

Bringing Animals into the Room Will Awaken Us

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In 2022, for the first time in the United States, a state high court asked whether “autonomous, nonhuman animals have rights that ought to be recognized by law.”¹ In a 5-2 decision, New York State’s highest court answered “no.” At least not in the context of habeas corpus—a centuries-old writ used to bring a prisoner or detainee into court—and not via the courts. Such dialogue, the majority said, should be directed towards the legislature. In one of two potent dissents, Judge Rivera insisted that “[t]he immensity of [the animal rights] question does not place it exclusively within the domain of the legislature.”² In this essay, I argue that the immensity of the question places it beyond both judicial and legislative processes.

But before we contemplate wood-paneled courtrooms and marble-filled legislative buildings, I hope to bring a bit of Happy—an elephant whose life was forever altered half a century ago—into the room you are sitting in. For that, we must first travel to Thailand in 1971 when, after a 22-month pregnancy, Happy’s mother gave birth to a spiky haired, curious elephant as tall as a kitchen counter and as heavy as an oven. With the help of her mother (although it will take her well over a decade to reach maturity) Happy could walk and communicate within hours. For the first year of her life Happy was bathed by her mother’s trunk, babysat by members of her herd, and protected from the sun by her mother’s body. Happy feasted on tree bark and leaves while she followed her matriarchal herd through winding forest paths.

Happy was likely warned about elephants’ biggest, and really only, predator: humans.³ But as an infant, Happy was free, not yet surrounded by human spectators, and of course not yet christened “Happy” by her captors. The name, a new continent, and new companions were all forced upon her after she was taken from her herd— “likely through the method of killing her mother and other

¹ Nonhuman Rts. Project, Inc. v. Breheny, No. 52, 2022 WL 2122141 (N.Y. June 14, 2022).

² *Id.* at *10 (Rivera, J., dissenting).

³ In this essay, I use “humans” and “animals” when distinguishing *Homo sapiens* from other members of the kingdom Animalia. The human/animal binary helps justify our current treatment of animals, and thus there are persuasive reasons for using the terms “nonhuman animal” and “human.” But this dichotomy still sets us apart while defining animals as what they are not. To avoid jargon, I use “humans” and “animals” while acknowledging that the dichotomous split and the generalization do animals a disservice. (*See* Derrida.) For important reading on how “animalization” has and continues to justify the exploitation, torture, and murder of humans, Judge Rowan’s dissent in *Happy v. Breheny* is a good start.

female protectors”⁴—and sent to a “safari park” in California when she was just one year old. For \$800 per infant, the Laguna Hills Lion Country Safari purchased Happy and six other still-nursing elephant calves whom they dubbed the Seven Dwarfs.

1. Bringing Happy to the United States

None of the seven elephants remained in California long. Sleepy died after arriving, and shortly thereafter the remaining giant juveniles were shipped across the country to Florida’s Lion Country Safari. In the 1970s, the Florida “safari park” had over 1,000 animals on their 4-mile plot of land. (Today, human animals in air-conditioned SUVs still visit the park to see other animals. Through their windshields, they gaze upon the striped bodies of two eastern bongos—a critically endangered antelope of which there are more in zoos than in the wild.) But back to Happy, who is no longer there. In 1977, Happy and Grumpy were sold to the Bronx Zoo and trucked up to New York City to take part in the grand opening of the Wild Asia exhibit. A *New York Times* article discussing the opening revealed that an “astounding” number of the 1,000 or so humans at the opening rode the elephants, even though the humans weren’t sure elephants were the most comfortable animal to “ride.”⁵

For much of their lives in the Bronx, Happy and Grumpy were part of a performing trio; they were ridden, they were taught to perform tricks, and they were made to participate in tug-of-war contests. In 1982, Grumpy lost tug-of-war to 25 football players who collectively, at 5,000lbs (2,268kg), weighed just a little less than the teenage Grumpy.⁶ Jim Doherty, who was then the curator of mammals at the Bronx Zoo and will, 36 years later, be the defendant in the legal case we will turn to, told the *New York Times* that Grumpy “was trying...[t]he team was just too good.”⁷

By 10 years old, Happy and Grumpy were, according to their trainer, “ringwise,” meaning they understood that they could act differently during performances because, as their trainer explained, they could work slower and get away with it since he didn’t “yell at them as much” in front of human crowds.⁸ During their years together, Grumpy won many of her tug-of-wars against rows

⁴ Lawrence Wright, *The Elephant in the Courtroom*, NEW YORKER, Feb. 28, 2022.

⁵ Enid Nemy, *A Whoop-De-Do at the Bronx Zoo*, N.Y. TIMES, June 29, 1977, at C14.

⁶ Paul L. Montgomery, *Fordham’s Rams Defeat Zoo’s Elephant in Bronx*, N.Y. TIMES, Aug. 22, 1982, at 37.

⁷ *Id.* After their win, one of the football players shouted, “Hey guys, let’s go hit the alligators.”

⁸ Barbara Crossette, *Two-Day Party in Celebration of Elephants at Bronx Zoo*, N.Y. TIMES, AUG. 21, 1981, AT C1.

of humans and played the tambourine with her trunk. Happy wore a diamond-studded, polka-dotted ensemble and did physical “tricks” like the dangerous hind-leg stand. Because she was “rougher” according to the same trainer, he “put all the physical tricks on [Happy].”⁹

In 2006, in her thirties, Happy became the first elephant to successfully pass the mirror self-recognition test (a test developed by a psychologist around the time Happy was born that attempts to measure animal self-consciousness).¹⁰ But today, at 50 years old, Happy no longer uses mirrors, wears polka dots, or does tricks. She still lifts her legs for trainers, but only so they can give her “pedicures” since footpad and nail overgrowth are common in captive elephants (in the wild, elephants walk for miles each day; Happy can walk across her 1.15-acre enclosure in less than a minute). At the zoo, trainers now use “protected contact” with elephants which means they only interact with Happy while they stand on the opposite side of her fence, the side with access to the outside world. They offer her apples when she obeys their commands and approaches the fence so that their tools can reach her. Recent zoo-goers have noted that Happy often stands still, shifting or gently pacing (...and pacing and pacing) her enclosure. The *New York Post* has reported that Happy spends much of her time indoors, in a space roughly double her size.¹¹

After Grumpy was euthanized, Happy’s more recent companion died of liver failure. Happy has lived alone for 18 years.

2. Bringing Happy to the Courtroom

In 2018, the Nonhuman Rights Project (NhRP) filed a petition against the Bronx Zoo, claiming that “Happy should be recognized as a legal person with the right to bodily liberty protected by the common law of habeas corpus.”¹² Translated from Latin, habeas corpus means “show me the body”; bringing a (human) body out of detention and into a court of justice, in principle, helps protect against illegal and indefinite imprisonment. Thus, the NhRP hoped to secure Happy’s release from her unjust confinement through use of the writ.

⁹ *Id.* at C23.

¹⁰ 2022 WL 2122141, at *60. (Wilson, J., dissenting).

¹¹ See Brad Hamilton, *Happy the Elephant’s Sad Life Alone at the Bronx Zoo*, N.Y. POST, Sep. 30, 2012.

¹² Brief for Petitioner at 5.

But the trial-level court dismissed the NhRP’s petition, stating that “Happy is not a ‘person’ entitled to the writ of habeas corpus.”¹³ On appeal, the Appellate Division unanimously supported the decision, writing that the right “is limited to human beings.”¹⁴ Finally, the Court of Appeals affirmed, holding that Happy was not a person with liberty rights safeguarded by the writ of habeas corpus.¹⁵

The Court of Appeals warned that allowing Happy to invoke habeas corpus “would have an enormous destabilizing impact on modern society.”¹⁶ The majority feared that “[g]ranting legal personhood to a nonhuman animal in such a manner would have significant implications for the interactions of humans and animals in all facets of life, including risking the disruption of property rights, the agricultural industry (among others), and medical research efforts.”¹⁷ They cautioned that allowing nonhuman animals the right to bring suit would “upend this state’s legal system.”¹⁸ These slippery slope objections and floodgates arguments are never essential to the holding; when judges turn to them, you can almost guarantee they are ignoring the facts, the legal merit of the case, and, when applicable, the elephant in the room. And they are nearly always exaggerating the consequences of their alternative action while punting to the legislature.

Judge Rivera’s dissent states that whether autonomous, nonhuman animals have rights that ought to be recognized by law” is too immense a question for the legislature to tackle alone.¹⁹ Legally defining those three terms would certainly be an immense achievement. But would the consequences, even if the terms were left undefined and no slippery slope mitigation occurred, be immense?

I fear not.²⁰ Answers to the immensity of the situation will largely be found outside of the law.

¹³ No. 260441/19, 2020 WL 1670735, at *10 (N.Y. Sup. Ct. Feb. 18, 2020).

¹⁴ 134 N.Y.S.3d 188 (App. Div. 2020).

¹⁵ 2022 WL 2122141, at *1.

¹⁶ *Id.* at *12.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at *10 (internal quotation marks omitted).

²⁰ For example, in India, dolphins were recognized as non-human persons in 2013, and some high courts have since granted animals legal personhood. This status change has not invalidated the numerous human systems built upon animal exploitation. *See e.g.*, Consumption Non-Vegetarian Food Growing in India: NFHS-5, CJP (May 21, 2022).

3. Bringing Happy into the Room

People who believe in a more just world for animals want Happy to be happy, but we also very much want to disrupt property rights, the agricultural industry, and medical research efforts. We wish a single legal decision or even a flood of litigation could have an enormous destabilizing impact on modern society. But a reliance on courtrooms and the legislature will not make this happen. Lawyers and legislators tend to have a hubristic belief in their ability to create change (do U.S. law schools inculcate this?). But to create the relational changes we need between humans and the rest of the natural world, only a large-scale shift in human perspective will do. And for that, we must bring animals into the room.

What we do to animals is uncomfortable to think about, so we rarely bring their realities into the rooms we occupy. In Happy's case, it would have been highly inappropriate to physically bring her into court. (Accusing NhRP of forum shopping, Doherty pointed out that should the court require Happy's attendance at a hearing, it would be exceedingly difficult to transport her to the further away courthouse). But luckily, to create change, we don't need Happy in court. Or in the legislature. Or physically in our living room. We just need to metaphorically bring her into the room and see her for who she is. And for that, we simply need to remove our current lenses and refocus.

4. Bringing Happy into Focus

Zoos exist for humans much like the Seven Dwarfs exist for Snow White. And like Snow White, we are the ones asleep in a Glass Coffin. (Pardon the indulgent metaphors but it's as if when they named Happy fifty years ago they knew they were starting an unhappy allegory.) A century ago, in *The Outermost House*, Henry Beston artfully described how our Glass Coffin, or in his words glass of knowledge, distorts our view:

“Remote from universal nature and living by complicated artifice, man in civilization surveys the creature through the glass of his knowledge and sees thereby a feather magnified and the whole image in distortion. We patronize them for their incompleteness, for their tragic fate for having taken form so far below ourselves. And therein do we err. For the animal shall not be measured by man. In a world older and more complete than ours, they move finished and complete, gifted

with the extension of the senses we have lost or never attained, living by voices we shall never hear.”²¹

Once we notice and exit our Glass Coffins, we begin to hear animals. We do not need legislators, lawyers, or even scientists to persuade us that animals deserve more. The advantage of a distorted view that in turn shapes our species’ negative interactions with other species is that it is within our power to change our view. In Happy’s case, there was a lot of concern about disrupting the animal-human binary. The inclusion of Happy under the personhood umbrella was too much for many to bear, and there are valid reasons to question a system that uses personhood as the starting point for rights. But the most compelling reason for normalizing some animals as persons is that it could help remind our species that *we* are part of the animal world. And this could be immense. Because when we acknowledge our status as animals, we chip away at the belief that we are outside of and apart from nature and are reminded of our relatedness.

But there are easier ways to shift our views than granting personhood-type rights to some “highly intelligent” animals. We simply must begin seeing animals without a human-centered focus while simultaneously reigning in our anthropodenial (our denial of the many characteristics we share with other animals).²² Judge Wilson’s dissent quotes Frederick Douglas, who, 150 years ago, offered a simple recipe for understanding and befriending a horse who is “in many respects like a man.”²³ Douglas’s solution is not found in judicial or legislative processes but through “uniform sympathy and kindness.”²⁴

Applying this can be as simple as asking the right questions while (re)noticing what is happening around us. For example, anyone who has spent time with dogs has likely noticed that they like to stop and sniff things. If *we* stop whilst they sniff, and simply ask ourselves “Do these dogs seem keen to continue sniffing?” often our answer will be “They sure do!” A follow up question could be, “Do I like to be interrupted when I am enjoying or learning something new?” We do not have to know that the area of the canine brain devoted to analyzing odors is 40 times larger than the comparable part of the human brain, or that their sense of smell is 10,000 to 100,000 times more acute than our own. In fact, we don’t have to *compare* their noses to our noses at all; through

²¹ THE OUTERMOST HOUSE: A YEAR OF LIFE ON THE GREAT BEACH OF CAPE COD 24 (1928).

²² Useful jargon. See Frans B. M. de Waal.

²³ *Id.* at *51.

²⁴ *Id.*

observation alone it is easy to understand that their sense of smell is important to *them*. This seemingly obvious acknowledgement might stop impatient leash pullers in their tracks. We push back against anthropodenial by understanding that like us, animals like to do things they're interested in doing (even if they bury their noses in places we find disagreeable). They are not exactly like us, but we are alike in so many important ways.

Similarly, we do not have to know that elephants have passed the mirror test. This fact was heavily emphasized in Happy's case but is this human- and sight-based test significant to Happy's freedom? Should freedom be denied to individual elephants and ants who fail it? Do mirrors indeed tell us who are the fairest species of them all?

Of course not.

The first section of this essay barely mentions Happy's cognitive abilities, her ability to empathize, her altruism, or her mourning of the dead. We do not need any studies, or even a mirror, to reflect on what our species did to Happy and see that it was wrong. It is easy to intuit that she would have been happier with her herd. With her mother. Possibly with her own daughter and granddaughter. In a familiar habitat with space to roam. If given a choice, she would not have chosen a drive-through safari park, years of tricks or reprimands, and retirement alone in NYC. We, as human animals, like to choose where we live, whom we see, whom we perform for, and whom we die with. It is not all that difficult to understand other animals.

5. Happily Not the End

Poisoned by anthropodenial and intellectualization we avoid feeling and seeing the obvious. Asleep at the wheel, we are careening deeper and deeper into climate, cruelty, and biodiversity crises. But it is not too late to wake up. We just need to follow Douglas's recommendations of sympathy and kindness. Sympathy implies "an affinity, association, or relationship between persons or things wherein whatever affects one similarly affects the other."²⁵ Realizing that they are like us even though we will never truly walk in their hooves (paws, fins, etc.) leads to understanding.²⁶ And importantly, change. Because there is no real future for us within our Glass

²⁵ Merriam-Webster.com (Mar. 3, 2024).

²⁶ For more on understanding across the species barrier see e.g., Korsgaard, Haraway, Despret, and Nussbaum.

Coffins where there is no space for other animals. When we bring them into our rooms, we shatter the glass and begin to admire and protect the spiders, sparrows, squirrels, and slugs who still live near us. We imagine the lives of the animals in slaughterhouses (even while the barriers to actual witnessing continue to grow) and stop requesting their bodies at mealtimes. We, the reason zoos exist, no longer abide seeing Happy unhappy.