

ELEPHANTS, PERSONHOOD, AND MORAL STATUS

DAVID DEGRAZIA

ABSTRACT This essay uses the lens of moral status to explore the question of whether elephants ought to count as persons under the law. After distinguishing descriptive, moral, and legal concepts of personhood, the author argues that elephants are (descriptively) at least “borderline persons,” justifying an attribution of full moral status and, thereby, a solid basis for legal personhood. A final section examines broad implications of elephant personhood.

THE CONCEPT OF A PERSON has various senses: descriptive, moral, and legal. While these senses are not always clearly distinguished, it is usually assumed that only human beings are persons. This common assumption was challenged in a recent legal case featuring Happy, a captive elephant in the Bronx Zoo. In *Nonhuman Rights Project v. James Breheny, et al.* (2022 N.Y. Slip Op 3859 (NY 2022)), petitioners contended that Happy is a person who has been wrongfully detained, is languishing in the zoo, and should be transferred, by a writ of habeas corpus, to a high-quality sanctuary. Submitted to the court were various amicus briefs, including briefs by such eminent philosophers as Christine Korsgaard (2021), Martha Nussbaum (2021), and Peter Singer (Singer, Comstock, and

Department of Philosophy, George Washington University, Rome 556, Washington, DC 20052-0086.

Email: ddd@gwu.edu.

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Lerner 2022) on behalf of the petitioners, and a brief by the National Association for Biomedical Research (2021) on behalf of the defendants. Following the introduction, this essay will explore, through the lens of moral status, the question of whether elephants ought to count as persons under the law. After distinguishing descriptive, moral, and legal concepts of personhood, I will argue that elephants are (descriptively) at least what I will call “borderline persons,” justifying an attribution of full moral status and, thereby, a solid basis for legal personhood. A final section will examine broad implications of elephant personhood.

American law understands persons as beings or entities that enjoy full protection and rights under the law. The law currently recognizes “natural persons,” meaning already-born, living human beings—members of *Homo sapiens*. It also recognizes “juridical persons,” meaning entities such as businesses that have legal standing and can perform such legal acts as entering into contracts and filing lawsuits.

Setting aside the category of juridical persons, it is especially noteworthy that “natural persons” are commonly assumed to include human animals but not non-human animals. (Here it is worth noting the irony that the National Association for Biomedical Research, a scientific organization, asserts in its brief that “there is no defensible basis to confer habeas rights on elephants or other animals,” as if human beings were not animals.) Following a pair of similar challenges involving the alleged personhood of several chimpanzees,¹ the present case turned the world’s attention to an elephant who appears to be languishing in her current circumstances of confinement. In June 2022, the New York Court of Appeals, the highest American court to consider an assertion of personhood on behalf of a nonhuman animal, ruled five to two against the petitioners. According to Chief Judge Janet DiFiore, “Habeas corpus is a procedural vehicle intended to secure the liberty rights of human beings who are unlawfully restrained, not nonhuman animals” (3).

DiFiore’s reasoning is of questionable cogency and invites further challenge. Even if habeas corpus is intended, or has standardly been intended, to apply only to human beings (or some subset thereof, such as living, postnatal human beings), that observation is consistent with this hypothesis: habeas corpus has been intended to apply to *those individuals who are persons in some relevant sense*, and, traditionally, judges have erroneously assumed that only human beings could be persons in that sense. As we know from history, prevailing interpretations of who qualifies as persons and who deserves legal standing are not infallible. Notoriously, for example, the United States did not regard Blacks as legal persons with protection under the law until the abolition of slavery.

¹*People ex rel. Nonhuman Rights Project, Inc. v. Lavery* (26 N.Y.3d 902 (2015), 38 N.E.3d 828, 17 N.Y.S.3d 82); *Matter of Nonhuman Rights Project, Inc. v. Lavery* (31 N.Y.3d 1054 (2018), 100 N.E.3d 846, 76 N.Y.S.3d 507).

DISTINGUISHING “PERSON” AND “HUMAN BEING”

The term “person” is used in different ways. When used descriptively, it designates an individual who possesses a property or set of properties that are definitive of a kind of being: persons. Often, in casual usage, “person” is used interchangeably with “human being.” But even those who use “person” in this way are likely to agree that, in principle, the word *could* apply to individuals who are not human beings—for example, to God, angels, the space alien E.T., or the fully linguistic, encultured apes of *The Planet of the Apes*. And many speakers who tend to conflate “person” and “human being” in practice do not really intend to include all members of our species, *Homo sapiens*, such as human embryos. It quickly becomes apparent that the term “person,” in its descriptive use, does not simply mean “human being,” even if the referents of the two terms are frequently coextensive.

In the 17th century, John Locke was well aware that “man” (referring to human beings in general) and “person” were distinct concepts. In his *Essay Concerning Human Understanding* (1694), Locke influentially defined a person as a “a thinking intelligent being, that has reason and reflection, and can consider itself, as itself, the same thinking thing, in different times and places” (Book II, chap. 27, sect. 9). Considering the philosophical usage of his time, in which “thinking” was often used broadly to include all conscious activity (as in Descartes’s *Meditations*) and “reflection” was used to refer to introspection, I read Locke as defining persons as beings with the capacities for consciousness, reason, introspection, and self-awareness over time. Whatever the most accurate reading of Locke, his analysis of personhood has been enormously influential, not in all of its particulars but in its emphasis on conscious life and cognitive capacities that are generally attributable to sufficiently mature human beings but not to nonhuman animals. Even though we now understand that consciousness—the capacity to have subjective experiences—is attributable to many nonhuman animals, there is some plausibility to the idea that few, if any, possess the full range of the aforementioned cognitive capacities.

Philosophers have had somewhat different understandings of which traits constitute personhood. Mary Anne Warren (1997), for example, focuses on moral agency, the capacity to deliberate with and act on distinctively moral reasons, while Daniel Dennett (1988) emphasizes consciousness, rationality, and possession of a language. Harry Frankfurt (1971) zeroes in on autonomy or freedom of the will, while Peter Singer (2011) appeals to rationality and self-consciousness. Some philosophers—such as Jane English (1975) and the present author (DeGrazia 1997)—have steered away from precise determinations of necessary and jointly sufficient conditions, instead understanding personhood as a “cluster concept” and, accordingly, presenting a list of properties that are *closely associated* with personhood, even if one can be a person without having all of those properties. For example, one’s list of personhood-relevant properties might be the capacities for consciousness, emotions, rationality, self-awareness, language, and autonomy—

yet one might judge that a highly verbal four-year-old child who demonstrated all of these capacities except autonomy had enough personhood-relevant traits to be a person while, by contrast, a cat and an infant did not have enough of these capacities to be a person. What unites this philosophical tradition of descriptive personhood is (1) the somewhat vague conceptual idea that persons are beings with the capacity for *sufficiently complex mental lives* and (2) the factual beliefs that (a) human beings, beyond infancy or perhaps the toddler years, are normally persons and (b) nonhuman animals are rarely, if ever, persons.

It is worth underscoring that the descriptive sense of personhood does not build species membership into the meaning. Locke understood that an apparently rational and fully conversant parrot might persuade us (correctly) that he was a person. For anyone who might be inclined to retain the dogma that only human beings can be persons, it is worth pressing the issue of who should count as a human being. Human corpses? Hardly. Human embryos and early fetuses? Moral and political conservatives might accept such inclusivity but liberals are likely to reject it.

From another angle, why only *Homo sapiens*? Primate evolution has featured a large number of hominid species, with *Homo denisovan*, *Homo florensiensis*, and *Homo neanderthalensis* (Neanderthals) overlapping with *Homo sapiens* only a few tens of thousands of years ago. In addition to the many species within the genus *Homo*, there were also hominid species in the genera *Paranthropus*, *Ardipithecus*, and *Australopithecus*. Which of these hominid genera and species included persons? If we believe that none of them did, insisting that only *Homo sapiens* includes persons, we invite charges of species bigotry and biological ignorance. For one thing, living human beings today have a small amount of Neanderthal DNA. If we go in the opposite direction and include members of all hominid species as human beings and persons, or even just those in the genus *Homo*, then it would seem bizarre to assume that the least cognitively complex among these hominids were persons, whereas the most cognitively complex great apes (chimpanzees, bonobos, orangutans, and gorillas), cetaceans (dolphins, porpoises, and other whales), and elephants were not persons. Assuming persons represent a kind of being defined by a type of mental life, the assumption that only members of our species could be, and have been, persons makes sense only if we also assume that members of our species are utterly unlike members of any other species, including the many other hominid species. And this assumption simply does not square with the facts of evolutionary biology. It fits better with the false belief that we did not evolve from other animals but emerged (perhaps by the hand of God) *sui generis*. No competent judge would base a finding on such an assumption. Nor should any thoughtful person.

CONNECTING THE DISTINCT SENSES OF PERSONHOOD

The preceding section considered the descriptive sense of “person.” Locke’s interest in analyzing personhood was ultimately practical: he sought an account that would provide a suitable basis for moral accountability. (He even called *person* “a forensic term,” but it would have been more accurate to call it a forensically or morally relevant term, because his analysis, quoted in the preceding section, was clearly descriptive.) Here it will be helpful to clarify the connections between the descriptive, moral, and legal senses of “person.”

When “person” is used in a moral sense, it is usually meant to refer to an individual with full moral status. For example, those who assert that fetuses are persons often mean (at least in part) that they have full moral status, though this status might be conveyed with such terms as “dignity” or “inviolability.” Nazi anti-Semites who denied that Jews were persons were denying, monstrously, that Jews had full moral status. Although some views about moral personhood, such as the anti-Semitic one, are unworthy of consideration, there is genuine controversy about which range of beings has full moral status. One point of agreement, however, is that those who are descriptively persons—on the basis of having the relevant properties—are also persons in this moral sense. In other words, descriptive personhood is *sufficient* for moral personhood.

Is descriptive personhood also *necessary* for moral personhood, or might some nonpersons have full moral status? Among advocates for animals, some maintain that all sentient animals have moral status and have it equally (cf. Regan 1983), thereby denying that descriptive personhood is necessary for full moral status. Note, however, that even this position agrees that descriptive personhood is sufficient for moral personhood, or full moral status, since beings who are descriptive persons are sentient.

How does legal personhood fit into the picture? An attractive thesis is that any moral persons—any beings with full moral status—ought to count as legal persons, that is, as beings entitled to full protection under the law. So, to assert that Happy the elephant is not a legal person because the doctrine of habeas corpus (or any other legal doctrine) has traditionally been understood to apply only to human beings leaves open the question of whether Happy and certain other nonhuman animals should count as legal persons because they are moral persons—beings with full moral status. And this fundamental question requires us to consider what underlies full moral status. My contention is that all beings who are persons—or even “borderline persons” in a sense I will explain—in the descriptive sense are moral persons and should count as legal persons. A just legal system, presented with sufficient evidence of these beings’ capacities, would recognize these individuals as persons.

Before turning to the factual matter of what elephants are like, which is crucial to applying any descriptive sense of “person,” we need to clarify the latter. As noted earlier, different thinkers have offered somewhat different analyses of

the concept. For present purposes, I will assume that any beings who exhibit significant intelligence, rich emotional lives, social self-awareness, and narrative self-awareness qualify as persons. In other words, meeting these conditions is sufficient for being a person whether or not it is also necessary.

By “narrative self-awareness” I mean an awareness of one’s own life as constituting a sort of story that unfolds over time and includes detailed memories of the past and intentions or plans for the future. An animal who remembers being younger, who is aware of relationships with other group members that have evolved over time, who sees herself as occupying a certain position or set of roles within her group, and has intentions about her future (for example, to change her position in the group or to see a young one become more independent) would qualify as having narrative self-awareness. By contrast, an animal who remembers only what he did a few moments ago and has intentions only about the relatively immediate future would not have enough self-awareness over time to count as narratively self-aware. This animal would be an agent, someone capable of intentional action, but not a person in the descriptive sense of the term I have in mind.

Here is a snapshot of the three senses of personhood along with my substantive claims about them:

1. *Person in a descriptive sense*
 - a. *Definition (the basic concept):* A being with the capacity for sufficiently complex forms of consciousness and cognition.
 - b. *My claim:* It is sufficient for personhood in this sense that a being exhibit significant intelligence, a rich emotional life, social self-awareness, and narrative self-awareness.
2. *Moral person*
 - a. *Definition:* A being with full moral status.
 - b. *My claim:* It is sufficient for moral personhood that one be a descriptive person or borderline person.
3. *Legal person*
 - a. *Definition:* A being with legal standing and full protection under the law.
 - b. *My claim:* All moral persons should be legal persons.

WHAT ELEPHANTS ARE LIKE—AND WHAT FOLLOWS MORALLY

Do elephants have the traits that constitute descriptive personhood, thereby qualifying for moral personhood and deserving the status of legal persons? (For the remainder of this section I will use “person[hood]” as shorthand for “descriptive person[hood].”) To answer this question requires a fairly detailed understanding of what elephants are like, especially in regard to their mental and social lives.

Because of their massive size and power, elephants have not been studied much, if at all, in laboratories. Instead, they have been studied in zoos, sanctuaries, and their natural environments—and not nearly as extensively as commonly used laboratory animals such as rodents, dogs, and monkeys.

What are elephants like, as far as we can tell on the basis of currently available evidence? It is clear that elephants are among the most cognitively sophisticated, socially complex nonhuman animals. With a natural lifespan of 50 to 70 years, their social groups typically feature two or three mother-offspring units headed by a matriarch (Vidya and Sukumar 2005). Elephants are highly social, with hierarchical relations, strong alliances among certain members, and nurturing and protection of juveniles. They appear to have rich emotional lives that include a disposition to grieve the death of a herd member. Elephants' efforts to help others who have fallen or incurred injury have been interpreted to involve empathic perspective-taking, a relatively rare ability among nonhuman animals (Douglas-Hamilton et al. 2006; Plotnik et al. 2010). They have demonstrated insightful problem-solving, even tool use, and have evinced significant bodily self-awareness in various activities such as passing the mirror test (in which one responds to one's own image in a mirror in a way suggesting recognition that the image is of oneself) (Dale and Plotnik 2017; Foerder et al. 2011; Hart et al. 2001; Plotnik et al. 2010).

Available evidence supports the attribution to elephants of significant intelligence, rich emotional lives, substantial bodily self-awareness, and a high degree of social self-awareness. Judge DiFiore apparently agrees, writing that “various experts explained—and it is largely undisputed—that elephants are intelligent beings, who have the capacity for self-awareness, long-term memory, intentional communication, learning and problem-solving skills, empathy, and significant emotional response” (2–3). But does their self-awareness achieve a degree of sophistication that reaches narrative self-awareness? Does an elephant think of her own life as constituting a sort of story with significant memory of her past and some intentions and plans for the (non-immediate) future? If so, then elephants qualify as persons in the descriptive sense I presented earlier. Although I believe it is highly possible, maybe even probable given current scientific understanding, that elephants—more precisely, sufficiently mature elephants (such as Happy)—typically possess narrative self-awareness, I cannot assert that they do with genuine confidence. Elephants obviously have moral status on the basis of their sentience. But it is unclear whether they have narrative self-awareness and qualify as persons, a description that would straightforwardly warrant the attribution of moral rights to them.

What is clear, however, is that elephants are (at least) what I call “borderline persons.” That is to say, while it is not the case that elephants are *clearly* persons, neither can it be said that elephants are clearly beings who fall short of personhood. As far as we can discern based on current scientific understanding, they

lie in a grey (uncertain) area between paradigm persons and paradigm nonpersons. (See DeGrazia 1997 for discussion of borderline personhood.) What is the moral upshot of being a borderline person? The matter is debatable. My claim is that borderline persons should be granted basic rights. It seems obvious that human borderline persons, such as toddlers, have moral rights to life, bodily integrity, freedom from torture, and the like. On some animal rights views, so do all sentient beings. I suggest that all reasonable views will agree that borderline personhood is sufficient for full moral status and basic moral rights. Like great apes and cetaceans, I believe, elephants should be understood to have full moral status, with basic moral rights, and for this reason should be treated as persons under the law.

THE IMPLICATIONS OF LEGAL PERSONHOOD FOR ELEPHANTS

What would it mean, practically, for elephants to be legal persons? At the most general level, it would mean that elephants may no longer be regarded as property, any more than human beings may be regarded as property. Legal personhood would further mean that elephants should possess certain basic legal rights that would correspond to their basic moral rights. I will enumerate several such candidate rights and comment briefly on their social implications.

First, elephants should have a legal right to life in the sense of a right not to be killed. Just as killing you or me would entail the serious crime of homicide, or murder, killing elephants should be comparably prohibited. No one should be permitted to kill an elephant for sport, or to harvest his ivory trunks, or in anger. All such unnecessary killing of a person, or borderline person, is murder. The use of the term “murder” as applied to elephants might sound exaggerated to those who are unaccustomed to thinking of elephants as beings with full moral status. But I contend that the strong connotations of the term “murder” are warranted in the case of some nonhuman animals—elephants, but also great apes and cetaceans. Any mismatch between our linguistic intuitions and the use of the term in the case at hand is due, I suggest, to our failure to recognize the full moral status of elephants.

It would not be an implication of legal personhood for elephants that they may never be intentionally killed. If an elephant on a rampage poses a threat of death or serious bodily harm to nearby human beings, killing the attacker is justified if no less harmful response is at hand. In this case the elephant’s right to life is overridden in justified self-defense, just as a human being’s right to life might be overridden in self-defense. Human beings who live where elephant attacks are fairly likely might have a responsibility to acquire nonlethal means of subduing a dangerous elephant, such as darts that induce unconsciousness.

One might resist my claim that elephants have a right to life by appealing to the appropriateness of sometimes euthanizing them. Surely, one might argue, it

is permissible to kill an elephant, even when self-defense is not an issue, if death would be preferable to continued life from the standpoint of the elephant's interests. According to the argument, this suggests that elephants don't have a right to life comparable to our right to life. But this reasoning is unpersuasive. For one thing, many people working in ethics, including me, are in favor of euthanasia for human beings under certain conditions. In addition, those who oppose euthanasia for humans might similarly deny that euthanasia is appropriate for elephants, especially if they hold that these creatures are moral persons.

A second broad implication of legal personhood for elephants concerns liberty. The implication is not, as some might suppose, that human beings may never confine or restrict the liberty of elephants. After all, elephants who currently live in conditions of human-controlled confinement might not be able to flourish—might even be greatly endangered—if set entirely free of human dominion. They might lack the know-how to protect themselves or the ability to integrate successfully into a wild elephant herd. They might also be easy prey for human predators. Related to this point is the realization that not all confinement is harmful on balance. Not all restrictions of liberty are contrary to an agent's interests.

These points apply to human children, whose full moral status is not in question. Good parenting restricts the liberty of young children in many ways. Children who are parented competently are not permitted to go wherever they please, by whatever means they choose, or to sleep at other people's houses without permission. Nor are they permitted to drink alcohol, consume illegal drugs, or cruise around the internet visiting dating or sex-oriented sites. Certain restrictions of liberty are in the best interests of children. Arguably, some restrictions of liberty are also in the best interests of competent adults—consider seatbelt laws and prohibitions against heroin use.

Confinement and restrictions of liberty might always be *prima facie* harmful (harmful at first glance), but they are not always harmful all-things-considered, especially in the case of children and mentally incapacitated adults. As I conceptualize moral rights, there is no general right to liberty, not even a negative one (a right not to have one's liberty interfered with). Rather, human beings have a cluster of liberty rights—which, in the case of adults, include rights to free speech and worship, to seek employment, to enter into relationships and associations, to pursue one's own vision of the good life, and the like. Importantly, one liberty right that both human children and adults have is the right not to be enslaved, where enslavement is understood as being forced to work, in ways not reasonably related to the individual's own interests, for the benefit of others. (Note that this concept does not fit the situation of children who are required to do their homework or even household chores.)

Elephants have a moral right, and should have a legal right, not to be enslaved. This means that they may not be used as circus performers, the cruelty and wrongness of which are gradually becoming apparent to humanity. Elephants

also should not be forced to give people rides or carry heavy loads. Here I mean to emphasize the word “forced.” If an elephant does not seem to mind doing work that is not overly strenuous and is offered certain benefits in exchange for the work, such as nutritious food and protection from predators, it might be appropriate to involve the elephant in a work situation. However, it is crucial not to interpret the acquiescence of an elephant who has been dominated and rendered submissive by humans as voluntary, benign participation in work. An elephant must have a genuine choice about whether to carry someone or do other work.

A third general right that we may attribute to elephants, as moral persons, is a right not to be caused to suffer. This should not be confused with an alleged right not to suffer. Freedom from all suffering is not a reasonable expectation for any conscious being, and much suffering is not the fault of any moral agent. An elephant’s right not to be caused to suffer means elephants must not be tormented, beaten, or tortured. It also means elephant families and herds must not be broken up by the forcible removal of some herd members. This right, like other basic rights, is not absolute, however. If an elephant who is living in a sanctuary, for example, has an ailment that calls for veterinary treatment, which is unavoidably somewhat painful or distressing, it would be appropriate to impose some suffering for the longer-term net gain of the animal. Analogous points apply in cases involving human children and even competent adults, although the latter have a right to refuse treatment and so (generally) may not have any associated suffering imposed on them against their informed wishes. Another circumstance in which an elephant’s right not to be caused to suffer might be overridden is one in which an elephant poses a grave threat to one or more humans—or elephants—and restraining the attacker unavoidably entails some experiential harm.

One further basic right that would follow from elephants’ moral and legal personhood is a right not to have their natural habitats destroyed or ruined such that they lose the ability to live in those habitats. The associated rights violation is somewhat unlike violation of the other basic rights we have identified. That is because the present right might be violated without the culprits doing anything directly to any elephants and without even realizing that they are harming them. Elephants commonly eat grasses, other small plants, bushes, fruits, roots, and tree bark. If human construction or other activities cause the foods available to a particular elephant herd to be inedible, or unavailable, the human enterprise would violate the elephants’ right not to have their habitat ruined.

One might deny that animals have a right not to have their habitat destroyed on the basis of a claim that only individuals who understand property rights can own property—such as a particular habitat and the foods normally available in it. But this argument is weak. One can violate the property rights (both moral and legal) of a young child who has no notion of property by defrauding her of it. The property—say, funds for later education—are rightfully hers, and the fraud would violate her rights by depriving her of the resource. Similarly, some reasonable amount of habitat and the resources normally available on it should be

regarded as rightfully reserved for elephants who depend on this parcel of nature. Although the idea of the “natural property” of a nonhuman person might be undeveloped at present, I believe it makes good sense given the assumption of an animal’s moral and legal personhood and merits careful exploration.

But first things first. We need to recognize that elephants have full moral status and ought to be legal persons: individuals with legal rights and entitled to full protection under the law. This recognition would support the claim that Happy should indeed be removed from the Bronx Zoo, where despite her name she seems unhappy, and taken to a sanctuary where she has a greater chance of flourishing. Similar inferences might be possible for many other elephants in captivity—but not for all of them because, as discussed, not all captivity is harmful, and captivity under certain conditions might be a particular elephant’s best option. Whether this is the case depends on whether captivity under a particular set of conditions is most compatible, among possible options, with a given elephant’s basic needs.

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