmarks were the result of bitterly

fought campaigns that evolved over many years. According to a Gallup poll in 2015, a third of Americans thought that animals should have the same rights as humans, compared with a quarter in 2008. But protecting animals in this way would have far-reaching consequences—among them, abandoning a centuries-old paradigm of animal-welfare laws.

Arguments in Happy's case began in earnest on September 23, 2019, in an oaken courtroom populated with reporters, advocates, and attorneys for the zoo. Kenneth Manning, representing the Wildlife Conservation Society, which operates the Bronx Zoo, made a brief opening argument. He pointed out that the plaintiff—the Nonhuman Rights Project, or NhRP—had already bounced through the New York court system with half a dozen similar petitions on behalf of chimpanzees. All had failed. Manning read aloud from one of those decisions, which ruled that “the asserted cognitive and linguistic capabilities of a chimpanzee do not translate to a chimpanzee’s capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions,” and that the animal therefore could not be entitled to habeas corpus. The NhRP countered that “probably ten per cent of the human population of New York State has rights, but cannot bear responsibilities, either because they are infants or they are children or they are insane or they are in comas or whatever.”

Manning urged Justice Tuitt to follow precedent: “The law remains well settled that an animal in New York simply does not have access to the habeas-corpus relief, and that’s reserved for humans. So, there is nothing in this case dealing with any claim of mistreatment or malnourishment or anything with respect to Happy the Elephant.” Manning summarized, “In short, Your Honor, Happy is happy where she is.”

Happy’s pen, at the Wild Asia exhibit in the Bronx Zoo, exemplifies the aesthetic of late-twentieth-century zoo design: creating the illusion of a natural habitat and disguising, as much as possible, the fact of captivity. There is a beaten path, which Happy has trodden alone for the past sixteen years, encircling a small pond with water lilies, where she can bathe and wallow. Leafy trees surround a one-acre enclosure, which is dominated by an artificial dead tree trunk, artfully fashioned with hollows and scaling bark. The enclosure has to be cleaned constantly, as a female Asian elephant can eat up to four hundred pounds of vegetation a day and excrete about sixty per cent of that. Another elephant, Patty, lives in an adjacent pen. From November to May, when the New York weather can be cold, the animals are reportedly quartered in separate stalls scarcely twice the length of their bodies.

Happy, who weighs approximately eighty-five hundred pounds, has a high, twin-domed

head, resembling that of an octopus, and the small, round ears that distinguish the Asian species from the larger African species. When I recently visited the zoo, her back was covered in dust, which elephants often use to guard against the sun and insects. Happy's heavy-lidded eyes are almost invisible in the great mass of her head; elephants are color-blind but see especially well at night. Her skin is gray and uniform, and has the soft, wrinkled complexity of a cerebral cortex.

She and Patty will be the last elephants to inhabit the Bronx Zoo: in 2006, the institution announced that no more would be acquired. Across the country, zoos have been responding to the growing public sentiment that elephants do not belong in captivity. Although elephants are social animals, Happy and Patty don't get along, so they are separated by a cable fence, living in parallel solitary confinement. The zoo's attorney was correct, though, in stating that there had been no charges of abuse. Nothing in the vast portfolio of animal-welfare laws prohibits zoos from locking an elephant—who, in the wild, ranges many miles a day—inside a pen a fifth the size of a New York City block. Most elephants in American zoos have lived in spaces half as large.

Happy was born in 1971 and was kidnapped as an infant from a herd in Thailand, likely through the method of killing her mother and other female protectors. According to a database maintained by Dan Koehl, a renowned Swedish elephant keeper, Happy was sent to a drive-through zoo in Laguna Hills, California, which had purchased her and six other baby Asian elephants, naming them for the Seven Dwarfs. One of them, Sleepy, died soon after arrival. The others were eventually transferred. Dopey and Bashful became circus performers. Sneezy went to the Tulsa Zoo, where he still resides. Doc, renamed Vance, broke his leg while doing a hind-leg walk at a zoo in Ontario; his leg never healed, and he was euthanized. That left Happy and Grumpy, who arrived in 1977 at the Bronx Zoo, often ranked as one of the world's best.

Few organizations have done as much for protecting animals in nature as the Wildlife Conservation Society, which, in addition to the Bronx Zoo, operates the Central Park Zoo, the Prospect Park Zoo, the Queens Zoo, and the New York Aquarium. The society focusses on the conservation of six “flagship” groups: apes; big cats; sharks, skates, and rays; whales and coastal dolphins; tortoises and freshwater turtles; and elephants. One of the society's first projects, in 1905, helped save the American bison from extinction. A campaign called 96 Elephants—named for the number of elephants thought to be killed every day by poachers—was launched in 2013. James Breheny, the director of the Bronx Zoo, stated that the society had “led the charge to help stop the ruthless slaughter of 35,000 African

elephants each year for the ivory trade.”

As for Happy, Breheny declared, with evident frustration, “We are forced to defend ourselves against a group that doesn’t know us or the animal in question, who has absolutely no legal standing, and is demanding to take control over the life and future of an elephant that we have known and cared for over 40 years.” He went on, “They continue to waste court resources to promote their radical philosophical view of ‘personhood.’ ”

According to the NhRP, it has repeatedly offered to drop the case if the zoo consents to send Happy to one of two sanctuaries, in Tennessee and in California, that have indicated a readiness to accept her. Given the zoo’s stated intention of eventually shutting the exhibit down, its refusal to settle the case suggests an institutional desire to put an end to the campaign for animal personhood. Officials for the society and the Bronx Zoo refused repeated requests to comment for this article.

Steven Wise, the founder of the NhRP, grew up in Maryland, and his family went to a farmers’ market once a month. There were animals for sale—in particular, chickens, crammed into small cages. To Wise, they appeared to be suffering. Although he had pets—a dog, named Gravy, and a succession of goldfish, mostly named Jack—he had given little thought to the question of animal welfare. But the plight of the chickens so moved him that, at the age of eleven, he wrote a letter to a state representative to call his attention to the subject. The representative wrote back, but nothing changed for the chickens.

As a teen-ager, Wise joined a couple of rock bands, vaguely hoping to make a career in music. In 1968, he enrolled at the College of William & Mary. Drawn to protests against the Vietnam War and issues of social justice, he became active in left-wing politics. He thought about going to medical school, but his grades weren’t good enough. He attended law school at Boston University instead, but he was drifting. He had the profile of someone who was looking for a cause.

Momentous social revolutions often begin with a book. The modern animal-rights movement was born in 1975, with the publication of Peter Singer’s “Animal Liberation.”

Singer, an Australian philosopher, popularized the concept of “speciesism,” which he compared to racism and sexism. “All animals are equal,” he asserted, adding, “The basic principle of equality does not require equal or identical *treatment*; it requires equal consideration.” Singer did not actually advocate for legal rights but for expanded welfare, declaring that the moral argument for equality rests exclusively on an animal’s capacity for suffering and happiness, not on its intellect or its abilities. His thinking can be traced to the utilitarianism of Jeremy Bentham, the Enlightenment-era English legal philosopher and reformer. The guiding principle of utilitarianism is that society should attempt to provide the greatest happiness to the greatest number, which is typically achieved by maximizing pleasure and minimizing pain. Bentham made an enduring case for animal welfare when he wrote, “The question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?” In 1980, a friend of Wise’s handed him a copy of “Animal Liberation.” Like many of Singer’s readers, he was instantly transformed. Wise’s mission in life became blazingly clear. He would defend the most brutalized and defenseless creatures: nonhuman animals.

Over Thanksgiving weekend in 1981, Wise attended a meeting in New York of the Society for Animal Rights. The participants were interested in improving welfare laws, but Wise eventually saw limitations in this approach. The caged chickens in the farmers’ market, for instance, were not covered by the Animal Welfare Act of 1966, the main federal law, which excepted from regulation all livestock, as well as birds, rats, and mice used in research. And even in cases where, say, pets were nominally protected by welfare laws, it was rare for abuse cases to be prosecuted: animals were property, after all.

In 1985, Wise had an epiphany: “I concluded that the real problem was rights. Only entities that had rights were ever going to be able to be appropriately protected.” In common law—the law generated in the courtroom by judges, not by elected legislators—rights accrue to persons, not things, so Wise settled on a strategy of seeking personhood for animals. In 1998, he unveiled the Nonhuman Rights Project in an article for the *Vermont Law Review* titled “Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy.” The organization’s goal was to get state courts to accept that a nonhuman animal has the capacity to possess “at least one legal right”: to be a person in the eyes of the law.

Wise later explained to a class at Harvard Law School that he had initially tried to protect animals by taking on “doggy-death cases”—defending canines who, after biting or mauling incidents, had been ordered to be killed. “I thought to myself, I can save five or six dogs’ lives a year and save some other animals, too. And that should be enough to get me into Heaven. But the problem is that, in the United States alone, for every beat of my heart one

hundred and sixty animals are killed”—that is, euthanized. In the class, he listed the animals he thought should be promoted to personhood: “I argue that these nonhuman animals—all four species of great apes, all of the elephants, all cetaceans—are so cognitively complicated that these beings should be persons today.” In a 2002 book, “Drawing the Line: Science and the Case for Animal Rights,” he also listed dogs, African gray parrots, and honeybees.

For a decade, Wise was the project’s only employee, but he eventually assembled a team of volunteers that included lawyers, law students, and academics. Their first task was to determine where to make their case. His organization began scouring jurisdictions across the U.S., seeking amenable judges and charismatic animals that would make appealing plaintiffs. The NhRP decided to initiate lawsuits in New York State. “It had a strong tradition of habeas corpus and the right to appeal judges’ decisions, which was critical,” Wise said. The point was to get into dialogue with the upper courts, where, he believed, judges would be more willing to overturn precedent.

By 2013, Wise was in his sixties, with tousled white hair that looked as if it had been cut with garden shears, and a tie that was perpetually askew. He had poured his entire career into the cause of animal personhood, remaining relatively obscure despite having published several significant books, including “Rattling the Cage: Toward Legal Rights for Animals” (2000), which the primatologist Jane Goodall had hailed as “the animals’ Magna Carta, Declaration of Independence, and Universal Declaration of Human Rights all in one.” (Goodall is on the NhRP’s board.) Wise was finally ready to strike.

Of all the animals the NhRP might have chosen to represent, it settled on chimpanzees—among the closest relatives to humans—for its first cases. Wise’s legal team spread across New York, searching for “imprisoned chimpanzees.” They found seven, two of them in a roadside zoo. Before the team could act, three of the chimps died, creating a sense of urgency. Wise dubbed the remaining animals the Chimpanzee Four. One, living in Gloversville, northwest of Albany, was Tommy, a former performing chimp who had been in a Matthew Broderick movie called “Project X.” Tommy was watching cartoons on a television stationed outside his cage when Wise first saw him. Another, Kiko, was living in a private sanctuary with a few dozen monkeys in Niagara Falls; he had been rescued from an abusive career in the entertainment business. At Stony Brook University, on Long Island, the Department of Anatomical Sciences had been studying the chimps Hercules and Leo to examine differences in human and chimpanzee locomotion. For six years, the animals were kept in a laboratory with no view of the outdoors. “Chimps swing their hips much more than humans when they walk,” the researchers found.

The courts were unconvinced by Wise's arguments. A judge in Suffolk County summarily rejected a petition on behalf of Hercules and Leo, saying that in New York habeas corpus applied only to persons. Of course, this was the very point that the NhRP was contesting. Although an appeals-court judge, Eugene Fahey, concurred in an opinion that denied liberty to Tommy and Kiko, he also acknowledged that the litigants had raised important ethical questions: "The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing."

Having lost the chimpanzee cases in New York, Wise and his team armed themselves with dozens of friend-of-the-court briefs in support of personhood for Happy. One of them came from Laurence Tribe, the Harvard legal scholar. "It cannot pass notice that African Americans who had been enslaved famously used the common law writ of habeas corpus in New York to challenge their bondage and to proclaim their humanity, even when the law otherwise treated them as mere things," Tribe wrote. "Women in England were once considered the property of their husbands and had no legal recourse against abuse until the Court of King's Bench began in the 17th century to permit women and their children to utilize habeas corpus to escape abusive men. Indeed, the overdue transition from thinghood to personhood through the legal vehicle of habeas corpus must be deemed among the proudest elements of the heritage of that great writ of liberation."

A precedent that Wise particularly favors is a 1772 case in England concerning James Somerset, a Black man enslaved to Charles Stewart, a customs officer in Boston. When Stewart brought him to England, Somerset briefly escaped, and upon his recapture Stewart had him imprisoned on a ship bound for Jamaica, where he was to be sold on the slave market. English supporters of Somerset filed for a writ of habeas corpus to gain his freedom. The case came before Lord Mansfield, a consequential figure in the British legal tradition. Although slavery had not been legally endorsed in Britain, an estimated fifteen thousand enslaved people lived there, and hundreds of thousands lived in British territories. Recognizing Somerset as a legal person would not just liberate a single individual but set a precedent that could be financially ruinous for slaveholders. Mansfield declared, "Let justice be done, though the heavens may fall." He ruled that slavery was "so odious" that common law could not support it.

"That was the beginning of the end of slavery, first in England, then at least in the northern

reluctant to declare that they are persons. Wise has been canny about framing his current case around a single elephant—not all elephants or all sentient animals. That being said, he admits that “it only takes one.”

Manning, speaking on behalf of the zoo, warned, “As you can tell from the pleadings, this is not *really* about elephants. It’s about elephants, it’s about giraffes—”

“It’s about animals,” Justice Tuitt said.

In the spring of 1838, Charles Darwin, recently returned to England after a five-year voyage on the *Beagle*, visited the London Zoo. The first orangutan ever to be exhibited there was on display. Named Jenny, she drank tea from a cup and wore a patterned dress and trousers. Darwin, who had never seen a great ape, was then formulating his theory of evolution. After watching Jenny, he wrote to his sister:

The keeper showed her an apple, but would not give it her, whereupon she threw herself on her back, kicked & cried, precisely like a naughty child.—She then looked very sulky & after two or three fits of pashion, the keeper said, “Jenny if you will stop bawling & be a good girl, I will give you the apple.”—She certainly understood every word of this, &, though like a child, she had great work to stop whining, she at last succeeded, & then got the apple, with which she jumped into an arm chair & began eating it, with the most contented countenance imaginable.

Darwin returned twice that fall and was permitted to enter Jenny’s cage to interact with her and a young male that the zoo had also acquired. Darwin’s world view was shaken. Anyone who witnessed an orangutan’s “passion & rage, sulkiness & very extreme of despair,” he declared, would not “dare to boast of his proud preeminence.” The apes could even use tools: Darwin observed in his notebook that Jenny would “take the whip & strike the giraffes” that were being kept in the same enclosure. And the orangutans were transfixed when Darwin showed them a mirror—they “looked at it every way, sideways, & with most steady surprise.”

A hundred and thirty years after Darwin’s encounter, Gordon Gallup, Jr., a psychologist at the University at Albany, wondered whether an animal could recognize the image reflected in a mirror as itself. If so, would that imply the presence of a self-conscious mind with a sense of the past and, possibly, of the future? These qualities were assumed to be exclusively

human. Gallup improvised on Darwin's experiment by presenting a mirror to four adolescent wild chimps. Initially, they bared their teeth and charged the mirror, but then they settled down and began making faces and blowing bubbles in the direction of their image. Next, Gallup anesthetized the animals and used an odorless dye to paint red spots on an eyebrow ridge and on top of an ear—places chimps can't ordinarily see on themselves. When the animals regained consciousness, they again stared into the mirror. Each of the chimps touched the spots repeatedly, indicating that they understood they were looking at themselves. Psychologists now consider mirror self-recognition a canonical test of subjectivity.

Diana Reiss, a research scientist working with dolphins at the Wildlife Conservation Society, and Frans de Waal, a primatologist at Emory University, decided to try the mirror test on elephants. They both knew that self-awareness was often associated with empathy—a quality that seemed highly developed in elephants. In 2005, Reiss and one of de Waal's

graduate students, Joshua Plotnik, set up video cameras on the roof of the elephant barn at the Bronx Zoo. Three of its elephant residents were given the test: Patty; her companion, Maxine; and Happy. All the elephants were exposed to a huge mirror that the researchers had bolted to a wall. Patty and Maxine awkwardly got down on their knees to peer under the mirror and stood on their hind legs to look over it. They repeatedly moved their heads in and out of view, as if wondering why the animal in the mirror kept doing the same thing. They also entertained themselves by bringing food over to the mirror and then looking at it while they ate.

A short time later, a large white "X" was painted on the right side of the forehead of each elephant, and an invisible sham mark on the other side of their heads, just in case there was some residual feeling or odor from the mark. When faced with the mirror, neither Maxine nor Patty touched the "X" on their foreheads.

Happy reacted differently. As Reiss and Plotnik later noted in a paper, the elephant walked straight to the mirror, "where she spent 10 seconds, then walked away." Seven minutes later, Happy returned to the mirror:

She moved in and out of view of the mirror a couple of times, until she moved away again. In the following 90 seconds, out of view of the mirror, she repeatedly touched the visible mark but not the sham-mark. She then returned to the mirror, and while standing directly in front of it, repeatedly touched and further investigated the visible mark with her trunk.

Happy touched the white “X” twelve times, becoming the first elephant to pass the mirror self-recognition test.

Gallup discounts many tests that have purportedly demonstrated self-recognition in other animals, including magpies, dolphins, and orcas. Human babies typically don’t recognize themselves in a mirror for eighteen to twenty-four months. “There have been literally hundreds of attempts to demonstrate mirror self-recognition in other animals,” Gallup told me. “There are only three species for which we have compelling experimental, reproducible evidence for mirror self-recognition: chimpanzees, orangutans, and humans. That’s it. So, Happy stands as an outlier.”

When Happy and Grumpy first arrived at the Bronx Zoo, they were about six years old. They were pressed into service as entertainers, alongside an older female, Tus, wearing costumes and giving rides to kids. A trainer of that era described Happy as “a more physical elephant than anything I’ve seen,” explaining, “That’s why I put all the physical tricks on her—the hind-leg stand, the sit-up.”

Some years later, Happy, Grumpy, and Tus were moved to the Wild Asia exhibit, where Patty and Maxine were also on display. In 2002, Tus and Grumpy died. Dan Koehl, the Swedish elephant keeper, looked into Grumpy’s death and determined that she had become crippled after being attacked by Patty and Maxine, and was euthanized. Happy was placed in a separate pen.

In November, 2018, an ailing Maxine was also euthanized. The zoo attempted to pair up Patty and Happy. Breheny, the zoo’s director, observed at the time, “We hoped with the change in herd structure and dynamics, the elephants might look to each other for companionship.” The experiment was a bust. “The issue with Happy is that she, as an individual, is subordinate in nature and has always been at the bottom of any social grouping of elephants of which she has been a part,” Breheny explained. “Happy has consistently demonstrated to us that she is more comfortable with her keepers and with safe barriers between her and other elephants. The stress she felt whenever in the direct company of more dominant animals had a negative impact on her welfare.” More recently, Breheny has said that Happy and Patty are “like sisters who don’t want to share the same room.” Steven Wise told me that the source of Happy’s hostility toward Patty and Maxine was obvious: “Those elephants killed Happy’s friend.”

Wise did not use the word “murder.” But if animals were granted personhood, should they

be held legally responsible for injurious actions? In the past, a number of animals, including elephants, have been subjected to capital punishment, and the stories now strike us as morally perverse. In 1916, following a circus performance in Tennessee, an elephant named Big Mary stepped out of line after spotting a watermelon rind. Her inexperienced handler, who was riding atop the animal, stabbed her with a bull hook. According to one account, the elephant hurled him to the ground, plunged her tusks into his body, trampled him, and then kicked his bloody corpse into the horrified crowd. A local magistrate ordered that Big Mary be hanged. A chain was placed around her neck, and she was slowly hoisted off the ground, as her feet pawed the air. The chain broke, and when Big Mary landed she shattered her pelvis. She lay there, moaning, until another chain was found and she was hanged successfully. The circus's other elephants were made to observe the execution.

Wise argues that elephants “cannot be held criminally or civilly responsible, any more than can a human child.” He pointed out to me that the killing at the Bronx Zoo was likely a result of the animals’ captivity: “Female elephants in nature almost never kill another elephant—especially a female or young elephant. Their imprisonment under terrible conditions for so long has greatly disturbed their emotional and mental health to the point that they would kill Grumpy.”

Judges skeptical of the NhRP’s claims for animal personhood often cite the work of Richard L. Cupp, Jr., a scholar at Pepperdine’s law school who has written extensively about the dangers of granting legal rights to animals. Steven Wise spent much of his time before Justice Tuitt trying to discredit an amicus brief that Cupp had written on behalf of the Bronx Zoo, terming him “a deeply reactionary” academic who “dispenses junk history” and “junk jurisprudence.”

Cupp’s brief argued, in part, that “whether Happy stays with the Wildlife Conservation Society or is moved to a different location should be a matter of human responsibility . . . not a matter of pretending that Happy is a person.” If Happy or other animals are being mistreated, then legislatures have an ethical duty to aggressively enlarge laws that protect them. This position—which Cupp has called “edgy animal welfare”—holds appeal for judges who prefer to see such issues resolved through legislation. Cupp warned that granting personhood to one elephant would flood the courts with similar appeals for other animals and for broader rights. “The question is ‘How far do we go?’ ” he told me.

In the nineties, Cupp was a new arrival at Pepperdine, specializing in torts. He said, “I heard about a case in which somebody had a dog that was

negligently killed, and there was an effort by the owner to seek emotional-distress damages.” The dog, a German shepherd named Bud, had been shot three times by a security guard. The matter was settled out of court, for thirty thousand dollars, and it made Cupp think about how a pet’s life should be valued. If a cow was killed, the market—not sentiment—would supply the answer. “It struck me, because I was single, and for a lot of my adult life I lived by myself, always with a dog,” he said. Cupp loved his family, but he realized that “it would influence my day-to-day life *more* if somebody negligently killed my dog than if they negligently killed my parents or siblings.”

Cupp grew up in Silicon Valley, but his parents had spent their childhoods on farms in Indiana, and thought nothing of killing chickens for dinner. These days, the only living animals that most Americans encounter are pets. “Their utility is emotional, rather than economic,” Cupp says. (That is how Steven Wise got to know animals as well: to this day, he keeps on his desk a box containing the ashes of Ditto, a beloved dog who passed away in 1987.)

Scientific advances have also had a profound effect on popular attitudes. “We understand so much more now about animals’ capabilities than we did in the past—how smart they are, how much they can suffer,” Cupp told me. “As that knowledge is spreading through society, it is just naturally going to push us to say we need to value these animals more highly.”

Cupp and Wise have occasionally sparred in public debate. In 2017, they appeared on a podcast called “Lawyer 2 Lawyer.” At the time, a court in New York had just struck down appeals for two of the NhRP’s chimpanzee suits. “The only thing our arguments were based on was the fact that chimpanzees are autonomous beings,” Wise said. His preferred definition of “autonomy” is grounding one’s behavior “on some non-observable, internal cognitive process, rather than simply responding reflexively.” Any animal that met that standard should be entitled to “bodily liberty”—the right to be free and left alone in an appropriate environment, either in the wild or in a dedicated sanctuary.

“Steve says ‘autonomy,’ but notice that the animals that he is talking about are all highly intelligent,” Cupp remarked. “What about the slippery slope? How much intelligence do you have to have to be able to be autonomous?” Cupp then observed that mentally disabled

you have to have to be able to be autonomous. Cappelletti observed that mentally disabled and comatose people, not to mention infants, may have cognition levels below that of an intelligent animal. “If we start including in our considerations of who is a ‘person’ some sort of individual intelligence analysis, we’re going to erode our enthusiasm for the healthy degree of rights that we afford people who have severe cognitive impairments,” he said. “The real determinant of whether chimpanzees or elephants or cetaceans or any other animals are treated well or not treated well is going to be humans. . . . We need to be focussed on that human responsibility.”

Wise responded, “The idea of animal welfare failed a long time ago.”

Elephants are the largest mammals on land. (The African species can reach ten feet in height and weigh more than thirteen thousand pounds.) Their huge brains are capable of complex thinking—including imitation, memory, coöperative problem-solving—and such emotions as altruism, compassion, grief, and empathy. Joyce Poole, an elephant

biologist who has worked at Gorongosa National Park, in Mozambique, told me that all this is evidence of consciousness. In an affidavit filed on behalf of Happy, she described what scientists call a “theory of mind”—that is, “the ability to mentally represent and think about the knowledge, beliefs and emotional states of others, whilst recognizing that these can be distinct from your own.” Poole added that elephants “are truly communicative, similar to the volitional use of language in humans.” Elephants have a variety of calls—roars, cries, rumbles, snorts, and various trumpets—all of which can convey meaning.

One of the most startling modern changes in the African-elephant population is the rapid evolution of tusklessness. Poole told me that, by the end of the Mozambican civil war, which lasted from 1977 to 1992, ninety per cent of the elephants in Gorongosa had been slaughtered. Only those without tusks were safe. Now, in the next generation, a third of the females are tuskless. In nature, elephants live in large, matriarchal clans. Male African calves stay with their mothers for about fourteen years, then merge into smaller, male groups. Competition for territory has led to conflict with humans. Elephants will raid crops and knock down fences, occasionally killing livestock; in places like the palm plantations of Indonesia, farmers may poison the animals. According to the World Wildlife Fund, more than a hundred people every year are killed by elephants in India alone, and elephants are sometimes killed in revenge. Non-lethal approaches to controlling elephants may help diminish the number of fatalities, but poaching and the loss of habitat create ongoing stress.

Despite the hazards, Poole rejects the common argument that elephants are safer in zoos

than in the wild. “They have a better chance of living to old age in the wild,” she told me. “They don’t suffer the diseases of captivity—obesity, arthritis, foot ailments, behavioral abnormalities, and infanticide. Is it better for them to face poachers? I think it is.” Such are the alternatives currently available to elephants.

After examining videos taken of Happy in her pen, Poole observed only five activities or behaviors: standing and facing the fence; lifting one or two feet off the ground, perhaps to take the weight off painful, diseased feet; dusting herself; eating grass; and swinging her trunk in what appears to be “stereotypic” behavior—the kind of repetitive action sometimes displayed by animals who are bored or mentally unbalanced. “Only two, dusting and eating grass, are natural,” Poole testified. “Alone, in a small space, there is little else for her to do.”

Poole appreciates the work done by the Wildlife Conservation Society, which has helped fund her studies. “They have some of the best scientists, but I don’t see any of them backing up the zoo’s claims,” she told me. “They’re not standing up, saying that Happy should remain in the zoo.” She compares elephants to whales and lions, who need huge amounts of space to roam: “Their social lives demand it. Elephants are complex enough to weigh the challenges they face. They discuss among themselves and make collective decisions. You take all that away and you take away what it means to be an elephant.”

In 1906, seven years after the founding of the Bronx Zoo, a human being was put on display in a cage. Ota Benga, a young man from what was then the Congo Free State, was placed in the primates hall, alongside an orangutan. He had been brought to the United States two years earlier by Samuel Phillips Verner, a missionary from South Carolina. Verner told the tale that he had discovered Benga for sale in a cage, and had purchased him with a bolt of cloth and a pound of salt. What’s certain is that the 1904 St. Louis World’s Fair had commissioned Verner to round up a dozen Pygmies for an anthropology exhibit.

What happened to Ota Benga can be seen as a commentary on the evolving boundaries of personhood. Along with the African tribespeople, the fair included Inuits, with sled dogs and an igloo; Ainu people, from Japan; more than a thousand Filipinos; and two thousand Native Americans. At an exhibit called “Home in the Old Plantation,” Black actors sang minstrel songs. It was a sprawling human zoo. Benga, whose teeth were sharpened into points, as was common among Congolese males, was presented as a “cannibal.”

When the fair closed, Verner escorted Benga and the other tribespeople back to the Congo

Free State. He claimed that, when he was preparing to return to America, Benga threatened suicide if Verner wouldn't take him along.

They stopped in New York, where Verner persuaded the director of the American Museum of Natural History to house Benga, along with two chimpanzees, while Verner spent more time in St. Louis. Benga became the museum's sole resident. He could wander through the galleries alone after closing hours, passing dioramas and taxidermied animals as if he were a character from "Night at the Museum." But he became restless, and the museum grew wary of the arrangement, so Verner arranged for him to move to the zoo in the Bronx.

The zoo had been founded by members of the Boone and Crockett Club, an organization of influential sportsmen—including Theodore Roosevelt—dedicated to hunting and conservation. One of the founders, Madison Grant, was a white supremacist who later wrote "The Passing of the Great Race," mourning the decline of the Nordic people. Adolf Hitler occasionally quoted the book in speeches.

Verner met with the zoo's director, William Temple Hornaday, and offered to loan him a chimpanzee and two reptiles, throwing Benga in as well. Hornaday was thrilled. Days later, zoo-goers found Benga in the primate house, where a sign read:

THE AFRICAN PYGMY, OTA BENG,
Age, 23 years. Height, 4 feet 11 inches.
Weight 103 pounds. Brought from
Congo Free State, South Central Africa,
By Dr. Samuel P. Verner.
Exhibited each afternoon during September.

The *Times* covered the exhibit's opening, noting that Benga and the orangutan "both grin in the same way when pleased."

A delegation of Black ministers went to the zoo. The Reverend James H. Gordon, the superintendent of the Howard Colored Orphan Asylum, in Brooklyn, said, "Our race, we think, is depressed enough, without exhibiting one of us with apes. We think we are worthy of being considered human beings, with souls." Some papers condemned the "shameful" exhibit while also puzzling over how to classify Benga. The Indianapolis *Sun* determined that he was "more man than beast"; the Minneapolis *Journal* decreed, "He is about as near an approach to the missing link as any human species yet found." Hornaday professed to be puzzled by the outrage, explaining that Benga had "one of the best rooms in the primate house." But the zoo eventually released Benga to Gordon's orphan asylum.

Pamela Newkirk, in her comprehensive biography, “Spectacle: The Astonishing Life of Ota Benga,” found evidence that Verner had kidnapped Benga from his village when he was thirteen—meaning that he would have been fifteen, not twenty-three, when he was displayed at the Bronx Zoo. Benga despaired of ever returning to Africa, and on March 20, 1916, he shot himself in the heart. A hundred and four years later, the Wildlife Conservation Society apologized for its “role in promoting racial injustice,” and acknowledged that Benga had been “robbed of his humanity.”

Steven Wise would like us to consider Benga’s story as a parable for zoo animals. We think of them as coming from the wild, and the St. Louis World’s Fair similarly presented Benga as a man untouched by civilization. But, for a long time now, there has been no such thing as “the wild.” The Congolese people were decimated by the genocidal violence perpetrated by the brutal colonial army of King Leopold II of Belgium. In Thailand, Happy’s birthplace, poaching and deforestation have reduced the once vast elephant population to endangered status—only an estimated seven thousand remain, about half of them in captivity, giving rides to tourists or laboring in the illegal logging industry. Thailand still has an active black market for ivory, and lately there has been a flourishing trade in elephant skin, used in Chinese traditional medicine. Of the two species of African elephants, forest elephants are critically endangered, and savanna elephants have declined in number by at least sixty per cent in the past fifty years. Scientists have talked about “elephant breakdown” in certain communities, because of chronic trauma the animals have experienced. On the other hand, herds in some parks and reserves have enjoyed modest increases in population, thanks to such groups as the Wildlife Conservation Society.

Several amicus briefs in the Happy case have represented institutions or professions economically dependent on animals, including zoos, aquariums, farmers, and the pet fanciers of the Feline Conservation Foundation (originally the Long Island Ocelot Club). All these parties consider themselves property holders. “Should Happy be provided with habeas corpus rights, farms, zoos, and aquaria would be at risk to a plethora of similar lawsuits purportedly made on behalf of the animals residing in their facilities,” one brief stated. “Pet owners would no longer be able to be certain that they will be able to keep

... caring for the dogs, cats or fish that they possess. . . . NhRP seeks nothing less than to uproot and overturn the social order.”

The state of New York is home to nearly a million and a half cows, eighty thousand sheep, and more than sixty thousand hogs. Milk is the state’s largest agricultural commodity.

“Should the Pandora’s Box of habeas corpus be opened on behalf of animals, New York’s multibillion-dollar agricultural industry would be at risk,” the property holders warned, and that prospect might lead farmers and businesses to flee the state for “more friendly confines and jurisdictions.” Any order transferring Happy to a sanctuary might constitute a “judicial taking”—a form of property seizure that is unconstitutional under the Fifth Amendment, unless the government’s action is for public use and fair compensation is provided. “This Court cannot magically convert legally-defined property like Happy into non-property,” another brief argued. “This Court itself neither has the money nor the authority to pay the Bronx Zoo.” Moreover, if an elephant can be deemed a person, “why not a pig, a cow, or a chicken?” The NhRP called this argument “preposterous,” pointing out that Happy is not an agricultural animal, although Wise himself had often acknowledged that he had other species in view.

In New York alone, the National Association for Biomedical Research represents Columbia University, Cornell, the New York University School of Medicine, and the Memorial Sloan Kettering Cancer Center. A brief by the group noted, “Excluding rats and mice, approximately 800,000 animals were used in research in fiscal year 2019. . . . If rats and mice were included, that number would likely be in the millions.” Extending habeas rights to animals would “impede important medical breakthroughs,” the brief continued. It invoked the recipients of the 2020 Nobel Prize in Physiology or Medicine, whose work led to a cure for hepatitis C: “Critical to the laureates’ discovery was the use of chimpanzees—the same species that the Nonhuman Rights Project has sought to endow with habeas corpus rights. . . . Without the use of animals—and in this case, comparatively intelligent animals—the world might have been deprived of a discovery that promises to save innumerable lives.”

A brief filed by veterinary groups argued that providing a writ of habeas corpus to Happy would “completely redefine the human-animal legal relationship” by undermining the status of ownership: “If animals do not receive the timely care they need, including during legal battles over their fate, they are the ones who will suffer. Ownership is the true pro-animal position.” (Their brief added that, according to New York law, any animal not privately owned is owned by the state.)

The veterinarians noted that the INHRP had been raising money based on the Happy case. If the lawsuit succeeded, other groups “would vie to ‘represent’ animals in zoos, aquariums, and other facilities in an effort to sustain their organizations,” even though “none of them would truly be speaking for those animals.”

The NhRP countered that ownership offered no guarantee of protection for animals, comparing the “undeniable injustice” of Happy’s circumstance to the tragedy of Ota Benga. Granting habeas-corpus relief to an unusually bright elephant would not disrupt “the entire human-animal legal regime,” the group said. “This Court is only being asked to recognize one right for Happy.”

“**W**hat makes mirror self-recognition interesting is that it’s an indicator of self-awareness,” Gordon Gallup said. “And by ‘self-awareness’ I mean the ability to become the object of your own attention, the ability to begin to think about yourself, and the ability to make inferences about experiences and mental states of other individuals.” But is self-awareness the same thing as personhood? In a way, what else can it be?

The Harvard psychology professor Steven Pinker is best known for his work in linguistics. Like many critics of animal rights, he is wary of blurring the line between humanity and other animals. “They are similar in some ways (such as the ability to suffer), but different in others (language, social complexity, complex cognition),” he told me, in an e-mail. He also explained, “Humans depend on know-how and acquired technology. We coöperate. We have deeper and richer social ties that cut across kinship. We have memories of the distant past, we have plans of the near and distant future. And it isn’t as if there’s one single criterion that’s relevant for personhood, because personhood itself is a vague concept.”

“The qualities that you’ve listed differ in degree, not in kind,” I said.

“My point is there may be *some* degrees of difference in kind plus *many* differences in degree, all of which—in the whole space of traits that are relevant to personhood—make humans quite distant from other mammals,” he said.

I asked him if animal-welfare laws provided sufficient protection. “Probably not,” he said. “But there are countless ways of strengthening them without, say, granting personhood to chickens. It seems more rhetorical than morally sound to take a concept that was designed for us in the first place and try to shoehorn very different species in.” He added, “If our concern is reducing the avoidable suffering of other species, let’s just minimize the suffering.”

Minimizing suffering, of course, was the goal of Peter Singer's "Animal Liberation." Singer recently told me he feels that his work has failed to inspire a true social transformation. "There's been relatively little progress in terms of real, on-the-ground change in the treatment of animals," he said. Some states have passed laws governing factory farms, but "there is still a lot of pretty horrible stuff going on—on the whole, I'm somewhat disappointed that we haven't moved faster." In "Animal Liberation," Singer wrote that "the language of rights is a convenient political shorthand," adding, "In the argument for a radical change in our attitude to animals, it is in no way necessary." Nevertheless, he decided to support the case for Happy's personhood. He told me, "I think that's entirely justifiable, in that we give legal status to nonhumans, like corporations, and also to humans who clearly lack the capacity to act on their own—to infants and to those with profound intellectual disabilities. We allow habeas-corpus writs for them. So I can't see any reason why we shouldn't allow them for animals whose mental capacities are similar or superior."

Martha C. Nussbaum, a noted philosopher at the University of Chicago who also teaches at its law school, was surprised when Wise asked her to write a brief supporting Happy's case. "I had clashed with Wise," she told me. "I had said that his own particular theory of animal rights is a bad theory, because it predicates rights on likeness to humans." She submitted a brief that staked out a path between welfare and rights. Nussbaum and Amartya Sen, the Nobel Prize-winning economist, have developed a theory called the "capabilities approach." In her brief, she explained that, "instead of animal rights being based on the capacity to engage in a social contract and to bear legal duties," the capabilities approach "asks how the law can help animals like Happy not only live but thrive." Welfare laws, Nussbaum observed, "protect only a small number of animals and fail to constrain, to any meaningful extent, the widespread infliction of suffering. They ban only the intentional, purposeful suffering of some animals, and fail to recognize the impact that captivity, lack of relationships, and solitude cause a creature like Happy." Nussbaum believes that, in order to apply the capabilities approach in a substantive way, animals must be given legal standing. "Right now, we have scraps and pieces of law that are not comprehensive," she argues, pointing to the lack of legal protection for animals raised for food.

Nussbaum identifies "a happy harbinger of what may be a new era in law": a 2016 opinion by a U.S. Court of Appeals. A lawsuit had charged the National Marine Fisheries Service with violating the Marine Mammal Protection Act by allowing the U.S. Navy to use low-frequency sonar in areas where it could interfere with the ability of whales and other sea creatures to communicate, reproduce, migrate, and forage. The court ordered the government to live up to its own statutory requirement to effect "the least practicable adverse impact" on marine life. Whales weren't injured by the Navy's actions, the court

admitted, but they weren't free to realize their capabilities as whales.

Because animals can't speak for themselves, welfare laws tend to protect them only when there is clear proof of grievous physical harm. How can animals secure protections for their capabilities? Nussbaum proposes a model based on fiduciary law. Guardians, trustees, and conservators have the legal authority to act in the interest of beneficiaries unable to take care of themselves. Nussbaum suggests that the government could designate a suitable animal-welfare agency to act as a fiduciary for specific animals, which would allow them to be represented in court. "Happy should first of all be given *standing*," Nussbaum told me. "And then things could begin to happen!"

People in both the welfare and the rights camps often speak as if animals got nothing out of their relationships with humans. Before talking with Nussbaum, I was stirred by a viral video of a man playing fetch with a beluga whale off the coast of Norway. The man throws a rugby ball and the whale streaks off to retrieve it—an apparently spontaneous game. YouTube and TikTok have repeatedly opened new windows on unexpected animal behavior. No doubt, the shift in attitudes about animal rights is in part the product of the delight that such glimpses award us.

As it turns out, the story of the beluga and the rugby ball is more complicated than it initially appeared. The whale was first noticed in Norwegian waters in the spring of 2019, when he approached a fishing boat, wearing a harness with a camera mount that said "EQUIPMENT ST. PETERSBURG." Some people speculated that the whale was an escapee from a Russian naval base and had been trained as a spy. Norwegians began calling him Hvaldimir—a play on the Norwegian word for whale, "*hval*," and the name Vladimir, as in Vladimir Putin. (Russia and the U.S. have both trained marine mammals for various deep-sea tasks, but there's no evidence that Hvaldimir was a spy.)

The whale began following fishing boats into the harbor of Tufjord, charming the locals, who petted and fed him. When it became apparent that Hvaldimir was malnourished, he was put on a feeding program, supported by the SeaWorld & Busch Gardens Conservation Fund. Eventually, he began foraging on his own. A new charity, the Hvaldimir Foundation, announced that its "ultimate goal and hope was for Hvaldimir to be able to hunt and remain in the wild without any human interaction." But why? The story of Hvaldimir is, in no small part, about the longing between people and a curious animal to get to know one another, and about the transformations that can result. Why not advocate for *more* interaction between humans and animals, when they naturally and safely occur?

I asked Nussbaum if animals might have their

ASKED NUSSBAUM IF ANIMALS MIGHT HAVE THEIR

capabilities enhanced, rather than diminished, by encounters with humans. “The very idea that there can be friendships suggests that,” she said. In a forthcoming book, “Justice for Animals: Our Collective Responsibility,” she argues that such relationships don’t occur solely between people and their pets—or “companion animals,” as she refers to them. Friendships with animals in captivity pose a challenge, because of the coercive nature of the relationship, and yet rich interactions do occur. In the nineteen-seventies, Irene Pepperberg, an animal

behaviorist, began working with an African gray parrot named Alex, and over the next three decades the bird acquired an astonishing mastery of English words—learning to identify objects by their color, shape, and texture, and to add sums up to six. When shown a mirror, Alex asked, “What color?” That’s how he learned the word “gray.” He is the only nonhuman animal known to have asked a question. During the same period, Jan van Hooff, a scholar of chimpanzee behavior, developed a deeply affectionate relationship with a chimp named Mama; when the chimp was dying, in 2016, van Hooff was the only person who could get her to eat. A video depicting the intense emotions between van Hooff and the chimp went viral. “These relationships are friendships,” Nussbaum insists, despite the fact of the animals’ captivity.

Making friends with animals in nature poses a greater challenge, because it requires entering into the animals’ world delicately, and for long periods. Nussbaum cites Joyce Poole, the elephant biologist, as an example of a scientist who has established profound connections with the animals she studies. Nussbaum proposes that researchers who amass such intimate knowledge of animals create inventories of capabilities to be honored. Last May, Poole posted to her Web site, Elephantvoices.org, a dazzling multimedia catalogue of more than three hundred behaviors exhibited by African savanna elephants. The archive contains some twenty-four hundred video clips, including one in which a female adorns herself with a clump of grass as if it were a tiara.

Poole began studying elephants in 1975, at a camp at the base of Mt. Kilimanjaro, which had been established three years earlier by the researcher and conservationist Cynthia Moss. Few have done more than these two scientists to describe the complexities of elephant society, cognition, and emotion. Poole has explored the manifold ways that elephants communicate—not only through sound but also through touch and gesture. The

range of their voices is astonishing, with some sounds produced by the larynx and others through the trunk. Many sounds that are well below the range of human hearing can be detected by elephants, sometimes more than six miles away. Sounds at such low frequencies transmit a replica signal through the ground, which means that elephants “hear” through their ears, their feet, and sometimes their trunks, too, recognizing the meaning of the call as well as the identity of the caller.

In 1990, Poole became the head of the elephant program at the Kenya Wildlife Service, which is based in Nairobi. Three years later, she returned to the camp near Mt. Kilimanjaro, supposing that the elephants had forgotten her. She brought along her infant daughter, Selengei. The elephants surrounded Poole’s car, and when Poole held out her daughter, the matriarch suddenly emitted a loud rumble. Poole recalls the scene in her memoir, “Coming of Age with Elephants”: “The rest of the family rushed to her side, gathering next to our window, and, with their trunks outstretched, deafened us with a cacophony of rumbles, trumpets, and screams until our bodies vibrated with the sound. They pressed against one another, urinating and defecating, their faces streaming with the fresh black stain of temporal gland secretions.”

Poole had seen this behavior before: it was “an intense greeting ceremony usually reserved only for family and bond group members who have been separated for a long time.” And yet its ultimate meaning was mysterious. As Poole puts it, “Who can know what goes on in the hearts and minds of elephants but the elephants themselves?”

In December, I visited SeaWorld San Antonio. Five orcas are kept in pools at the park, where they flip, twirl, and splash in shows. Whales have much in common with elephants. They are giant mammals with long life spans who form matrilineal pods; in the ocean, whales range over vast distances, and they can communicate at frequencies below the level of human hearing, with sounds that travel for miles; they are extremely social and can express joy and curiosity.

Orcas have no natural predators, other than humans, and yet one population in the Pacific Northwest is critically endangered—at last count, it had only seventy-three residents. They are threatened by overfishing, pollution, and noise disturbance from boats that interferes with echolocation, which they use to forage. A new calf was born in 2018—thought to be the first in three years—but lived for less than a day. The grieving mother, surrounded by other females in her pod, carried the calf’s body with her for seventeen days, across a thousand miles of ocean. It would be going too far to say that the mother knew her loss was

a step toward the extinction of her community, but it might also be going too far to say that she didn't.

SeaWorld became famous because of an orca named Shamu, who performed aquatic tricks at the original park, in San Diego, in the sixties. Like Happy, Shamu had been captured in the wild after her mother was killed—harpooned by whalers. Shamu bit an employee in 1971, and might have killed her if a colleague hadn't pried the whale's jaws open with a pole. SeaWorld was building up the Shamu brand, though, and one dangerous incident wasn't going to derail that. Southwest Airlines painted some of its jets in killer-whale black-and-white. Adorable stuffed Shamu dolls were everywhere. Captive orcas in SeaWorlds around the country were given the name Shamu. Audiences invariably gasped as the whales rocketed out of the water, and squealed when splashed by their tail flukes. Trainers rode on the backs of the orcas, and the whales would shoot them into the air for a swan dive.

The orcas in San Antonio are as graceful as ever, but as I watched them perform I recalled the elephant shows that used to be put on by Ringling Brothers and Barnum & Bailey Circus—performances so elaborate that George Balanchine was once commissioned to choreograph a pachyderm ballet. Under unrelenting pressure from animal-rights organizations, the circus retired its elephants in 2016, and a year later it went out of business. SeaWorld has been similarly beleaguered since the release of a damning documentary, "Blackfish," which chronicles the story of Tilikum, a performing orca who killed a trainer at the SeaWorld in Orlando in 2010. The film makes the case that the trainer's death was the inevitable result of conditions that orcas experience in captivity. (There's no record of orcas killing humans in the wild.) After the film aired on CNN, SeaWorld's stock plummeted, and there were protests outside its parks. Since then, the organization has restricted interactions between trainers and whales, and announced the end of its captive-breeding program.

Zoos and aquariums want to be seen as embassies where the human and animal kingdoms

can come together, and to some extent they are. Along with sea lions and vaulting belugas, tail-walking dolphins are mainstays of the SeaWorld spectacle. Tail-walking was unknown in nature until a bottlenose dolphin named Billie was rescued from a polluted harbor in Australia, in the late nineteen-eighties, and sheltered for a few weeks at a water park showcasing dolphins. She apparently learned the skill by watching others do it, and after being returned to the wild she taught it to dolphins in an estuary on Australia's southern coast. Tail-walking became a fad among dolphins in the neighborhood, though it died out a

couple of decades later. It was a vivid example of social learning—a prime signifier of sentience—and of the marvels that can arise from the interactions between humans and animals. The question is whether such encounters can occur without exploitation.

On February 18, 2020, Steven Wise lost his case. “This Court agrees that Happy is more than just a legal thing, or property,” Justice Tuitt wrote. “She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty. Nonetheless, we are constrained by the caselaw to find that Happy is not a ‘person’ and is not being illegally imprisoned.” Tuitt stated that, in her view, the legislative process was better equipped to decide whether zoos should be allowed to keep elephants, but she noted that she found the arguments “extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot.”

The NhRP said that it was “deeply encouraged” by Tuitt’s sympathetic order. Wise noted that “she essentially vindicated the legal arguments and factual claims about the nature of nonhuman animals such as Happy that the NhRP has been making.” The group is working on an appeal. (Oral arguments are pending.)

Given the courts’ demonstrated reluctance to grant personhood status to chimpanzees or to elephants, Happy’s case will likely end where the others did—in an unambiguous rejection of setting such a far-reaching precedent. Since Wise began pursuing personhood litigation, though, judges have repeatedly expressed misgivings, acknowledging in their decisions that animals deserve more protection and consideration; they just believe that the courts are not the place to make such a momentous cultural adjustment.

The sentient animals in our custody have served as sacrificial ambassadors, helping us to see the majesty of life outside the realm of human domination. Awarding certain appealing animals such as Happy the status of personhood would not remedy the cataclysm of extinction so many species face, or the vast exploitation of animals for food and labor. If Wise’s campaign succeeds, it will arguably push human society toward a more equitable bargain with the animal kingdom, but the courts are rightfully concerned about the proliferation of lawsuits that might follow, and the difficulty of discerning which species deserve such consideration. That has been an issue with the sentience bill under consideration in the U.K., which was originally aimed at protecting vertebrates and has already been expanded to include octopuses, crabs, and lobsters.

In the past several decades, as the human population has doubled, the populations of animal species have declined by an average of nearly seventy per cent. Clearly we need to

animal species have declined by an average of nearly seventy per cent. Clearly, we need to contain our heedless rapacity. There is also a danger of becoming paralyzed by the scope of the change required. “We’re at the beginning of a big ethical awakening,” Martha Nussbaum, the philosopher, told me. “It’s only the beginning, because people are not really prepared to make sacrifices.” She advocates for vegetarianism, smaller families, and the end of the factory-meat industry.

How are we to recalibrate our relationship with animals that live in complex societies and have a sense of themselves as individuals? The question becomes more urgent as the future of such species grows increasingly perilous. They are penned in, harassed and hunted, subjected to experiments, eaten, used in medicines. Zoos and aquariums have certainly been part of the human exploitation of nature, but at this stage they can also act as a reservoir for creatures that have been forced out of their natural environments because of expanding human populations and climate change. Many animals live longer, and more securely, in sanctuaries and nature parks overtly managed by humans than in their bespoiled habitats.

Focussing on the indignities of captive elephants or orcas can inadvertently divert attention from the much larger damage civilization has done to the natural world.

In this important dialogue, Happy’s voice is silent. No doubt, within the borders of her small pen in the Bronx Zoo, she is well cared for. And she may be exceptional in having a sense of self, which adds to the tragedy of her circumstance. Happy has become both a symbol and a pawn—in the contest between advocates of animal rights and advocates of animal welfare, and in the contest between humans and animals to fulfill their capabilities. “There will be conflicts which we have to arbitrate,” Nussbaum told me. “We think that, because we found ourselves on this globe, we have a right to use it for our own sustenance. Animals have the same claim. They, too, didn’t choose to be where they are.”

Joyce Poole observes that what elephants really need is something we can’t give them: freedom. “All we can do is give them more space,” she told me. The sanctuaries that would adopt Happy are an “imperfect solution,” perhaps, but a fair compromise. And a sanctuary would at least allow Happy to rediscover some of her elephant capabilities. As Poole put it, “If we can’t save elephants, what can we save?” ♦

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