

Orangutans are persons with rights:

Amicus Curiae brief in the Sandai case, requested by the Interspecies Justice Foundation

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Attorney Affirmation

Amici biographies

1. **Gary Comstock** is Alumni Distinguished Undergraduate Professor of Philosophy at North Carolina State University. He conducts research on ethical questions in the biological sciences. He is especially interested in animal minds and the moral relevance of what's known and not known about the brains and behaviors of nonhuman mammals. In his book, *Research Ethics: A Philosophical Guide to the Responsible Conduct of Research* (Cambridge, 2013), Comstock shows how Peter Singer's expanding circle metaphor lends coherence to an otherwise disparate set of issues in research ethics.

2. An award-winning researcher and teacher, Comstock's *New York Times* essay, "You Should Not Have Let Your Baby Die," received Honorable Mention in the PEA Soup 2017 Ethics Prize competition. Two years earlier, he was named an NC State Alumni Association Outstanding Teacher of the Year. A coauthor of *Chimpanzee Rights: The Philosophers' Brief*, and co-editor of *The Moral Rights of Animals*, Comstock wrote *Vexing Nature? On the Ethical Case Against Agricultural Biotechnology*.

3. For two years, Comstock was ASC Fellow of the National Humanities Center. He continued there as Editor-in-Chief of *On the Human*, one of the Center's online projects. Comstock directed the OpenSeminar in Research Ethics, and is editor of two more books, *Life Science Ethics*, and *Is There a Moral Obligation to Save the Family Farm?* He served on the committee that co-authored the third edition of *On Being a Scientist*.

4. **Adam Lerner** is incoming Post-Doctoral Associate in the Center for Population-Level Bioethics at Rutgers University. Previously, he was Lecturer in the Department of Philosophy at Princeton University and Assistant Professor/Faculty Fellow in the Center for Bioethics at New York University. He earned his PhD in philosophy from Princeton University, where he earned the Porter Ogden Jacobus Fellowship, Princeton's top honor for graduate students.

5. Lerner's work lies at the intersection of ethics, metaethics, and moral psychology. In his dissertation, he argued that appreciating the role of empathy in moral inquiry can help us make progress on debates about the strength of our obligations to reduce animal suffering and extreme poverty. He also works on questions in political philosophy, population ethics, and moral epistemology. His work has appeared in venues such as *The Journal of Moral Philosophy*, *Oxford Studies in Metaethics*, *Philosophical Studies*, and *Philosophical Perspectives*.

6. **Macarena Montes Franceschini** is an attorney and doctoral researcher at Universitat Pompeu Fabra's Law Department. She has been a visiting researcher at Max Planck Institute for Comparative Public Law and International Law in Heidelberg and a Rights Research Fellow at the Brooks McCormick Jr. Animal Law & Policy Program at Harvard Law School, where she will begin a visiting fellowship in 2023. She is also a board member of the UPF-Centre for Animal Ethics, editor of the journal *Law, Ethics and Philosophy* (LEAP), a member of the Editorial Committee of the Chilean Journal of Animal Law, and the treasurer of the Great Ape

Project - Spain. She has written several articles on nonhuman animal personhood, animal rights, and animal law and a book titled *Derecho Animal en Chile* (Libromar, 2018).

7. Peter Singer is the Ira W. DeCamp Professor of Bioethics at Princeton University. Journalists have called him the “world’s most influential living philosopher.” His most influential work has focused on the ethics of our treatment of animals, which is often credited with starting the modern animal rights movement, and on obligations to alleviate extreme poverty, which inspired and continues to influence the movement of effective altruism. Key figures concerned with animal welfare, including Jane Goodall and Ingrid Newkirk have said that his book, *Animal Liberation* (1st ed. 1975, 3rd ed., HarperCollins, 2009), led them to get involved in the struggle to reduce the vast amount of suffering we inflict on animals. To that end, he co-founded the Australian Federation of Animal Societies, now Animals Australia, the country's largest and most effective animal advocacy organization. In 2021 he was awarded the Berggruen Prize for Philosophy and Culture, a \$1 million award given annually to "thinkers whose ideas have profoundly shaped human self-understanding and advancement in a rapidly changing world."

8. Singer is the founder of The Life You Can Save, an organization based on his book of the same name. It aims to spread his ideas about why people in developed countries should be doing much more to improve the lives of people living in extreme poverty, and how we can best do this.

9. Singer’s writings on poverty include: the 1972 essay “Famine, Affluence, and Morality” in which he argues for donating to help the global poor; and two books that make the case for effective giving: *The Life You Can Save* (Random House, 2009) and *The Most Good You Can Do* (Yale, 2015).

10. Singer has written, co-authored, edited or co-edited more than 50 books, including *Practical Ethics*, *The Expanding Circle*, *Rethinking Life and Death*, *One World*, *The Ethics of What We Eat* (with Jim Mason) and *The Point of View of the Universe* (with Katarzyna de Lazari-Radek). His writings have appeared in more than 30 languages.

11. Singer was educated at the University of Melbourne and the University of Oxford. After teaching in England, the United States, and Australia, in 1999 he became Ira W. DeCamp Professor of Bioethics in the University Center for Human Values at Princeton University

I. STATEMENT OF INTEREST OF AMICI CURIAE

Amicus Gary Comstock, an award-winning researcher and teacher, is Alumni Distinguished Undergraduate Professor of Philosophy at North Carolina State University. His book, *Research Ethics: A Philosophical Guide to the Responsible Conduct of Research*, shows how Singer's expanding circle metaphor lends coherence to an otherwise disparate set of issues in research ethics. *Amicus* Adam Lerner is incoming Post-Doctoral Associate in the Center for Population-Level Bioethics at Rutgers University. His work has appeared in venues such as *The Journal of Moral Philosophy*, *Oxford Studies in Metaethics*, and *Philosophical Studies*. *Amicus* Macarena Montes Franceschini is an attorney and doctoral researcher at Universitat Pompeu Fabra's Law Department, and the author of *Derecho Animal en Chile*. *Amicus* Peter Singer is the Ira W. DeCamp Professor of Bioethics at Princeton University. His publications in the 1970s are widely credited with creating the philosophical basis of the modern animal rights movement. His work in this area and in the area of our duties to those living in extreme poverty, are some of the most excerpted and reprinted essays in applied ethics anthologies. *Amici* specialize in ethics and have particular expertise in the analysis of issues relating to the moral status of animals.

We present ethical reasons that the court should grant the Interspecies Justice Foundation's (IJF) request for habeas corpus relief for Sandai, an orangutan. Sandai has a basic interest in not being confined, an interest that should be legally protected just as the human interest in not being confined is legally protected.

SUMMARY OF THE ARGUMENT

This Brief argues on consequentialist grounds for the transfer of Sandai to an orangutan sanctuary. First, we show that satisfying his interest in being transferred brings far greater value than the value achieved by keeping him confined. Second, we show that he has the capacities sufficient for personhood. Third, we show that all persons have a right to relative liberty insofar as they have interests they can exercise only under conditions of relative liberty. Fourth, we show that individuals need not be able to assume social obligations and duties in order to be rights holders.

Our argument reflects commitments, as we say, to consequentialist reasoning about moral problems. However, we note that influential representatives of the other dominant ethical traditions—the deontological and Aristotelian traditions—reach our conclusion, too. It makes no difference, in this instance, which ethical theory one adopts. Under all of them, Sandai is a person with an interest in relative liberty entitled to habeas corpus protection.

ARGUMENT

We argue on consequentialist grounds and, specifically, on utilitarian grounds, for Sandai's release. Contemporary utilitarianism originates in the writings of the 19th century

thinkers Jeremy Bentham,² John Stuart Mill,³ and Henry Sidgwick.⁴ Today, *amicus* Peter Singer is perhaps the most widely recognized proponent of the theory.⁵ In his book, *The Expanding Circle*, he argues that altruism evolved because environments selected for humans with strong desires to protect their family and community members. Subsequently, people, acting on the basis of reason, can choose to recognize strangers—who may possess interests very different from their own—as moral equals. This idea, that all persons are equal, is a key utilitarian commitment and explains why utilitarians have consistently defended arguments widely regarded as being on the right side of history.⁶ This is especially true in the case of controversies about the legal rights of persons. For example, when African-Americans were treated as slaves, utilitarians provided arguments for abolition long before courts recognized their probity. Again, when women were denied the ballot, utilitarians joined hands with suffragists arguing on behalf of women’s rights. Once again, when lesbians, gay men, and transgender people faced discrimination in employment, utilitarians objected to this rights violation.

This Court faces a new controversy involving the denial of rights to persons. Following earlier consequentialists, we here argue that the rights of another person, this time a nonhuman person, demand legal protection. Sandai’s interest in relative freedom must be acknowledged. We are pleased to see that in 2016 Argentina recognized the personhood of a chimpanzee named Cecilia and ordered her release from the Mendoza Zoo to Brazil’s Great Ape Sanctuary (Tercer Juzgado de Garantías de Mendoza [J.G.Men.] [Third Criminal Court of Mendoza], 3/11/2016, “Presentación Efectuada Por AFADA Respecto del Chimpancé ‘Cecilia’ Sujeto No Humano,” [Expte. Nro.] P-72.254/15, (Arg.). 3 Pablo Giuliano, *El Santuario de los Primates de Brasil, la Ventana*). Justices in our country, the United States, are also beginning to recognize that nonhuman animals should no longer be considered as property rather than persons. In *Matter of Nonhuman Rights Project, Inc. v Lavery*, 31 NY3d 1054, 1058 “(Tommy)” 1059 [Eugene Fahey, J., concurring]), Judge Fahey wrote that “...there is no doubt” that a chimpanzee, named Tommy, is not a mere thing and questioned “whether the Court was right to deny leave” for habeas corpus relief for Tommy. In *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. June 15, 2018), the 4th Department affirmed that it is “common knowledge that personhood can and sometimes does attach to nonhuman entities like ... animals.” In his dissent in *The Nonhuman Rights Project*,

² Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (J.H. Burns et al. eds., 1996).

³ John Stuart Mill, *Utilitarianism and On Liberty* (Mary Warnock ed., 2d ed. 2003).

⁴ Henry Sidgwick, *The Methods of Ethics* (7th ed. 1907).

⁵ Singer first published his argument in a book review in 1979. See Peter Singer, *Animal Liberation*, N.Y. Rev. of Books (Apr. 5, 1973). Two years later, in *Animal Liberation* he argued that the ideal of moral equality demands that we give equal weight to the like interests of all parties affected by an action.

⁶ Peter Singer, *The Expanding Circle: Ethics, Evolution, and Moral Progress* (2d ed. 2011).

Inc. v Breheny (2020 WL 1670735, [Sup C., Bronx County, Feb. 18, 2020, Tuitt, J., index No. 260441/19, *affd* 189 AD3d 583 [2020]) at *10), Justice Tuitt wrote that an elephant, Happy, “...is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty.” And in their dissenting opinions in a subsequent appeal case, *Nonhuman Rights Project, Inc. v. Breheny*, 2022 N.Y. Slip Op. 3859 (N.Y. 2022) Judge Rivera and Judge Wilson both affirm that nonhuman animals have the characteristics that make them entitled to protection as legal persons. Judge Rivera writes, “I conclude that history, logic, justice, and our humanity must lead us to recognize that if humans without full rights and responsibilities under the law may invoke the writ to challenge an unjust denial of freedom, so too may any other autonomous being, regardless of species.” Echoing the arguments that Comstock, Lerner, and Singer offered in an amicus brief submitted in favor of Happy, Judge Wilson argues that “Once a court is engaged in a merits analysis of a habeas petition, it must undertake a normative analysis that weighs the value of keeping the petitioner confined with the value of releasing the petitioner from confinement.” Judge Wilson concludes that such an analysis favors granting Happy the right to habeas corpus, and that the fact that Happy is an animal is no reason for denying them this right: “When the majority answers, ‘No, animals cannot have rights,’ I worry for that animal, but I worry even more greatly about how that answer denies and denigrates the human capacity for understanding, empathy and compassion.”⁷

We are pleased to see these favorable judicial assessments concluding that nonhuman animals may be entitled to the right to habeas corpus. These legal opinions represent the leading edge of the expanding circle. We write to defend the implicit claim that these animals are in the relevant sense persons and have, as a consequence of their personhood, a suitably qualified right to liberty. Philosophical reflection leads inevitably to these conclusions.

Since Sandai has the capacities required for personhood and is entitled to be treated with respect, the Court must consider him for protection under the writ of habeas corpus. A decision to deny the appeal on his behalf would carry a grave moral risk. The Court cannot avoid moral risk by deferring judgment. A decision *not* to grant Sandai the right to habeas corpus is subject to ethical evaluation just as much as a decision to recognize it. Whatever verdict it reaches, the Court faces the potential of doing wrong. In this case, as we will show, the potential for doing wrong is much greater if Sandai’s right to habeas corpus is not protected.

1. The Consequentialist Reasoning Defended by Peter Singer in The Expanding Circle and Other Work Has a Consistent Track Record of Being on the Right Side of History When It Comes to Controversial Decisions About Legal Rights

Most of us have a natural affection for family members. On the basis of our recognition that those outside of our intimate circle have interests like ours, we have come to recognize that our obligations extend to all human beings. Persons beyond our family, tribe, and even nation, are persons. Like us, they have basic interests in life and liberty. In *The Expanding Circle*, Singer shows that the circle is even larger than previously recognized because it includes all sentient animals (that is, all beings able to have conscious experiences, including pain or pleasure):

The only justifiable stopping place for the expansion of altruism is the point at which all whose welfare can be affected by our actions are included within the

⁷ <https://www.nycourts.gov/ctapps/Decisions/2022/Jun22/52opn22-Decision.pdf>

circle of altruism. This means that all beings with the capacity to feel pleasure or pain should be included; we can improve their welfare by increasing their pleasures and diminishing their pains.⁸

Singer's argument for including sentient animals is motivated by his consequentialist commitments. Consequentialism refers to a group of ethical theories that judge actions by their outcomes. According to the dominant version of consequentialism, an act is right if and only if it produces the best outcome. What is the best outcome? "Best" is defined in various ways, perhaps most persuasively as the greatest sum of relevant benefits over harms for all concerned. "Benefits" and "harms" are also defined in various ways, but pain and frustration are harms on every account. There is no question about Sandai's sentience.⁹ The *ethical* question, then, is this. Should Sandai's interests be taken into account as we try to achieve the best outcome? And, if they should, how should they be weighted?

Sandai's confinement is the cause of his pain and frustration. He is alternately anxious and frustrated, or bored and isolated. Release to a sanctuary would remove these harms and initiate a cascade of goods. In cases where we can prevent grave harms with a minimum of effort, ethical principles dictate that we should do so. If one can save a drowning child simply by reaching down and picking them up, one ought to do so. The obligation to prevent harms is especially acute in cases where significant harms can be prevented or removed at very little cost. The Court has this power in Sandai's case. The harms being visited upon him presently can easily be relieved by transferring him to a sanctuary, and the costs involved in doing so, if any, are minimal. Consequently, as we shall argue, rigorous analysis—based not only on utilitarian foundations but also on the other two moral theories most widely accepted among ethicists—leads inevitably to our conclusion.

2. Sandai's Strong Interest in Being Transferred Has Greater Moral Weight Than Anyone Else's Interest in Keeping Him Confined.

According to consequentialism, the permissibility of transferring Sandai to a sanctuary depends on the moral value of the outcome where Sandai is confined indefinitely, compared to the moral value of the outcome where Sandai is transferred to a sanctuary. The moral value of each of these outcomes is equal to the total value of the benefits to everyone who is benefited in that outcome minus the total disvalue of the harms to everyone who is harmed in that outcome. The right action is the one whose outcome has the greatest moral value.

In the case of Sandai, the most salient stakeholder by far is Sandai. In contrast to the very

⁸ Singer, *supra* note 7, at 120.

⁹ Chilean law has protected animals against suffering for the past hundreds of years. For example, the lawmaker abolished bullfighting in 1823. In 2003, Chile celebrated a Free Trade Agreement with the European Union, where Chile agreed to develop animal welfare legislation grounded on animals' sentience. In 2009, Law No. 20,380 on animal protection expressly recognized animals as sentient beings. Currently, there are several statutes in Chile recognizing sentience, like Decree No. 30 (transportation), 29 (husbandry), and 28 (slaughter). Additionally, there is a bill in Congress seeking to amend the Civil Code to recognize animals' sentience, and the draft of the new Constitution also recognizes animals as sentient beings. See, Macarena Montes, *Derecho Animal in Chile* (Libromar, 2018).

great benefits to Sandai from being allowed to go to a sanctuary where he could flourish with other orangutans, the marginal benefits to zoo visitors of seeing an orangutan from a monorail, as to opposed to in a documentary—if there are any—do not outweigh the profound harm of living as an orangutan in confinement.

This is why a consequentialist approach to ethics implies that moving Sandai to a sanctuary is right and keeping him confined is wrong.

The argument so far assumes that the benefits of keeping Sandai confined are limited to the positive experiences people have seeing Sandai. One might also wish to include other benefits that Sandai's confinement makes possible. For example, keeping Sandai at Buin Zoo may bring in additional revenue for the Zoo, making it possible to employ more people and to fund conservation efforts. Or perhaps seeing Sandai confined leads visitors to take tangible steps to improve the lives of orangutans in the wild.

We exclude these benefits, because these count in favor of Sandai's confinement only if obtaining them requires Sandai's confinement. And that is far from obvious. There are other ways to employ people, fund conservation efforts, and improve wild orangutans' lives. Consequentialists would need a strong case that Sandai's confinement was necessary for these benefits before they should consider keeping Sandai confined in order to promote them.

Indeed, this objection gets to the heart of the consequentialist case for granting legal personhood to nonhuman persons. Unless nonhuman persons are granted legal personhood, their mistreatment will be rationalized by the ever-present possibility of downstream benefits. Without legal protection, the temptation to frustrate animals' interests will prove too strong, leading humans to overlook alternatives that are less convenient but better for animals and the world as a whole.

3. Sandai Has the Capacities Sufficient for Personhood.

A person, according to the Lockean tradition, is an autonomous individual with a unified, continuous, sense of self. Persons identify with their memories of the past and project themselves into the future. They can reflect on where they have been, but they can also plan, aspire, and anticipate where they will go. These time-traveling abilities give persons access to novel benefits, but they also expose them to novel harms. When persons are confined, for example, this does not only frustrate their present interests. It robs them of their future.

On a yet richer conception of personhood, persons not only have memories and projects, but they are also sentient, rational, emotional, social, and autonomous individuals. These characteristics of persons further strengthen their interests in avoiding isolation and confinement. Sandai has these characteristics.

Orangutans pass the mirror test of self-recognition, which means they are self-aware.¹⁰ They also have the capacity to learn sign language and understand spoken human languages.¹¹ For example, orangutan Chantek learned American Sign Language and invented his own words to refer to particular objects, like contact lens solution, which he called EYE-DRINK.¹² He also

¹⁰ J. Anderson and G. Gallup Jr (2015), "Mirror self-recognition: a review and critique of attempts to promote and engineer self-recognition in primates," *Primates* 56, 317–326.

¹¹ H. L. White Miles, "Language and the Orang-utan: The Old 'Person' of the Forest." In: P. Cavalieri and P. Singer (eds.) *The Great Ape Project. Equality Beyond Humanity*. (St. Martin's Griffin, 1993), 42–57.

¹² *Id.* at 50.

invented nicknames like DAVE-MISSING-FINGER for his favorite university employee who had a hand injury.¹³ Additionally, he would sign NO-TEETH to show that he would not use his teeth during rough play.¹⁴ Chantek was capable of labeling certain conducts as good or bad, like when he grabbed the cat.¹⁵ Chantek's linguistic abilities are comparable to those that two or three-year-old human children possess.¹⁶ Orangutans can also put themselves in the place of others, showing altruism, empathy, and deception.¹⁷ For example, Chantek would sign DIRTY to go to the bathroom to play with soap instead of using the toilet.¹⁸ On a different occasion, Chantek stole an eraser, pretended to swallow it, and signed FOOD-EAT to say he had swallowed it, but held it in his cheek and later hid it among his things.¹⁹

Orangutans are the most skilled apes at manipulating objects.²⁰ In the wild, orangutans use more than 38 tools, including bee covers, fans, umbrellas, swatters, napkins, straws, toothpicks, blankets, pillows, and roofs for their nests.²¹ In zoos, orangutans are known as escape artists because of their ability to manipulate objects.²² Indeed, research has shown that orangutans can complete tasks using tools with more than twenty problem-solving steps.²³ Orangutans also have the capacity to plan. For example, wild male orangutans plan and communicate their travel direction one day in advance to females, which attracts sexually active females and allows dominant males to defend females from the harassment of other males.²⁴

Female orangutans breastfeed their offspring between seven and nine years and transmit their culture to them so they can survive in the forest.²⁵ Dominant male orangutans defend females who call them when other males are harassing them, and even plan their travel and communicate it, so females know where they are in case they need them.²⁶ Many animals can reciprocate because empathy is a phylogenetically continuous trait across species.²⁷ In a token

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 48.

¹⁶ P. Casal and P. Singer, *Los derechos de los simios* (Editorial Trotta, 2022), at 199.

¹⁷ *Id.* at 200.

¹⁸ White, *supra* note 10, at 48.

¹⁹ *Id.*

²⁰ *Id.* at 45.

²¹ E. Meulman and C. van Schaik, "Orangutan tool use and the evolution of technology."

In: C. Sanz,

J. Call, C. Boesch (eds.) *Tool Use in Animals. Cognition and Ecology*. (Cambridge University Press, 2013), pp. 176-202.

²² White, *supra* note 10, at 45.

²³ *Id.* at 49.

²⁴ C. van Schaik, L. Damerius, and K. Isler (2013), "Wild Orangutan Males Plan and Communicate Their Travel Direction One Day in Advance," *PLoS ONE* 8(9), 1–10.

²⁵ *Id.* at 194.

²⁶ Van Schaik et al., *supra* note 23, at 2.

²⁷ S. Preston and F. de Waal (2002), "Empathy: Its ultimate and proximate bases," *Behavioral and Brain Sciences* 25, at 2.

exchange experiment, researchers found that orangutans reciprocated by transferring numerous valuable tokens to their partner, suggesting they understand each other's needs.²⁸

In short, orangutans have problem-solving intelligence, reason, mental representations, communication and language skills, inventiveness, self-awareness, self-reflection, psychological continuity, the capacity to plan, memory, and the capacity to put themselves in the place of others.²⁹

We emphasize these facts to underscore the importance of the claim that Sandai is a sentient, rational, emotional, and autonomous individual with beliefs and desires. We add only that these cognitive capacities suffice to qualify Sandai as a *person*. Any human being with the capacities just named is undoubtedly a person. As such, they have strong interests that demand legal protection. This is so even if they lack additional cognitive capacities, such as the ability to act on moral principle. To that capacity we now turn.

4. Rights Holders Need Not be Capable of Bearing Social Obligations.

We here discuss an important objection to our view, that to be a rights holder one must be capable of agreeing to uphold certain social obligations. We grant for the sake of argument that orangutans cannot assume social duties. However, we here show that, contrary to this objection, rights holders need not meet this requirement.

The objection is a significant one, because it has misled many reasonable persons. It demands rebuttal as previous rulings have relied on its misconceptions. For example, in the case seeking habeas corpus relief for Tommy, a chimpanzee, Richard Cupp mistakenly asserts that the “principles of the social contract support recognizing that legal rights are intertwined with a norm of legal accountability.”³⁰ Cupp further contends that the concept of rights was created by humans and is “rooted in” and “has force” “only within that world.” Cupp’s mis-construal made its way, unfortunately, into the court’s reasoning when it, the Third Department, decided against granting habeas corpus for Tommy, the chimpanzee, on the grounds that Tommy could not assume any duties. Citing Cupp, the Third Department asserted:

While petitioner proffers various justifications for affording chimpanzees, such as Tommy, the liberty rights protected by such writ, the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government.³¹

²⁸ V. Dufour, M. Pelé, M. Neumann, B. Thierry, and J. Call (2009), “Calculated reciprocity after all: computation behind token transfers in orang-utans,” *Biology Letter* 5, 172–175.

²⁹ White, *supra* note 10, at 51–52, van Schaik et al., *supra* note 23, at 8–9.

³⁰ Brief of Richard L. Cupp as *Amicus Curiae* Supporting Respondents-Respondents, *Nonhuman Rights Project v. Breheny*, No. 2020-02581 (2020) [hereinafter Brief of Cupp].

³¹ See *Lavery III*, *supra* note 13 at *151 (citing Richard L. Cupp, Jr., *Children, Chimps and Rights: Arguments from “Marginal” Cases*, 45 Ariz. L. J. 1, 12-14 (2013)) (internal citations omitted).

The Third Department further relied on Cupp when it claimed that:

Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, “rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights.”³²

These claims are subject to decisive counterexample. If the liberty rights protected by habeas corpus were confined to those able to bear societal obligations, then infants, the senile, and people with profound congenital cognitive disabilities would lack liberty rights. Such persons are not now, have never been, and should never be thought to lack the protections of habeas corpus.

The Third Department and Cupp arrive at these erroneous conclusions because they misunderstand the contractualist tradition they invoke. According to the social contract theorists whose work most strongly influenced the U.S. system of government—Locke³³ and Rousseau³⁴—individuals have *natural rights* even *before* they enter into social contracts. They *surrender* some of their rights in order to form stable governments. One cannot surrender what one does not have. It follows that, on the contractualist tradition, people need not enter into an agreement and assume social obligations to have rights.

Nor must they be able to do so. As Judge Fahey writes, human neonates, like nonhuman animals, cannot bear duties and “yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one’s infant child.”³⁵ Likewise, Judge Rivera recognizes, “We afford legal protections to those unable to exercise rights or bear responsibilities, such as minors and people with certain cognitive disabilities.”³⁶

One may be inclined to think that infants have such rights only because they have the *potential* to develop the abilities needed to acquire social obligations. If so, we could explain why infants have rights but Sandai does not.

But we cannot limit rights to individuals who have the potential to develop moral autonomy. Such an approach is inconsistent with the idea of the equality of all human beings, because it implies that neurally diverse, congenitally cognitively disabled children without the capacity to develop into moral agents are not persons. These children do not have the potential to develop moral autonomy. However, this is not a reason to exclude them from the circle of protections afforded persons. It would not be improper to seek a writ of habeas corpus on behalf of one’s cognitively disabled child. To think otherwise is counterintuitive and offensive.

It is worth pausing a moment here to examine an argument briefly stated in fn. 3, on p. 152 of the judgment in *Tommy*.³⁷ At the point in which the judgment emphasizes that “Case law

³² *Id.* at 151.

³³ John Locke, *Second Treatise of Government* (C. B. Macpherson ed., 1980).

³⁴ Jean Jacques Rousseau, *The Social Contract and Other Later Political Writings* (Victor Gourevitch ed. and trans., 1997).

³⁵ *See Lavery III*, *supra* note 13.

³⁶ <https://www.nycourts.gov/ctapps/Decisions/2022/Jun22/52opn22-Decision.pdf>

³⁷ *See Lavery III*, *supra* note 13.

has always recognized the correlative rights and duties that attach to legal personhood,” the footnote seeks to repudiate the apparent implication that humans who are unable to reciprocate, or carry out any duties at all, therefore must lack legal personhood.³⁸ The footnote acknowledges, as of course we all must, that some humans are less able to bear legal duties or responsibilities than others. Then it states:

These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise.³⁹

The problem with the passage is simple: the second sentence does not follow from the first. From the fact that human beings *collectively* possess the ability to bear legal responsibility, we are not entitled to conclude that all human beings, whether or not they can individually bear legal responsibility, are entitled to the rights which, as the judgement has just emphasized, have always been recognized as requiring correlative duties. One might just as well argue: “It is undeniable that Chileans, collectively, possess the unique ability to elect the President of Chile. Accordingly, nothing should limit the rights of Chileans (including children) to vote.”

Such arguments are not valid. We are familiar with many examples of rights without correlative duties, and these examples cannot be explained by an appeal to the collective abilities of humans. Nor can they be explained, as might also be attempted, by claiming that certain abilities are typical or characteristic of the species. Our treatment of others should be dictated by their own characteristics, not the characteristics of their relatives.⁴⁰ Hence we cannot base the legal rights that beings have on their ability to understand and carry out their duties. We should, instead, base the legal rights of different beings on their interests.

³⁸ *Id.* at 152 n.3.

³⁹ *Id.*

⁴⁰ Imagine an orangutan who, through neuroscientific enhancement, has obtained all of the abilities characteristic of human beings. See the case of the “Superchimp” in Jeff McMahan, *Cognitive Disability, Misfortune, and Justice*, 25 *Philosophy & Pub. Affairs* 13 (1996). If individuals had rights only because they are members of a species that typically or characteristically possess such abilities, then we would be forced to withhold rights from this orangutan, because orangutans do not typically or characteristically possess these abilities. This is absurd. To avoid this implication, one may endorse a disjunctive view, on which individuals have rights *either* because they have such abilities themselves *or* because they are members of a species whose members typically or characteristically possess such abilities. This disjunctive view faces several problems. First, it is theoretically unmotivated. Again, membership in a species whose members typically or characteristically possess such abilities does not by itself allow one to take on social obligations that, according to Cupp and the 3rd Department, grounds one’s possession of rights. Second, this disjunctive view implies that human beings who lack these abilities have rights for a fundamentally different reason than other human beings. This offends against ideals of human equality. Third, we have strong reason to be suspicious of any view that makes the possession of rights depend on group membership. Humans have a long history of defending such group-based views (e.g., racism, sexism), and time has invariably proven these views to be mistaken.

Sandai cannot and, for all we know, does not, have the potential to be able to participate in our conversations about promises and obligations. He cannot reciprocate with us or bear legal duties. However, these facts about him, if they are facts, no more eliminate him from the circle of persons than does the fact that some humans cannot contract, reciprocate, or assume responsibilities. The assertion that individuals must be capable of accepting social duties to be persons is a nonstarter. We reject this way of thinking in unqualified terms and urge an end to this unsound line of reasoning.

5. The Question of Sandai's Standing Must Not Await Legislative Debate.

One might think Sandai's treatment is not unlawful because the legislative branch has not ruled on whether nonhumans can be persons. This is a grave error. While no nonhuman has previously been the recipient of a habeas corpus order in Chile, this fact does not prevent Sandai from being the first. As Judge Wilson argues, numerous examples confirm "the maxim that habeas corpus is an innovative writ—one used to advocate for relief that was slightly or significantly ahead of the statutory and common law of the time."⁴¹ This flexibility of the writ has allowed it to be used to free slaves from slavery, and to free women and children from abusive husbands and fathers. As Judge Rivera writes, these comparisons are meant not to equate the experience of these humans with the experiences of animals, but to show that "even when those classes of human beings have, by operation of law, been denied legal recognition of their humanity, the writ of habeas corpus was still available to them." In short, Judge Rivera writes, the writ of habeas corpus can be used to "develop the law", even these developments go beyond or even contravene existing law.⁴²

Sandai presents a case in which vagueness in the law fails to address a manifest injustice. Since statute and precedent do not settle whether Sandai is a legal person, the decision whether to grant him legal personhood must be based on basic moral principles. We argue that these moral principles univocally support granting Sandai the status of legal person.

Research has shown that animals with big brains like great apes (including orangutans), orcas, and elephants suffer greatly in captivity regardless of the environmental enrichment in their enclosures.⁴³ Their brains are designed to learn from their conspecifics, so the lack of stimulation causes thinning of the cortex, decreased blood supply, less support for neurons, and decreased connectivity among neurons.⁴⁴ The brain's physical damage affects memory functions and the processing of emotions, leading to depression, anxiety, mood disorders, and post-traumatic stress disorder.⁴⁵ Legislative processes granting legal personhood to these animals typically take years. In the interim, animals suffer enormously from these conditions and are

⁴¹ <https://www.nycourts.gov/ctapps/Decisions/2022/Jun22/52opn22-Decision.pdf>

⁴² <https://www.nycourts.gov/ctapps/Decisions/2022/Jun22/52opn22-Decision.pdf>

⁴³ Casal and Singer, *supra* note 15, at 34.

⁴⁴ B. Jacobs and L. Marino (2020), "The Neural Cruelty of Captivity: Keeping Large Mammals in Zoos and Aquariums Damages Their Brains," *The Conversation*. Available at: <https://theconversation.com/the-neural-cruelty-of-captivity-keeping-large-mammals-in-zoos-and-aquariums-damages-their-brains-142240> (Accessed: July 13, 2022).

⁴⁵ *Id.*

likely to die, as has happened several times in different countries.⁴⁶ For this reason, judges from the highest courts in Colombia, Ecuador, and Argentina have recognized that the writ of *habeas corpus* is an adequate mechanism to request an animal's freedom and transfer to a sanctuary and thus, consider that courts are competent to resolve these types of cases.⁴⁷

6. The Three Most Widely Accepted Moral Theories Agree on Sandai's Case.

We have argued on consequentialist grounds that Sandai should be released. However, one need not be a consequentialist to reach this judgment. While no ethical theory enjoys universal acceptance, ethics textbooks tend to recognize three dominant schools of thought: consequentialism, deontology, and the Aristotelian tradition. The Court may not know which of these theories is correct. Fortunately, it does not have to know because, in this matter, all three theories lead to the same conclusion. Christine Korsgaard, arguing from a deontological perspective, argues for the release of Happy, an elephant, on the basis of our duties to Happy.⁴⁸ Martha Nussbaum, arguing from the Aristotelian tradition, argues for Happy's release on the basis of Happy's capacities.⁴⁹ Sandai has cognitive capacities similar to Happy's. Kantian and Aristotelian arguments very probably apply equally to orangutans as to elephants.

These circumstances place the Court in an enviable position. The major traditions in moral philosophy converge on the same judgment. It is unusual to find such convergence among ethics specialists. But the most influential ethicists from distinct traditions agree; some nonhuman animals have rights. The grounds of the claim that Sandai ought to be transferred are as strong in moral philosophy as the grounds of any claim in this field are likely to be.

Moreover, these views are not limited to academic philosophy. This philosophical convergence parallels public sentiments that increasingly oppose the confinement of cognitively complex animals like orangutans.

7. Other Jurisdictions Increasingly Edge Toward Recognizing Nonhuman Personhood.

Jurisdictions around the world have begun to directly recognize the personhood of cognitively complex animals. In 2015 in the U.S., the Oregon state legislature declared that "Animals are sentient beings capable of experiencing pain, stress and fear"; "Animals should be cared for in ways that minimize pain, stress, fear and suffering"; and, "The suffering of animals

⁴⁶ M. Montes (2021), "Animal Personhood: The Quest for Recognition," *Animal & Natural Resource Law Review* 17, at 147.

⁴⁷ *Id.*

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<https://www.nonhumanrights.org/content/uploads/Christine-M.-Korsgaard-Amicus-Brief-Happy-Case.pdf>

⁴⁹<https://www.nonhumanrights.org/content/uploads/IMOTheNonhumanRightsProjectIncvBreheny-amicus-ProfessorMarthaCNussbaum-AmicusBrf.pdf>

can be mitigated by expediting the disposition of abused animals that would otherwise languish in cages while their defendant owners await trial.”⁵⁰ Article 13 of the Treaty on the Functioning of the European Union (2016) recognizes some nonhuman animals as “sentient beings.”⁵¹ So does legislation in France, the Netherlands, New Zealand, Sweden, Colombia, Portugal, Spain, Quebec and the Australian Capital Territory.⁵²

In 2014, India’s Supreme Court recognized that Raju, an elephant, had a right to be freed after 50 years of confinement.⁵³ In 2014, the Argentine Federal Criminal Cassation Court, one of the highest courts in the country, recognized orangutan Sandra as a subject of rights in a proceeding initiated with a *habeas corpus*.⁵⁴ Later on, Judge Elena Liberatori recognized Sandra as a nonhuman person and a subject of rights.⁵⁵ Sandra’s case has been used as a precedent by other judges in Argentina and worldwide to grant animals legal personhood or recognize them as subjects of rights. For example, the judge that decided to recognize animals as rights holders and close the Marghazar Zoo in Islamabad and transfer the animals to sanctuaries cited Sandra’s case as an example of case law on animal rights.⁵⁶ In 2016, an Argentine court recognized Cecilia the chimp as a nonhuman person and a subject of rights and transferred her to a great ape sanctuary in Brazil.⁵⁷ In 2021, Argentine courts also recognized elephants Guillermina and Pocha as nonhuman persons⁵⁸ and howler monkey Coco as a subject of rights.⁵⁹ More recently, the

⁵⁰ Or. Revised Statutes § 167.305(1) (2015).

⁵¹ See 59 Official Journal of the European Union (June 7, 2016), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:202:FULL&from=EN>.

⁵² Ross Kelly, *Recognition of Animal Sentience on the Rise*, VIN News Service (May 14, 2020), <https://news.vin.com/default.aspx?pid=210&Id=9639465>.

⁵³ Krishnadev Calamur, *Indian Court Says Elephant Who Was Chained for 50 Years is Free*, NPR (Dec. 2, 2014), <https://www.npr.org/sections/thetwo-way/2014/12/02/368028114/indian-court-says-elephant-who-was-chained-for-50-years-is-free>.

⁵⁴ Cámara Federal de Casación Penal [C.F.C.P.] [Federal Criminal Cassation Court], Second Chamber, 18/12/2014, “Orangutana Sandra s/ Recurso de Casación s/ Habeas Corpus,” No 2603/14 (Arg.).

⁵⁵ Juzgado Contencioso Administrativo y Tributario No. 4 de la ciudad de Buenos Aires [J.C.A.T.] [Court for Contentious-Administrative and Tax Proceedings No. 4 of the city of Buenos Aires], 21.10.2015, “Asociación de Funcionarios y Abogados por los Derechos de los Animales y otros c. GBCA sobre amparo,” No. A2174-2015/0 (Arg.).

⁵⁶ Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad, etc., (2020) W.P. No. 1155/2019 PLD (ISL) 1, 4 (Pak.).

⁵⁷ Tercer Juzgado de Garantías de Mendoza [J.G.Men.] [Third Criminal Court of Mendoza], 3/11/2016, “Presentación Efectuada Por AFADA Respecto del Chimpancé ‘Cecilia’ Sujeto No Humano,” [Expte. Nro.] P-72.254/15, (Arg.).

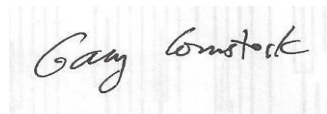
⁵⁸ Cámara Federal de Mendoza [C.F.M.] [Mendoza Federal Court], 14/09/2021, “Presentante: Fundación Tekove Mymbra s/ Habeas Corpus” [Expte. Nro.] FMZ 13623/2021/CA1, (Arg.).

⁵⁹ Juzgado de Primera Instancia en lo Penal Contravencional y de Faltas 4 [Juzgado de Primera Instancia Penal 4] [Court of First Instance in Criminal Matters and Misdemeanors]

Constitutional Court of Ecuador has recognized the legal right of wild animals to be released from confinement via a writ of *habeas corpus* in certain circumstances.⁶⁰ The decision cites Peter Singer in support of the view that denying animals rights on the basis of species is an objectionable prejudice, “speciesism,” and that speciesism violates the law’s commitment to rights of equality and non-discrimination.⁶¹ We encourage this Court to apply this line of reasoning to the case of Sandai.

CONCLUSION

Amici respectfully assert that Sandai’s interest in relative liberty is being violated. His interest in relative liberty is equal to any similar interest of a confined human being’s interest in relative liberty. In both cases, a basic right is at stake. To right the wrong and produce the best consequences, the Court should honor the IJF’s request to move Sandai to a sanctuary.



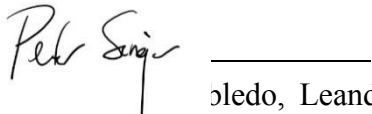
Gary Comstock



Adam Lerner



Macarena Montes Franceschini



ledo, Leandro Nicolas y otros sobre 239 – Resistencia o desobediencia a la autoridad” [Expte. Nro.] IPP 246466/2021-0, (Arg.).

⁶⁰ Nonhuman Rights Project, *Constitutional Court of Ecuador Recognizes Animal Rights in Landmark Ruling*, PR Newswire (Mar. 23, 2022), <https://www.prnewswire.com/news-releases/constitutional-court-of-ecuador-recognizes-animal-rights-in-landmark-ruling-301509297.html>.

⁶¹ Caso Mona Estrellita [El Pleno de la Corte Constitucional del Ecuador] Febr. 22, 2022, No. 253-20-JH, at 25 n.77, 26 n.80 (available in English at <https://animal.law.harvard.edu/wp-content/uploads/Final-Judgment-Estrellita-w-Translation-Certification.pdf> (last visited Apr. 7, 2022)).

Peter Singer