

Court of Appeals
of the
State of New York

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HAPPY,

Petitioner-Appellant,

– against –

JAMES J. BREHENY, in his official capacity as Executive Vice President and
General Director of Zoos and Aquariums of the Wildlife Conservation Society
and Director of the Bronx Zoo and WILDLIFE CONSERVATION SOCIETY,

Respondents-Respondents.

**BRIEF OF AMICUS CURIAE CHRISTINE M. KORSGAARD IN
SUPPORT OF PETITIONER-APPELLANT**

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STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, Amicus states that, as of the date of the completion of this Brief, there is no related litigation pending before any court.

STATEMENT OF AMICUS CURIAE

Pursuant to Rule 500.23(a)(4)(iii) of the Rules of Practice of the Court of Appeals of the State of New York, Amicus states that no party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner. Petitioner-Appellant the Nonhuman Rights Project Inc. contributed money that was intended to fund preparation and submission of the brief. No person or entity, other than Petitioner-Appellant or Petitioner-Appellant's counsel, contributed money that was intended to fund preparation or submission of the brief.

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Professor Christine M. Korsgaard is the Arthur Kingsley Porter Research Professor of Philosophy at Harvard University.¹ Professor Korsgaard submits this brief as a moral philosopher whose areas of research include moral and political philosophy, the history of moral and political philosophy, and animal ethics, with a specialization in the moral and political philosophy of Immanuel Kant. Professor Korsgaard has a special expertise regarding the issues presented by this case related to theories of rights. *Amicus* has a special interest in assisting the Court in analyzing the questions that this case raises related to rights and duties. *Amicus* respectfully urges the Court to (1) recognize that the elephant Happy has a right to liberty that has been violated, and (2) grant the Petitioner-Appellant Nonhuman Rights Project’s request for habeas corpus relief on her behalf.

II. SUMMARY OF THE ARGUMENT

This brief does not address the issue of Happy’s personhood. The key question for the Court is not whether Happy can be called a “person.” Instead, the key questions are, first, whether there are beings who have rights even though they cannot have duties or responsibilities (whether we call such a being a “person” or not). Second, whether Happy is such a being. Third, whether liberty rights are or can

¹ University affiliation is noted for identification purposes only. This amicus brief reflects only the views of Professor Korsgaard as a scholar, not the views of Harvard or any other institution.

be among the rights of such beings, and are among Happy's rights. Fourth, whether transfer to a sanctuary is a remedy for the violation of Happy's liberty rights, if there is such a violation.

As far as the first question—whether we should call Happy a person or not—is concerned: The law has traditionally classified things into persons and property. But let us suppose there are three legal categories of things, (1) Beings with rights and duties, (2) Beings with rights but no duties, and (iii) Beings (“things”) which have no rights and can therefore be property and can be used however we please. Should we choose to reserve the word “person” for the first of those categories—for beings who have both rights and duties—that usage surely is not a reason for violating the rights or the liberty rights of beings in the second category. Should we choose to use the word “person” for beings in both of the first two categories, that is, for all beings who have rights of any kind, that does not settle the question whether any given “person” has any specific right to liberty or not, and so whether that “person” falls under the protection of habeas corpus. To claim that it is possible to separate rights from duties is not to deny that some rights may be connected to the ability to have duties, so we must still establish that a given right to liberty is not one of those.

This brief approaches these questions in this way. First, it argues that if human beings have a legitimate claim to have rights, then Happy does so as well, on the

basis of some reflections about why we suppose we have rights at all. Second, it argues that on the account of rights it offers—and on most accounts of rights in the philosophical tradition—it makes sense to recognize a category of beings who have rights but no duties. Because one of the arguments against such a recognition calls into question whether a being without duties can have liberty rights in particular, this brief will argue that it also can make sense to think of such beings as having liberty rights, and it makes sense to think of Happy as having such a liberty right which has been violated. And fourth, this brief argues that release to a sanctuary is an appropriate response to the violation of Happy's liberty right.

III. ARGUMENT

1. Does Happy Have Rights?

In order to ascertain whether Happy has rights, we must first ask why we suppose that human beings have rights. Philosophers have long supposed that there are two theories about the purpose that is served by the existence of rights. One—usually called the interest theory—is that rights exist in order to protect the important interests of an agent. According to the interest theory, we protect an individual's interests in her bodily integrity, her property, her ability to do certain things without interference, and so on, against the encroachment of others, because these matters are of deep concern to her. The other—the will theory—is that rights exist in order to define a sphere of action in which the agent has a kind of normative control. In

H. L. A. Hart's famous phrase, a right makes the right-holder a small-scale sovereign.² According to the will theory, no one may legitimately exercise control over what the agent may believe or, within limits of safety, what she may say or with whom she may associate. Property exists to give her control over land, buildings, or objects she needs in order to pursue her own projects, and so on. Normatively speaking, it is up to her to say what she will do with her own body, her own mind, and her own property, and to determine what others may or may not do with those things.

The Court need not take a stand on which of these accounts is correct, because what is important in this context is the background idea shared by these two theories. Suppose we ask why some agent's important interests should receive special protection against encroachment by others, or why there should be a sphere of action over which the agent has normative control? The answer in both cases is that the right-holder stands in a special relation to certain events, activities, and conditions, namely, the ones that we identify as elements of her own life. The interest theory says that it is important to protect the deep interest an agent has in those activities, events, and conditions that comprise her own life, so long as that is consistent with the like interest others have in their lives. The will theory says that the agent must

² H. L. A. Hart, "Legal Rights," in *Essays on Bentham: Studies in Jurisprudence and Political Theory* 183 (1982).

be allowed to live her own life, to make her own decisions, to actively determine what she does and what happens to her, insofar as she can do that consistently with a like right for others. The shape of her life should be determined by her own choices and purposes. The idea of a right is a recognition that at the basis of all value is the value that their lives have for individuals themselves. That is why the concept of a right has become increasingly important as humanity as come increasingly to recognize the importance and value of the individual. It is why people who have had to struggle against the idea that they exist primarily for someone else's use—slaves who were thought of as primarily providing labor for others or women who were thought of as primarily serving as wives and mothers for men—have found it natural to frame their demands in terms of the concept of a right.

According to both of the traditional theories of rights, then, what qualifies an agent to have rights is that the agent stands in a special normative relation to her own life. When we grant that an agent has rights, we express the conviction that the value of the events, activities, and conditions of that agent's life is, above all, the value they have for her. The value that other agents might get from using her body, or mind, or her property for their own purposes cannot be allowed to outweigh the value that these things have for her. We regard an agent as a right-holder when we grant the value she sets on her own life has normative priority over the value that others might find in using her in various ways. Her rights, on either theory, are designed to

protect that standing.

To stand in this kind of relation to the value of your own life is to be what Immanuel Kant called an end in itself.³ According to Kant, someone who is an end in himself or herself should never be used as a mere means to the ends of others. An agent is treated as a mere means when the value that her life, her body, her mind, or her property have for her is subordinated to the value that these things have for other agents. To be a mere means to the ends of others is to be the property of others.

Why do we human beings suppose that we are ends in ourselves? Politically, this is an issue about which we have what John Rawls called an “overlapping consensus.”⁴ That is a point on which the citizens of a polity agree although it is for different theoretical reasons. Utilitarians think that what happens to us matters for its own sake because of our capacity for pleasure and pain, a capacity we share with the other animals. Some religious thinkers suppose it is because we are the children of God. (This brief will say more about the implications of religious views for animals in the next section.) Kant believed that human beings must assume we are ends in ourselves, on pain of irrationality. Kant’s point was that rational action necessarily aims at the good, so that unless we take our own ends to be good, we

³ Immanuel Kant, “Groundwork of the Metaphysics of Morals,” in *Cambridge Texts in the History of Philosophy* 36-37 (Mary Gregor ed., 1997) (1785).

⁴ John Rawls, “The Idea of An Overlapping Consensus,” in *John Rawls: Collected Papers* (Oxford Univ. Press 1999) (1987).

cannot see ourselves as acting rationally. For Kant, the view of ourselves as ends in ourselves is a presupposition of rational action.

What all of these views share is a conception of the individual as having a dignity that requires that we regard his ends as good because of the way that they are good for him. To take our own ends to be good is, most obviously, to deem them worthy of pursuit. But it is also to demand that others take our ends to be good, at least to the extent that they do not interfere with our pursuit of them.

Why do we take our ends to be good in this way? The ends that we pursue are, for the most part, the things that we take to be good for ourselves and for those about whom we care. The conditions and activities that are good for us are given by our nature: they are the conditions and activities that enable us to flourish as the kinds of beings, and as the particular beings, that we are. In our case, the things that good for us are the conditions that make us healthy human animals, well-functioning members of society and of our families and of our cultures and professions. In Happy's case, they are the conditions that make her a healthy elephant and a well-functioning member of an elephant group.

To be clear, this brief has used the idea of "the good" in two ways above. In one sense, an end is good if it is worthy of pursuit and grounds legitimate claims on others, at least to non-interference. In another sense, an end is good for some agent if it enables that agent to function well as the kind of being that she is. When we

pursue the things that are good for us and our loved ones, thinking we have the right to do this, we bring these two conceptions of the good together. This is just a wordy way of saying that we think it matters that we should have good lives, where that means lives that are good for us. We think it matters because it matters to us. That is why the individual, who experiences her own life as good or bad, is the ultimate source of value.

Is it only human lives that matter in this way? There is no reason to think so. We take our lives to matter because they matter to us, and we should take Happy's life to matter because it matters to her. In fact, one of the main reasons we take our lives to matter in this way is that we are ourselves animals, and it is the nature of an animal to pursue her own good. Think about what an animal is. An animal is a special kind of organism that has evolved to be conscious of the things that are good for her and to experience them as welcome, and to be conscious of the things that are bad for her and to experience them as unwelcome. This way of experiencing things has evolved because it motivates her to pursue the things that are good for her and avoid the things that are bad. A healthy animal likes the things that enable her to function well as an individual organism and, if she is a social animal, as a member of her family and her group. She wants to eat, to mate, to stretch her muscles and to rest and keep clean. It is this alignment of her likes and dislikes with the things that make her a well-functioning organism that enables her to survive. So, an animal is an

organism that actively seeks the conditions and enjoys the activities that are good for her. In this sense, it is the nature of an animal to matter to herself. When we human beings insist that the goodness of our own lives matters, and that we therefore have rights, that is just the animal in us, speaking with a rational voice.

Like us, Happy, when left to her own devices, pursues her own good, and chooses her own activities accordingly, with determination and enthusiasm, as if it matters that she succeed in these endeavors, as if she herself matters. Like us, she does this because she is an animal, and the goodness of our lives is what matters to us animals. All animals do this, to some extent, but the fact that Happy is a cognitively sophisticated animal, with memory and expectation and an ongoing sense of self, makes her even more like us in this regard. These facts give her life, as an object of her concern and ours, a greater unity than the life of a more cognitively and emotionally primitive animal. Happy has a life of her own that has value for her, just as each of us has a life of our own that has value for us. Her claim to be regarded as a right-holder, then, is no less well-founded than our own.

Why would anyone think otherwise? In the traditional theory of natural rights, two reasons have been offered for limiting rights to human beings. The first reason, and the most common one, is avowedly theological. Natural rights theories often begin with the claim that we have the right to use the natural resources of the earth in order to live our own lives and pursue our own good because God gave human

beings the earth for that purpose. The ideas that (1) God gave us the resources of the earth and that (2) the animals are among the resources he gave to us are usually supported by certain passages in Genesis:

And God said, Behold, I have given you every herb bearing seed, which is upon the face of all the earth, and every tree, in the which is the fruit of a tree yielding seed; to you it shall be for meat.⁵

And to every beast of the earth, and to every fowl of the air, and to every thing that creepeth upon the earth, wherein there is life, I have given every green herb for meat: and it was so.⁶

Every moving thing that liveth shall be meat for you; even as the green herb have I given you all things.⁷

There are two problems with using this argument to limit rights to human beings. One is that if our rights were grounded in a gift from God, the second of these passages plainly gives rights to use the resources of the earth to the other animals as well, even if God does grant the right to use animals to human beings in the third. But the more important problem, of course, is that theological considerations belonging to specific religions have no place in American law.

The second argument against animal rights is based on the claim that human beings have, and the other animals lack, free will. Historically, this is the source of the familiar view that you cannot have rights unless you have responsibilities. This

⁵ *Genesis* 1:29 (King James).

⁶ *Genesis* 1:30 (King James).

⁷ *Genesis* 9:3 (King James).

brief will address this question in the section that follows.

A third reason that is probably behind the thesis that animals have no rights—although one not as often theoretically articulated as the two just mentioned—is the idea that the lives of animals are not important to them in the ways that ours are to us. This view of animals is theoretically associated with an outdated form of behaviorism that regards all animals as governed by stimulus-response mechanisms, and so as both cognitively and emotionally primitive. This is a view that is no longer scientifically credible about intelligent animals like Happy, or indeed in general about mammals and birds.

2. The Separability of Rights and Duties, and the Question of Liberty Rights.

Certain New York courts have been attentive to a supposed “social contract” theory of rights according to which society grants rights to its citizens in return for the assumption of duties and responsibilities by those citizens.⁸ While a whiff of this view may perhaps be gleaned from the work of Thomas Hobbes, this is not in general the view of the social contract tradition. John Locke believed that human beings have full-bore natural rights in the “state of nature” which it is the duty of political society

⁸ See e.g., *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) (*Lavery I*) (“Reciprocity between rights and responsibilities stems from principles of social contract...”); *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) (*Lavery II*) (adopting reasoning of *Lavery I*).

to defend.⁹ Immanuel Kant believed that human beings have “provisional” natural rights in the state of nature and it is the point of society to render these rights “conclusive” by enforcing them.¹⁰ These central social contract theories and others in the tradition accept the idea of natural rights, which are not in the gift of society. Philosophically, the view that rights and duties are inseparable has another source, which is explained below.

As set forth above, the two theories of rights—the interest theory and the will theory—are both grounded in the priority we assign to the individual and the value that his own life has for him. On that generalized account of rights, you are the subject of natural rights if you have a life that you yourself experience, and experience as good or bad. On that account, Happy, or any animal whose cognitive and emotional equipment enables her to experience her own existence in a good or bad way, is the subject of natural rights.

Nevertheless, there is a difference between the two theories that some philosophers take to matter to the question of the separability of rights and duties. The interest theory emphasizes the special interest an agent has in the activities and conditions that comprise her own life, while the will theory captures the idea that

⁹ John Locke, *Second Treatise of Government* (C. B. Macpherson ed., Hackett Publ’g Co. 1980) (1690).

¹⁰ Immanuel Kant, “The Metaphysics of Morals” in *Cambridge Texts in the History of Philosophy* (Mary Gregor ed., 1996) (1785).

that the agent has a general right to normative control over the activities and conditions that comprise her own life. Some philosophers believe that the will theory does not ground rights for non-human animals, because animals cannot have the same kind of control—normative control—over their own actions that human beings do. It is for this reason that they cannot have responsibilities. In traditional terms, they lack free will. These philosophers conceive the right to control your own life and determine your own actions as associated with a certain form of self-government. Although intelligent animals like Happy certainly decide what to do, they do not decide on the basis of general conceptions of what it is good or bad to do. Adult human beings think and reason about what counts as a good life, as well as about what counts as a good or bad action, and we have the right to pursue our own good as we conceive it so long as we do nothing bad to others. Other people do not get to determine what counts as the good for us. Animals, by contrast, live according to their nature, not according to their conceptions of what counts as a good life. Their “conception” of a good life is built into the instinctively based way of perceiving the world that govern their actions; it is not an object of thought that governs their choices. Some philosophers have thought that animals therefore do not have any use for the normative control that rights, according to the will theory, assign to a right-holder. The purpose of rights, they suppose, is to give us the liberty to exercise our freedom of will. On this theory, the reason for associating the capacity

to have duties with the capacity to have rights is that they are both associated with the capacity for free-willed action, conceived as action that is self-governed in a particular way, namely governed by conscious thought about what is right and good. Addressing this objection will enable me to address another issue at stake in this case, which is whether it makes sense to think of Happy as having liberty rights.

Although the line of thought described above derives from Kant, it does not, in his theory, require a connection between being able to have rights and being able to have duties. Kant defined liberty as independence from being constrained by another's will.¹¹ The point of rights is not to give us the capacity to exercise free will, but rather to protect us from having our lives and actions determined by others. Rights protect us from encroachments by other people who have purposes that are different from our own purposes for our own lives and actions. So, the important thing about rights is not that they give us liberty to exercise the specific form of self-government characteristic of humans. The important thing about rights is that they free us from subjection to the will of others. Liberty in the sense of independence from the control of others is plainly an issue for non-human animals when their lives are completely controlled by human beings, that is, when their lives dedicated to human purposes at the expense of their own purposes. Even if they don't choose the purposes at which they aim, animals have their own purposes and they have their

¹¹ See "The Metaphysics of Morals," 30, *supra* note 10.

own lives. They lack freedom when they are not permitted to live their own lives in accordance with their own purposes.

This brief has suggested that we claim rights because we believe each individual stands in a special relation to the activities and conditions that comprise her own life. Obviously, in many cases, there is room for debate over whether a given condition or activity counts as primarily pertaining to my life or to yours. It is part of the work of the courts to adjudicate such disputes. But when the shape of a life is completely determined by purposes that are foreign to the being who lives it, as it is in the case of a captive animal or a slave, there is plainly a violation of liberty. The encroachment in the case of a human slave undermines the slave's ability to control the conditions and activities of his own life; the encroachment in the case of the captive animal undermines the animal's ability to have a life of her own at all. Happy's liberty right is quite simply a right to have a life of her own, not one that is totally shaped by human purposes.

3. Is Release to a Sanctuary an Appropriate Response to Happy's Predicament?

In 2018, in a similar matter regarding the rights of chimpanzees, Judge Fahey issued an opinion challenging the Appellate Division's holding "that habeas relief was properly denied, because petitioner 'does not challenge the legality of the

chimpanzees’ detention, but merely seeks their transfer to a different facility.’”¹²

Judge Fahey remarked that this was incorrect, because habeas corpus can be used to justify transfer to a different institution.¹³ This brief suggests that there is a further reason that transfer to a sanctuary can be justified.

Happy’s predicament is that her life is entirely given over to purposes other than her own. She is in a zoo, a place where human beings come to look at the animals and learn about them. If what is in question were the transfer to another institution with somewhat different human purposes, the Appellate Division may have had a point. Suppose, for instance, she were transferred to a circus, where the purpose of the animals is to entertain people by doing tricks. Even in the unlikely case that this was a better situation for Happy—imagine, for instance, that she has more opportunities to socialize with other elephants at the circus—this would not be a remedy for Happy’s predicament. It would just be a different captivity. So, it matters here that the purpose of a sanctuary is not to use the animals for some human purpose, but precisely to allow the animals to live the nearest thing they can have to their own sort of life. In the sanctuary to which Happy will be moved if she wins her case, people other than those who care for the animals are not even allowed to view the animals. It is a place for the animals to live their lives, not a place for human

¹² *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1056 (2018) (Fahey, J., concurring) (citing *Lavery II*, 152 A.D.3d at 79.).

¹³ *Id.*

edification or entertainment. Happy cannot be returned to the wild, for which she is now unfit, nor of course can she simply be set loose, since she cannot lead her own sort of life on the streets of an American city or in an American forest. Given these limitations, a sanctuary is as close as we can come to providing a remedy for the violation of Happy's right against the captivity that treats her as a mere means to human ends.

IV. CONCLUSION

Amicus respectfully asserts that Happy has rights, that among those rights is the right not to have her life entirely determined by human purposes—that is, a right not to be treated as a mere means to someone else's ends. She has a right to live her own life in her own way. Like us, Happy experiences her own life as something that is good or bad for her, and that kind of experience is the ground of rights. Happy's right to a life of her own has been violated, and release to a sanctuary is as close as the Court can come to providing a remedy for this violation. It is true that some of the philosophical views cited here are controversial, as all philosophical views are. But philosophers of very different persuasions have found common ground in the idea that any case that can be made for claim that human beings have (or ought to have) rights, will also show that animals like Happy have (or ought to have) rights. Indeed, the very fact that there are laws against cruelty to animals shows that most Americans, and most people, think that animals do have at least some rights. While

some argue that most of these laws do not really give rights to animals, merely “protections,” most people believe that these widely supported laws exist to protect the rights of animals.¹⁴

The purpose of rights, on either of the two major theories of rights, is to privilege the value that a life has for the one who lives it over whatever value it might have for others. No right can be more fundamental than the right not to have the whole shape of your life determined by purposes that are not your own, and that is the right that has been violated in Happy’s case. Happy should not be treated as a mere means to human ends. *Amicus* respectfully urges the court to remedy this.

Dated: August 25, 2021
Brooklyn, NY



Jay Shooster

¹⁴ Cass Sunstein, “Can Animals Sue?” in *Animal Rights* (Cass R. Sunstein & Martha Nussbaum eds., Oxford Univ. Press 2004).

WORD COUNT CERTIFICATION

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 5450 words.

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Jay Shooster