Animal Personhood: A Legal and Moral Defense

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To my mother, Marisol, for her unconditional love and support.

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Paula introduced me to Peter Singer as "the world's greatest expert on animal writs of *habeas corpus*," and I doubt anybody has researched these cases so exhaustively. I also intensely researched the history of the term *person* and read countless papers on animal

cognition. But how do I also know the views of so many authors? How did I learn enough philosophy of science and language to understand that attorneys were confused about cluster concepts, enough metaphysics to understand debates on personal identity, Bios and Zoe, enough political philosophy to express my views in terms of range properties, or enough ethology to have animal examples for every point I wanted to make? The answer is that I received multiple crash courses from Paula on all sorts of subjects as I needed them. I would type a question on Whatsapp and get an instant minilecture on why pain is not all that matters or the complete life history of a weird animal without the gene for pain. I will always recall what I learned this way because it fitted so well with my instincts and my goals that they are now not just part of my thesis but part of how I see the world.

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Having expressed my heartfelt thanks to so many people, I must also say that these opinions are mine, mistakes included, and do not necessarily represent the views of those I thank. Even those close to me have sometimes unsuccessfully attempted to change my mind about some matters, so I am responsible for the ideas expressed in this thesis.

Abstract

The thesis defends the plausibility of nonhuman animal personhood from a legal and moral perspective. It offers an ecumenical defense as it argues that animals can be considered persons from very different, even rival, theoretical positions. It begins by documenting the origins and evolution of the concepts of the *person* and *personhood*, surveying the ideas associated with these terms since Antiquity. This analysis shows that the notion of personhood I employ has been widely used in various professions rather than fabricated for present purposes. This historical research yields a list of the marks of personhood, most of which are scientifically verifiable, for example, using Gallup's mirror test. Having gathered this list and discussed its elements, I propose understanding personhood as a cluster concept defined in terms of a weighted list of related criteria, none of which are necessary or sufficient. I also discuss non-verifiable traits such as soul possession, which already contain not merely descriptive, but also evaluative elements. I then offer a taxonomy of what moral philosophers have argued are the normative implications of personhood. Turning to law, I demonstrate that animals can be considered legal persons according to five conceptions of the legal person, and argue that animals possess the attributes of personality that at least the legal systems of French continental law associate with personhood. Finally, I examine thirty-two cases on animal legal personhood, mainly writs of *habeas corpus*, defining some common trends, findings, and dilemmas to overcome when litigating in court.

Resumen

La tesis defiende la plausibilidad de la personalidad de los animales no humanos desde una perspectiva legal y moral. Ofrece una defensa ecuménica al argumentar que los animales pueden ser considerados personas desde posiciones teóricas muy diferentes, incluso rivales. Comienza documentando los orígenes y la evolución de los conceptos de *persona* y *personalidad*, repasando las ideas asociadas a estos términos desde la Antigüedad. Este análisis demuestra que la noción de persona que empleo ha sido ampliamente utilizada en varias profesiones, en lugar de inventada para propósitos actuales. Esta investigación histórica produce una lista de rasgos de la personalidad, la mayoría de los cuales son científicamente verificables, por ejemplo, utilizando la prueba del espejo de Gallup. Habiendo reunido esta lista y discutido sus elementos, propongo entender la personalidad como un concepto racimo, definido en términos de una lista ponderada de criterios relacionados, ninguno de los cuales es necesario ni suficiente. También discuto rasgos no verificables, como la posesión de un alma, que contienen elementos no meramente descriptivos, sino también evaluativos. A continuación, ofrezco una taxonomía sobre lo que han argumentado los filósofos morales respecto de las implicaciones normativas de la personalidad. Volviendo al derecho, demuestro que los animales pueden ser considerados como personas según cinco concepciones y sostengo que los animales poseen los atributos de la personalidad, que al menos los sistemas jurídicos provenientes de la tradición continental francesa asocian a la persona. Finalmente, examino

treinta y dos casos sobre la personalidad de los animales, principalmente *habeas corpus*, definiendo algunas tendencias comunes, conclusiones y dilemas a superar al litigar ante los tribunales.

Introduction

My story

I am an attorney and, I worked for five years in private law cases in a Chilean law firm. For the last seven years, I have focused on animal law, because I have always been interested in animals. In addition, although I have no training in biology, I adopted two dogs back in 2009 and 2011, so I have been able to observe them closely over the years and contrast my observations with claims that I hear others in my profession voicing against the idea of animal rights or personhood. I also became very interested in the idea of what the person is and why the fact that an individual is a person should make a difference in how we treat this individual. Reading about the work of the Great Ape Project and the Nonhuman Rights Project has also been an enormous inspiration.

During all these years, I have witnessed how the number of *habeas corpus* cases and other legal proceedings which imply the idea that some animals may be persons have proliferated like wildfire throughout Latin America, with various high-profile cases taking place in the US and Asia too. They are reaching progressively higher courts and permeating the culture of our profession, challenging deeply entrenched convictions and conventions. All this made the research very timely and exciting, making me think there is more hope in this route than most of us imagine. I think this legal phenomenon is not only philosophically and legally interesting but

also very positive regarding how we treat animals and how we view them.

All this made me want to work with Professor Casal in this field. The order of the terms *legal* and *moral* in the title reflect this history. The law came first, but it soon became clear to me that I could not understand the issue properly without venturing into ethics and philosophy. However, as these are, in a sense, previous matters, I ended up leaving the most legal and applied aspects of the thesis for the end.

My view

My general view is that people seem overly concerned with having a distinctive view and insufficiently concerned with really understanding matters. As a result, in many fields of inquiry, we have very few solid, stable answers, as to what needs to be done, and an overabundance of theoretical frameworks. A vast number of people seem to focus their intellectual efforts on developing *my* account of this or *my* theory of that and distinguish themselves from others (often in very small ways) by criticizing other views rather than by focusing on the daunting problems we are facing and on really understanding the many complex challenges we face today.

Except for Casal and very few others, most people could not give me a clear and well-thought-out answer to what a person is and why we should be especially concerned that they are not killed, tortured, or

imprisoned. My view, then, is simply that when there is a critical and muddy area, we should strive to understand this rather than be overly concerned with having *our*, somewhat distinctive, personal theory.

In addition, I think there are too many divisions within the animal movement and between the animal and green movements. There is too much focus on differences in outlook, with so many authors calling others speciesist because they do not agree with them on all sorts of complex matters such as intervention in nature or cancer research. Hence, I prefer, perhaps also as a matter of personality, for an overlapping consensus and ecumenical defenses, where we can all come to certain conclusions from a very different route. After all, what matters most is that we reach those agreements and turn them into law.

It was interesting to see how this is possible and how, for example, Casal and Singer could write a book together on the rights of apes, when Singer is a utilitarian and now also of the hedonist variety. It was also exciting to speak with Peter Singer about my thesis and see how his overall theoretical position does not impede his interest in all the new legal developments, and my attempts to understand personhood. In order to move away from utilitarianism and develop a new, rights-based account, political philosopher John Rawls reflected on the idea of the person and invoked the separateness of *persons* (rather than all sorts of individuals) to criticize the utilitarian tendency to "lump" everyone together and view the happiness of separate persons as freely aggregable and interchangeable as if there

was no difference between a person's prudential decisions and public policy (Rawls, 1999, p. 25). And yet, Singer does not find discussions of rights and personhood threatening in any way. Instead, he welcomes this research because of the reduction of suffering that it may achieve. This made me hope that if a utilitarian can see the value of these developments, others with different outlooks could do this too. For example, I can see why some people find it odd to think about animal suffering or the ethical treatment of children in terms of rights rather than in terms of needs, interests, and vulnerabilities (Gruen, 2015).

On the other hand, if it is good that we have a Universal Declaration of Human Rights that is achieving a virtually total consensus in the world, it would also be good if a Declaration of Children's Rights reached comparable agreement and if we could develop a list of the Rights of Persons, human or otherwise, that we can all agree upon. The list should certainly include the prohibition of death, torture, and confinement. If this is our goal, it may be good to have more than one way of understanding what we owe to animals, which can persuade different people and be employed for different purposes. As I hope to be able to show, this approach has a future and has already harvested an important degree of success in court.

From the point of view of the legal defense of animals, speaking about rights is beneficial, and so it makes sense even for utilitarians for whom rights are not fundamental, to support the Great Ape Project, to root for Cecilia during her *habeas corpus*, and to welcome

other such initiatives. In fact, those who are already more deontologically oriented sometimes offer even greater resistance to seeing some animals as persons. Nevertheless, now that we even have Kantian defenses of animal ethics (Korsgaard, 2018), I hope that I will be able to persuade some deontologists that at least some animals should have legal rights or that calling some animals persons is legitimate and plausible, given the history of the concept, and recent scientific findings. I also think it is a good way to capture our moral imagination and sum up a list of traits that most of us think have moral relevance.

My not purely legal view

Turning to the law now, for some scholars, a legal person is, quite simply, whatever we have decided is a legal person. Since it is just a convention, we can agree that all right holders are persons, just as we can agree that all tunic wearers are persons. Legal persons are simply the entities or beings the law recognizes as legal persons. We may still think we have more reason to adopt a convention than another, but in principle, definitions are up for grabs. This view also tends to see the way we use certain concepts within the law as independent from how we use those concepts in philosophy, science, history, and other areas of knowledge. Thus, we may decide that legal persons own property, a condition that has nothing to do with what we associate with personhood in, for example, developmental psychology. Others hold, by contrast, that we cannot simply make it up or that, if we do, we must provide reasons to adopt a convention

and not another, and those reasons often refer to the meaning of personhood in other areas, particularly ethics.

This debate is present throughout this dissertation, and I argue that we can defend animal personhood according to both paths. However, I find the second account more plausible because, as I explain throughout the first chapter on the origins and evolution of the concept of the person, external elements have, in fact, seeped into the law. Moral norms often become traditions and then laws, and laws often become moral norms. After millennia of this dialogue between what we deem moral and what is actually legal, it does not make sense to attempt to impose a particular understanding of a term that is at odds with how we employ it the rest of the time.

My project

The thesis explores the idea that a nonhuman animal can be considered a person from a moral or a legal point of view. I shall be attempting an ecumenical defense of this possibility, for I believe that the idea that an animal can be a person is something that can and should be accepted from a wide variety of positions and does not require our holding unusual or sectarian theories on some particular matters such as the relationship between law and morality, the ethical implications of personhood or any particular theory of rights. The thesis is structured as follows.

Chapter One, *Persons: Origins and Evolution of the Concept*, examines the origins and evolution of the concept of the person to determine what elements have been attached to this concept throughout history. This chapter ends with a table that summarizes the relevant elements.

Chapter Two, *The Verifiable Marks of Personhood*, examines ten verifiable cognitive marks and three verifiable social marks of personhood. This chapter ends with a list of marks that I consider relevant for understanding personhood as a cluster concept.

Chapter Three, *The Status of Persons,* is divided into two sections. The first section examines three non-verifiable marks of personhood which have an evaluative component: the soul, dignity, and human nature. I include these non-verifiable marks of personhood in this section because they have been used to separate humans from other animals by arguing that humans have a higher moral status or special inviolable rights that other animals lack. The second section examines the evaluative dimension of personhood, distinguishing between three theories: the Dual System, the Gradual Hierarchy, and Unitarianism, which offer different answers to how we should treat persons.

Chapter Four, *Traditional Conceptions of Legal Personhood*, examines four traditional understandings of the legal person, arguing that animals can be considered persons in all these four ways.

Chapter Five, *Legal Personhood as a Cluster Concept*, examines a fifth understanding of the legal person as a cluster concept. In this section, I propose using the attributes of personality, a list of legal persons' characteristics widely accepted in civil law legal systems, to argue that animals also possess these attributes. Notably, this section argues that persons have the right to life, freedom, and physical and mental integrity because death, incarceration, and torture can be especially bad for beings who qualify as persons. Please note that I first employ the idea of a cluster concept in search of a philosophical definition of personhood that includes various verifiable traits. I here employ the idea of a cluster again, but this time in search of a legal definition of personhood. The list is not composed of verifiable psychological traits scientists can test. Instead, it is now a list of legal attributes.

Chapter Six, *Animal Personhood in Court: The First Wave (1972–2015)*, and Chapter Seven, *Animal Personhood in Court: The Second Wave (2016-–2021)*, examine thirty-two cases from different countries on animal legal personhood. These chapters identify some surprising trends and findings, as well as three dilemmas concerning the pros and cons of employing legal or political means in animal personhood cases, the relative advantages of the writ of *habeas* corpus (*habeas*) versus other legal strategies, and whether legal practitioners should attempt certain cases with a very low probability of success.

My caveats

To simplify, I shall call nonhuman animals, animals, but other clarifications are necessary.

First, I shall generally indicate all species except for humans and refer, for example, to "chimp Cecilia."

Second, since I am citing attorneys, judges, jurisprudentialists, ethicists, philosophers of mind, ethologists, and other natural scientists, except in some well-known cases, like Kant, I will indicate the individual's profession and refer, for example, to "judge Liberatori." It may sound odd to those from each field, particularly when I cite some well-known authors within a discipline, but it may help others.

Third, as this is a very interdisciplinary dissertation, especially considering the extended use of legal concepts, I include a glossary after the bibliography. I have included the Spanish translation of some legal terms between parentheses. I have not included the translation to other Latin-based languages because they are sufficiently similar to Spanish for the relevant speakers to connect the dots.

Fourth, I include different lists throughout the dissertation in an attempt to systematize the information for the reader and make it available at a simple glance:

(i) The marks of personhood in Ancient Greece.

(ii) The status of persons in Ancient Greece.

(iii) The elements of the person in Roman law.

(iv) The marks of personhood in Medieval Times.

(v) Christian Wolff's different kinds of consciousness.

(vi) Kant's distinction of the capacities between persons and animals.

(vii) Human personality dimensions.

(viii) Defining items of chimpanzees' personality factors.

(ix) Dog's personality traits.

(x) Kathleen Wilkes' different uses of the word *consciousness*.

(xi) Helen Steward's conditions for animal agency.

(xii) Steven Wise's conditions for practical autonomy.

(xiii) Elephant society tiers.

(xiv) Montes' verifiable marks of personhood.

(xv) Remy Debes' list of different understandings of the word *dignity.*

(xvi) Arguments against the Great Ape Project and the Nonhuman Rights Project.

(xvii) The evaluative dimension of personhood theories.

(xviii) The four traditional concepts of the legal person.

(xix) Examples of animals' ability to choose.

(xx) Challenges of the cluster concept of legal personhood.

(xxi) Neil MacCormick's and Visa Kurki's bundle of passive incidents of personhood.

(xxii) Attributes of personality.

(xxiii) Arguments in Bear Chucho's *habeas*.

Finally, I also include five tables, so the reader can come back to a summary of specific concepts like the list of verifiable and non-verifiable marks of personhood, and so the reader can compare different accounts easily. I also include two figures to illustrate how the subset view of legal personhood organizes the legal universe, and a map of the animal legal personhood cases.

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1. PERSON: ORIGINS AND EVOLUTION OF THE CONCEPT

INTRODUCTION

In this chapter, I present a historical overview of the evolution of the term *person* from Ancient Greece to the current days with four objectives. First, the historical development of the person shows its overlapping nature in different fields, such as philosophy, law, theology, and language. Second, its overlapping nature shows the different elements attached to this concept, such as our role in society, rationality, consciousness, and self-awareness. Third, the historical overview shows that the concept of the *person* is different from the concept of the *human*. Fourth, the historical overview is proof that we have always accepted the existence of nonhuman persons. At the end of the chapter, I have included a table summarizing the elements attached to the person historically as a visual aid for the reader. Chapter One paves the way for the following chapters that argue that at least animals can be considered persons in philosophy and law according to the different definitions of the person in these areas.

1.1 THE PERSON IN ANCIENT GREECE

a) Etymology

The etymological origins of the word *person* are unclear. However, most scholars accept that the origins of the Latin word *persona* can be found in the Etruscan word *phersu*, used to refer to a masked character that appears on the Tarquinian Tomb of the Augurs dated 520 BC (Brouwer, 2019, p. 20). The masked figure of *phersu* on the tomb represents the dual nature of the dead: as the deceased and its mystical "I" (Maroi, 1933, p. 93). According to philosopher René Brouwer, who specializes in ancient philosophy, *phersuna*, which meant "belonging to *phersu*" in Etruscan, came to refer to *phersu*'s mask in Rome, as the Romans used the letter p, instead of ph (Brouwer, 2019, p. 22).

Additionally, as Greek theatre influenced Roman theatre, the Greek word *prosōpon* that initially referred to the masks used in theatre (Brouwer, 2019, p. 23) and then referred to the roles and characters on stage (Brouwer, 2019, p. 25), was transferred to Roman theatre as *persona* (Brouwer, 2019, p. 26).[1] We still refer in English to somebody's public *persona* very much in this sense. They are playing a role in front of others, representing a certain character.

[1] As the word *tragedy* comes from the Greek words *tragos* (goat) and *oide* (song), some believe that the use of masks in ancient Greek theatre originated from a dramatic ritual where a goat was sacrificed and the executioner used a mask to prevent the goat from recognizing him (Lonsdale, 1979, p. 153).

According to Roman law scholar José María Ribas, Greek and Roman theatre masks were used as part of a religious ritual to invoke the gods of death and the underground world through music, dance, and words (Ribas Alba, 2012, p. 106). Theatrical masks were then intended to honor or worship the dead, rather than just for entertainment. These rituals using masks honored the wishes of the dead, or at least of some important dead persons, for example regarding their property. This could explain the introduction of the Latin word *persona* in Roman legal vocabulary (Paricio, 2013, p. 283).[2]

In sum, the use of masks was central in the origins of the Latin word *persona*. Romans used masks in two distinct ways that are relevant to the origins of the word *persona*. First, Etruscan burial rituals involving masks transferred to Rome (Brouwer, 2019, p. 28), where Romans represented the deceased through identical masks of their faces (Brouwer, 2019, p. 22). Second, the Greek word *prosōpon* used to refer to theatre masks was transferred to Roman theatre as *persona* (Sheffler, 2017, p. 1; Brouwer, 2019, p. 26). These are the two main ideas regarding the origin of the term that are most generally accepted. As the next sections show, from now on disagreements abound.

[2] Adolf Trendelenburg, German philosopher and philologist, suggests that just as the word *persona* was used to refer to characters on stage in classical theatre, it would then be used in legal vocabulary to refer to characters in court, specifically referring to the plaintiff and defendant (Trendelenburg, 1910, p. 346).

b) Meaning

In this section, I examine the Greek concept of the *person* because it demonstrates that personhood not only focuses on a subjective understanding of ourselves as an "I" but also has a relational dimension grounded on relationships and participation in social life. This concept of the *person* supports animal personhood because many animals are social, develop different types of relationships, and participate in society as family members and companions, as I explain in the following chapters.

However, scholars disagree on whether the ancient Greeks had a concept of the *person* (Sheffler, 2017, p. 3). Some argue that the ancient Greeks had no such concept (Snell, 1953; Dihle, 1982; Cary, 2000). Others hold that they did have this concept but did not understand it exactly like we do today (Gill, 1996; Sorabji, 2006; de Vogel, 2018). As Christopher Gill, philosopher who specializes in ancient thought, plausibly argues, it is hard to believe that the Greeks had nothing like the notion of personhood, which is so central to modern thinking. He warns, however, that we should not assume that the Greek notion of personhood had the same ideological and metaphysical associations that we attach to this notion nowadays (Gill, 1996, p. 3). He thinks that Greeks lacked the modern understanding of personhood because such a concept was influenced by post Cartesian thought, where the subject, the "I", and a subjective perspective of knowledge and psychology play a central role (Gill, 1996, p. 14).

The modern concept of the *person* is considered as a subjective approach, whereas in Greek thought the concept of the *person* should be understood as an "objective-participant" point of view, where reasoning and participating in reflective discourse are the relevant features to distinguish a person (Gill, 1996, p. 12). In particular, the objective-participant view suggests that persons meet the following conditions (Gill, 1996, pp. 11–12):

(i) Persons act on reasons.
(ii) Persons participate in shared forms of human life and discourse.
(iii) Persons have a psycho-ethical life, ruled by reason, interpersonal and communal relationships, and reflective debate.
(iv) Persons are reason ruled due to participating in discourse.
(v) Persons understand themselves as human beings.

None of these conditions rule out women, foreigners or even all animals. Some, however, believe that in Greece the term *person* was limited to those who could participate in public discourse and reflective debate: free Greek men (Schaps, 1998, p. 180). The term *person*, then, could be used to distinguish free individuals with a certain social position and legal standing and ordinary humans which could be wives, foreigners or slaves that did not have the same standing and could even be owned by those with the standing of a

person. This was one of the reasons why people in Ancient Greek were thankful for three things:

(i) being born a human being instead of an animal,
(ii) being born a man instead of a woman, and
(iii) being born a Greek instead of a barbarian (Schaps, 1998, p. 162).

Some scholars, however, challenge this traditional view, arguing that women, foreigners, and slaves had some form of participation in the political space of the agora (Vlassopoulos, 2007, p. 42). Some of the most important and popular philosophers, like Socrates and Plato, certainly believed that not allowing women in politics was as absurd as not allowing female horses to transport grain or female dogs to guide the sheep (Hall, 1913, p. 59).

The Greek understanding of the person focuses on relationships and participation in social life, which is coherent with the Roman law understanding of personhood as the role we play in society, as I explain in the next section. The Greek and Roman concepts of personhood supply the framework for defending in Chapter Four that animals can be considered legal persons due to their role in society.

1.2 THE PERSON IN ROMAN LAW

Roman law was structured upon three categories: *persona* (persons), *actiones* (actions), and *res* (things), which were transmitted to Western legal theory (Van Dyke, 2019, p. 126). In particular, Western legal tradition has been constructed upon the distinction between persons and things (Ribas Alba, 2012, p. 239). These categories were incorporated into civil law legal systems through the process of codification during the 18th century (Guzmán Brito, 2012a, p. 5). Although the influence of Roman law has commonly been studied in relation to civil law legal systems, Roman law also undeniably influenced the common law (Re, 1961, p. 448; Stein, 1991, p. 1591; Nestorovska, 2005, p. 88). The Roman concept of the *legal person* has influenced our legal systems until today. Hence, a defense of animal legal personhood requires understanding how the legal person originated in ancient Rome because animals still play important roles within society.

a) Origins

Pontifical law (*ius pontificium*) was responsible for developing the concept of the *persona* in Roman law. Three different groups of priests preserved and interpreted Ancient Roman law. The College of Fetials was in charge of relations with external communities; the College of Augurs was in charge of omens, and the College of Pontiffs was in charge of protecting the calendar and all public and private rituals (Ribas Alba, 2014, p. 5). Romans believed in the soul's

immortality and considered the dead as active members of their families and political communities, thus, an important part of Pontifical law regulated the cult of the dead (Ribas Alba, 2014, p. 9).

The cult of the departed included the use of funeral masks as *imagines mortuorum o animorum* (Paricio, 2013, p. 283). The Roman ruling class tradition of an actor wearing a funerary mask representing the deceased during burial ceremonies, was decisive for the development of the Latin word *persona* (Ribas Alba, 2014, p. 10). The funerary mask replaced the body of the dead and represented humans as having a unique and incommunicable identity, and the mask's realism represented a concrete biography (Ribas Alba, 2014, p. 11).

Hence, it is no surprise that the word *persona* was used in a legal document for the first time when politician and scholar Quintus Mucius Scaevola (140–82 BC), who was elected as *Pontifex Maximus* (chief priest of Rome), used it in a pontifical *decretum*, which regulated those obligated to the *sacra familiaria* (Paricio, 2013, p. 285). This legal document used the word *persona* when describing those who were forced to perform the *sacra*: the heirs and the deceased's debtor (Paricio, 2013, pp. 285, 286). The idea of giving legal continuity to the deceased through the heirs became relevant in Roman law thanks to this pontifical *decretum* (Ribas Alba, 2012, p. 235).

The introduction of the word *persona* in a legal document produced a systematic opposition between *persona* and *res* (Ribas Alba, 2012, p. 240). To this day, civil law and common law systems distinguish between persons and things. The person thing dichotomy has led to considering persons as the masters of things (Esposito, 2016, p. 27). The law has considered animals as things since Antiquity, so they have been subdued to the "master," the human person, which explains their precarious legal protection.

b) Elements

The pontifical *decretum* managed to incorporate two elements to the concept of the *persona* (Ribas Alba, 2012, p. 235):

(i) Substantial Element: Reference to a particular individual that is represented through the funeral mask.

(ii) Functional Element: Reference to a subject of moral duties that gives continuity to the deceased in legal life.

On the one hand, the pontifical tradition gave the concept of the *persona* a substantial meaning. In Roman law scholar Francisco Paricio's words, a "metaphysical weight," as the *persona* applied to each human considered as an individual with a different and unique identity (Paricio, 2013, p. 287). On the contrary, others argue that Roman law did not offer a metaphysical explanation of persons nor

based the person on a biological notion, but rather simply connected the person to juridical transactions (Mussawir and Parsley, 2017, p. 49).

Paricio's account seems more plausible because funerary rituals did in fact recognize the dead as an individual with a unique identity and biography. Therefore, these rituals were not celebrated only to comply with a legal requirement or transaction but to worship the deceased. Although, the metaphysical foundation of the person that has influenced philosophy and law until today appears later on with Christianity (Mauss, 1985, p. 19), I propose acknowledging that Roman law gave a *primitive* metaphysical dimension to the concept of the person as a unique individual with a concrete biography. This primitive metaphysical dimension is useful in the debate on animal personhood as many animals are in fact individuals with their own identity and biography.

On the other hand, the *persona* also had a functional meaning, so it could be useful in law. *Persona* was considered a character within different legal relations (Paricio, 2013, p. 287). In this functional sense, Roman law would start referring to the *person of the* father, slave, creditor, testator, and heir (Ribas Alba, 2012, p. 236). The functional aspect of the concept of the *persona* was used to describe the different statuses or roles humans had within Roman society. In this sense, Roman law scholar Jakob Fortunat explains that Romans *had* a person, that is, a status or role within society, thus, the word *persona* was a neutral concept used to organize statuses within

society (Fortunat Stagl, 2018, p. 4). As the table at the end of the chapter indicates, the Roman concept of the *person* lacks the complications it has today due to its theological and metaphysical influence later in history (Mussawir and Parsley, 2017, p. 47).

In short, the significance of this pontifical *decretum* lies in uniting both the substantial and functional aspects of the person. The *decretum* designated the individual human being that has a distinct identity as well as the role that humans play within a legal relationship.

c) Gaius' Contribution

The decisive use of the word *persona* came when the famous Roman jurist Gaius (AD 130–180) decided to divide law into *persona* (persons), *actiones* (actions) and *res* (things) (Paricio, 2013, p. 286). In the *Institutiones*, Gaius used the word *person* as a genre that included all human beings to classify them into species that represented the different Roman social statuses. For example, slaves were classified as *persona servi*. The word *persona* was used to indicate that they were human, but the word *servi* indicated that they belonged to the status of slaves and to the category of things (Berger, 1953, p. 628; Iglesias, 1985, p. 118). The rights people had in Rome did not depend on their humanity, but rather on their position within society (de Cossío, 1942, p. 751). In this sense, the word *persona* was used as an instrument of domination to categorize humans within society (Fortunat Stagl, 2015a, p. 379).

Gaius' inclusion of slaves in the category of persons has caused great debate among scholars. Some have considered that slaves had partial legal capacity because they had some limited patrimonial rights, while others have considered that slaves had partial legal capacity just because they were classified as persons (Fortunat Stagl, 2018, p. 2). The former view seems more plausible as Gaius' use of the word *persona* to refer to slaves should not be interpreted in Boethius and Saint Thomas Aquinas's iusnaturalist sense that came later on in history but simply as a recognition that slaves are also human (Fortunat Stagl, 2018, pp. 4–5). Following this view implies that slaves' categorization in Roman law is purely technical and does not reveal anything about their partial legal capacity (Fortunat Stagl, 2018, p. 9).

Ribas agrees that slaves had limited legal capacity, as the *peculium* allowed slaves to manage some assets (Ribas Alba, 2012, p. 238). In fact, some refer to slaves as "potential subjects" (Guarino, 2001, p. 267). Slaves could also be heirs, form family relations similar to those that free men could form and act within the religious order (Iglesias, 1985, p. 126 and 127). Slaves could be considered as legal subjects because they had to bear duties within Roman law, so the concept of the *persona* could be understood as a "responsible subject" (Ribas Alba, 2012, p. 238). Even though slaves were things, they were not treated in the same way as animals because they were still human and had partial legal capacity (Iglesias, 1985, p. 124). Slaves' legal status as things with partial legal capacity is comparable to animals' legal status today. Animals are considered things while holding certain

rights against cruel treatment and welfare protections. However, slaves were also legally categorized as persons in Roman law.

It is important to note that Roman law did not use the word *persona* as the modern subject of rights (Iglesias, 1985, p. 117; Corral Talciani, 1990, p. 302; Guzmán Brito, 1996, p. 271; Fortunat Stagl, 2015a, p. 384). In fact, the *capacity to enjoy rights*, the *capacity to exercise*, and *subjective rights* are concepts that belong to modern law, so the discussion regarding the Latin *persona* should not be based on these concepts (Ribas Alba, 2012, p. 238). Some even propose to analyze the *persona* from the perspective of duties, rather than rights, as duties were clearly established in Roman law (Ribas Alba, 2012, p. 238).

However, Alejandro Guzmán Brito, legal scholar and historian, argues that if we were to apply the modern legal concepts *subject of rights*, *capacity to enjoy rights*, and *capacity to exercise rights and duties* to Roman law, we would have to conclude that even though slaves held certain rights and duties, they lacked the capacity to enjoy rights because everything they acquired belonged to their owners (Guzmán Brito, 1996, pp. 272–273).[3] Nonetheless, slaves had the capacity to exercise as they could enter into certain contracts. Therefore, possessing the capacity to exercise rights and duties was

[3] See the glossary at the beginning of Chapter Three: The Person in Law. The law distinguishes between the *capacity to enjoy rights* (*capacidad de goce*) and the *capacity to exercise* (*capacidad de ejercicio*). Traditionally, the capacity to enjoy rights is the ability to hold rights and duties and the capacity to exercise is the ability to exercise those rights and duties on one's own. See the glossary at the end of this dissertation.

enough to be considered as a subject of rights (Guzmán Brito, 1996, p. 272).[4]

Full legal capacity was reserved to free Roman male citizens who were not subdued to the power of a father (Gardner, 1987, p. 5). As children, women, and men who were subjected to the power of a father were not considered in the same position as slaves or foreigners in Roman society, some argue that it is possible that gradations of personhood existed within Roman society (Allen, 1985, p. 33). The fact that Roman law allowed intermediate states between full personhood and lack of personhood, which considered slaves as things, also suggests a gradation of personhood (de Cossío, 1942, p. 755).

I consider that the discussion on the gradation of personhood belongs to a modern understanding of the person rather than the Roman person, as the latter refers to statuses within society. The fact that slaves were legally considered as *persona servi*, that is, as persons and at the same time, as things, simply meant that they were humans that belonged to that specific status within society, more than indicating that they were less or more persons than others within society. The bundle of rights and duties varied depending on the

[4] Currently, the law considers that all humans are persons with the capacity to enjoy rights. The capacity to exercise is limited in the case of children and people with intellectual disabilities (Planitz, 1957, p. 47). Entities that are considered as things do not have the capacity to enjoy rights nor the capacity to exercise, except corporations that are considered as legal persons. In general, animals are considered things that formally lack the capacity to enjoy rights and the capacity to exercise rights and duties. However, animals hold certain legal rights, so I argue that they possess the capacity to enjoy rights.

status of people: heir, slave, citizen, foreigner, father, subdued to the power of a father, among many others.

***

In sum, ancient Roman anthropology played an essential role in the origins of the legal concept of the *person*, combining elements from theatre and religious rituals to communicate with the dead. The concept of the *person* had two elements: a *substantial* element, which referred to a unique individual with a concrete biography, and a *functional* element, which referred to the role within legal relations and society. I suggest that the primitive metaphysical dimension of the Latin *persona* is useful for animal personhood because it lacks the complications of Christian theology, metaphysics, and medieval philosophy, and their use of concepts like the soul, rationality, and dignity, as I will explain in the following sections. Slaves' legal status shows that a being or an entity can be a rights holder while being regulated as property, like animals today. Although the concept of the person was initially used in Roman law to regulate certain funerary rituals, the person as a role within the law and society persists until today. This definition of legal personhood supports the argument for animal legal personhood, as I will examine in Chapter Four.

1.3 THE PERSON IN MEDIEVAL THOUGHT

a) Theology

Even though Christian theology is responsible for exalting human exceptionalism, and some of these beliefs are still attached to the person today, Christian theology is relevant for the defense of animal personhood because it defends the existence of nonhuman persons: god, Holy Trinity, Holy Spirit, Christ's divine nature, angels, and the devil. Therefore, the use of the term *person* in Christian theology demonstrates that personhood has not been understood by the main institutions and intellectuals of the Western tradition, as coextensive with membership in the *Homo sapiens* species. Hence, those who insist on rejecting the idea of a nonhuman person appealing to "shared understandings" do not have a case.

At the end of the II century, Tertullian (AD 155–220), the first Western theologist, who had just converted to Christianism, dedicated his work to the study and defense of this religion (Paricio, 2013, p. 290). In his work *Adversus Praxean* (AD 213), Tertullian used the word *substantia* to refer to god, and used the word *persona* to refer to the three components of the Trinity: Father, Son, and Holy Spirit (Paricio, 2013, p. 290). Additionally, Tertullian used the word *persona* to explain Christ's dual nature as divine and human (Ribas Alba, 2014, p. 13). The Christian concept of the *persona* was also used to explain the nature of angels (Ribas Alba, 2014, p. 14).

Later on, despite not writing directly on the person, Augustine's (AD 354–430) theology indirectly contributed to the development of the concept of the *person* (Hackmann, 1991, p. 15). During the Council of Nicaea, Christian bishops decided that the Trinity is one substance with three persons (Arias Reyero, 1989, p. 256). Augustine defended this definition and argued that the three persons (Father, Son, and Holy Spirit) have a distinctive relationship to each other within the one substance (Hackmann, 1991, p. 18). In Augustine's explanations of Christ's incarnation, person is understood as a unified relationship of three substances: the divine, the rational soul, and the physical body (Hackmann, 1991, p. 18). In sum, Augustine's theology indicated that a person is a "complex integrated unity of being, relationships, and activities" (Hackmann, 1991, p. 18).

However, it was Boethius' (AD 477–524) definition of *persona* that "inaugurates personhood as such in Latin speaking theology" (Williams, 2019, p. 53). Boethius defined *persona* as: "an individual substance of a rational nature" (Boethius and Stewart, 2011, p. 29). Boethius referred to rationality in the definition of *persona*, but he did not provide any criteria to determine when a being is rational and stated elsewhere that a rational being is capable of thought and free will (Williams, 2019, p. 53).

Philosopher Scott Williams, expert in medieval philosophy and theology, argues that Boethius' rationality condition for personhood was considered irrelevant by many Latin theologians in that period, so there was not much discussion on what rationality involved

(Williams, 2019, p. 84). Gilbert of Poitiers, scholastic theologian, states that incorporating rationality in personhood was a matter of philosophical use (Poitiers, 1966, p. 146). Furthermore, philosopher John Marenbon, expert in medieval philosophy, suggests that incorporating rationality into the definition of *persona* was an arbitrary distinction (Marenbon, 1988, p. 346). In fact, Latin theologians were more interested on the metaphysical aspects of the *persona*, such as exploring the individual substance (Williams, 2019, p. 84). Hence, the debate on rationality as a condition for personhood is a modern philosophical development (Williams, 2019, p. 53). As I examine in Chapter Two, some argue that animals are not persons because they are irrational and quote Boethius' definition, even though it seems that the reference to rationality was originally an arbitrary distinction that Boethius did not really examine. In fact, even today there is no clarity on what rationality is and scientific research has shown that many animals are rational in many ways.

In sum, thanks to theology the word *persona* gained the meaning of "an individual, intransmissible (incommunicable), rational essence which is self-existent" (Trendelenburg, 1910, p. 354). The difficulty of using the concept of the *person* for corporations and other entities in modern times results from the lasting consequences of Boethius' definition, long after that metaphysical and theological account has been overcome (Dewey, 1926, p. 666).

We can conclude that our "shared understanding" is that a *person* and a *human* are not the same thing. The fact that the Holy Trinity

contains three persons and only one of them is *Homo sapiens* shows that this is the case for Christianity. The idea that there is a powerful chief male god (Zeus, Jupiter, Amun-Ra, among others) who chooses a beautiful and pure female human and conceives a child endowed with special powers who performs great feats is, moreover, a common theme of many religious traditions. So, we can say that it has been clear for millennia that a person may be human, not human, and even just partly human.

b) Philosophy

The word *persona* was commonly used during the thirteenth century in the Latin West in different areas of knowledge such as language, logic, law, politics, and theology (Van Dyke, 2019, p. 124). These different uses of the word *persona* overlapped, and basically meant that persons were individual subjects with intrinsic worth, not things (Van Dyke, 2019, p. 127). In this sense, the difference between *persona* and *res* became an important part of Medieval scholarship (Van Dyke, 2019, p. 126). As I argued in the Roman law section, the primitive metaphysical account of the person contributed the *unique individual* to the concept of the *person*. However, Medieval philosophy contributed the idea of *intrinsic worth* to the concept of the *person*.

Philosopher Christina Van Dyke, expert in medieval philosophy, distinguishes three common characteristics of the medieval concept

of the person that may be drawn from language, logic, law, politics, and theology (Van Dyke, 2019, p. 131):

(i) Individuality
(ii) Rationality
(iii) Dignity

First, regarding individuality, Boethius' definition of *persona* was widely accepted in universities in the thirteenth century (Van Dyke, 2019, p. 128). This definition encouraged discussions on persons' individuality, and specifically, persons' subjectivity, particularity, and incommunicability (Van Dyke, 2019, p. 128). For example, theology based its explanation on the distinction between the three persons of the Trinity on persons' individuality being incommunicable to others (Van Dyke, 2019, p. 128).

Second, Boethius' definition of the *person* also states that persons have a rational nature. Van Dyke argues that this criteria was crucial because it separated conscious, reflective, and self-aware beings from those lacking these capacities (Van Dyke, 2019, p. 130). In other words, rationality involved controlling one's actions through intellect and free will, as well as memory, imagination, understanding, and creativity (Van Dyke, 2019, p. 130). For example, during this period, people thought only persons were capable of love and knowledge (Van Dyke, 2019, p. 130).[5]

[5] Some scholars who believe only humans can be considered persons, still believe that only humans are capable of love (Lacalle Noriega, 2016, p. 50). However, research on animal behavior and emotions, as well as neuroscientific research on

Third, between the thirteenth and fifteenth centuries, the concept of *dignity* was commonly discussed in legal, political, and theological contexts related to persons (Van Dyke, 2019, p. 139). Humans were considered subjects rather than things, holding rights and bearing duties, which distinguished them from animals, plants, and non-living objects (Van Dyke, 2019, p. 139). For many centuries, it was thought that animals had duties to behave in a certain way, with failure to conform with them resulting in their public accusation, trial, and conviction to a variety of punishments, including death, if the crime was sufficiently severe. Such crimes may involve the participation in sexual acts with the wrong individual, particularly humans, the killing of others, and the wanton destruction of needed crops (Sykes, 2011). Furthermore, dignity became one of the features that distinguished persons from things due to religious beliefs in souls with dignity that come to join particular bodies and in god as an artist that creates in his image and transmits "his" personality and dignity to his creatures (Van Dyke, 2019, p. 127). This was all obviously intended to privilege humans, but some of the glory of being god's creation was also extended to animals.

Even though all human beings were considered persons during this period, given the widespread belief in god and thousands of angels and archangels, nobody believed that only humans were persons (Van Dyke, 2019, p. 127). As noted earlier, this historical fact supports the case for animal personhood because a common

animals and research on hormones, such as oxytocin, known as "the attachment hormone," evidence that when animals interact with humans or other animals, they also experiment what humans call "love." I discuss love in Chapter Two and Three.

argument against it is that only humans can be persons, as we have understood those terms.

Interestingly, this untenable argument is invoked *particularly* by Christian scholars. Many Christians seem to find the idea of nonhuman personhood threatening, unsettling, or contrary to their faith. They fear that it may clash with the idea of god having created the other animals for our sake or raise uncomfortable questions about chimpanzee souls or heavens. As I have tried to explain, it is particularly Christian scholars that should not invoke our shared traditional understanding of the concept of personhood throughout history to reject the idea that animals may be persons. We return to this issue later, for example, in Chapter Three.

1.4 THE PERSON IN PHILOSOPHY

Philosophers have extensively debated personhood with different ethical and metaphysical concerns in mind, such as when a person ceases to be the person that s/he is, either for the sake of a metaphysical inquiry into personal identity or with a practical purpose such as discussing the legitimacy of crimes committed a long time ago, when the culprit was in some sense another person. In the various discussions, they have associated personhood with different elements or attributes. Hence, defending animal personhood requires understanding the philosophical concept of the *person* and proving that animals possess the attributes that philosophers attach to persons. This section examines the origins of the concept *subject of rights*,

which is extremely relevant in the discussion on *legal* persons as I explain in Chapter Four. This section briefly surveys the contributions that various philosophers made to the conversation about personhood across centuries. Locke, Leibniz, Wolff, Kant, and Fichte were particularly relevant; as is the contribution that Personalism made to the success of the concept of personhood in the XX Century.

a) Subject of Rights

The origins of the concept *subject of rights* (*sujeto de derecho*) is found in XVI century Spanish Scholastic as a philosophical notion used to examine who is entitled to property and other subjective rights (Guzmán Brito, 2012b, p. 137). The word *subiectum* was a translation of the Greek word *hypokeímenon*, which Aristotle used to designate *ousía* that means the essence or substance of categories (Guzmán Brito, 2012b, p. 137). Spanish Scholastic used the word *subiectum* in a metaphysical sense to identify the human being as the essence of *ius*. However, the concept *subiectum* did not replace the concept of the *person* and Scholastics even used *subiectum* to refer to any entity in other contexts (Guzmán Brito, 2012b, p. 138).

Philosopher Gottfried Leibniz was responsible for developing the technical meaning of the concept *subiectum iuris*. Initially, Leibniz considered persons and things as *subiecta iuris* and later on, he only identified persons as such (Guzmán Brito, 2012b, p. 138). Philosophers Christian Wolff and Immanuel Kant followed Leibniz's

theory, identifying *subiectum* and *persona* under the concept *subiectum iuris*, which XVIII and XIX century German scholars widely accepted (Guzmán Brito, 2012b, p. 139).

Even though Leibniz and his followers argued that only humans are subjects, the concept became useful for theories that argue for the rights of animals and nature (Guzmán Brito, 2012b, p. 140). In fact, XVI century Spanish Scholastic used *subiectum* to discuss if animals were entitled to property (Guzmán Brito, 2012b, p. 140).

Modern legal scholars have continued tying the concept of the *person* to the concept of *subject of rights*, making the former a condition for conceiving the latter and vice versa (Esposito, 2012b, p. 2). Judges are no strangers to this trend. For example, judge María Alejandra Mauricio argued in chimpanzee Cecilia's ruling that the law identifies the concept of the *person* with the concept of *subject of rights*.[6] However, the concepts *subject of rights* and *person* seem to be departing as not all subjects of rights are legal persons, according to certain theories of rights. Animals are currently entitled to certain rights granted by animal welfare legislation and criminal law but are not recognized as legal persons. This trend may be seen as a partial victory (at least animals are now subjects of rights) but it may not be necessarily beneficial for animals as it may create an intermediate

[6] 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, at 31 (Arg.).

category that lacks the recognition of fundamental rights normally granted to legal persons, as I argue in Chapter Four.

b) Locke

During the seventeenth and eighteenth century in Europe, the concept of the *person* was widely debated among theologians interested in the Trinity, as well as in politics, morality, and the law, where the concept referred to agency and responsibility for one's actions (LoLordo, 2019, p. 154). According to philosopher Antonia LoLordo, who specializes in the Early Modern period, people then assumed that not all humans were legal persons and that some nonhuman beings, such as corporations, were legal persons (LoLordo, 2019, p. 154).

The most important definition of this period was Locke's definition of the *person* as:

> a thinking, intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places; which it does only by that consciousness which is inseparable from thinking, and, as it seems to me, essential to it: it being impossible for any one to perceive, without *perceiving* that he does perceive. (Locke, 1894, p. 448).

Locke adds that *person* is a:

> forensic term appropriating actions and their merit; and so belongs only to intelligent agents, capable of a law, and happiness, and misery. (Locke, 1894, p. 467).

Locke's reference to happiness and misery suggests that persons are sentient creatures.

Locke's definition of the *person* has been extensively debated (Gordon-Roth, 2020, p. 8). Some scholars have criticized Locke's definition of the *person* because it does not give importance to the soul (Gordon-Roth, 2020, p. 17). Many scholars still wonder what consciousness is for Locke, suggesting that consciousness is simply memory (Gordon-Roth, 2020, p. 14), while some have opposed including consciousness in personhood, considering it an imprecise concept not suited to generate sound philosophical or scientific conclusions (Wilkes, 1993, p. 101). Some philosophers such as Sydney Shoemaker (Shoemaker, 1984) and Derek Parfit (Parfit, 1984) cite Locke's definitions in support of their theories of personal identity in terms of psychological continuity (Shoemaker, 2021).

Finally, animalism appeared as a philosophical view against the neo-Lockean approach to the persistence question in the personal identity debate, arguing that humans belong to the *Homo sapiens* species and thus, share persistence conditions with animals (Blatti, 2020, p. 1). For the metaphysical animalist, a person is a certain kind of animal, and it persists or ceases to do so, when the animal we are persists or

ceases to persist. On this view, if a person called Mary suffers amnesia or dementia, she becomes Mary with amnesia or dementia, but does not cease to be Mary.

Locke's theory of personal identity is still relevant for three current debates. The first concerns persons and their persistence conditions (Gordon-Roth, 2020, p. 31), which is very relevant, for example, to discuss abortion or euthanasia, as philosopher Jeff McMahan has shown (McMahan, 2002). To cite a simple example, it makes no sense to oppose abortion insisting on the identity between myself and the early embryo from which I emerged, when that embryo could have resulted in two individuals, the twins Maca and Rena, who would have been distinct from each other, but still identical to their former selves in complete violation of the rules of transitivity.

The second, but often just as heated debate, concerns not innocent fetuses or demented octogenarians but serious criminals. Personal identity is relevant for discussing the criminal responsibility of perpetrators with mental illnesses, such as Multiple Personality Disorder (Sinnott-Armstrong and Behnke, 2001) and the most common case noted earlier involving punishments for crimes committed by people whose identity has changed drastically over the years (Diamantis, 2019). Finally, Locke's discussion is relevant for nonhuman personhood, since it seems to be concerned with intelligent sentient creatures, but not necessarily with humans, as I will examine in Chapter Two.

c) Leibniz, Wolff, Kant, and Fichte

Most seventeenth and eighteenth century philosophers used the concept of the person when discussing theological and moral issues with a theological basis, such as the soul's immortality, life after death, moral and legal responsibility (Thiel, 2019, p. 187). For instance, Leibniz's concept of the *person* was important for his distinction between human and animal souls and for his notion of individual substance (Thiel, 2019, p. 189).

On the other hand, Wolff focused on consciousness when defining the person, distinguishing between four types of consciousness:

(i) consciousness of current mental states,
(ii) consciousness of the self as a subject of mental states,
(iii) consciousness of external things, and
(iv) consciousness of being the same subject of mental states at different points in time, that is, consciousness of diachronic identity (Thiel, 2019, p. 201).

According to Wolff, a being must possess consciousness of diachronic identity to be considered a person, a condition which was supposed to rule out the possibility of animal personhood (Thiel, 2019, p. 203) but actually fails to do so, as I later explain.

Like Locke, Kant also links the concept of the *person* to self-consciousness and self-identity, granting it an important role when

distinguishing between humans and animals (Thiel, 2019, p. 213). In Kant's words:

> The fact that the human being can have the "I" in his representations raises him infinitely above all other living beings on earth. Because of this he is a *person*, and by virtue of the unity of consciousness through all changes that happen to him, one and the same person – i.e., through rank and dignity an entirely different being from *things*, such as irrational animals, with which one can do as one likes. (Kant, 2006, p. 15)

As I will later show, this criterion does not rule out all animals. More strangely, Kant also distinguishes persons and animals appealing to two capacities (Thiel, 2019, p. 214):

(i) The capacity to differentiate things from each other.
(ii) The capacity to recognize the difference between things.

At this point, one may recall that serious experiments on animal cognition have only been quite recently performed, that scientific knowledge on animals has been quite limited for most of history and that, with some notable exceptions like Aristoteles, Leibniz, and Kropotkin, philosophers very often ignored even the limited ethological knowledge available during their lifetime. Still, the idea that animals cannot differentiate one thing from another is rather

perplexing, unless it is interpreted normatively, as the capacity to understand that an action or state of affairs is different and morally preferable to another, and associate it with moral agency (Ware, 2019, p. 253), and freedom (Ameriks, 2012, p. 123).

In any case, when verifiable traits fail, one can always appeal to unverifiable traits such as the possession of dignity. Unlike other authors, Kant, offered criteria for the possession of dignity, or "absolute inner worth" (Kant, 1996, p. 186): persons are ends in themselves. This, however, does not seem to suffice to disqualify animals. In fact, as philosopher Cristine Korsgaard has shown, a Kantian defense of animal rights and a rejection of their treatment merely as means is also possible (Korsgaard, 2018).

Finally, philosopher Johann G. Fichte regards the "I" as dependent on relations with others (Ware, 2019, p. 255). Hence, he views sociality as a necessary condition for selfhood (Ware, 2019, p. 256). As I argued in the sections on Ancient Greece, Roman law, and in Chapters Two and Four, sociality and relationships with others are important elements of personhood, and humans are not the only social animals. Many other species of animals are social and live in complex societies (Goodall, 1986; Mann *et al.*, 2000; Poole and Moss, 2008).

In sum, for these German philosophers, the concept of the *person* was useful to separate humans from the rest of the animal kingdom, asserting that animals lacked certain capacities that humans possess.

Both because of their profession and their time, they did not seem very informed about what other animals are really like, and so assumed certain characteristics like intelligence, sociality, and a sense of self, to be exclusive to *Homo sapiens.*

d) XX Century's Personalism

During the first half of the twentieth century, personalism became a philosophical school that located the person in the center of philosophical, theological, and humanistic studies (Williams and Bengtsson, 2018, p. 1). This philosophical school considers the person as the "ultimate explanatory, epistemological, ontological, and axiological principle of all reality." (Williams and Bengtsson, 2018, p. 1).

Personalism does not concentrate on a philosopher or specific work but rather involves different schools that share the person's significance, uniqueness, and inviolability (Williams and Bengtsson, 2018, p. 2). Therefore, personalism refers to any philosophical school that focuses on persons and their unique status among other living beings (Williams and Bengtsson, 2018, p. 2).

Personalist thought started developing during the nineteenth century against impersonalist theories perceived as dehumanizing, such as Hegel's idealism (Williams and Bengtsson, 2018, p. 10) and Marxism, which viewed personhood as a relational state within society (White, 2013, p. 83). Personalism defended the inherent

dignity of singular persons, resisting losing the individual to the collectivity, and particularly, standing against totalitarianism, which only values persons as part of the community (Williams, 2019, p. 10).

However, personalism did not only oppose collectivist theories but also individualism, promoting values such as solidarity and interrelations among persons (Williams and Bengtsson, 2018, p. 11). Personalism also resisted Darwin's claim that humans and other animals differ in degree, but not in kind (Williams and Bengtsson, 2018, p. 25). Personalism identified opposing theories, but included different doctrines (Moyn, 2010, p. 88).

In the inter-war period, the French personalist school led by Emmanuel Mounier gained traction in Europe, offering the human person as a solution to the crisis (Williams and Bengtsson, 2018, pp. 13–14). Europe used personalism as a tool to incorporate the human rights discourse in international law after World War II (Moyn, 2010, p. 86). In fact, the French personalist Jacques Maritain had an essential role in drafting the Universal Declaration of Human Rights (Williams and Bengtsson, 2018, p. 15), becoming a notorious postwar human rights philosopher (Moyn, 2010, p. 87). In particular, Charles Malik, a Lebanese Christian diplomat, politician, and philosopher was responsible for the Universal Declaration of Human Rights' personalistic language (Moyn, 2010, p. 99). Thus, the initial discourse of human rights in Europe was linked to Christian personalism and its defense of the human person and human dignity (Moyn, 2010, p. 105 and 106).

Finally, some scholars have opposed personalism because it has supported human exceptionalism (Williams and Bengtsson, 2018, p. 25). For instance, philosopher Will Kymlicka opposes Maritain's radical distinction between persons and all other beings, elevating humanity above animality, and proposes to defend human rights based on other concepts, such as basic needs, vulnerability, embodied subjectivity, capabilities, care, flourishing, or precarious life, which include humans as well as nonhuman animals (Kymlicka, 2017a, p. 19).

1.5 NONHUMAN LEGAL PERSONS

a) Corporations

At the beginning of the twentieth century, the nature of the corporation as an artificial or real person was still subject to debate. Some scholars argued that a corporation's legal personhood is a legal fiction just like humans' legal personhood (Deiser, 1908, p. 138). On the other hand, the German *Genossenschaftstheorie* suggested that the corporation is a "real person with a body, and members and a will of its own" (Geldart, 1911, p. 93). According to legal theorist Bryant Smith, ships, corporations, and natural persons, are all parties to legal relations, and thus, legal persons, discarding the discussion on the fiction or reality of corporate personality as purposeless (Smith, 1928, p. 292).

The legal treatment of corporations is quite unique as the corporation plays the dual role of a person (it owns assets) and a thing (it is owned by shareholders) at the same time (Iwai, 1999, p. 593). Hence, the corporation has "trespassed across that great divide between persons and things at least in the province of law" (Iwai, 1999, p. 593). The legal order has granted legal personhood to these abstract entities simply to facilitate business (Iwai, 1999, p. 592).

During the last years, scholars have discussed whether corporations can be granted human rights (Kulick, 2021, p. 537). Most scholars support the *individualistic approach*, which argues that corporations cannot hold human rights, only individual humans enjoy this protection (Kulick, 2021, pp. 538, 539). However, this approach has caused corporations to hold human rights broadly, as courts look past the corporate veil at the shareholders' rights, granting corporations rights, such as the protection of religious faith (Kulick, 2021, p. 556). Therefore, shareholders have the best of both worlds: They are not liable for private law purposes but they can lift the corporate veil to argue that the corporation holds their own human rights (Kulick, 2021, p. 557).

Hence, corporations should only be granted those human rights that are necessary to achieve the purposes for which the corporation was created (Kulick, 2021, p. 565). For instance, a newspaper requires the protection of its freedom of expression and press, but the newspaper's shareholders cannot argue the right to religious freedom to exclude

abortion from their employee's health care plan (Kulick, 2021, pp. 564–565).

Although corporations are fictitious entities created to facilitate business that, in many cases, serve morally objectionable purposes and sometimes even illegal activities, the debate on expanding fundamental rights to corporations has not had nearly the opposition that expanding some of these rights to animals has encountered. Animal personhood seeks to protect sentient beings who experience a wide range of emotions, many are highly social, possess complex cognitive abilities, and are currently in danger of extinction or subdued to extreme cruelty.

b) Nonhuman Physical Persons

The legal concept of the *person* has been challenged during the last decades due to advances in biology, neuroscience, biotechnology, computer sciences and artificial intelligence (Pietrzykowski, 2018, p. 3), as well as social pressure from ecologists and animal rights advocates to extend legal rights to nature (Stone, 1972) and other animals (Wise, 2000). Nature, animals, and future generations are all included in the *community of the voiceless*, which refers to beings or entities that are not recognized as legal persons and would require guardians to act on their behalf to ensure their protection (Abate and Crowe, 2017, p. 71).

In particular, the traditional dichotomy between natural or physical persons (humans) and juridical persons (corporations) is strained due to certain entities like embryos, fetuses, animals, and artificial intelligence, which are not fictional entities like corporations (Berg, 2007, p. 384). Moreover, some of these entities are not even human. Hence, legal and bioethical scholar Jessica Berg suggests that social interest should be a normative justification for juridical personhood, so entities that are different from corporations can be included in this same legal category (Berg, 2007, p. 384). I argue that animals should be included in the natural person category with humans, as humans are also animals and thus, have far more in common than animals do with corporations or nature.

According to some scholars, the legal person has become the scapegoat for the failure of human rights (Esposito, 2012b, p. 5). For instance, philosopher Roberto Esposito argues that due to the expansion of the ideology of the person and its natural effect of separating entities into things and non-things, human rights have failed (Esposito, 2012b, p. 14). Fortunat disagrees and argues that human nature is the cause of the human rights decay, not the concept of the *person*. He compares Esposito's rejection of the person to protect human rights with firefighting with gasoline (Fortunat Stagl, 2015b, p. 288).

I support Fortunat's view. Humans continue violating other humans' rights and continue exploiting animals and nature as their property, refusing to understand legal personhood in a way that includes other

animals. If human conduct changes in this regard, then the concept of the *person* may help protect historically excluded nonpersons. In legal scholar Richard Tur's words:

> The law may well have to admit itself defeated by the ethical issues raised by certain aspects of personality. In particular, it may be that the law requires to be informed by ethical considerations about the person, rather than that the law itself provides a clear and non-contentious concept of the person. (Tur, 1987, p. 116).

CONCLUSION

The concept of the *person* has overlapped in different areas of knowledge, from theology, law and philosophy to language, and psychology. This makes the attempt to reconstruct a distinct history of the different uses of the concept of the *person* very challenging, if not impossible. This may explain why there is still so much disagreement regarding not only *what* the person is and *who* qualifies as a person, but also what sort of definitions constitute legitimate employments of the term in view of a certain history.

For instance, both theologians and philosophers have studied the person in relation to issues such as the soul, the form, or the substance of an individual, as well as the idea of individuality, idiosyncrasy, identity, and individuation. They have used the term with very different purposes in mind, which makes finding a definition which

can fit all purposes very difficult. To complicate matters further, theology and philosophy have linked certain concepts to the person, such as human dignity and human exceptionalism to separate humans from the rest of the animal kingdom. These concepts have seeped into the law.

Concepts like the soul, inherent worth, and dignity have been especially problematic in philosophical and legal debates on the person because they entail a deep belief that humans do possess these qualities. The positive aspect of these concepts is that we cannot empirically demonstrate that animals do not have a soul, inherent worth, or dignity, in the same way as we cannot prove that humans possess these qualities.

The following table shows the gradual aggregation and overlap of concepts linked to the person throughout history. From Christian theology onwards, the concept of the *person* became convoluted due to the addition of abstract concepts like the soul and dignity. However, two things are clear: the concept of the *person* is different from the concept of the human, and we have always accepted the existence of nonhuman persons.

Moreover, the following tables show the main aspects linked to the concept of the *person* that I examine in the following chapters, which support the argument for animal personhood:

(i) The person has generally not been identified with the human. Nonhuman persons have always existed.

(ii) The person refers to a unique individual.

(iii) The person is a sentient, conscious, self-aware, and intelligent individual.

(iv) The person also refers to a being that participates in social life and relates to others.

(v) The person refers to the role played in society and the law.

<table>
<tr><th colspan="2">ANTIQUITY</th><th colspan="2">MEDIEVAL TIMES</th><th colspan="6">PHILOSOPHY</th><th colspan="2">NONHUMAN LEGAL PERSONS</th></tr>
<tr><th>ANCIENT GREECE</th><th>ROMAN LAW</th><th>THEOLOGY</th><th>PHILOSOPHY</th><th>SUBJECT OF RIGHTS</th><th>17TH & 18TH CENTURY IN EUROPE</th><th>LOCKE</th><th>GERMAN PHILOSOPHY</th><th>PERSONALISM</th><th>CORPORATIONS</th><th>NONHUMAN PHYSICAL PERSONS</th></tr>
<tr><td rowspan="2">Reason</td><td>Opposition to things</td><td rowspan="5">Individual</td><td>Opposition to things</td><td rowspan="6">Nonhumans beings</td><td rowspan="6">Nonhuman beings</td><td>Intelligence</td><td>Human souls</td><td>Human person</td><td rowspan="5">Fiction</td><td rowspan="6">Nonfictional beings</td></tr>
<tr><td rowspan="4">Unique individual</td><td>Individual</td><td>Consciousness</td><td>Consciousness</td><td>Human dignity</td></tr>
<tr><td rowspan="3">Participation in society and discourse</td><td rowspan="3">Rationality: controlling one's actions through intellect and free will, as well as having memory, imagination, and creativity</td><td rowspan="3">Self-awareness</td><td rowspan="3">Consciousness of diachronic identity</td><td rowspan="4">Inherent worth</td></tr>
<tr><td rowspan="2">Biography</td><td rowspan="2">Soul</td><td rowspan="2">Love</td></tr>
<tr><td rowspan="2">Relationships</td><td rowspan="3">Responsibility</td><td rowspan="2">Memory</td><td rowspan="2">Self-awareness</td><td rowspan="2">Dual nature: property & person</td></tr>
<tr><td>Knowledge</td><td rowspan="4">Concept of subject of rights</td><td rowspan="3">Sentience: beings capable of happiness and misery</td><td>Dignity</td><td>Relationships</td><td rowspan="4">Nonhuman beings</td></tr>
<tr><td rowspan="3">Sociality</td><td rowspan="2">Role in legal relations</td><td rowspan="2">Rationality: capable of thought and free will</td><td>Dignity</td><td rowspan="3">Agency</td><td rowspan="2">Inherent worth</td><td rowspan="2">Sociality</td><td rowspan="3">Fundamental rights for corporations</td></tr>
<tr><td>Inherent worth</td></tr>
<tr><td>Status in society</td><td>Nonhuman beings</td><td>Nonhuman beings</td><td>Animalism</td><td>Sociality</td><td>Human exceptionalism</td></tr>
</table>

Table 1. The Marks of Personhood Throughout History

2. THE VERIFIABLE MARKS OF PERSONHOOD

INTRODUCTION

Legality and Morality

One of the most critical debates in the philosophy of law is the relation between legality and morality (Shapiro, 2007, p. 5). This debate has partly focused on the defense or rejection of legal positivism, understood as the theory that defends that "the law is made by explicit social practice or institutional decision" (Dworkin, 2013, p. 4). Philosopher H.L.A. Hart defended that humans create the law and that there is no necessary connection between morality and the law (Hart, 1994).

On the contrary, in *Law's Empire*, philosopher Ronald Dworkin argues that some legal theorists like Hart suffer the "semantic sting" because they cannot explain theoretical disagreements in legal practice but can only disagree on the words used in the law, on how to solve penumbral cases, or on modifying the law (Endicott, 2022, p. 23). Hence, legal scholars like Hart disagree on linguistic aspects of the law (Dworkin, 1986, p. 31). The problem is that in some cases "there are issues of moral principle that lie beneath an apparently linguistic problem" (Dworkin, 2013, p. 17).

According to Dworkin, interpreting the law requires using morality because the law itself cannot solve certain hard cases. For example, an easy case, where a judge only has to apply the law is when someone exceeds the speed limit (Dworkin, 2013, p. 17). However, some cases cannot be solved by applying the law. For instance, if we want to challenge a statute that allows stoning women who talk to men without male supervision, interpreting the words of the law or revising what the lawmaker said at the time of drafting the statute will not solve the problem. Indeed, society was utterly different hundreds of years ago when numerous statutes still in force were enacted, like the 1787 US Constitution or the 1804 French Civil Code. Thus, moral philosophy can help us conclude that the specific statute is unjust and violates women's rights, even if it has been enacted following a constitutionally determined legislative procedure.

Many moral and political philosophers take Dworkin's side. On their view, an analysis of the meaning of a term, our shared understandings and the uses of a word may be necessary, but it is clearly not sufficient. It certainly makes no sense to try to make any decision regarding gay marriage, for example, by merely looking at countless precedents expressing homophobia and bigotry or by studying in various dictionaries the word marriage. We are more likely to get it right the other way around: by engaging in a normative discussion, and once we come to see that what matters has more to do with the intention of continuity and the commitment to look after one another

than with any particular sexual preference, we should adjust all the dictionaries accordingly (Casal, 2013, p. 9).

Other jurisprudentialists, such as Joseph Raz, take a similar position: "a concept is a product of a theory or a doctrine consisting of moral principles for the guidance and evaluation of political actions and institutions. One can derive a concept from a theory but not the other way around" (Raz, 1986, p. 16).

The debate on legal positivism is particularly relevant for the topic of this dissertation. On the one hand, some legal theorists like Kelsen view legal personhood as a legal technicism that depends on social convention reflected in the lawmaker's activity. Hence, legal persons are simply the entities the law recognizes as legal persons. On this view, the law occupies its own separate and self-sufficient sphere, isolated from morality and perhaps from other aspects of culture, science included. If the decision on whether an entity is a person is just a legal decision, it may not even matter what that entity is like from a scientific point of view. This is what happens, for example, with tomatoes and whales, which for natural scientists are fruits and mammals respectively, but have been treated respectively as vegetables and fish by the law (Martí and Ramírez-Ludeña, 2020). Dworkin rejects the view of the law as a separate and self-sufficient sphere. He argues that the law is open to interpretation, and we should use our moral arguments to find the best interpretation of the law.

We can defend animal personhood according to either view. If a legal person is simply what the lawmaker determines, then animals can be considered persons because the only requirement for legal personhood is the lawmaker's recognition. For example, if the lawmaker defines persons as rights holders, then animals can be persons if the law grants them rights. If the law must be informed by moral and perhaps also scientific considerations, then it is also possible for animals to be legal persons, if we can present a convincing case in favor of granting them personhood.

Marks of Personhood

As I explain throughout Chapter One, philosophical elements have seeped into the law, influencing legal discussions on persons as on many other matters, ranging from specific issues such euthanasia and abortion to very general views about what the purpose or function of the law is, its nature and justification. We have good reason then, to see the law as part of our culture and take both philosophical and scientific considerations into account.

The previous chapter shows that historically, a person is not the same as a human and that much of what theologians and philosophers have said about persons is applicable, in view of recent scientific findings, to at least some animals. This chapter continues this argument drawing on more contemporary authors who have specifically focused on this matter.

For contemporary philosophers it seems clear that the concept *human* is a biological concept that depends on possessing human DNA, so human fetuses and corpses belong to the *Homo sapiens* species. However, *personhood* is a philosophical concept with a descriptive and evaluative dimension. The fictional Superman and the signing gorilla Koko, for example, are not humans but they are persons because they possess specific attributes, and thus, possess specific moral standing or rights. In sum, being human is neither a necessary nor a sufficient condition for being a person. It is not necessary because not only supernatural entities, but members of other species may also qualify and it is not sufficient because human corpses, human hair, anencephalic children, and embryos are human but are not persons.

As noted earlier, different marks have been linked to persons throughout history. The table at the end of Chapter One summarizes the marks connected to the person from Ancient Greece to contemporary times. There have been famous concepts of the person throughout history, such as those of the Roman law, Boethius', Locke's, and Kant's. Additionally, during the 20th century, different philosophers have proposed specific marks of persons. The following table summarizes three popular lists of personhood marks proposed by bioethicist Joseph Fletcher (Fletcher, 1972), philosopher Mary Anne Warren (Warren, 1973, para. 30), and scientifically informed philosopher Daniel Dennett (Dennett, 1976).[7]

[7] Philosopher Kathleen Wilkes suggests adding a seventh condition to Dennett's attributes: the construction and use of tools because it is an example of sophisticated behavior (Wilkes, 1993, p. 24). I do not consider tool use as a distinct

<table>
<tr><th>JOSEPH FLETCHER</th><th>MARY ANNE WARREN</th><th>DANIEL DENNETT</th></tr>
<tr><th>1972</th><th>1973</th><th>1976</th></tr>
<tr><td>1. Minimal intelligence.</td><td rowspan="3">1. Consciousness, particularly, the capacity to feel pain.</td><td rowspan="3">1. Persons are rational.</td></tr>
<tr><td>2. Self-awareness.</td></tr>
<tr><td>3. Self-control.</td></tr>
<tr><td>4. A sense of time.</td><td rowspan="3">2. Reasoning: capacity to solve new and relatively complex problems.</td><td rowspan="3">2. Persons are subjects of intentational ascriptions.</td></tr>
<tr><td>5. A sense of futurity.</td></tr>
<tr><td>6. A sense of the past.</td></tr>
<tr><td>7. The capability to relate to others.</td><td rowspan="3">3. Self-motivated activity, which is relatively independent of genetic or direct external control.</td><td>3. Persons are moral objects.</td></tr>
<tr><td>8. Concern for others.</td><td rowspan="3">4. Persons are moral agents.</td></tr>
<tr><td>9. Communication.</td></tr>
<tr><td>10. Control of existence.</td><td rowspan="3">4. Capacity to communicate by whatever means, messages of an indefinite variety of types.</td></tr>
<tr><td>11. Curiosity.</td><td rowspan="2">5. Persons are language users.</td></tr>
<tr><td>12. Change and changeability.</td></tr>
<tr><td>13. Balance of rationality and feeling.</td><td rowspan="3">5. Presence of self-concepts and self-awareness.</td></tr>
<tr><td>14. Idiosyncrasy.</td><td rowspan="2">6. Persons have a special kind of consciousness, usually, self-consciousness.</td></tr>
<tr><td>15. Neo-cortical function.</td></tr>
</table>

Table 2. Fletcher's, Warren's, and Dennett's Marks of Personhood

However, I do not focus on a specific list of marks proposed by philosopher. Instead, I examine the common marks that most

attribute of personhood but rather as an indicator of other attributes, such as rationality and intelligence, and an example of a characteristic that once was thought to be exclusively human. However, research has shown that many animals, including all great apes, many cetaceans, various corvids, and elephants, make and use tools too.

philosophers connect to the person that have been repeated once and again throughout history, such as consciousness, rationality, self-awareness, agency, mental continuity, and sociality. I divide these verifiable marks, which can be empirically demonstrated, into cognitive and social marks. If we are going to treat persons better than nonpersons, it is clearly preferable if personhood can be based on verifiable marks.

Cluster Concept

As it should be clear by now, many different marks have been linked to the person throughout history. Different authors propose different lists of marks. Some focus on a core condition, such as self-awareness, while others invoke a long list. Also, some consider a single condition sufficient for personhood, but perhaps not necessary, while others think that various conditions are necessary. It is very difficult to come up with a single trait that is plausibly both necessary and sufficient for personhood. A solution to this problem is to propose that personhood is a cluster concept.

A cluster concept is "defined by a weighted list of criteria, such that no one of these criteria is either necessary or sufficient for membership" (Matthen, 2010). Membership requires satisfying sufficient criteria or doing so to a sufficient degree. Some other important cluster concepts include art, democracy, game, species, and mathematical proof.

For example, art is a cluster concept because none of the criteria that define art are necessary or sufficient. Works of art like Marcel Duchamp's 1917 urinal *Fountain* or Maurizio Cattelan's golden toilet *America* exhibited at Guggenheim Museum in New York are not beautiful, nor do they imitate nature. They are not even creations by the relevant artist. They were merely moved there by the artist, as some sort of joke. But not all art is comical, weird, shocking, or tries to redefine art. Some examples of "anti-art" are also art (Galambosova, 2022). Art can even be repulsive, like Piero Manzoni's *Merde d'artiste*: 90 tin cans filled with 30 grams of his excrement. One tin was even sold for 270,000€ at a Milan art auction in 2016 (Galambosova, 2022). We could then think that art is provocative, but sometimes it is not, like fruit or vase paintings, such as Caravaggio's *Still Life with a Basket of Fruit* or Cézanne's *Basket of Apples*, which show the artist's talent for capturing variations in light and dark or portray a different perspective of an everyday object. Hence, art is a cluster concept because none of the criteria (beautiful, shocking, comical, bizarre, repulsive, provocative, use of light and dark, or unique perspective of a common object) are necessary or sufficient. Not everything is art, but art does not need to exhibit all the possible traits of art.

We may say the same about personhood. Some otherwise normal people can suffer from amnesia, and even recurrent amnesia, and forget what has happened to them very quickly. But this may not disqualify them as persons if they exhibit other traits. For example, children in rural areas do not recognize themselves in the mirror until

much later than urban children, and African children typically take much longer than Europeans (Broesch *et al.*, 2011). In other respects, rural African children act in incredibly mature and alert ways, and it would be crazy to say than they are not persons if other children their age are. Since the stakes of qualifying as a person are very high, we should not make it all depend on a single feature, as fixating on any single one seems quite arbitrary.

One may think that this increases the chances of animals qualifying as persons. Perhaps, but maybe not. As a matter of fact, normally when an animal satisfies some of the conditions, such as self-awareness, they normally satisfy many other conditions too. While other animals fail to satisfy not just one but a whole set of conditions.

Certain animals exhibit a cluster of apparently unrelated traits, for example, all self-recognizing animals, also practice interspecific altruism, and like to hang out with their friends. So, in nature, traits seem to have appeared in clusters too, but an animal may be very good at certain cognitive tests and less good at others. Bonobos, for example, excel at mind-reading and various social tasks, while chimpanzees are much better with technological experiments and spatial awareness. Something similar happens between males and females, and it would be absurd to count only some species or some genders as persons by fixating on a specific task.

Despite its obvious plausibility, some may still want to reject the idea of personhood as a cluster concept. If so, we can still defend animal

personhood according to a particular definition of the person, picking any one available in the literature.

2.1 COGNITIVE MARKS

a) Biographical Individuality

In Chapter One, I explain that the Roman concept of the *person* had a *substantial* and a *functional* element. The *substantial* element denoted a particular individual represented by the funerary mask, symbolizing a unique identity with a concrete biography (Ribas Alba, 2014, p. 11). Thus, being an individual with a biography was one of the first verifiable traits to describe persons in history. I shall call this verifiable trait *biographical individuality*. This attribute has conserved its importance in philosophy. Philosopher Alasdair MacIntyre calls it narrative unity (MacIntyre, 2007, p. xi). McMahan argues that narrative unity is when the "elements in a life fit together to form a meaningful whole, a series of events that have an intelligible purpose, direction, and overall structure […] a beginning, a middle, and end" and that it is relevant to determine the badness of death (McMahan, 2002, pp. 174–175).

In this section, I explain two relevant aspects of biographical individuality. First, I explain why being an individual with a biography is a verifiable trait. Second, I argue that sentience is a sufficient condition for biographical individuality.

First, biographical individuality is a verifiable trait because a being must possess specific cognitive abilities to have a biography. The ancient Greeks had two words to refer to the concept of "life": ζωή (*zoe*) and βίος (*bios*). Dworkin explains that *zoe* meant physical or biological life, while *bios* meant "a life as *lived*, as made up of the actions, decisions, motives, and events that compose what we now call a biography." (Dworkin, 2011, p. 82). This distinction has been relevant in philosophical debates on euthanasia, abortion, and the killing of nonhuman lives (Ruddick, 2005; Dworkin, 2011). Let us imagine the life of two distinct types of animals: a coral reef and an elephant. A coral reef cannot possess a biography because it cannot act, decide, or experience events. A coral reef's life is simply a biological life, so it is an example of *zoe*. However, an elephant can act, decide, and experience different events like motherhood, grief, play, a mud bath, and sunbathing. Thus, an elephant is an example of *bios*. All living animals have *zoe* but not all living animals have *bios* (Ruddick, 2005, p. 503).

Second, I argue that sentience is a sufficient condition for biographical individuality. Sentience is "the capacity for having any pleasant or unpleasant experiences–or, […] *feelings*." (DeGrazia, 2020, p. 18). Sentient beings have an interest in avoiding or experiencing certain feelings. Hence, they experience their environment in a unique subjective manner, so they possess biographies describing different events and experiences that can make their lives go better or worse.

For example, Happy the Asian elephant was born in the wild in 1971, poached and sent to the Lion Country Safari in the US.[8] In 1977, Happy was sent to the Bronx Zoo, where she was forced to entertain visitors and has been living alone since 2006 (*First elephant to pass mirror self-recognition test; held alone at the Bronx Zoo*, 2018). Happy possesses biographical individuality because she has experienced different events throughout her life that have caused deep suffering, such as losing her family in the wild and her elephant friends Grumpy and Sammie at the zoo. Happy has also experienced positive emotions, especially before being poached, like her relationship as a newborn and as an infant with her mother and other herd members and her friendship with other elephants at the zoo.

b) Idiosyncrasy

Fletcher argues that persons have idiosyncrasies: "an identity, to be recognizable and call-able by name." (Fletcher, 1972, p. 3). Fletcher was thinking about humans when he included idiosyncrasy in the 1972 *Indicators of Humanhood* because we once believed that only humans possessed personality traits (Buss, 1988). However, we now know that many animals possess unique personalities. Indeed early studies tried to avoid anthropomorphizing animals, focusing on specific behaviors instead of broader personality traits, but researchers concluded that broader trait words summarized the animal's behavioral history efficiently (Hampson, John and Goldberg, 1986). Personality studies have examined more than 60

[8] See Happy's *habeas* section in Chapter Seven.

different species (Gosling, 2008, p. 989). I offer six examples of animal idiosyncrasy.

First, researchers define *personality* as the "characteristics of individuals that describe and account for temporally stable patterns of affect, cognition, and behavior." (Gosling, 2008, p. 986). Researchers agree that there are five major human personality dimensions (Svartberg and Forkman, 2002, p. 134):

(i) Extraversion (sociability and activity).
(ii) Neuroticism (anxiety and moodiness).
(iii) Conscientiousness (competence and self-discipline).
(iv) Agreeableness (trust and compliance).
(v) Openness (fantasy and ideas).

Research on animals has revealed that extraversion, neuroticism, and agreeableness show considerable generality across species:

> The evidence indicates that chimpanzees, various other primates, nonprimate mammals, and even guppies and octopuses all show individual differences that can be organized along dimensions akin to E [extraversion], N [neuroticism], and (with the exception of guppies and octopuses) A [agreeableness]. (Gosling and John, 1999, p. 70).

Moreover, factors related to openness, such as curiosity and playfulness, have been identified across many species (Gosling, 2008, pp. 989–990).

Second, following the human personality dimensions mentioned above, zoo chimpanzees have been divided into different personality factors: dominance, extraversion, dependability, agreeableness, emotionality, and openness. The defining items of these personality factors are (Pederson, King and Landau, 2005, p. 537):

(i) Dominance: dominant, submissive, dependent, independent, fearful, decisive, timid, cautious, intelligent, persistent, bullying, and stingy.
(ii) Extraversion: solitary, lazy, active, playful, sociable, depressed, friendly, affectionate, and imitative.
(iii) Dependability: impulsive, defiant, reckless, erratic, irritable, predictable, aggressive, jealous, and disorganized.
(iv) Agreeableness: sympathetic, helpful, sensitive, protective, and gentle.
(v) Emotionality: stable, excitable, and unemotional.
(vi) Openness: inventive and inquisitive.

This research on chimpanzee personality links the personality factors listed above to specific behaviors (Pederson, King and Landau, 2005, p. 544). For example, extraversion is associated to enthusiastic gymnastic activity in chimps, as in humans, while solitary behavior

is negatively correlated to extraversion and openness (Pederson, King and Landau, 2005, p. 545). Chimpanzees also possess a conscientiousness factor like humans, probably due to having developed frontal cortices, including the lack of attention and goal-directedness and unpredictable and disorganized behavior (Gosling, 2008, p. 990).

Chimpanzees in the wild also possess individual personality traits. For example, they show idiosyncratic preferences with no adaptive explanation when building nests at enormous altitudes (Fruth and Hohmann, 1994, p. 114; Casal and Singer, 2022, p. 219).

Third, research has shown that semi-captive Asian elephants also have a complex personality structure and possess three main personality factors: attentiveness, sociability, and aggressiveness (Seltmann *et al.*, 2018, p. 6). The traits used to assess the elephants' personalities are: active, affectionate, aggressive, attentive, confident, distractible, dominant, effective, fearful, friendly, impulsive, inquisitive, inventive, mischievous, moody, obedient, playful, popular, protective, quitting, slow, social, solitary, subordinate, timid, vigilant (Seltmann *et al.*, 2018, p. 5).

Fourth, research has shown that personality traits can be identified in dogs with accuracy (Gosling, Kwan and John, 2003, p. 1166). A 2002 experiment examined the behavior of 15,329 dogs belonging to 164 different breeds, exposing them to different situations such as playing, meeting strangers, and fear-aggression evoking stimuli like

gunshots and metallic noises, revealing five personality traits (Svartberg and Forkman, 2002, pp. 133–135):

(i) Playfulness
(ii) Curiosity/fearlessness
(iii) Chase-proneness
(iv) Sociability
(v) Aggressiveness

Moreover, a 2003 experiment measured dogs' extraversion, agreeableness, neuroticism, openness, and intellect based on the human personality dimensions (Gosling, Kwan and John, 2003, p. 1163). Research has also determined that personality is generally consistent in dogs, and puppy personality tests accurately predict aggression and submissiveness from an early age (Fratkin *et al.*, 2013, p. 17).[9]

Fifth, research on spotted hyenas (*Crocuta crocuta*), who live in stable clans dominated by an alpha female, has shown sex differences for individual traits (Gosling, 1998, p. 108). Female hyenas rate

[9] Anyone living with dogs can easily observe their distinct personalities. Anecdotally, my dogs, Uva and Mora, have had similar lives. I adopted Uva when she was a month old and Mora when she was four months old. Since their adoption, their lives have been similar. They have lived in the same places and had the same care and training. However, they have entirely different personalities. Mora is a "morning person," calm, friendly, never barks, loves to be caressed, bananas, meeting new dogs and humans, and is not scared of loud noises. Uva is always alert, gets tired of people caressing her, dislikes bananas, waking up early, and other dogs, is wary of strangers, barks at humans and animals walking by our house, is afraid of thunderstorms and fireworks, and loves playing with balls.

higher than males in being confident, bold, assertive, argumentative, aggressive, strong, persistent, and irritable. Males rate higher than females in being fearful, nervous, careful, and high strung (Gosling, 1998, p. 112).

Sixth, not only mammals have distinct personalities. Research on great tits (*Parus major*), a small passerine bird, has shown that individuals may be bold and adopt a proactive coping style or shy and adopt a reactive coping style to control their environment (Carere *et al.*, 2005, p. 803). Research on the Guppy fish (*Poecilia reticulata*) has demonstrated consistent individual differences and personality dimensions such as active and sociable, passive, bold and fearful (Budaev, 1997, p. 408). Finally, research on octopuses (*Octopus rubescens*) has categorized their behavior in three personality dimensions: activity, reactivity, and avoidance (Mather and Anderson, 1993), mainly focusing on curiosity, aggression, sociability, and play (Mather, 2007, p. 1).

Fletcher listed curiosity separately from idiosyncrasy in the *Indicators of Humanhood*. However, I include curiosity as a personality trait in this section on idiosyncrasy because this trait has been tested in research on personality in animals, as explained above. Research has shown that many animals explore the world around them even if they are not hungry or thirsty (Byrne, 2013, p. 469). In a 1966 experiment, researchers gave more than 200 zoo animals novel objects. Primates and carnivores investigated the objects more than rodents and marsupials (Glickman and Sroges, 1966, p. 184).

Chimpanzees and gorillas showed a variety of responses to the novel object (Glickman and Sroges, 1966, p. 171). Reptiles showed little response, except for a single crocodile (Glickman and Sroges, 1966, p. 185). Perhaps there is a close relationship between brain size and curiosity (Byrne, 2013, p. 470). Predictably, great apes explore camara traps more than other primates (Forss, Motes-Rodrigo and Tennie, 2019).

Indeed, the famous saying "curiosity killed the cat" is not just an old saying. The US National Fire Protection Association has informed that an estimated 500,000 companion animals are affected annually by home fires. Nearly 1,000 of these fires are accidentally started by the homeowner's companion animals because "dogs are curious and will investigate cooking appliances, candles, or fireplaces. […] Remove stove knobs. A stove or a cooktop is the piece of equipment most often involved when dogs start a fire." (*Toronto Star*, 2018).

c) Sentience

Sentience is the capacity for pleasant of unpleasant experiences (Beauchamp and DeGrazia, 2020, p. 9). Some authors defend that sentience is a sufficient condition for personhood (Francione, 2008, p. 20; Donaldson and Kymlicka, 2011; Kymlicka, 2017b, p. 134). Philosopher Gary Francione argues that sentient beings are capable of suffering and experiencing pleasure, which means they are interested in continuing to live (Francione, 2008, p. 11) and should possess the basic right not to be treated as property (Francione, 2008,

p. 51). Philosophers Sue Donaldson and Will Kymlicka defend that all sentient animals should be considered persons, although they reject the language of personhood and propose using *selfhood* instead (Donaldson and Kymlicka, 2011, pp. 30–31).

I shall continue using the word *personhood* because most scholars, philosophers, and legal practitioners use this term and not selfhood, and this dissertation aims to overcome the barrier separating humans from other animals in the personhood category, demonstrating that an animal can be a person according to the historical, philosophical, and legal understanding of personhood. Sentientists reject other positions requiring sentient animals to possess additional cognitive abilities such as self-awareness.

Claiming that sentience is a sufficient condition for personhood is problematic. As I explained in Chapter One, the concept of the *person* has had a complex evolution, where different attributes have been added to this concept. Sentience is just one of the many attributes linked to persons. Hence, the dominant trend in philosophy is that sentience is not a sufficient condition for personhood, and other attributes are required. Considering the state of the discussion, I suggest that animal advocates should demonstrate that animals possess other attributes when arguing for animal personhood. This approach should not pose a problem because sentient animals possess other attributes of personhood, such as biographical individuality, intelligence, self-awareness, and idiosyncrasy. Perhaps sentience will be seen as a sufficient condition for personhood sometime in the

future but insisting on this now is unlikely to persuade, and so can be imprudently premature and self-defeating.

d) Consciousness

I argue that consciousness is an ambiguous concept (Dawkins, 2001, p. 20), so personhood should not depend solely on consciousness. Here are three examples of confusion regarding the concept of *consciousness*. First, philosopher Kathleen Wilkes argues that consciousness should not be a condition for personhood (Wilkes, 1993, p. 169) because "there is no 'thing' which is consciousness – no unitary or special capacity or state of mind." (Wilkes, 1993, p. 174). Indeed, the adjective *consciousness* has at least four different uses:

(i) Consciousness is being awake, instead of sleeping or being in a coma (Wilkes, 1993, p. 175).

(ii) Consciousness of mental states and events like pain, beliefs, and perceptions (Wilkes, 1993, p. 176).

(iii) Consciousness of sensory experiences (Wilkes, 1993, p. 179).

(iv) Consciousness of propositional attitudes (Wilkes, 1993, p. 180).[10]

[10] A propositional attitude is a mental state for explaining, predicting, and rationalizing ourselves and others (Lindeman, 1995). For example, the sentences *Max believed that he had lost the race* or *Jane hopes that she will get a raise* report a propositional attitude.

Hence, Wilkes argues that our thoughts run between the extremes of consciousness and non-consciousness: "[…] consciousness emerges not only as thoroughly heterogeneous, but also as a prima-facie unpromising, phenomenon for systematic exploration. The majority of psychologically interesting or important events, states, and processes seem not clearly conscious, but are yet not evidently non-conscious." (Wilkes, 1993, p. 182).

Second, Philosopher Ned Block argues that consciousness involves different concepts and phenomena, distinguishing between *phenomenal consciousness* and *access-consciousness*, which are often confused. The former is "what it is like to be in that state," while the latter is used for "reasoning and rationally guiding speech and action" (Block, 1995, p. 227).

Third, consciousness is also confused with sentience. However, consciousness is less complex than sentience, involving a subjective experience or awareness, while sentience is awareness involving feelings (DeGrazia, 2020, p. 27). For example, the 2012 Cambridge Declaration on *Consciousness*, signed by a group of prominent cognitive neuroscientists, establishes that animals possess the neural substrates for emotions (sentience):

> The neural substrates of emotions do not appear to be confined to cortical structures. In fact, subcortical neural networks aroused during affective states in humans are also critically important for generating emotional

> behaviors in animals. Artificial arousal of the same brain regions generates corresponding behavior and feeling states in both humans and non-human animals. Wherever in the brain one evokes instinctual emotional behaviors in non-human animals, many of the ensuing behaviors are consistent with experienced feeling states, including those internal states that are rewarding and punishing. […]
>
> Convergent evidence indicates that non-human animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviors. Consequently, the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness. Nonhuman animals, including all mammals and birds, and many other creatures, including octopuses, also possess these neurological substrates (Low *et al.*, 2012, pp. 1–2).

I claim that it is crucial to distinguish between sentience and consciousness for three reasons. First, recent research on insects has indicated that they may be conscious but insentient, so these animals experience the world subjectively but do not have pleasant or unpleasant experiences (DeGrazia, 2020, p. 18). Robots in the future may also possess consciousness but not sentience (DeGrazia, 2020,

p. 18). Hence, conscious but insentient beings may lack interests and thus, lack moral status (DeGrazia, 2020, p. 30).

Second, research on the naked mole rat (*Heterocephalus glaber*) has shown that they have evolved not to feel pain to tolerate their harsh environment (Young, 2019). These rodents live in densely populated underground burrows, where the air is acidic due to the high levels of exhaled carbon dioxide. This acidic environment would cause a painful burning sensation in most mammals' noses, eyes, and skin (Young, 2019). However, naked mole rats are insensitive to this acidic environment and are also insensitive to capsaicin, the chemical that causes burning pain when eating chili peppers, and AITC, which burns when eating mustard oil (Young, 2019). Capsaicin and AITC are found in the naked mole rats' regular diet. Some humans who possess congenital insensitivity to pain, a rare hereditary disease, are also unable to feel pain (Moawad, 2022).

However, being insentient towards pain does not imply that naked mole rats and humans with congenital insensitivity to pain lack consciousness. Naked mole rats are social animals living in burrows, so they interact with each other and know where to excavate and escape if they perceive danger. Hence, it is possible to be conscious and not suffer from pain. Moreover, lacking the capacity to feel pain does not imply that these mammals lack the capacity to feel pleasure or the capacity to suffer from emotional pain.

Third, as explained above, one common understanding of consciousness refers to being awake. However, we can still suffer during a nightmare and wake up feeling stressed and depressed. Even though we are unconscious during a nightmare, our bodies still react to the stressful dream, causing us to suffer. Hence, it is possible to suffer while being unconscious.

In short, I understand consciousness as "something that it is like to *be* that organism" (Nagel, 1974, p. 436), what Block refers to as *phenomenal consciousness*. When we are dreamlessly asleep, in a coma, or under general anesthetic, there is nothing like being that individual, but when we are awake, there is something that is like experiencing our environment, taste, smell, sound, and colors (Birch, 2022, p. 2). Hence, many animal species, including some insects like bees, are conscious because they experience their environment subjectively even though they may not be sentient (DeGrazia, 2020, pp. 27–28).

e) Rationality

As Chapter One shows, rationality has been a popular attribute linked to persons since Ancient Greece. Indeed, Greeks thought persons act on reasons (Gill, 1996, p. 11). Later on, in Medieval times, Boethius defined the person as "an individual substance of a rational nature" (Boethius and Stewart, 2011, p. 29), stating elsewhere that a rational being is capable of thought and free will (Williams, 2019, p. 53). During this period, philosophers understood rationality as controlling

one's actions through intellect and free will and having memory, imagination, and creativity (Van Dyke, 2019, p. 130). Even though Locke did not explicitly mention rationality in his definition of persons, he viewed the person as a thinking and intelligent being with the capacity to reason and reflect, psychological continuity, and memory (Locke, 1894, p. 448).

Contemporary lists of attributes of personhood like Fletcher's, Warren's, and Dennett's refer to rationality in different ways, as the table at the beginning of this chapter indicates. Fletcher argues that persons are a balance between rationality and feeling, not strictly cerebral nor strictly emotional (Fletcher, 1972, p. 3). Some feminist scholars have criticized focusing on rationality to establish personhood (Albright, 2002). A list of marks of personhood should include emotions. Even though the emotional component has been historically overlooked, it is a crucial aspect of persons, indicating their interests, distinguishing them from other beings that do not experience emotions, like robots. Warren does not include rationality in her list but refers to reasoning as the capacity to solve relatively complex problems. While Dennett argues that "being rational is being intentional" and being intentional "is being the object of a certain stance" (Dennett, 1976, p. 178).

Therefore, rationality has been understood differently throughout history, linking, or confusing it with other marks of the person. For this reason, I examine the capacity to think in the section on consciousness, as having a subjective experience of the world. As I

explain in that section, a robot may be conscious because it has a subjective experience. Thus, it can think, but it does not have emotions, so it is insentient. A robot may make extremely fast mathematical calculations, but cannot suffer or enjoy, and does not have the capacity to care that some strongly (and plausibly) associate with personhood (Jaworska, 2007).

I explain the capacity of controlling one's actions, acting intentionally, reflecting on our thoughts or second-order beliefs, and free will in the section on agency. Psychological continuity and memory also have their own sections in this chapter. Hence, we are left with rationality as intelligence, problem-solving, reasoning, imagination, and creativity. In this section, I argue that many animals are rational according to these criteria.

•Intelligence and Problem Solving

It is difficult to define intelligence and to decide what it entails because it is a broad term (Hurley and Nudds, 2006, p. 2). We can think that an individual who is being bullied is intelligent for ignoring the bully or we may think that anger at bullies and desire to confront them is a sign of intelligence too. Scientists have associated intelligence with very varied behaviors ranging from squirrels' hide-and-find nuts practices to knowledge about a wide range of topics. *Trivia* contest winners are usually described as intelligent. Defining intelligence as the capacity to solve problems does not narrow down the options because problems vary too much, and require different

skills such as communication, memory, and engineering skills. However, orangutans can solve problems that involve over twenty intermediate steps (Miles, 1994, p. 49).

Fletcher considers intelligence as a minimum I.Q. mark in the Stanford-Binet test, so a 40 I.Q. mark indicates that an individual is questionably a person, while individuals below the 20 I.Q. mark are not persons (Fletcher, 1972, p. 1). Obviously, the Stanford-Binet test is not an adequate test to determine animal intelligence because it is designed for humans. It may not even be an adequate test for all humans because it does not consider the enormous inequality and cultural differences among humans (Kaplan, Sadock and Grebb, 1994), nor other forms of intelligence like emotional intelligence that requires perceiving, using, understanding, and managing emotions (Salovey and Grewal, 2005). However, Koko scored 80 in this and other intelligence tests, and humans are not considered intellectually disabled until they fail to obtain 70 (Casal and Singer, 2022, pp. 206–207).

Rationality and *intelligence* are not interchangeable concepts because researchers can observe intelligent animals carrying out irrational behavior according to human standards (Pepperberg, 2006, pp. 469–470). For example, research on grey parrots (*Psittacus erithacus*) indicates that when researchers trick them during certain tasks, requiring them to search longer for an object, they get angry and stop searching, while human children keep searching (Pepperberg, 2006, pp. 480–481). Contrary to what researchers think, I consider that

getting angry for being tricked is a sign of rationality. However, sometimes intelligence and rationality converge, like when Alex the grey parrot learned the names of more than 50 objects, which is considered rational behavior in the case of human children (Pepperberg, 2006, p. 471). Hence, to understand animal rationality, researchers must also consider that the animal's behavior may indicate her own goals and interests, which may seem irrational at first sight to the researchers (Pepperberg, 2006, p. 484).

Considering that intelligence is a broad term, and experts disagree on a definition, I suggest two possibilities that allow us to argue that animals are intelligent. First, we can consider that animals are intelligent for different reasons considering specific domains and recognizing the broadness of the term. A dog, a chimp, and a rat may be intelligent in totally different ways. For example, border collie Rico learned 1,022 names for her toys (Sheridan, 2011), rats have been taught to drive miniature cars to reach a desired area (Crawford *et al.*, 2020), and chimpanzee Washoe, gorilla Koko, bonobo Kanzi, and orangutan Chantek learned American Sign Language (Gardner and Gardner, 1975; Patterson, Tanner and Mayer, 1988; Savage-Rumbaugh *et al.*, 1993; Miles, 1994). They also learned spoken English spontaneously by hearing it on the radio, as well as the language of their own conspecific group. And what is more important, they use that language to communicate very rich and complex inner lives, to express their hopes for the future, to enact imaginary roles, to discuss deep topics like death, to ask questions,

to insult and to make jokes (Casal and Singer, 2022, p. 199, 208, and 221).

Second, we can understand intelligence as *behavioral flexibility*: "the ability to modify or create behavior adaptively in the face of new evidence or changes in world conditions" (Herman, 2006, p. 441). I offer two examples of behavioral flexibility. Firstly, dolphins and dogs understand the human pointing gesture and act accordingly (Herman, 2006, p. 460). Dolphins Ake and Phoenix responded to cross-body pointing gesture on their first exposure, "inferring that the direction of the arm's extension, rather than which arm it was, called attention to an object." (Herman, 2006, pp. 460–461). Secondly, tool use is a sign of problem-solving in animals. There is extensive evidence of the construction and use of tools by chimpanzees, gorillas, orangutans, bonobos, capuchin monkeys, elephants, dolphins, and corvids (Seed and Byrne, 2010, p. 1032). Recently, researchers have documented Goffin's cockatoos building and using tools in the wild (Mioduszewska, Auersperg and O'Hara, 2022).

•Reason

Rationality is sometimes confused with reasoning, defined as "a special kind of behavior-generating process, which might be thought to involve reflective consciousness, or conceptual or linguistic abilities" (Hurley and Nudds, 2006, p. 5). Hence, we may qualify an animal's behavior as rational because it increases the animal's reproduction rate, but this does not mean that the processes that

generated that behavior are rational (Hurley and Nudds, 2006, p. 5). Reasoning or rational processes require an animal to select a specific behavior because it is suitable for what is occurring. For example, an orangutan building and using an umbrella to protect herself from the rain is evidence of reason or a rational process.

In the debate on animal reasoning, scholars have distinguished between *practical rationality* (the rationality of actions) and *theoretical rationality* (the rationality of beliefs). The latter involves evaluating beliefs, conceptual, and linguistic abilities, while the former does not (Hurley and Nudds, 2006, pp. 18–19). Hence, theoretical rationality is more demanding for animals. However, not all reasoning requires conceptual abilities, inference, or theorizing (Hurley, 2006, p. 139).

In any case, we know that many animas have rational beliefs, for example when we play magic tricks and they laugh because they understand that things are not where they are supposed to be, or do not work the way we would rationally imagine they work.[11] We once thought that animals could only reason about the outcomes of accidental interventions but could not make inferences (Taylor, Miller and Gray, 2012), but various findings proved this unjustified. For example, elephants make complex inferences when determining human intruders' threat levels by differentiating their ethnicity,

[11] CBSN Brand Account. (2015) Baby orangutan flips out over magic trick, 10 December. Available at: https://www.youtube.com/watch?v=rNWPqfCJDnc (Accessed: July 10, 2022).

gender, and age (Bates *et al.*, 2007). This example suggests that elephants know that adult Maasai tribesmen sometimes kill elephants in competition for grazing or retaliation for attacks against humans, while Kamba tribesmen, or women and children from both tribes do not pose a threat (Bates *et al.*, 2007; Buckner, 2019, p. 706). Prosecuted apes in Africa seek the help of Western women, as they are most likely to help them than bush meat eating males (Casal and Singer, 2022, p. 18).

Second, research has shown that New Caledonian crows (*Corvus moneduloides*) are capable of inferring the presence of a hidden human agent from the movement of an inanimate object (Taylor, Miller and Gray, 2012, p. 16390).

•Imagination and Creativity

I argue that some animals possess imagination and creativity. For example, research has shown that female infant chimps use sticks as dolls when playing, similar to human children. Thus, female chimps imagine that sticks represent other objects during play. As primatologist Richard Wrangham stated in an interview, playing with sticks as dolls involves: "forming a mental image that is not real but nevertheless represents reality." (Gómez and Martín-Andrade, 2005, p. 146; Handwerk, 2010).

Young chimpanzees also pretend to wrestle and fight (Gómez and Martín-Andrade, 2005, p. 144), and imitate adult chimps that walk

differently due to a physical disability (Gómez and Martín-Andrade, 2005, p. 147). Researchers have also documented language signing chimps play pretending. For example, chimp Viki played by pretending to drag and tug an imaginary pull-toy (Gómez and Martín-Andrade, 2005, p. 151). Chimp Washoe liked playing with dolls, and she would feed and bath them, while chimp Dar was documented signing TICKLE TICKLE to a stuffed bear (Gómez and Martín-Andrade, 2005, p. 153). Washoe will show embarrassment when caught having imaginary conversations with her toys (Fouts and Fouts, 1993, p. 34) and it is common among signing apes to look at food pictures in magazines and comment on how they must taste (Fouts and Fouts, 1993, p. 34). Chimp Loulis would put a block of wood on his head and sign HAT (Fouts and Fouts, 1993, p. 36), and many other apes have created new terms combining those they knew, such as EYE-DRINK for contact lens liquid (Miles, 1994, p. 50). Imagination can have all sorts of purposes. Adult chimpanzees, for example, have also been seen pretending to limp in the presence of the dominant chimp who hurt them (Gómez and Martín-Andrade, 2005, p. 145) and many other animals fake injury or death for different purposes.

Animals can also be creative. First, animals can create works of art like paintings and drawings, as the chimpanzee and elephant painting suggest. They have also taken pictures and self-portraits or pose for them. I explain works of art created by animals in Chapter Five when I argue that animals can have copyright as an attribute of legal personhood. Second, the Sulphur-crested cockatoo Snowball

(*Cacatua galerita eleonora*) became famous for dancing to the beat of the music and inventing 14 distinct dance moves.[12] Researchers have suggested that parrots can dance because they are vocal learners like humans, so their brains can connect sound and movement (Jao Keehn *et al.*, 2019). Third, researchers have documented that dolphins can understand the sign CREATE given by their trainers, meaning they can respond by executing any behavior they choose (Herman, 2006, p. 450). In fact, during the experiment, dolphin Elele executed more than 30 novel behaviors never seen before (Herman, 2006, p. 451).

Interestingly, researchers conducted an experiment on pigeons, teaching them to discriminate between a good piece of art (beautiful) from a bad piece of art (ugly) created by children by reinforcing pecking at the good art (Watanabe, 2010). After learning the discrimination task, pigeons could correctly discriminate novel pieces of art by using color and pattern (Watanabe, 2010), so pigeons may lack the creativity to be an artist like chimps and elephants but can possess the knowledge to be art critics.

Animals can also have humor. I consider that humor is an indicator of imagination and creativity. For example, psychologist Francine Patterson asked Koko, who knew American Sign Language, what her middle name was, and Koko signed DEVIL. On another occasion,

[12] Guardian News. (2019) Scientists discover Snowball the cockatoo has 14 distinct dance moves, 8 July. Available at: https://www.youtube.com/watch?v=iMjr8MsB1qo (Accessed: 29 June 2022).

Koko signed that Patterson was a GORILLA.[13] Koko would also playfully attack Patterson with a monster puppet and laughed when Penny spun her around on a spinning stool.[14] Koko also laughed when a research assistant accidentally sat on a sandwich or when another assistant pretended to feed sweets to a toy alligator (Patterson and Gordon, 1993, p. 66). Koko also liked to play pranks on people and make jokes. For example, she would blow bugs on people to startle them, chuckling before carrying out the prank (Patterson and Gordon, 1993, p. 66). Once Koko was nesting on white towels and signed THAT RED. Research assistant Barbara Hiller corrected her, telling her the towels were white, but Koko insisted on signing THAT RED. The exchange continued until Koko picked up a piece of red lint, showed it to Barbara while smiling, and signed THAT RED (Patterson and Gordon, 1993, p. 62). Another one of Koko's jokes went like this (Patterson and Gordon, 1993, pp. 66–67):

K: THAT ME (to an adult bird).

B: Is that really you?

K: KOKO GOOD BIRD.

B: I thought you were a gorilla.

K: KOKO BIRD.

B: Can you fly?

K: GOOD. (GOOD can mean yes).

B: Show me.

[13] Kokoflix. (2022) Koko's Sense of Humor, 16 June. Available at: https://www.youtube.com/watch?v=hyaNaIIn_Do (Accessed: 11 July 2022).
[14] Beth Gallagher. (2013) A Conversation with Koko, 29 April. Available at: https://www.youtube.com/watch?v=SNuZ4OE6vCk (Accessed: 11 July 2022).

K: FAKE BIRD, CLOWN. (Koko laughs).

B: You're teasing me. (Koko laughs).

B: What are you really?

Koko laughs again, and after a minute signs:

K: GORILLA KOKO.

Dolphins also have a sense of humor. For example, when a young dolphin saw a human blowing cigarette smoke, she rushed to her mother, obtained milk, returned, and started spewing forth milk that looked much like cigarette smoke (Mitchell, 2001, p. 349).

In sum, there is great disagreement on what rationality entails, but I have shown that animals can possess rationality according to the common understandings of the concept, offering examples of rationality in mammals and birds.

f) Agency

In general terms, an agent is "a being with the capacity to act, and 'agency' denotes the exercise or manifestation of this capacity." (Schlosser, 2019, p. 1). Thus, possessing the capacity to act is a sufficient condition for agency. However, as I explained in Chapter One, some philosophers have considered persons as *moral agents*. Hence, agency has been linked to moral agency, free will, and autonomy (Weissman, 2018, p. 609), and rationality thanks to Kant (Steward, 2009, p. 228), contributing to the confusion on agency and particularly, to the opposition to animal personhood (Steward, 2009,

p. 228). In this section, I distinguish the concepts to demonstrate that animals can be considered as persons because they are agents, possess moral behaviors, free will, and autonomy.

•Agency

Philosopher Helen Steward distinguishes between a basic conception of purposive agency possessed by infants and a full-scale propositional attitude psychology, which appears later on in life (Steward, 2009, p. 224). She argues that purposive agency survives into adulthood, and propositional attitude psychology is an outgrowth of the basic concept of agency developed to help us interact with other humans (Steward, 2009, p. 224). Hence, Steward argues that many animals are agents according to four conditions (Steward, 2012, pp. 72–73):

(i) Agents can move some parts or their whole bodies.
(ii) Agents possess some type of subjectivity.
(iii) Agents possess some type of intentional state like trying, wanting, and perceiving.
(iv) Agents settle matters concerning certain movements of their bodies. In other words, these movements are not "a mere reflex or a simple stimulus-response mechanism" (Steward, 2009, p. 225).

Steward believes that it is crucial for animal agents to possess freedom and control over the movements of their bodies to satisfy

their instinctual needs and desires (Steward, 2009, p. 225). Hence, body possession and bodily control are the core of Steward's concept of agency (Steward, 2009, p. 228):

> watching a bird pecking around for food or a cat stalking a mouse is just utterly unlike watching, say, trees blow in the wind or a car drive down a road. To watch a creature engaged in such goal-directed activity is, I maintain, to think of it as a moment-to-moment controller of its own body, a centre of subjectivity, a possessor of some representational and some motivational states (whether or not we are prepared to call these beliefs and desires) and a settler of matters which concern its own bodily movements – and this way of thinking is at the same time a way of seeing. (Steward, 2009, p. 229).

DeGrazia argues that sentient animals have desires, like wanting an experience to continue or stop (DeGrazia, 2009, pp. 202–203). Hence, according to Steward and DeGrazia's accounts, sentient animals have agency.

•Moral Agency

Wilkes argues that animals are not moral agents because they cannot be held responsible for their actions nor reciprocate to others, as reciprocation implies recognizing and acknowledging someone's attitude (Wilkes, 1993, pp. 25–26). I agree that animals are different

from human adults, who can be held responsible for their actions and are criminally liable. However, responsibility is only one aspect of moral agency. Animals and children can reciprocate, act altruistically, and express gratitude. I offer three examples of animals' moral behaviors.

First, some animals have specific duties within their communities. For example, chimpanzees' group hunting shows that individuals have distinct roles, such as the driver, who initiates the hunt, blockers, who prevent the prey from escaping, chaser, who runs after the prey, and ambusher, who silently appears in front of the prey, evidencing shared goals and intentions (Boesch, 2005, p. 692, 2012). Chimpanzees also patrol the borders of their territories (Casal and Singer, 2022, p. 215). Female orangutans breastfeed their offspring between seven and nine years and transmit their culture to them so they can survive in the forest (Casal and Singer, 2022, p. 194). Male orangutans communicate their travel plans in advance, so females can call them if they need defense from other males (van Schaik, Damerius and Isler, 2013). Hence, animals can have distinct duties within their communities that are crucial for their survival.

Second, some animals have a theory of mind, which means they can put themselves in the place of another and see things from their perspective (Royka and Santos, 2022). This ability is linked to deceiving, predicting behaviors, teaching, and empathy (Casal and Singer, 2022, p. 190). For example, primates support each other in fights, hunt together, share food, and console victims of aggression

(de Waal and Suchak, 2010, p. 2711). Primates also help each other altruistically by bringing water or slowing down travel for an incapacitated group member, and female chimpanzees defend their female friends from aggressive males (de Waal and Suchak, 2010, p. 2715). De Waal describes a remarkable case regarding bonobo Kuni, who rescued an injured starling, tried to place his feathers back in place, climbed to the highest tree in her zoo enclosure, and gently opened the bird's wings. The bird tried to fly but fell, so she climbed down and guarded him, preventing other bonobos from coming near until the bird recovered enough to fly away (de Waal, 2005, pp. 1–2).

Research has also shown that elephants act altruistically and empathetically, exhibiting helping behavior during the death of kin and non-related elephants (Douglas-Hamilton *et al.*, 2006, p. 87), as well as forming coalitions, protecting and comforting others, babysitting calves, aiding individuals who cannot move, and removing extraneous objects from other elephants (Bates *et al.*, 2008, p. 204). We can find the same behavior in cetaceans, who show altruistic behavior toward schoolmates and cetaceans from other species (Connor and Norris, 1982, p. 358; Lalot *et al.*, 2021). For instance, whale hunting orcas have been observed freeing a tangled humpback whale on the Australian Coast instead of hunting the whale (Prentice, 2022). Whales have also been documented

protecting human divers from sharks[15] and showing signs of gratitude after being freed from nets by human divers.[16]

Not only do primates, elephants, and cetaceans show reciprocity and altruism. Gray wolves, for instance, enter fights against other packs to defend their pack members instead of escaping (Cassidy and McIntyre, 2016, p. 945). Research has also demonstrated that dogs show reciprocity when they prefer people who have given them food rather than people who have withheld food. They approach and spend time with the former. Thus, dogs can discriminate generous and selfish attitudes and use this information to decide whom to approach (Carballo *et al.*, 2015, p. 20). In fact, discriminating and remembering the generous and selfish behaviors of others is most likely an adaptive ability in social animals (Carballo *et al.*, 2015, p. 1).

Research has also shown empathetically-motivated prosocial helping in dogs towards humans in need (Sanford, Burt and Meyers-Manor, 2018, p. 384), and has shown that dogs reciprocate by helping to provide food to other dogs more, after receiving help from a dog before (Gfrerer and Taborsky, 2017, 2018).

[15] The Dodo. (2018) Whale Protects Diver From Shark, 10 May. Available at: https://www.youtube.com/watch?v=NTw8MR67xv8 (Accessed: 3 July 2022).
[16] Wake Up World. (2011) Humpback Whale Shows Amazing Appreciation After Being Freed From Nets, 17 July. Available at: https://www.youtube.com/watch?v=tcXU7G6zhjU (Accessed: 3 July 2022).

•Free Will

Some philosophers have described animals as *wantons* who only act due to first-order desires, arguing that they are "slaves to their passions" and thus, lack freedom of will (Frankfurt, 1971, p. 11; Wilkes, 1993, p. 25). Philosopher Harry Frankfurt considers that young children and some human adults are also wantons (Frankfurt, 1971, p. 11). I offer three arguments against Frankfurt and Wilkes' position.[17]

First, some animals form second-order beliefs. For example, Jane Goodall's description of chimp Figan's behavior regarding a banana that researchers had placed on a tree and the dominant chimp Goliath sitting under the banana shows that chimpanzees form second-order beliefs:

> One day, sometime after the group had been fed, Figan spotted a banana that had been overlooked – but Goliath was resting directly underneath it. After no more than a quick glance from the fruit to Goliath, Figan moved away and sat on the other side of the tent so that he could no longer see the fruit. Fifteen minutes later, when Goliath got up and left, Figan without a moment's hesitation went

[17] I do not examine the problem between determinism, indeterminism, compatibilism, and free will. However, if determinism is true, and humans are determined by external factors like natural laws, then they do not possess free will, so this concept would not be relevant for discussions on personhood.

> over and collected the banana. Quite obviously he had sized up the whole situation: if he had climbed for the fruit earlier, Goliath almost certainly would have snatched it away. If he had remained close to the banana, he would probably have looked at it from time to time. Chimps are very quick to notice and interpret the eye movement of their fellows, and Goliath would possibly, therefore, have seen the fruit himself. And so Figan had not only refrained from instantly gratifying his desire but had also gone away so that he could not 'give the game away' by looking at the banana (Goodall, 1988, pp. 95–97).

The famous marshmallow test, explained in the following paragraphs, also proves that chimpanzees have second-order beliefs. Even though the chimps want to eat the marshmallows immediately, they refrain from doing it to receive more marshmallows in the future, proving that they have preferences over their preferences (Beran and Hopkins, 2018).[18]

Research has shown that parrots understand that a token can purchase food of different values in a token exchange test, demonstrating that they can decide economically, especially large macaws. This test

[18] This video shows a gorilla forming second-order beliefs by signing to zoo visitors that they should not feed him. Daily Mail. (2018) Moment gorilla tells zoo goers not to feed him with sign language, 15 June. Available at: https://www.youtube.com/watch?v=wIJaJg63cA4 (Accessed: July 10, 2022).

requires inhibiting impulses and evaluating expected incomes because they have to decide if waiting is worthwhile (Krasheninnikova *et al.*, 2018).

In a 2007 experiment on rats, researchers concluded that these animals can reflect on their mental processes because they know when they do not know the answer to a test. Before the test, researchers sometimes gave the rats the option to decline the test and gave them a large reward for answering the test correctly, no reward for answering incorrectly, and a small reward for declining a test:

> If rats possess knowledge regarding whether they know the answer to the test, they would be expected to decline most frequently on difficult tests and show lowest accuracy on difficult tests that cannot be declined. (Foote and Crystal, 2007, p. 551).

Frankfurt understands free will in terms of a dichotomy: possessing second-order beliefs and desires or lacking these beliefs or desires. This way of examining free will falls at odds with biology. Scientists have long abandoned the idea that animals only act in response to external stimuli (Heisenberg, 2009, p. 164). Thus, animals exert self-initiated action (Heisenberg, 2009, p. 165). Animal brains, including human brains, have evolved to exert the capacity of free will to survive; without this capacity we could not make a different choice under identical circumstances (Brembs, 2011, p. 936). Hence, neuroscientists reject the metaphysical concept of free will,

understanding it as a biological trait and shifting the discussion from "do we have free will?" to "how much free will do we have?" (Brembs, 2011, p. 933).

Second, self-control is an expression of free will as it implies deciding whether to exert self-control or not and the way to do so (Rigoni *et al.*, 2012; Feldman, 2017, p. 8). Research has proven that many animals possess the capacity for self-control, which has been tested through delay of gratification experiments. Indeed, self-control is essential for cooperation within animal communities and avoiding dominant competitors when eating or mating (Miller *et al.*, 2019, p. 3). Research has shown that chimpanzees delay gratification in the famous marshmallow test, where they had to choose between a small reward available immediately or a larger reward available in the future (Beran and Hopkins, 2018). Corvids (crow family) and psittacines (parrot order) have shown a capacity for delayed gratification comparable to primates (Miller *et al.*, 2019, p. 13). It is important to note that human children's delayed gratification has also been examined through the marshmallow test (Mischel, Shoda and Rodríguez, 1989).

In fact, researchers have shown that animal self-control processes depend on the same biological resource as human self-control processes: dependency on glucose as energy (Miller *et al.*, 2010, p. 537). The cognitive process of self-control is challenging (Miller *et al.*, 2019, p. 2) as it depletes blood glucose in humans, resulting in worse performance on a subsequent task, which can be corrected by

drinking a glucose drink (Gailliot *et al.*, 2007). The same experiment has been performed on dogs, yielding the same results. Dogs that were given a glucose drink persisted in the task whether or not they had had to exert self-control before the test (Miller *et al.*, 2010, p. 537). These researchers suggest that a sense of self is not necessary for self-control, considering that glucose dependency is a biological commonality between humans and other animals (Miller *et al.*, 2010, p. 537).

Moreover, self-control also depends on the ecological niche of the species. For example, dogs have shown to be better at self-control and more tolerant of longer delays than wolves (Range, Brucks and Virányi, 2020). Socio-ecological factors explain differences in self-control tests in human children. For example, healthier and wealthier children show better self-control (Moffitt *et al.*, 2011). Hence, it is simply false that animals are *slaves to their passions* and that second-order beliefs are required for self-control.

•Autonomy

Philosopher John Christman defines *autonomy* as "the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own" and "to be directed by considerations, desires, conditions, and characteristics that are not simply imposed externally upon one, but are part of what can somehow be considered one's authentic self" (Christman, 2020). Hence, an animal whose acts are controlled by external forces or due to reflex does not qualify as

autonomous (Andrews, 2013, p. 176). Additionally, according to Philosopher David Weissman's definition, autonomous beings can anticipate and adjust their behavior to altered circumstances (Weissman, 2018, p. 611). Thus, every animal has a degree of autonomy (Weissman, 2018, p. 644).

Attorney Steven Wise, president of the Nonhuman Rights Project (NhRP), calls a minimum level of autonomy *practical autonomy*, designing a scale of animals, which determines who should receive basic liberty rights under the common law (Wise, 2002, p. 241). Wise claims that humans, great apes, and dolphins belong to the group of animals who clearly possess sufficient autonomy for basic liberty rights. Elephants and African grey parrots belong to the second group, possessing sufficient autonomy for basic rights. Dogs belong to the third group with most animals, where more research is required to determine whether they possess sufficient autonomy for basic rights (Wise, 2002, p. 241). According to Wise, practical autonomy involves three abilities (Wise, 2013, p. 1283):

(i) Ability to want something.
(ii) Ability to act intentionally to achieve one's desires.
(iii) A complex enough sense of self, where achieving one's goals matters to us.

I think that Wise should have referred to this capacity as *autonomy* instead of practical autonomy because the concept *autonomy* has been central in debates on legal freedoms and rights, so it may be

confusing to use a different concept (Christman, 2020). Perhaps Wise wanted to distinguish this notion from other notions of autonomy, as positive freedom or having several acceptable options to choose from.

g) Self-Awareness

Locke's famous definition of the person considers self-awareness and mental continuity as personhood traits:

> a thinking, intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places; which it does only by that consciousness which is inseparable from thinking, and, as it seems to me, essential to it: it being impossible for any one to perceive, without perceiving that he does perceive. (Locke, 1894, p. 448).

Psychologist Gordon Gallup Jr. developed the mirror self-recognition (MSR) test in 1970 to determine whether chimpanzees had the ability of visual self-recognition. The test consists of anesthetizing and marking an animal with paint or a sticker on a body part that the animal cannot usually see, like the eyebrow ridge and the top half of the opposite ear, and giving the animal access to a mirror after the anesthesia has worn off (Gallup Jr., 1970, p. 86). Investigating the mark signifies self-recognition (Gallup Jr., 1970, p. 86). In this initial experiment, Gallup demonstrated that chimpanzees had a concept of

self, but stump-tailed macaques (*Macaca arctoides*) and rhesus monkeys (*Macaca mulatta*) did not (Gallup Jr., 1970, p. 87). Several other animals have been reported to pass the MSR like orangutans (Anderson and Gallup Jr., 2015), gorillas (Patterson and Cohn, 1994), elephants (Plotnik, de Waal and Diana, 2006; Plotnik *et al.*, 2010), manta rays (Ari and D'Agostino, 2016), dolphins and orcas (Delfour and Marten, 2001), the Eurasian magpie (Prior, Schwarz and Güntürkün, 2008), and the cleaner wrasse fish (*Labroides dimidiatus*) (Kohda *et al.*, 2019, 2022). However, some consider that only humans, and great apes pass the MSR, maintaining a conservative approach (Gallup Jr. and Anderson, 2018).

Since the 1970s, research on animal cognition and behavior has advanced quickly. The MSR has been mainly criticized because the test does not measure other ways animals can be self-aware, such as distinguishing their odor or songs (Bekoff, 2002, p. 255). Likewise, the MSR does not recognize other forms of self-awareness like bodily self-awareness in sentient animals (DeGrazia, 2009, p. 217) or social self-awareness in highly social creatures like wolves (DeGrazia, 2009, p. 202), or pre-intentional self-awareness (Rowlands, 2019, p. 165).[19]

I consider that the MSR is not appropriate for all animals for three reasons. First, the MSR is not even an appropriate tool for all humans.

[19] Philosopher Mark Rowlands argues that pre-intentional self-awareness is when "I am aware of myself but without making myself into an object of any intentional act of mine." (Rowlands, 2019, p. 165). Many animals possess this kind of self-awareness.

For example, research has shown that infants recognize themselves in the mirror at different ages depending on their culture (Broesch *et al.*, 2011). However, we would not say that the children that fail to recognize themselves in the mirror lack a concept of self. Moreover, infants born with complete sight loss cannot recognize themselves in a mirror either.

Second, self-awareness is not binary, so we should not rely on the MSR test as the only indicator of self-awareness (de Waal, 2019). Evolution suggests that self-recognition is gradual, so I find it more plausible for animals to be self-aware at different degrees. For example, pigs (Broom, Sena and Moynihan, 2009) and dogs (Howell *et al.*, 2013) are capable of using mirrors to find hidden food, suggesting some degree of self-awareness in these animals (Broom, Sena and Moynihan, 2009, p. 1037). In De Waal's words:

> Moreover, all animals need a self-concept. A monkey needs to know if a branch can carry his weight before landing on it, or whether he has the strength and skill to win a fight before challenging another individual. Animals need to be aware of the place and affordances of the self in its physical environment as well as the role of the self in their social group. Therefore, to explore self-awareness further, we should stop looking at responses to the mirror as the litmus test. (de Waal, 2019, pp. 6–7).

Third, as explained above, the MSR was created for chimps that are visual, go to sleep with their eyes closed, and possess hands they can use to self-examine their bodies when they wake up (Casal and Marino, 2022, p. 12). There are at least four reasons that show the MSR may not be appropriate for all animals. First, even though some marine mammals have passed the MSR, it may not be optimal for them because sound is more important for underwater animals than vision (Delfour and Marten, 2001, p. 189). Second, they require a somewhat different procedure because they do not fall asleep (Casal and Marino, 2022, p. 8). Third, some animals do not possess hands, feet, or trunks, so the role of the tactile sense in self-examination during the MSR cannot be performed in these cases (Delfour and Marten, 2001, p. 189). Four, some animals rely on olfaction like dogs, who use olfaction first, then audition, and finally, vision. Research has shown that dogs investigate their odors longer when they have an additional odor than when they do not and also spend longer investigating the odor of other dogs than their own, suggesting that they recognize themselves (Horowitz, 2017)

Gallup and psychologist James Anderson criticize olfactory tests because they consider that self-awareness requires a concept of self as a whole, not fractioned according to each sense (Gallup Jr. and Anderson, 2018, p. 17). I argue that for personhood, recognizing their smell, image, or sounds is sufficient because this suggests animals have some concept of self, considering that this is a matter of degree due to evolution. Additionally, Gallup and Anderson's position may be overly anthropocentric, failing to acknowledge how other senses

than sight may work in other species. In this sense, a visual cue may not mean anything to a particular animal. However, an olfactory cue may give the animal all the information needed about himself or others.

h) Memory

Philosophers have associated memory, rationality and personhood at least since medieval times (Van Dyke, 2019, p. 130). Locke's definition of personhood also led some philosophers to examine what he meant by consciousness, suggesting that it is largely memory of one's past (Gordon-Roth, 2020, p. 14). As an attribute of personhood, memory could also be argued on behalf of computers, robots, or artificial intelligence, but I specifically focus on animal memory and do not believe that remembering a loving mother, a tragic death, or painful medical procedures has the same moral relevance as storing infinite amounts of data. In this section, I argue that animals can remember different events, can have episodic memories, and can possess emotional memory too.

First, there is extensive research on the capacity of animals to remember different events. For example, sheep can remember 50 different sheep faces for over two years (Kendrick *et al.*, 2001). Old female elephants remember sources of food and water during droughts that occurred many years ago, helping their families survive current droughts (Foley, Pettorelli and Foley, 2008). Great apes can recall participating in experiments performed many years ago,

remembering what to do precisely to receive the reward (Martin-Ordas, Berntsen and Call, 2013, p. 1438). Chimpanzees can easily beat humans at short-term memory tests.[20] Research has shown that they have similar memories to humans, remembering past events, possessing involuntary memory retrieval and long-term memory, suggesting that the "ability to spontaneously recollect past events may be shared across species" (Martin-Ordas, Berntsen and Call, 2013; Lewis, Berntsen and Call, 2019, p. 121).

Second, episodic memory, which gives us information on the what, when, and where of something that happened was also thought to be uniquely human (Clayton, Bussey and Dickinson, 2003, p. 686). However, research on Western Scrub-Jays (*Aphelocoma californica*) has shown that these birds remember the food they hid, where and when they hid it (Clayton, Bussey and Dickinson, 2003, p. 685). Squirrels can also remember the content and location of the food they have hidden (Jacobs and Liman, 1991).

Third, animals can also have emotional memories, which not only store facts but the emotional response to those facts (Casal and Singer, 2022, p. 38). Many animals with remarkable memories also have emotional memories. Emotional memory makes animals remember when they were hurt, and it makes them feel frightened and have nightmares, develop stereotypical behavior, and other mental issues (Lopresti-Goodman, Kameka and Dube, 2013; Casal

[20] Laffsteve. (2007) ABC News, Chimps vs Humans, 9 December. Available at: https://www.youtube.com/watch?v=cPiDHXtM0VA (Accessed: 30 June 2022).

and Singer, 2022, p. 38). However, emotional memory also allows animals to know who to be grateful to and whom to trust or punish, so it is necessary for morality (Casal and Singer, 2022, p. 38).

I consider emotional memory particularly relevant for personhood for two reasons. First, emotional memory causes animals to suffer not just in the moment, but when they remember that event, even years later, and by fearing that the event will happen again in the future (Casal and Singer, 2022, p. 224). In some cases, they have been through such horrible experiences that they will never forget what happened. I offer two examples. Chimp Annie was used in research at the *Laboratory for Experimental Medicine and Surgery in Primates* (LEMSIP), where they performed biopsies on her, and injected her with drugs. Fauna Foundation rescued her, and Annie adopted several young chimps in her new home. However, Annie remembered being tortured at the lab, so she would hide with her adoptive children when she thought people from the lab were coming (Casal and Singer, 2022, p. 76).

Gorilla Koko had a kitten called All Ball, who was run over by a car in December 1984.[21] Koko cried when she was told the news. Three days later, Patterson asked Koko if she wanted to talk about All Ball, and Koko signed CRY. She was then asked what had happened to All Ball, and she signed SLEEP CAT. When Koko saw a picture of a similar cat to All Ball, she would sign CRY, SAD, FROWN

[21] Thinky TV. (2017) Koko Amazing Talking Gorilla – Befriends kitten & gorilla (recounts death of mother by poachers), 5 August. Available at: https://www.youtube.com/watch?v=1ihC6QHS_m0 (Accessed: 29 June 2022).

(Patterson and Gordon, 1993, p. 67). Months after All Ball's death, Koko had the following conversation with Patterson (Patterson and Gordon, 1993, p. 67):

> F: How did you feel when you lost Ball?
> K: WANT.
> F: How did you feel when you lost him?
> K: OPEN TROUBLE VISIT SORRY.
> F: When he died, remember when Ball died, how did you feel?
> K: RED RED RED BAD SORRY KOKO-LOVE GOOD.

Second, having an emotional memory is intimately linked to being self-aware, having psychological continuity, a specific biography, and idiosyncrasy, also attributes of personhood. Annie and Koko can remember events from *their* pasts that have made them experience a diverse array of emotions. These experiences make up their biographies, give their lives narrative unity, and influence their personalities, making them distrustful, cautious, empathetic, or frightful.

i) Psychological Continuity

As noted earlier, Locke understood the person to be "a thinking, intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places"

(Locke, 1894, p. 448). His conception of personhood is probably the most influential not only regarding metaphysical discussion on personal identity, but also in contemporary bioethics. His views figure prominently in Peter Singer's work, for example, who has, in turn, been very influential in this field. Definition of the person has generated an intense debate thus far on persons' persistence conditions in the topics of abortion, euthanasia, criminal responsibility, and nonhuman personhood. Locke is not the only philosopher who refers to psychological continuity. As explained in Chapter One, Wolff argues that persons have consciousness of diachronic identity, which is being the same subject of mental states at different points in time (Thiel, 2019, p. 201).

Psychological continuity is relevant for personhood because beings with this capacity are intimately connected to their pasts and futures, so these matter to them. They are connected to their past through memories and their future through goals, projects, and plans. Their present is filled with activities to accomplish their goals in the future. Hence, "psychological unity is a condition of many goods, such as friendship and achievement, that require a continuing access to one's past through memory." (McMahan, 2002, p. 173).

j) Planning

The capacity to plan is an attribute of personhood because it reflects how certain individuals are intimately connected to their future though different plans and projects that they wish to accomplish.

Human children between the ages of three and four start acquiring the ability to deal with future-oriented situations (Thompson, Barresi and Moore, 1997). When children are a bit older, they start communicating their dreams of becoming a veterinarian or a firefighter. This capacity explains why a six-year-old child's death is worse than a fetus' death, even though the fetus has more years to live, as I explain in Chapter Five (McMahan, 2002, p. 170; Casal and Singer, 2022, p. 33). If all things are equal, the death of an individual is worse if she had plans and projects that she will be uncapable of fulfilling (Singer, 2011, pp. 76–77). If instead of dying, she suffers an accident that prevents her from accomplishing the projects she had been working for like climbing Mount Everest, she will most likely suffer deeply for being deprived of the future that she had envisioned for herself.

Animals can also make plans for their future. The construction and the use of tools indicate that animals plan (Seed and Byrne, 2010; Casal and Singer, 2022, p. 85). For example, chimps can spend a long time searching for a specific stone they need to make a tool, build it, and then take it to a different location to use (Casal and Singer, 2022, p. 85). Primatologist Karel van Schaik has documented orangutans using more than 38 different types of tools, including bee covers, auto-erotic tools, dolls, cushions, fans, flyswatter, napkins, nail cleaner, seed-extractor, straw, and tooth cleaners. Thus, they are planning for their self-hygiene, for their protection against bugs, for their meals, for the comfort, for play-time, and even for their sexual pleasure (Meulman and van Schaik, 2013, pp. 186–187). 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 (van Schaik, Damerius and Isler, 2013, p. 8).

There are also impressive examples of planning for the future in the group of great apes who learned how to communicate through American Sign Language. Chimp Tatu asked for ice cream on a birthday because ice cream was often eaten on birthdays (Fouts and Fouts, 1993, p. 38). Chimp Tatu also asked for the CANDY TREE (Christmas tree), just after celebrating Thanksgiving, demonstrating that he could plan and had temporal perceptions (Fouts and Fouts, 1993, p. 38).

2.2 SOCIAL MARKS

a) Relationships

In Chapter One, I explain that the ancient Greeks and Romans considered relating to others as a mark of persons. I argue that animals can develop strong emotional relationships with other animals that belong to their species or with animals that belong to other species, including humans. I offer four examples.

First, the mother-offspring relationship is crucial in many species like great apes, elephants, and cetaceans. For example, orcas and their offspring share the same home range, while male calves stay close to

their mothers throughout their lives (Rose, 2000b, p. 32). Orangutans breastfeed their offspring between seven and nine years so mothers can transmit their culture to their offspring (Casal and Singer, 2022, p. 194). Chimps and bonobos breastfeed their offspring for three years, feed them until they are five, and care for and protect them for more years (Casal and Singer, 2022, p. 215).

Elephants have calves every four to five years and breastfeed for at least four years (Moss, 2000, p. 135). Elephant mothers rescue their calves when they fall in holes, lift them when they are weak, and carry them on their tusks and trunk when they are dying (Moss, 2000, p. 135). Researchers have documented the remarkable case of elephant Echo, who gave birth to a male elephant named Ely, who could not stand on his own. Echo repeatedly tried to help him and never left his side. Enid, Echo's nine-year-old daughter, stayed with her mother and Ely, and tried to lift her newborn brother. Three days later, against all odds, Ely managed to walk (Moss, 2000, pp. 135–136). Seven years later, Ely was found bleeding with a spear embedded a foot deep into his back. A group of vets came to cure him, but they could not keep Echo away, who had a new three-year-old calf. When Ely was anesthetized, the elephant herd panicked, gathered around him, and tried to lift him. After being chased off, only Echo, Enid, and Eliot, Echo's second daughter, stayed next to Ely, even though they were being chased off by jeeps and gunshots (Moss, 2000, pp. 135–136).

Second, animals can also develop emotional relationships with other members of their communities. For example, researchers have documented elephants protecting and comforting others, babysitting calves, aiding individuals who cannot move, and removing extraneous objects from other elephants (Bates *et al.*, 2008, p. 204).

Third, many animals grieve for the loss of a family member or a friend. Primates, cetaceans, and elephants present more and longer behaviors towards their dead conspecifics (Goldenberg and Wittemyer, 2020). For example, in 2018, an orca named Tahlequah became famous for losing her calf soon after birth, pushing the corpse with her nose for 17 days, preventing it from sinking, and barely eating during this period. Tahlequah swam more than 1,000 miles pushing her calf while following the rest of her family (Monsó, 2021, p. 47).[22] Orcas do not only grieve the loss of their offspring but other family members. For example, teenage and adult male orcas have been seen grieving the loss of their mother for days, swimming back to the places their mother had visited before dying (Rose, 2000a, p. 144).

Researchers have also shown that primates present grieving behaviors. For instance, when silverback gorilla Digit, primatologist Dian Fossey's favorite gorilla, was killed by poachers, researchers documented that his family, who was usually quite loud and greeted the researchers with load barks, was completely silent after his death

[22] La Vanguardia. (2018) Una orca carga con su cría muerta durante 17 días [An orca carries her dead calf for 17 days], 13 August. Available at: https://www.youtube.com/watch?v=R3dtHoIm53c (Accessed: 30 June 2022).

(Weber and Vedder, 2012, p. 30). Moreover, researchers documented the close relationship between baboon Sylvia and her daughter Sierra, whom the lions killed. After Sierra's death, Sylvia became depressed, sat alone for two weeks and did not initiate social interactions with other baboons, even though she was a high-ranking female (King, 2013, p. 106).

Fourth, animals can develop emotional relationships with members of different species. For example, gorilla Koko cared for the cat All Ball (Patterson and Gordon, 1993, p. 67). Dogs can also form emotional relationships with humans. Research has shown that the hormonal reaction between humans and dogs when glaring at each other is the same: both produce oxytocin, the attachment hormone (Nagasawa *et al.*, 2009; Petersson *et al.*, 2017). Likewise, MRI research on dogs has shown that their brain activity, specifically the caudate, when smelling a familiar human resembles that of humans when seeing a picture of loved ones (Berns, Brooks and Spivak, 2015, p. 44). Furthermore, research has shown that dogs are capable of discriminating between emotional expressions of human faces thanks to their memories of real emotional human faces (Müller *et al.*, 2015).

b) Sociality

In Chapter One, I explained that the Ancient Greeks and Romans considered participating in society a crucial mark of persons. I argue

that animals can possess this mark if they live in complex animal societies or human societies.

First, many animals are members of complex societies, like great apes, elephants, and cetaceans. For example, chimps live in complex fission-fusion societies,[23] with distinct territories that they patrol (Casal and Singer, 2022, p. 215). In chimpanzee societies, recognizing each individual and perceiving the social relationships between others, known as triadic awareness, are necessary for the stability of their hierarchical society based on coalitions (de Waal, 2000, p. 175). De Waal has documented chimps' behavior showing their awareness of other individuals' coalitions. For instance, chimp Luit is more likely to attack Yeroen when he is alone than when Nikkie is around because he knows they are allies (de Waal, 2000, p. 175). Chimps' ability to recognize other chimps is essential for conflict resolution. For instance, once chimp Franje took chimp Jimmie's baby, and so Jimmie threatened Franje. Another chimp called Amber intervened and handed Jimmie her baby, while Franje greeted Jimmie submissively from a distance (de Waal, 2000, p. 176).

Like chimpanzees, elephants live in a multitiered, fission-fusion society, which separates into smaller groups or families for some time and then participate in larger social gatherings (Poole and Moss, 2008, p. 71). Members of an elephant family display strong affiliative behavior, a pattern of greeting ceremonies, cooperation in defending

[23] Fission-fusion means that chimps live in larger groups that disperse into smaller groups that come back together (Casal and Singer, 2022, p. 215).

the group, acquiring resources, caring for the offspring, and decision making. A matriarch, usually the oldest female, leads each family, (Poole and Moss, 2008, p. 72). Elephant societies tiers are:

(i) Family unit: one or more adult females and calves (Poole and Moss, 2008, p. 70).
(ii) Bond groups: composed of as many as five families (Poole and Moss, 2008, p. 75).
(iii) Clans: composed of several bond groups and families who share the same dry-season home range and can include hundreds of elephants (Poole and Moss, 2008, p. 75).

Researchers acknowledge that elephant societies' fluidity and the durability of their associations and relationships rival the complexity of chimpanzee and human societies (Poole and Moss, 2008, p. 76).

Second, many animals are members of human societies. For example, some animals are considered as family members like companion animals. The most common companion animals worldwide are dogs and cats (Petfood Industry, 2016). The unique relationship between humans and dogs can be traced back thousands of years. For example, Greeks kept dogs as companion animals and buried them alongside humans (Lonsdale, 1979, p. 150). As I explain in Chapter Four, some countries have amended the law to regulate the custody and visitation of companion animals in divorces. Hence, some animals have a

similar status to children in family law, where divorce judges must consider their interests.

c) Culture

I include culture in the list of verifiable attributes of personhood for three reasons. First, culture relates to identity, indicating that certain animals belonging to a group behave in specific ways that differ from other groups. As I explained at the beginning of this chapter, being a unique individual is central to personhood. Second, culture reveals the relevance of relationships between animals as they learn from each other from birth. Specifically, possessing a culture shows how crucial and profound the mother-offspring relationship is for the survival of many species. Third, culture can indicate that many animals belong to complex societies with their unique behaviors.

Once we thought that culture was uniquely human, but research has shown that many animals have their own culture. In the 90s, some anthropologists defined *culture* broadly as "any behaviors common to a population that are learned from fellow group members rather than inherited through genes" (Vogel, 1999).

Great apes that were taught American Sign Language started to teach this language to their adoptive children (Fouts, 1997, pp. 242–244). For example, chimp Loulis learned to sign mainly by watching chimp Washoe closely, but also Washoe would teach him directly. For example, once, Washoe brought a chair and showed Loulis the

CHAIR SIT sign five times (Fouts, 1997, p. 244). On another occasion, Washoe molded Loulis' fingers into the FOOD sign and moved it to his mouth several times, as psychologist Roger Fouts had done with her when she was young (Fouts, 1997, p. 244). Loulis was the first animal to learn a human language from another animal (Fouts, 1997, p. 244). Great apes also show their nonhuman sign language to others too, and when moved to a different group learn the communicating conventions that the group shares.

Over 39 behaviors were found to vary among chimpanzee populations regarding tool use, grooming, and courtship (Whiten *et al.*, 1999, p. 682). For example, for example, some groups have a stone-based material culture, employing stones as anvils, hammers, projectiles, and so on. Others have a wood-based culture, hunt with spears and use logs as clubs (Casal and Singer, 2022, p. 218). Nut-cracking occurs in Western chimpanzee populations but not in Eastern populations, ending abruptly at the Sassandra-N'Zo river (Whiten *et al.*, 1999, p. 685). Another example refers to ant fishing. Gombe chimps fish ants using 60-centimeter-long sticks, waiting for the ants to climb up half of the stick, then withdraw the stick from the ant nest and sweep the ants off with their free hand, putting a handful of ants into their mouths. However, Taï chimps use shorter sticks, wait a few seconds, and use their lips to swoop the ants off the stick, so they gather fewer ants with this method than Gombe chimps (Vogel, 1999). They have different methods of carrying water, either by collecting them with sponges they fabricate by mashing and crewing some plants, or by digging certain water holding roots that

they use as canteens to drink while travelling (Casal and Singer, 2022, p. 218).

In 2010, researchers discovered that chimpanzees preferred copying the method used to solve a foraging problem by an older, higher-ranking individual with a prior success record, indicating that, like humans, chimps also follow prestigious individuals (Horner *et al.*, 2010, p. 1). Moreover, research has shown that chimps not only learn specific behavior from members of their groups but that behaviors can spread from one group to another (Vogel, 1999).

Researchers now mostly agree that culture "involves a collective adoption and transmission of one or more behaviors among a group" (Balter, 2013). Hence, new research has indicated the existence of culture in other species. First, bottlenose dolphin (*Tursiops aduncus*) populations differ culturally in their use of tools (Krützen *et al.*, 2014). For example, bottlenose dolphins that live in deep habitats use sponges for foraging while dolphins that live in shallow habitats do not (Kopps *et al.*, 2014). In bottlenose dolphin populations that use tools, sponge use is mainly transmitted from mother to female offspring, distinguishing their cultural transmission of tool use from that of great apes (Krützen *et al.*, 2005).

Second, research on humpback whales has indicated cultural foraging transmission. The researched group of whales employed a fishing method called bubble-feeding, where they would blow bubbles around fish schools to confuse and hunt them. However, a

whale was observed striking the water with her tail before blowing the bubbles. This method is called lobtail feeding, and in a matter of years, it spread among the whale population (Balter, 2013).

Third, as calves, belugas (*Delphinapterus leucas*) and humpback whales follow their mothers on migrations between different feeding places, which they repeat throughout their lives, suggesting "strong maternal migratory traditions" (Rendell and Whitehead, 2001, p. 313).

Fourth, research has shown that vervet monkeys (*Chlorocebus aethiops*) learned to avoid the bitter-tasting alternative between two foods, evidencing that infants learn to eat the food that their mothers choose and that adults accept the behaviors that are the norm in a specific group they join (Van de Waal, Borgeaud and Whiten, 2013, p. 483).

CONCLUSION

Some consider that legal personhood can be understood as a technical instrument and that anything can be considered a person if the law recognizes it as such. But others believe that the law is not immune to the influence of morality and science. Hard cases require judges turning to moral arguments or scientific evidence because the law does not offer a solution.

Disputes on who qualifies as a legal person can be solved resorting to ethics and science. Hence, in this chapter, I examine the verifiable marks of personhood, proposing to consider personhood a cluster concept. However, we can still defend animal personhood using a particular account of personhood like Fletcher's, Warren's, or Dennett's. After examining the verifiable marks of personhood, I propose the following list of marks:

- A sense of futurity
- A sense of past
- A sense of time
- Agency
- Altruism
- Autonomy
- Balance between rationality and feelings
- Biographical individuality
- Being an animal
- Care and concern for others
- Change and changeability
- Communication
- Consciousness
- Creativity
- Culture
- Curiosity
- Emotional Memory
- Empathy
- Episodic Memory
- Free will
- Gratitude
- Grief and thanatological behavior
- Humor
- Idiosyncrasy
- Imagination
- Intelligence
- Love
- Memory
- Planning
- Play
- Problem-solving

- Psychological continuity
- Range of emotions
- Rationality
- Reason
- Reciprocity
- Relationships
- Second-order beliefs
- Self-awareness
- Self-control
- Sentience
- Sociality
- Strong mother–offspring bond
- Teaching
- Theory of Mind

I propose viewing personhood as a cluster concept according to my list of verifiable marks for three reasons:

(i) Understanding personhood as a cluster concept is more plausible than identifying necessary or sufficient traits. If we consider self-awareness a necessary condition for personhood, children from rural areas who take longer to recognize themselves in the mirror will not be considered as persons, even though they have plans for their future and psychological continuity. The same occurs with someone suffering from amnesia. If memory is necessary for personhood, then she will not qualify as a person despite possessing other marks. If we consider autonomy a sufficient condition for personhood, then artificial intelligence is a person. If we consider memory sufficient, a computer is also a person, but a human with Alzheimer's is not. The cluster concept allows

beings to be considered persons even if they lack certain marks as long as they satisfy sufficient criteria from the list or do so to a sufficient degree.

(ii) Although there are some commonly accepted marks of personhood, there is no general agreement on a list of marks. Thus, each author proposes a different list, giving importance to some marks over others. This selection is arbitrary and can deny personhood to beings that satisfy other relevant criteria.

(iii) My list of verifiable marks includes the marks attached to persons throughout history, the marks proposed by contemporary philosophers and bioethicists, and the marks that I consider relevant after my research, representing an ecumenical defense of animal personhood.

I have included marks that seem to suggest personhood but rejected others, such as Fletcher's neocortical function that may be a mark of humanity but as a mark of personhood, seemed entirely arbitrary. Birds, for example, have very efficient, small, and weightless brains so that they can fly. However, some are very intelligent and perform with the nidopallium, the same executive functions that we perform with our neocortex.

3. THE STATUS OF PERSONS

INTRODUCTION

This chapter is divided into two sections. The first section examines three non-verifiable marks of personhood: the soul, dignity, and human nature. Historically, we have used these marks to exclude other animals from personhood. As we cannot empirically verify these marks, I include them in this chapter because they have an evaluative component and suggest that persons have a superior or special moral status or inviolable rights.

The second section examines the evaluative dimension of personhood. In Chapter Two, I examine the descriptive account of personhood, which outlines a list of marks that identify persons. However, this list would be pointless without an evaluative dimension that examines how we should treat persons. First, I examine three central views that try to answer this question: the Dual System, the Gradual Hierarchy, and Unitarianism. I then examine some common criticisms against NGOs that share Unitarianism's view: The Great Ape Project and the Nonhuman Rights Project.

3.1 NON-VERIFIABLE MARKS OF PERSONHOOD

a) Soul

In the sixth and fifth century in Ancient Greece, having a soul meant being alive, applying to all living things (Lorenz, 2009, p. 4). Hence, philosophers considered that plants, animals, and humans had souls (Lorenz, 2009, p. 8). For example, Aristotle considered that the soul is the principle of life, so plants have a vegetative soul, animals have a sensory soul (Oelze, 2018, p. 36), and humans have a rational soul (Oelze, 2018, p. 2). This distinction between plants, animals, and humans forms the Great Chain of Being, where plants only have vegetative faculties like growing and reproducing, animals have these faculties, plus sensory faculties (Oelze, 2018, p. 29), and humans have vegetative and sensory faculties, plus rational faculties like intellect and reasoning (Oelze, 2018, p. 1).

Christian theology incorporated Aristotle's Great Chain of Being and contributed to the separation between humans and other animals in two ways. First, by defending that humans were created in the image of god, so they had rational and immortal souls. Second, by arguing that humans had dominion over the earth and other living beings (Oelze, 2018, p. 3).

In the 18th century, philosophers continued debating about the soul. For example, Leibniz recognized that animals also have souls but

humans are rational animals, and their souls are called minds, which are capable of reflecting, having a sense of self, and knowledge (Look, 2020, p. 43). Likewise, Wolff argued that animals have souls but are not persons because they lack consciousness of diachronic identity, which humans possess (Thiel, 2019, p. 208). Hence, for Wolff possessing a soul is not a necessary nor a sufficient condition for personhood. Wolff believes persons possess diachronic identity, or as I call it in this chapter, psychological continuity.

Historically, the soul has been understood as something immaterial or the essence of things, so the concept of the *soul* seems like an empty cup that we must fill with something else to make sense of it. Indeed, Aristotle argued that humans have a *rational* soul with the faculties of *intellect* and *reason*. Leibniz argued that the human soul is *self-aware* and capable of *reflecting*. Wolff linked the human soul with *psychological continuity*. Rationality, self-awareness, reasoning, and psychological continuity are verifiable attributes of personhood that I explained in the previous chapter, but the soul is something unverifiable. We cannot prove that animals lack souls as much as we cannot prove that humans possess souls.

Some still defend the connection between the person and the soul, like legal scholar María Lacalle, who argues that the person is the union of the body and soul (Lacalle Noriega, 2016, pp. 23–24). Lacalle claims that the life of individuals who cannot act on their own like intellectually disabled people is still valuable because what makes them persons is having a spiritual or immaterial soul, which is

bestowed with intelligence and will, and not the actual capacity to exercise these abilities (Lacalle Noriega, 2016, p. 104). In other words, as the soul is an abstract concept without any clear meaning, Lacalle connects intelligence and will to the soul to give it meaning. As the table at the end of Chapter One shows, intelligence and free will have been considered attributes of persons since Medieval times.

I argue that the reference to the soul is surplus to requirement. Lacalle could argue that persons are intelligent and autonomous and that even though some intellectually disabled people lack these attributes, they possess other attributes of personhood like sentience, consciousness, a biographical individuality, or are capable of developing relations with others, considering personhood as a cluster concept.

Referring to the soul in debates on the personhood of intellectually disabled people can make a case for their personhood weaker for three reasons. First, the concept of the soul is an abstract concept without a clear meaning. Second, we cannot prove that humans, animals, or plants have or lack souls (Horta, 2013). Third, references to the soul may indicate the scholar's religious beliefs. There are numerous religions worldwide, and many people who do not participate in any of them. We should not employ criteria to guide how we should treat individuals that so clearly violates liberal neutrality and the separation of church and state.

b) Dignity

Even though dignity has been considered an attribute of persons and has been central in the development of human rights, it an extremely ambiguous concept (Beitz, 2013). In fact, philosopher Remy Debes lists twenty-one different notions of dignity found in history, etymology, religion, philosophy, law, and policy (Debes, 2009, pp. 45–46):

- Rational autonomy
- Spiritual identity with god
- Honor
- Rank
- Station
- Inherent worth
- Inalienable worth
- Equal worth
- Supreme worth
- Uniqueness
- Beauty
- Poise
- Gravitas
- Personality
- Integrity
- Bodily integrity
- Self-respect
- Self-esteem
- A sacred place in the order of things
- Unquestionable specialness
- Apex of astrological influence

As Debes shows, there are many different ways to understand dignity. I refer to three different understandings. First, as I explained in Chapter One, throughout history, philosophers have commonly defined dignity as inherent worth. For example, Kant defined dignity as "absolute inner worth" (Kant, 1996, p. 186). Legal scholars also define dignity as the inherent value of humans (Lacalle Noriega, 2016, p. 48). Likewise, the preamble of the Universal Declaration of Human Rights states that people have "reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person."[24] Dignity as inherent worth is an unverifiable concept because we cannot empirically prove that someone or something has inherent worth. Particularly, we cannot prove that animals lack inherent worth or that humans possess inherent worth. Hence, we can argue that animals have dignity.

Second, sometimes the concept of dignity, like the concept of the soul explained in the previous section, is defined by connecting it to another concept that may be empirically verifiable like rationality (Lacalle Noriega, 2016, p. 49), or agency (Beitz, 2013). In these cases, dignity would be a verifiable cognitive attribute of personhood, as I explained in the previous chapter. According to these definitions, if we prove that animals are rational, possess agency, or autonomy then we could say that they possess dignity.

Third, another option is to understand dignity as a relational concept

[24] United Nations, Universal Declaration of Human Rights, 1948. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights (Accessed: June 30, 2022).

as philosopher Lori Gruen proposes. By relational, she means that we should examine how the victim is perceived in the community and if the behavior is worthy of respect (Gruen, 2014, p. 234). In the case of animals, forcing them to do things that are not part of their lives as members of a specific species would affect their dignity, like forcing a bear to dance like a ballerina (Gruen, 2014, p. 236). This type of dignity can be verifiable because an animals' characteristic behaviors or lives can be empirically determined.

In short, if dignity means inherent worth it is an unverifiable attribute of persons, so we could argue that animals have dignity just like we could argue that humans lack dignity. But if dignity means rationality, agency, or developing a characteristic life or behavior then it is a verifiable attribute of personhood.

c) Human Nature

Throughout history, humans have thought that they are the only beings that qualify as persons, deserving higher moral consideration than other animals due to their unique *human nature*. I argue that there are two main problems with this conception. First, nobody really knows what human nature is. Hence, it has varied throughout history. Once there was an extended belief among philosophers that humans uniqueness was grounded on humans' creation in the image of god and possessing souls. If human nature refers to the soul, dignity, or a special essence humans possess, then it is an unverifiable attribute.

Second, science has shown that humans are not so unique because animals share characteristics with humans to different degrees. In this case, human nature is verifiable. Humans once thought that they were the only animals that built and used tools, until primatologist Jane Goodall observed chimps building tools to extract termites in the 1960s (Goodall, 1988, p. 75). Today we know that many animals use tools like gorillas, orangutans, bonobos, capuchin monkeys, elephants, dolphins, crows (Seed and Byrne, 2010, p. 1032), and cockatoos (Mioduszewska, Auersperg and O'Hara, 2022). We also thought that humans were the only mammals that farmed, but recent research has shown that pocket gophers (*Geomys pinetis*) also practice a form of agriculture by cultivating the longleaf pine roots that grow into their burrows (Selden and Putz, 2022).

We thought that only humans possessed language, but then research proved that great apes can learn and communicate using American Sign Language, like chimpanzee Washoe, gorilla Koko, bonobo Kanzi, and orangutan Chantek (Gardner and Gardner, 1975; Patterson, Tanner and Mayer, 1988; Savage-Rumbaugh *et al.*, 1993; Miles, 1994). More recently, we learned that they have their own native sign language too, and scientists in the university of St Andrews have started to compile a great ape dictionary.[25] Research has also shown language-like skills in other animals like dolphins (Herman and Uyeyama, 1999), suggesting a continuity between human and animal communication systems (Barón Birchenall, 2016).

[25] Great Ape Dictionary. Available at: https://greatapedictionary.ac.uk/experiment/great-ape-dictionary/ (Accessed: July 10, 2022).

Throughout history, we have also believed that humans are the only animals capable of love (Lacalle Noriega, 2016, p. 50; Van Dyke, 2019, p. 130). However, if love involves intimately caring for someone else, then some animals also love (Milligan, 2014, p. 211). Indeed, grieving behavior indicates that animals can love. Additionally, research has shown that the attachment hormone oxytocin plays an important role in animal bonding, including inter-species bonding (Nagasawa *et al.*, 2009). For example, human-dog interactions result in increasing oxytocin levels in the humans and the dogs (Petersson *et al.*, 2017).

Not even medication is uniquely human. Research has shown that, bees, lizards, birds, elephants, dolphins, gorillas, bonobos, and chimpanzees self-medicate (Shurkin, 2014). Gorillas, chimps, and bonobos have been documented chewing bitter pith to treat gastrointestinal problems (Huffman, 1997, pp. 175–176) and swallowing whole leaves for treating tapeworm (Huffman, 1997, p. 181). For example, through the analysis of bonobos' feces, researchers have discovered that these apes swallow entire leaves of *Manniophyton fulvum* (Euphorbiaceae) in small amounts at specific times for its purging properties (Fruth *et al.*, 2014, p. 146). Indo-Pacific bottlenose dolphins also self-medicate by rubbing their bodies against specific corals and sponges as treatment for microbial infections (Morlock *et al.*, 2022).

Evolutionary anthropologist Robin Dunbar has suggested that religion may be the characteristic that distinguishes humans from

other animals (Casal, 2010). In an interview to primatologist Frans de Waal, when philosopher Paula Casal asked if he agreed, the latter was very surprised, and noted that animal superstition is a very common term in ethology. Many animals exhibit behaviors with no adaptive function out of habit or because it worked once. They may choose the longest route, they may be scared by creatures that pose no threat, may go to places they have no reason to go and may even repeatedly touch a part of their body, because they had found food in the past when doing so (Casal, 2011). There is considerable data on orangutans, dogs, and pigeons showing superstitious behavior (Kellogg, 1949).

Moreover, this practice goes to large extents in some species. Chimpanzees, for example, have been observed throwing stones at trees or into tree cavities, accumulating stones at these sites for some time for no reason at all with various members of the group contributing to this absurd task (Kühl *et al.*, 2016). Some researchers believe that this behavior is not related to foraging, but a ritualized behavioral display (Kühl *et al.*, 2016; Harrod, 2021). One possible explanation for this behavior is that chimpanzees participate in a symbolic ritual (Kühl *et al.*, 2016, p. 6). Another explanation is that some animals enjoy things they find aesthetically pleasant, like Mozart, sunsets, or their own artistic creations and since such stoned filled trees look quite striking to us, it is possible that they impress other animals too.[26] It is also possible that, like humans, animals have

[26] Crystal Pineda. (2015) Beluga mesmerized by violin, 24 June. Available at: https://www.youtube.com/watch?v=N3JRNvQi4Oc (Accessed: July 10, 2022).

mix motives, ranging from impressing females and others to having fun.

Like possessing aesthetic preferences, having a theory of mind, second-order beliefs, empathy, culture, or being capable of altruism or interspecific empathy have also been believed to be uniquely human and have now been documented in different species. What seems entirely uncontroversial is that the more we know about animals, the less unique *Human nature* turns out to be.

3.2 EVALUATIVE DIMENSION OF PERSONHOOD

The evaluative or moral dimension of personhood refers to the rights, duties, obligations, and respect afforded to persons (Sapontzis, 1981, p. 607). Commonly, philosophers consider that having interests is necessary and sufficient for moral status (DeGrazia, 2020, p. 18). Hence, philosophers usually acknowledge that sentient animals have moral standing. Philosophers also commonly agree that persons have higher moral standing than nonpersons (Jaworska, 2007, p. 460; Kagan, 2016, p. 10), and that it is worse to kill a person than a nonperson because persons have plans and desires for their futures (Singer, 2011, pp. 76–77).

Since political philosophy tends to only discuss the interest of human persons, it is normal to find texts that use *human*, *person*, *people*, and *individuals* interchangeably. This does not happen in bioethics where

the issue of whether an individual, such as a fetus or a completely senile individual are persons is the subject of heated debates (Casal and Singer, 2022, p. 77). Discussing the verifiable marks of persons suggest that although personhood is not a scientific category, it could become one. We may disagree on the relative importance we give to some marks over others, but if it was a purely descriptive matter, the disagreements would not matter so much. Now, the idea that persons have moral rights and should have legal rights too can be interpreted in at least three ways.

a) The Dual System

The dual system was famously proposed by political philosopher Robert Nozick in *Anarchy, state and utopia*: "utilitarianism for animals, Kantianism for people" (Nozick, 1974, p. 39). This view is consistent with the possibility of including some animals in the group of persons. This is what philosopher Agneska Jaworska does. According to this view, persons are inviolable. Their rights are very stringent and should not be interpreted as goals but as side constraints. For example, you can kill a chicken to save five, but you cannot kill a person to save five (Jaworska, 2007, pp. 460–461).

According to Jaworska, the emotional capacity to care is a sufficient condition for full moral standing (Jaworska, 2007, p. 460). She presents the dual system in combination with this trait, suggesting a hierarchical interpretation of moral standing like the Gradual Hierarchy, explained in the next section, defends. Note, however, that

the trait by which we choose to determine personhood, and what difference we think that being a person makes morally, are entirely different and independent matters.

I agree with Jaworska that (i) the capacity to care is an important trait, of special moral importance, (ii) that it is possible for an animal to be a person with full moral standing, and (iii) that great apes have the capacity to care and thus, can be considered persons with full moral standing (Jaworska, 2007, p. 495). I very much doubt, however, that she has given a satisfactory answer to the question at hand.

First, many other animals possess the capacity to care like elephants (Douglas-Hamilton *et al.*, 2006; Bates *et al.*, 2008), cetaceans (Connor and Norris, 1982; Lalot *et al.*, 2021), wolves (Cassidy and McIntyre, 2016), and even dogs (Gfrerer and Taborsky, 2017, 2018; Sanford, Burt and Meyers-Manor, 2018). In fact, empathy is a phylogenetically continuous trait across species (Preston and de Waal, 2002, p. 2). She could reply that all these animals should be considered persons too. I am certainly open to this possibility, but I do not think that this solves the problem for Jaworska, as caring exists in a continuum and she seems to be engaging in two arbitrariness at once: of all the plausibly relevant traits of personhood she picks only one, and of all the degrees of caring available, she draws the line at a particular one. She then attributes an enormous significance to an arbitrary threshold in a continuum, regarding just one trait.

The view that the further away from personhood we are, the more plausible it is to kill us to save a larger number is very widespread. Readiness to kill, even for smaller numbers of saved individuals increases as the moral standing of those individuals decreases (Caviola *et al.*, 2021). But again, it is a scalar matter. You need to be saving more people to justify killing people (as in so many just war theories) than if you were killing an infectious chicken to save others. But it is all a matter of more or less, not the all or nothing distinction Jaworska seems to have in mind.

b) The Gradual Hierarchy

The interest of persons has greater moral importance than those of nonpersons, so that, for example, even pain of the same kind, intensity, duration, and with the same consequences matters more if it is part of the life of a person than if it is it part of the life of a nonperson. Typically, in this view, human persons matter most, then a group including great apes and other animals that exhibit the traits associated with personhood, then quasipersons, which include dogs, sea lions and other very intelligent mammals, then another group, and so on. Each status is attached to a multiplier that determines the final moral importance of each interest.

Note that the two views are very different. We may argue that rights are not goals but side constraints so that for example, we cannot steal one dollar to make the call that prevents a much larger robbery, and still think that money robberies do not matter too much. As Casal

explains, the stringency of a right and the conception of rights as side-constraints are very different things (Casal, 2018).

The Dual System and Gradual Hierarchy allow for various combinations. For example, the Dual System may classify all animals in just two categories but distinguish them by the weight we give to their interests rather than applying more stringent deontological constraints. Conversely, we may employ the scalar model of the Gradual Hierarchy view but argue that there is no such multiplier of the weight of interests and that all that distinguishes those from the higher levels from those of the lower levels is the number of individuals at risk that justify sacrificing one of them. This is the view for which there is research that confirms it fits widespread intuitions (Caviola *et al.*, 2021). Of course, one can also have either a Dual model with two moral statuses or a Scalar model with several moral statuses and attach both types of implications to them.

Philosopher Shelly Kagan advocates the hierarchical view (Kagan, 2019, p. 4 and 10). Even though Kagan mostly thinks of humans when he talks about persons, he admits that some animals can be persons (Kagan, 2016, p. 10). Kagan argues that we are not really speciesists, but personists because we all agree that it would be terrible to kill ET or Superman as they are clearly persons, even if they are not human (Kagan, 2016, p. 9). He argues that while speciesism is wrong, personism is morally justified. Whether or not people are speciesist and whether or not speciesism is the cause of animal suffering are empirical matters. Kagan says no, and Singer

says yes (Singer, 2016), but their positions seem to be grounded on a hunch rather than based on evidence, as neither has conducted the relevant study to establish this.

It also seems like a false debate because it is possible, and indeed likely, that people are both speciesist *and* personists. In any case, Kagan argues that there are six levels (or maybe four, he is not sure), and personism, or the importance of personhood will only account for the special status of the first level, but not for the difference in importance given across all the levels. Kagan admits to belonging to the kind of philosopher who writes about animals without knowing anything about them. Indeed, the list of animals he places in the hierarchically organized ranking is somewhat perplexing.

Kagan's view includes a detachable concept called modal personism. Modal persons are individuals who are not persons, and may even lack any potential to become persons, but could have been persons in some possible world. This idea has the effect of privileging those who have fallen into non-personhood due to an accident or perhaps because they took too many drugs over those who suffer from a congenital disease. Making such distinctions seems implausible, but since this part of his theory can be detached from the more commonly held gradual hierarchy view, we need not discuss it further. The view has been very effectively criticized by McMahan (McMahan, 2016), who interestingly inspired philosopher Peter Vallentyne's gradual hierarchy view (Vallentyne, 2005, 2006), which became extremely

important in the development of Kagan's own gradual hierarchy (Kagan, 2019).

c) Unitarianism

Finally, there is what Kagan calls Unitarianism. On this view there is no full and partial moral status or standing as Jaworska calls it, nor a hierarchical ranking of a larger number of statuses associated with a particular multiplier. On this view, moral considerability, moral standing, and moral status are all the same thing. However, the traits of persons that we have been discussing, make death, torture, and captivity particularly harmful for persons. An example of this view is McMahan's explanation of the badness of death for self-aware psychologically contiguous individuals that remember their past and plan their future.

The Great Ape Project book did not clarify this matter. Instead, it provided a list of capacities that great apes had, and proposed a list of rights, but it did not explain what connection there was between having some capacities and certain rights. This has now been provided by Casal in her latest book with Peter Singer in a way that is fully consistent with Unitarianism (Casal and Singer, 2022). For example, I mention McMahan's explanation of why losing one's life is worse for persons. Such a view is consistent with Unitarianism. In Chapter Five, I return to this view, and also consider the case against the captivity of persons in ways which are consistent with Unitarianism.

The word *person*, however, is culturally, emotionally, morally, and even politically loaded, so its application creates heated disputes, even when it has no explicit implications. When what follows from the label is substantial, then criticisms rapidly emerge. For example, one would imagine that the Great Ape Project (GAP), conceived by two animal rights advocates, Paola Cavalieri and Peter Singer, and defended for two decades by Paula Casal, will be universally welcomed by the animal movement. This, however, is not what happened.

It was strongly criticized within the animal rights movement for focusing on a relatively small number of animals. Charities need to specialize to be effective at dealing with individuals with similar problems. The fact that the great apes are in greater proximity to humans than any other species made a *habeas* more likely to succeed in their case than in any other. Moreover, because of their similarity, they were used by the thousands in extremely painful biomedical research on cancer, hepatitis, aids, and many other conditions. Because of their anatomical similarity and great capacity to learn, they are also more particularly exploited for entertainment in circuses and films, or even for sexual purposes. They are also particularly bad at surviving confinement without developing mental pathologies, so their rescue was both urgent and feasible. Similar motivations animated Steve Wise's NhRP, which includes all the self-recognizing species (the great apes, cetaceans, and elephants), who suffer greatly from confinement and had the best chance of winning in court. Both defenses of animal personhood have been accused of:

(i) *Speciesist* for their preferential treatment of a few species.

(ii) *Anthropocentric* for choosing those closer to humans cognitively or evolutionarily.

(iii) *Elitist* for focusing on the ablest and autonomous animals, leaving not only other animals, but also humans of very limited ability in a second place.

(iv) *Intellectualists* for privileging rationality over emotions, which are associated with women and given a second place.

All such accusations are unfair.

•Speciesism

The GAP and the NhRP are not speciesist. First, these NGOs do not seek to protect certain animals because they belong to a specific *species* but because they possess specific *morally relevant characteristics*, such as the possession of emotional memory, and the ability to develop emotional relationships with family members and friends (Casal and Singer, 2022, p. 94).

Second, quite the contrary, these NGOs are trying to break the species barrier that considers only humans as persons and other animals as nonpersons (Casal and Singer, 2022, p. 96 and 99). Moreover, the GAP volunteers are usually veteran animal rights advocates that

decide to specialize in the problems that great apes face due to different reasons like sympathy or feasibility (Casal and Singer, 2022, p. 96). Accusing these NGOs of speciesism is like labelling those that focus on protecting feral cats as speciesists for not focusing on abandoned dogs.

Third, as Chapter Six and Seven show, the *habeas* filed on behalf of great apes have opened the door to the debate and the recognition of other animals' legal personhood, such as elephants, orcas, bears, dogs, and other primates.

•Anthropocentrism

The GAP and the NhRP are not anthropocentric. First, these NGOs do not consider certain characteristics morally relevant because they assimilate other species to humans, but because certain characteristics are linked to particular *interests*. For instance, the ability to remember is necessary to miss a family member or a friend (Casal and Singer, 2022, p. 94). Therefore, memory is not a morally relevant characteristic because humans possess memory, but because animals with memories (including humans) can suffer the loss of their families or friends, making it morally wrong to separate them. It is important to note that these morally relevant characteristics are not *human* characteristics but *animal* characteristics that many animals share to different degrees.

Second, the characteristics that the GAP and the NhRP focus on are connected to specific interests, and thus, indicate what legal rights these animals should have (Casal and Singer, 2022, p. 94). If research shows that particular female animals develop strong emotional bonds with their offspring, like orangutans, we should not separate mothers from their offspring. If we separate them, as zoos commonly do, the female animal and her offspring will suffer tremendously and may not recover from their loss. Hence, the law should recognize these animals' right to form a family and stay together, prohibiting their separation. For example, baby orangutan Bimbo was separated from his mother, whom the poachers most likely killed. The poachers left Bimbo upside down in a crate on a boat traveling from Singapore to Bangkok. Even though he was rescued and recovered his physical health, he stopped eating and let himself die (Casal and Singer, 2022, p. 89).

•Elitism

The elitist critic can come from entirely opposing views. First, it can come from inside the animal rights movement by criticizing the GAP and the NhRP for requiring specific cognitive abilities for personhood instead of requiring sentience as a sufficient condition for personhood (Francione, 2008, p. 20; Donaldson and Kymlicka, 2011; Kymlicka, 2017b, p. 134). However, the GAP and the NhRP do not consider these cognitive abilities *necessary* but rather *sufficient* conditions for legal personhood (Wise, 2013, p. 1286). Moreover, Wise argues that sentience has fewer chances of

convincing judges due to the many sentient species used for different human activities (Wise, 2013, p. 1286).

Second, some supporters of human exceptionalism argue that grounding personhood on autonomy is an ableist argument that could threaten humans that do not possess this capacity or possess it to an inferior degree to animals (Lacalle Noriega, 2016, p. 45; Cupp, 2017, p. 499). However, autonomy is not the only mark to ground personhood in ethics or the law. As I explain throughout this dissertation, there is a long list of moral and legal personhood marks.

Particularly, legal scholar Richard Cupp's view against using cognitive abilities as a condition for legal personhood faces two inconsistencies. First, in a different paper, Cupp states that humans have a greater capacity for autonomy than other animals (Cupp, 2013, p. 45). Therefore, Cupp uses autonomy as an argument for human personhood while opposing Wise's argument on behalf of autonomous animals. Second, Cupp argues that animals lack moral agency, so they cannot express their agreement or bear social duties and thus, are not part of the social contract (Cupp, 2009, p. 66). This argument leaves certain humans out of the social contract, failing to acknowledge that animals can express their wills, bear duties in their communities, and possess certain aspects of moral agency like gratitude, empathy, reciprocity, and altruism, as I explain in Chapter Two, and Chapter Four.

•Intellectualism

The GAP and the NhRP are not intellectualists. First, these NGOs do not argue that cognitive abilities are the only attributes that matter or that they are the most critical conditions when arguing for animal personhood (Casal and Singer, 2022, p. 95). Instead, these NGOs defend that these cognitive abilities may be relevant to determining certain kinds of suffering. For example, the lack of stimulation in captive animals with large brains designed to learn causes brain damage like thinning of the cortex, decreased blood supply, less support for neurons, and decreased connectivity among neurons (Jacobs and Marino, 2020). Thus, the physical damage in the brain affects memory functions and the processing of emotions, likely leading to similar issues as in humans: depression, anxiety, mood disorders, and PTSD (Jacobs and Marino, 2020).

Second, ecofeminists have criticized Wise for grounding animal rights on rationality and autonomy, proposing to replace the "rationality test" with feminist care ethic, which grounds animal rights on their emotional lives and relationships with humans (Albright, 2002, pp. 915–916). I find these feminist criticisms of the GAP and NhRP unjustified and based on a misunderstanding of the profound connection that exists between emotion and cognition.

First, cognitive abilities like autonomy are necessary for developing relationships. For example, an animal that only acts on reflexes cannot establish relationships with others, like clams. The capacity to

have an emotional life is a cognitive ability that not all animals have. An animal must possess sentience to have an emotional life because they can experience pleasant and unpleasant feelings, as I explained at the beginning of Chapter Two. However, having other cognitive marks like self-awareness and an emotional memory contribute significantly to a rich emotional life.

Second, as I explained in Chapter One, the ability to develop relationships with others has been a relevant mark of personhood since Antiquity. Many animals can develop relationships with other animals (including humans). Likewise, emotions have been relevant in discussions on personhood throughout history because the person has been considered a unique sentient individual with a biography.

Third, having an emotion like fear is a cognitive reaction to something that we know is dangerous for us. Evolution has developed emotions because they are faster ways of getting us to act in a certain way, without the slowness that accompanies rational processes.

Finally, as noted earlier, some philosophers argue that persons have full moral standing and that the capacity to care is *sufficient* for full moral standing, which some animals like great apes possess (Jaworska, 2007). Hence, the idea that some animals can be persons is perfectly compatible with care ethics (Casal and Singer, 2022, p. 96).

CONCLUSION

Personhood has an evaluative and a descriptive dimension. In Chapter Two, I examine the descriptive dimension of personhood, which refers to the verifiable marks of personhood. In this chapter, I examine the non-verifiable marks of personhood, which place the person in a special status or grant the person specific inviolable rights. The following table summarizes the verifiable and non-verifiable marks of personhood.

<table>
<tr><th rowspan="2">NON-VERIFIABLE ATTRIBUTES</th><th colspan="2">VERIFIABLE ATTRIBUTES</th></tr>
<tr><th>COGNITIVE</th><th>SOCIAL</th></tr>
<tr><td rowspan="3">1. Soul</td><td>1. Biographical Individuality</td><td rowspan="3">1. Relationships</td></tr>
<tr><td>2. Idiosyncrasy</td></tr>
<tr><td>3. Sentience</td></tr>
<tr><td rowspan="3">2. Dignity</td><td>4. Consciousness</td><td rowspan="3">2. Sociality</td></tr>
<tr><td>5. Rationality:
- Intelligence and Problem Solving
- Reason
- Imagination and Creativity</td></tr>
<tr><td>6. Agency:
- Agency
- Moral Agency
- Free Will
- Autonomy</td></tr>
<tr><td rowspan="4">3. Human Nature</td><td>7. Self-Awareness</td><td rowspan="4">3. Culture</td></tr>
<tr><td>8. Memory</td></tr>
<tr><td>9. Psychological Continuity</td></tr>
<tr><td>10. Planning</td></tr>
</table>

Table 3. The Verifiable and Non-Verifiable Marks of Personhood

The evaluative dimension of personhood examines the rights, duties, and respect afforded to persons. In other words, the treatment we afford to persons. I defend the NHRP and GAP from several accusations caused by the evaluative dimensions of personhood. I also distinguish three views regarding what difference it makes morally that someone is a person:

(i) According to the Dual System, we should adopt Kantianism for persons and utilitarianism for animals. Persons have rights that are side constraints and are inviolable ends in themselves. Nonpersons are not. I discuss the views of Agnieszka Jaworska and some criticisms.

(ii) According to the Gradual Hierarchy view, there is a gradation of statuses with humans on top. Each status is associated with a multiplier so that even the trivial interest of somebody in a top status may count more than the most fundamental interests of a very large number of individuals from lower statuses. The Gradual Hierarchy can be combined with the Dual System if we consider that persons belong to the top level and have inviolable rights.

(iii) Finally, according to Unitarianism, there is only one status, but death, captivity, torture, exploitation, abandonment, family separation and other actions are

particularly harmful to persons, and this is why we should protect persons more. This is the view that I find most plausible, but since I am pursuing an ecumenical defense, I welcome the fact that Jaworska and Kagan also agree that animals can be persons with full moral standing.

4. TRADITIONAL CONCEPTIONS OF LEGAL PERSONHOOD

INTRODUCTION

Great confusion has surrounded the concept of the person as it has not only been examined in law, but also in theology, philosophy, psychology, sociology, and anthropology. In law, there is great confusion because there are different concepts of the person. This chapter examines four traditional concepts of legal personhood and argues that none imply that only a human and never an animal can be considered a person in each of the specified senses:

(i) Personification of a set of norms.
(ii) Status or role.
(iii) Legal capacity to hold rights and bear duties.
(iv) Subject of rights.

I consider that animal legal personhood has a greater chance of success by demonstrating that animals can be considered legal persons according to the four traditional definitions. These concepts of legal personhood do not exclude each other. In fact, judges sometimes reference several in the same ruling as chimp Cecilia's and dog Tita's cases show. Having several definitions of legal personhood may benefit animals because one concept may be more suitable in some cases depending on the animal's particular circumstances or characteristics. Due to the legal nature of this

chapter and the chapter on *habeas* litigation, I have included a glossary of legal terms at the end of the dissertation.

4.1 PERSONIFICATION OF A SET OF NORMS

Some think that individuals have certain rights independently of what other humans have done (natural rights), and those who think that to say that an individual has rights only means that somebody has granted him or her those rights (positive rights). In other words, that all rights are equally artificial conventions. This position leads to the conception of legal personhood as a useful fiction or mere convention that needs not be related to any physical or metaphysical reality.

Philosopher and legal scholar Hans Kelsen is the main exponent of this position. He proposed the *Pure Theory of Law* because he believed politics and morality were contaminating traditional legal philosophy, reducing the law to a social science (Kelsen, 1992, p. 53; Marmor, 2016, p. 1). Kelsen claimed that the concept of legal subject or person are "simply an artificial aid to thought, a heuristic concept created by legal cognition–under the pressure of a personifying, anthropomorphic legal language– in order to illustrate the data to be dealt with." (Kelsen, 1992, p. 46). Hence, person is "simply a personifying expression for the unity of a bundle of legal obligations and legal rights, that is, the unity of a complex of norms." (Kelsen, 1992, p. 47).

In other words, the legal person is simply a personification of a set of legal rules (de Castro y Bravo, 2008, p. 26) or the meeting place for a set of rules (Corral Talciani, 1990, p. 314). This concept of legal personhood has influenced contemporary authors, such as legal scholar Rafael Verdera, who defines the legal person as the meeting point and center for the assignment of rights and duties (Verdera Server, 2019, p. 202). Moreover, courts also use this concept of legal personhood. For example, in Cecilia's case, judge María Alejandra Mauricio stated that:

> Most animals and, specifically, great apes are also made up of flesh and bones, are born, suffer, drink, play, sleep, have the capacity for abstraction, love, are gregarious, etc. Thus, the category of subject as the center for the imputation of norms (or "subject of rights") would not only include the human being but also great apes – orangutans, gorillas, bonobos and chimpanzees."[27]

It is undeniable that animals are the meeting point for a set of rules in our legal systems. Indeed, animal welfare, environmental, conservationist, and anticruelty regulations protect animals as individuals and species. Positivism supports animal legal personhood because anything can be a legal person as long as the law recognizes this status to an entity or being. Therefore, I consider that we can defend animal legal personhood using Kelsen's theory.

[27] Tercer Juzgado de Garantías de Mendoza [J.G.Men.] [Third Criminal Court of Mendoza], *supra* note 6, at 39.

4.2 STATUS OR ROLE

As explained in Chapter One, legal personhood understood as status originated in Roman law, where the legal person referred to the role played in society (de Cossío, 1942, p. 751). People in Ancient Rome could be free or slaves; citizens or foreigners; *sui iuris* (free Roman women and men who were not subjected to the authority of the *paterfamilias*) or *alieni iuris* (Corral Talciani, 1990, p. 307). Everyone had a status in Ancient Rome because it simply meant having a position within Roman society (de Cossío, 1942, p. 752). Legal personhood as a status has also been understood as belonging to a specific community. For example, the Nazi racial criteria to determine who were members of the community and thus, considered legal persons (de Castro y Bravo, 2008, p. 24). Unfortunately, legal personhood as status has been used to discriminate and exploit different groups within society.

Even though legal personhood as a status is mainly linked to Roman law, some scholars continue using it during the 20th century (de Cossío, 1943, p. 15) and 21st century (Mussawir and Parsley, 2017, p. 53). Indeed, people still have different status within society that are relevant for the law, such as being a citizen, resident, married, single, divorced, heir, refugee, asylee, among others. Hence, legal personhood is like "a mask" or a hat that we employ to play different roles in the legal world as creditor or debtor, plaintiff or defendant, lessee or lessor, owner or possessor (Mussawir and Parsley, 2017, p. 53). All these legal roles carry different rights and duties. Therefore,

legal personhood as a status no longer indicates social classes or racial criteria to discriminate people, but certain relevant roles people have within society that are relevant to the law.

One cannot appeal to this understanding of legal personhood to attempt to exclude animals because animals can also play different roles. For example, they can be family members, they can be workers that eventually retire, they can be guides or assistants, they can be involved in illegal activities and they can be victims of natural disasters (Irvine, 2008, pp. 1954–1955). Hence, I argue that animals can also be considered legal persons in the sense of status due to the different roles they play in society, which are relevant to the law. I offer three arguments to defend that companion animals are legal persons in the sense of status: an anthropological argument, an empirical argument, and a legal argument.

First, many people consider dogs, cats, and other domesticated animals as family members. During 2011, The Harris Poll of 2,184 adults in the US determined that 91% considered their companion animal as a family member (Corso, 2011). The same trend can be found in a national survey conducted among 1,500 adults in the US in 2017, revealing that 94% considered their dogs as family members (*The Truth About Dog People: New Survey and Infographic Tell All*, 2017). This survey also revealed the special bond that exists between people and their dogs. For instance, 56% say hello to their dog first when they come home and 54% would consider ending a romantic relationship if they believe their dog does not like their partner (*The*

Truth About Dog People: New Survey and Infographic Tell All, 2017).

Second, psychological research has shown that people view animals as family members (Albert and Bulcroft, 1988, p. 550). In fact, people can be as attached to their dog as to their mothers, siblings, best friends, and significant others, and even closer to their dogs than to their fathers (Kurdek, 2008, p. 261). Moreover, research on the bereavement process following the death of a companion animal has also confirmed that people and animals have such a close relationship that their death causes grief (Archer and Winchester, 1994, p. 267). These results confirm that companion animals play a significant role in society as family members.

Third, the family is the basic social institution protected by law. For example, the Spanish Constitution ensures the family's social, economic, and legal protection.[28] In Latin America, the 1980 Chilean Constitution[29] and the 1991 Colombian Constitution recognize the family as the fundamental institution of society.[30] Judges have also started to treat companion animals similar to children and thus,

[28] Spanish version: "Artículo 39. 1. Los poderes públicos aseguran la protección social, económica y jurídica de la familia." See, 1978 Spanish Constitution. BOLETÍN OFICIAL DEL ESTADO [BOE], No. 311, December 29, 1978. Available at: https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229.

[29] Spanish version: "Artículo 1, inciso 2. La familia es el núcleo fundamental de la sociedad." See, 1980 Chilean Constitution. Decreto No. 100, September 17, 2005. Available at: https://www.bcn.cl/formacioncivica/constitucion.html.

[30] Spanish version: "El Estado reconoce, sin discriminación alguna, la primacía de los derechos inalienables de la persona y ampara a la familia como institución básica de la sociedad." See, 1991 Colombian Constitution. GACETA CONSTITUCIONAL NO. 116, July 20, 1991. Available at: http://www.secretariasenado.gov.co/constitucion-politica.

examine shared custody and visitation in divorce cases (Kindregan, 2013, p. 229). For example, on May 27, 2019, a Spanish court in Valladolid granted shared custody of Cachas, the dog, ordering that he should spend six months with each spouse, allowing visitations on weekends.[31] Therefore, the consideration of some animals as family members has pushed judges to apply family law to animals, acknowledging that their legal status as property is unsuitable for solving these types of cases. Furthermore, Law 17/2021 of December 15, 2021, which amended the Spanish Civil Code, now regulates companion animals' shared custody and visitation in divorce and separation cases, ordering judges to consider the animal's welfare when deciding these cases.[32] Not only are family law courts recognizing companion animals as family members. For instance, Argentine criminal judge Gustavo Daniel Castro recognized Tita the dog, who was shot dead by a policeman, as a "nonhuman daughter" and recognized the plaintiff as Tita's "father," as well as recognizing Tita a subject of rights and nonhuman person (Rosa, 2021). Hence, courts worldwide are recognizing multispecies families, so undoubtedly, companion animals play a role in society relevant to the law as family members, specifically as nonhuman daughters or sons.

[31] Juzgado de Primera Instancia 9 de Valladolid [Juzgado de Primera Instanca 9] [Court of First Instance 9 of Valladolid], 27/5/2019, [Expte. Nro.] 1068-2018 (Spa.).

[32] Law 17/2021, of December 15, amending the Civil Code, the Mortgage Law, and the Law of Civil Procedure, on the legal regime of animals. BOLETÍN OFICIAL DEL ESTADO [BOE], No. 30.
Available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-20727.

Finally, legal personhood understood as status should not be necessarily limited to companion animals. Philosophers Sue Donaldson and Will Kymlicka propose a political theory of animal rights, which is based on the different relationships between humans and animals that generate distinctive rights and responsibilities (Donaldson and Kymlicka, 2011, p. 9). According to this theory, domesticated animals should be considered as full citizens because we have bred them to be interdependent with humans. Animals in the wild should be seen as separate sovereign communities and liminal opportunistic animals should be treated like migrants or denizens (Donaldson and Kymlicka, 2011, p. 14). Their specific rights and the duties humans have towards animals will depend on the status they have within society.

4.3 LEGAL CAPACITY TO HOLD RIGHTS AND BEAR DUTIES

Most scholars claim that the legal person is a being that has the ability to hold rights and bear duties, thus, considering legal personhood and the capacity to enjoy rights as synonyms (de Castro y Bravo, 2008, p. 24). This view is a textbook definition of legal personhood (López de la Cruz, 2019, p. 81). This section first examines the challenges of considering legal personhood as the capacity to bear duties and then examines the challenges of considering legal personhood as the capacity to hold rights in relation to animals.

a) Problems with the Legal Capacity to Bear Duties

Some scholars reject legal personhood for animals, arguing that as rights and duties are correlative, animals cannot hold rights because they cannot bear duties (Cupp, 2009, p. 66; Lacalle Noriega, 2016, p. 50; Rogel Vide, 2018, p. 72). I argue that duties are not a necessary condition for legal personhood for the following five reasons.

First, I claim that rights and duties are not correlative because the possession of a legal right by someone does not entail the bearing of a legal duty by that same individual, rather it entails the bearing of a legal duty by someone else (Kramer, 2001, p. 42). According to this argument, if the law recognizes great apes the right to life that means that humans would have to bear the duty of abstaining from killing great apes.

Second, even if holding a legal right entailed bearing a legal duty, animals could still hold rights because bearing duties is "simply to be placed under it" (Kramer, 2001, p. 41). As I explain throughout this chapter, understanding a duty, or a right, is not always a condition for holding a duty or right, which guardianship proves. Thus, the law could place someone under a duty who does not understand that duty.

I claim that there is an important difference between *bearing* a duty and *fulfilling* a duty. Animals, children, and intellectually disabled people can *bear* duties because the law can place them under a duty. However, as they cannot *fulfill* their duties due to different

circumstances, such as immaturity, cognitive abilities, or illness, a guardian must act on their behalf. This difference is coherent with the legal distinction between the capacity to enjoy rights, understood as the ability to hold rights or duties (or to be placed under them), and the capacity to exercise those rights or duties on one's own. The latter requires a guardian to act on one's behalf if we cannot act on our own.

For instance, if chimpanzees like Matthew and Rosie Pan receive a generous donation and the law contemplates a tax on donations, the chimpanzee will bear a duty, but the guardian will fulfill the duty and pay the tax on the chimp's behalf.[33] If the chimpanzees have offspring that need medical attention, although the donation was given to them and not their offspring, since chimps have duties towards their infant, part of the funds should be re-directed to them. Hence, a guardian can fulfill duties on behalf of an animal, like an attorney or representative often fulfills duties on our behalf.

Third, it is true that animals are not always aware of their duties, but sometimes they are, and sometimes we are not. Chimpanzees not only recognize duties to family members or to non-related members of a group but recognize duties of reciprocity to individuals who may not even be members of their species. De Waal shares a thought-provoking situation where two young chimps did not comply with their group duties. The chimpanzee group was given dinner when all group members came inside from the outdoor enclosure, but dinner

[33] See Matthew Pan's case in Chapter Six.

got delayed because two chimps stayed outside longer enjoying the sunset and evening breeze. The rest of the group became agitated having to wait unusually long for their dinners because of these young rebels, so the two tardy chimps were put in a separate enclosure for protection. The next day, the rest of the chimps screamed angrily at the two tardy chimps (Barber, 2008, p. 124), who showed signs of having understood perfectly why they were told off, not only with their body language, but by subsequently being the first in line at dinner time (Casal, 2011).

It is interesting that de Waal, who has gained international fame describing the life of chimpanzees employed in biomedical research, used to deny chimps had rights on the grounds that they did not have duties (de Waal, 1996, p. 215). Chimpanzees may not have duties towards humans, but according to de Waal himself, they have many duties towards other chimpanzees (de Waal, 2000). It was perhaps the realization of this incongruence that has led de Waal to drop the duty-based objection to chimpanzee rights (Casal and Singer, 2022, p. 178–179). De Waal currently holds a position that is very similar to that of advocates of chimpanzee rights, except he resists the use of the term *right* and speaks instead of our duties towards them (Casal and Singer, 2022, p. 179).

Fourth, in the past, Western legal systems recognized that animals could bear duties. Indeed, during Medieval Times animals legally bore duties and were trialed for breaching these obligations, such as abstaining from killing humans, destroying crops, or participating in

zoophilia (Sykes, 2011, p. 280). Usually, courts convicted animals to death, but they sometimes acquitted animals for having a good character or not participating in the criminal activity (Sykes, 2011, p. 281). I certainly do not support animal trials, but they are useful reminders that humans once considered that animals could legally bear duties, so the legal system adapted to this conviction. Hence, we could have a new conviction: Many animals bear duties in their societies or groups, so we should adapt the legal system to recognize that animals can be legal persons because they can also bear duties in their own unique ways.

Fifth, the law, moreover, considers beings that cannot fulfill their duties, like children, disabled individuals and comatose or terminal patients, as legal persons. So, the idea that having duties is a requirement of legal personhood is simply false. However, the textbook definition of legal personhood as involving duties still confuses some judges. For instance, when the NhRP filed a *habeas* on behalf of chimpanzee Tommy in 2013, the Third Judicial Department of New York denied the petition arguing that "unlike human beings, chimpanzees can't bear any legal duties, submit to societal responsibilities, or be held legally accountable for their actions."[34] The Court based the ruling on the *Black's Law Dictionary* definition of person as a being capable of bearing rights *and* duties.[35]

[34] *Nonhuman Rights Project v. Lavery*, No. 518336, at 4 (N.Y. Sup. Ct. Appellate Div. Third Jud. Dep., Dec. 4, 2014). Available at: https://www.nonhumanrights.org/content/uploads/Appellate-Decision-in-Tommy-Case-12-4-14.pdf, at 6.
[35] *Id*. at 4.

The source of the *Black's Law Dictionary* definition of legal person is the book *Salmond on Jurisprudence*, which defines persons as "any being whom the law rewards as capable of rights *or* duties" (Salmond and Fitzgerald, 1966, pp. 299, emphasis added), proving the dictionary's definition to be mistaken.[36] The NhRP argued that, as noted earlier, chimpanzees actually bear responsibilities within their communities and within chimpanzee–human communities, ostracize individuals who violate social norms, have a cooperative social life, and perform death-related duties (Wise, 2017, p. 5).

In any case, the State of New York Supreme Court Appellate Division Third Judicial Department's argument is not the dominant trend among courts. In other *habeas* cases around the world, judges have argued that animals do not need to bear or fulfill duties, as Judge Luis Armando Tolosa argued in Chucho's case.[37] The duties argument was not considered relevant in orangutan Sandra, chimp Cecilia's, or woolly monkey Estrellita's cases either.

In sum, the law currently recognizes certain beings that cannot fulfill their duties as legal persons, so the definition of legal personhood clearly includes these cases. Using the conjunction *and* suggests that the being must be capable of holding rights and fulfilling duties to be considered a legal person. On the contrary, using *or* clarifies that a legal person can hold rights but may not be capable of fulfilling its

[36] Bryan Garner, *Black's Law Dictionar*y's editor-in-chief agreed to correct the next edition (Choplin, 2017a).
[37] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ. julio 26, 2017, M.S: L. Tolosa Villabona, Expediente AHC4806-2017, at 15 (Colom.).

duties. Consequently, Salmond's definition of legal person should be preferred to avoid this confusion.

b) Problems with the Legal Capacity to Hold Rights

According to the contemporary theory of rights, animals currently hold certain legal rights even though the law categorizes them as things and not as legal persons. Indeed, animals currently hold certain basic rights derived from animal welfare and anticruelty regulations, although these are weak rights that do not provide animals with the strong protection associated with legal rights (Stucki, 2020, p. 544). Some scholars criticize the definition of legal personhood as the capacity to hold rights because it clashes with the contemporary theory of rights (Kurki, 2019, p. 4).

Wise defines legal personhood as "the capacity to possess at least one legal right" (Wise, 2010, p. 1). The NhRP files *habeas* on behalf of certain animals requesting courts to recognize that animal as a legal person with the capacity to hold the right to bodily liberty. Legal scholar Visa Kurki criticizes the NhRP's litigation strategy due to employing this concept of legal personhood and identifies it as the "orthodox view of legal personhood" (Kurki, 2021, pp. 47–48).[38]

[38] Perhaps to avoid the inconsistency produced by the orthodox concept of legal personhood regarding the contemporary theory of rights, the legal person could be defined as being a party to legal relations (Smith, 1928, p. 284), the subject of legal relations (Lawson, 1957, p. 915) or "he who can act in law" (Naffine, 2003, p. 347). These definitions avoid referring to rights and duties, so they avoid the problems these terms produce.

Kurki mainly criticizes two aspects of the NhRP's litigation strategy. First, he claims that the NhRP grounds its strategy on animals lacking legal rights, so winning a case would turn them into legal persons with certain rights, framing the debate as "momentous and historic," and thus, deterring courts (Kurki, 2021, p. 48). Second, he argues that animal advocates, specifically the NhRP, should center the debate on animals holding certain rights instead of legal personhood (Kurki, 2021, p. 48). I offer five arguments against Kurki's position.

First, attaining animal rights through courts or congress *is* momentous and historic. Animals have been exploited for centuries and have only been afforded basic legal protection in recent decades. Even though animals currently hold some legal rights, these are minimum, difficult to enforce, and allow animal suffering and abuse. The NhRP grounds its strategy on pushing the barrier and challenging the status quo, defying judges, and the public opinion to change the legal status of animals through litigation and activism, media presence, and education on animals' cognitive abilities and complex societies. It may be true that this strategy can shock some judges, but so has every expansion of rights throughout history.

Latin American case law indicates that lawsuits on animal rights and legal personhood have not dissuaded judges. Quite the contrary, some courts have dared to consider great apes, bears, dogs, and monkeys as legal persons or subjects of rights. Higher courts like Supreme Courts or Constitutional Courts have started selecting these cases for revision, considering them novel and an opportunity to rule on animal

rights. Even if these courts finally dismiss these cases, they are showing interest and slowly granting more protections to animals. Animal legal personhood is becoming a familiar concept among legal practitioners and the public thanks to these lawsuits.

Second, the only *completely* successful *habeas* case in the world used the orthodox concept of the legal person to recognize chimpanzee Cecilia as a legal person.[39] In fact, judge María Alejandra Mauricio identified the concept of legal person with the concept of subject of rights, arguing that great apes are subjects of rights with the "capacity for rights."[40] Thus, the orthodox view of legal personhood benefited chimpanzee Cecilia, who is currently living in a sanctuary in Brazil.

Third, given that the judicial quest for animal personhood and animal rights is to improve matters for animals, we must ask ourselves the following question. Is the NhRP's employment of the orthodox view self-defeating? Although, the NhRP has not won a case in the US yet, we cannot ascribe this circumstance to the use of the orthodox concept of legal personhood. In fact, in chimpanzee Kiko's case, the Fourth Judicial Department denied the petition arguing that the *habeas* must challenge the confinement itself and seek immediate release from custody, rather than changing the confinement

[39] I use the word *completely* because I consider other cases have been successful even though a higher court reversed the judgment that recognized the animal plaintiff as a legal person or a subject of rights, as I explain in Chapter Six. Estrellita's case was successful in the sense that the court recognized animals as subjects of rights, but it dismissed the *habeas* because Estrellita had died. I explain Estrellita's case in Chapter Seven.
[40] Tercer Juzgado de Garantías de Mendoza, *supra* note 6, at 31, 33.

conditions (*A former animal 'actor,' partially deaf from past physical abuse*, 2013). Likewise, in the case of elephants Beulah, Minnie, and Karen, judge Bentivegna simply dismissed the case arguing that the NhRP lacked standing as it did not have a significant relationship with the elephants and considered the case frivolous (Choplin, 2017b).

In chimpanzee Tommy's case, the New York State Supreme Court, Appellate Division, Third Judicial Department dismissed the case arguing that chimpanzees cannot hold duties (*The NhRP's first client*, 2013). Hence, the court dismissed the case using the orthodox view of legal personhood (Kurki, 2021, p. 54). The NhRP used the orthodox view of legal personhood, requesting the Court to recognize Tommy as a legal person with the capacity to hold the right to bodily liberty (*The NhRP's first client*, 2013), so the orthodox view of legal personhood can be used to argue against and in favor of animal rights. In Happy's case, among several other arguments, the court also argued that animals must bear duties to hold rights.[41]

I suggest that even if the NhRP had used a different concept of legal personhood in Tommy's case instead of the orthodox concept of legal personhood, the court could still use the orthodox view to dismiss the *habeas*. First, courts are not forced to use the same concept of legal

[41] In the Matter of Nonhuman Rights Project, Inc., &c., Appellant, v. James J. Breheny, &c., et al., Respondents, State of New York Court of Appeals, June 14, 2022, at 9, 10. Available at: https://www.nycourts.gov/ctapps/Decisions/2022/Jun22/52opn22-Decision.pdf.

personhood that the plaintiff uses in their brief, so a court could prefer to use a different concept, considering –as this chapter shows– that there are different definitions. Second, courts could prefer to use a textbook definition of legal personhood as these definitions are familiar to legal practitioners. Thus, perhaps choosing a textbook definition of legal personhood is strategically convenient for the NhRP because it avoids having to additionally convince courts that the textbook definitions of legal personhood are wrong due to the contemporary theory of rights and that the court should use a different definition to rule that animals are legal persons. Third, even if the court had not used the orthodox definition of legal personhood, it could still argue that bearing duties is a necessary condition of legal personhood, considering that humans *as a species* have autonomy to bear duties (Cupp, 2013, p. 45). As examined in Chapter One, throughout history different concepts have influenced the *person* and seeped into the law, such as dignity, responsibility, and agency. Therefore, it is not strange for judges to link personhood with duties, regardless of the definition of legal personhood.

Four, judges may not follow or even know about the contemporary theory of rights, so they may consider that animal welfare legislation and anticruelty statutes do not grant animals legal rights but rather regulate animals as objects of protection. For example, the Supreme Court's Criminal Chamber in Chucho's case considered that animals are sentient beings in Colombia, so humans have duties to protect

animals derived from animal welfare legislation and case law, but this does not imply than animals have the right to welfare.[42]

Fifth, Kurki suggests that the NhRP should avoid debating that the animal is a legal person, and instead focus on whether the animal is entitled to a specific right (Kurki, 2021, p. 58). In other words, arguing that the animal is a legal person is surplus to requirement. Considering the NhRP's litigation strategy, Kurki's proposal means proving that the animal has a right to bodily liberty through the *habeas*, without claiming that the animal is a legal person. Certainly, it would be easier to avoid having to convince courts that at least some animals are legal persons and directly argue that these animals are entitled to bodily liberty through the *habeas*. However, civil law and common law legal systems usually establish straightforwardly that *persons* are entitled to the *habeas*, forcing attorneys to prove that the animal *is a person* during trials. In common law legal systems, case-law, statutes,[43] and famous legal dictionaries[44] refer to the

[42] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Cas. Pen. octubre 10, 2017, M.P: F. Bolaños Palacios, Expediente STP16597-2017, at 24 (Colom.).
[43] The US Code on Habeas Corpus states: "Where an application for a writ of habeas corpus is made by a *person* in custody under the judgment and sentence of a State court of a State which contains two or more Federal Judicial districts, the application may be filed in the district court for the district wherein such *person* is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent Jurisdiction to entertain the application." U.S. Congress (1982) United States Code: Habeas Corpus, 28 U.S.C. §§ -2256 1982, at 342 (emphasis added).
[44] The *Black's Law Dictionary* defines the *habeas corpus* as: "A writ employed to bring a *person* before a court, most frequently to ensure that the *person's* imprisonment or detention is not illegal" ('Habeas corpus', 2009, p. 778 emphasis added).

person when regulating or defining the *habeas*.[45] In Tommy's case, the NhRP referenced article 70 § 7002 (a) of the *Civil Practice Law and Rules* (CPLR) of the *Consolidated Laws of New York* in its *habeas* to demonstrate standing. This regulation regulates the *habeas* petition, clearly stating that *persons* may file the *habeas*:

> A person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf or a party in a child abuse proceeding subsequent to an order of the family court, may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance. A judge authorized to issue writs of habeas corpus having evidence, in a judicial proceeding before him, that any person is so detained shall, on his own initiative, issue a writ of habeas corpus for the relief of that person.[46]

The New York State Supreme Court (Fulton County) found that the term *person* under CPLR article 70 did not include chimpanzees and denied the petition.[47] Hence, courts do, in fact, examine if the animal

[45] This is not novel. In the 17th century English legal system, we will find the *person* in laws on the *habeas corpus*. For example, the English Habeas Corpus Act of 1679 stated: "For the prevention whereof and the more speedy Releife of all *persons* imprisoned for any such criminall or supposed criminall Matters whensoever any *person* or *persons* shall bring any Habeas Corpus" (sic). See, Habeas Corpus Act (1679). England: Parliament. Available at: https://www.legislation.gov.uk/aep/Cha2/31/2/data.pdf.

[46] New York Consolidated Laws, Civil Practice Law and Rules, § 7002 (a) (2013). United States. Available at: https://law.justia.com/codes/new-york/2013/cvp/article-70/7002/.

[47] People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 2013, para. 26

plaintiff fulfills the *habeas* requirements. Hence, the NhRP must prove that the animal is a person in these proceedings. If the court finally decides that a chimpanzee is not a person is a different story. The court's refusal to consider a chimp a person under article 70 does not imply that the NhRP's strategy is wrong. It just means that that specific court does not consider that a chimp complies with the first legal requirement to file a *habeas*: legal personhood.

Civil law legal systems also regulate the *habeas* through laws that detail *who* can file the writ. In these legal systems, judges must determine whether these requirements are fulfilled when deciding to grant or dismiss the *habeas*. In fact, in many countries the *habeas* law explicitly states that only natural persons can file the writ, so juridical persons cannot file *habeas*. For example, article 1 of Spanish Organic Law 6/1984, which regulates the *habeas* procedure states that any illegally detained *person* will obtain the immediate availability of a judge.[48] Additionally, article 21 of the 1980 Chilean Constitution states that the *habeas* may be filed on behalf of a *person* whose right to personal liberty and individual security is illegally deprived, disturbance, or threatened.[49] Likewise, article 4 of Colombian Law

[48] Original text in Spanish: "Artículo 1. Mediante el procedimiento del «*Habeas* Corpus», regulado en la presente ley, se podrá obtener la inmediata puesta a disposición de la Autoridad judicial competente, de cualquier *persona* detenida ilegalmente." (Emphasis added). See, Organic Law 6/1984, of May 24, which regulates the habeas corpus procedure. BOLETÍN OFICIAL DEL ESTADO [BOE], No. 126, May 26, 1984 (Spain). Available at: https://www.boe.es/buscar/act.php?id=BOE-A-1984-11620.

[49] Original text in Spanish: "Artículo 21, inciso 3. El mismo recurso, y en igual forma, podrá ser deducido en favor de toda *persona* que ilegalmente sufra cualquiera otra privación, perturbación o amenaza en su derecho a la libertad personal y seguridad individual." (Emphasis added). See, 1980 Chilean Constitution, *supra* note 29.

1095/2006 states that the *habeas* petition must state the name of the *person*, the date and place where the *person* is deprived of freedom, and the name of the people who deprived the *person* of freedom. Article 5 states that the judge will interview the *person* that has filed the *habeas* and article 6 states that the judge will order the *person's* freedom.[50]

Therefore, in civil law jurisdictions it is also relevant to argue that the animal is a person as *habeas* regulations state that the writ applies to *persons* and judges must apply the law, examining if the petitioner fulfills the legal requirements. This argument may apply to other fundamental rights that are specifically granted to *persons* in Constitutions, international treaties, and statutes.

[50] Original text in Spanish: "Artículo 4. Contenido de la petición. La petición de Hábeas Corpus deberá contener: 1. El nombre de la *persona* en cuyo favor se instaura la acción. 2. Las razones por las cuales se considera que la privación de su libertad es ilegal o arbitraria. 3. La fecha de reclusión y el lugar donde se encuentra la *persona* privada de la libertad. 4. Si se conoce el nombre y cargo del funcionario que ha ordenado la privación de la libertad de la *persona o personas* en cuyo favor se actúa." (Emphasis added).
"Artículo 5.2. Trámite. La autoridad judicial competente procurará entrevistarse en todos los casos con la *persona* en cuyo favor se instaura la acción de Hábeas Corpus. Para ello se podrá ordenar que aquella sea presentada ante él, con el objeto de entrevistarla y verificar los hechos consignados en la petición. Con este mismo fin, podrá trasladarse al lugar donde se encuentra la *persona* en cuyo favor se instauró la acción, si existen motivos de conveniencia, seguridad u oportunidad que no aconsejen el traslado de la *persona* a la sede judicial." (Emphasis added).
"Artículo 6. Decisión. Demostrada la violación de las garantías constitucionales o legales, la autoridad judicial competente inmediatamente ordenará la liberación de la *persona* privada de la libertad, por auto interlocutorio contra el cual no procede recurso alguno." (Emphasis added). See, Law 1095/2006, which regulates article 30 of the Constitution, November 2, 2006, Diario Oficial [D.O.] 46440, (Colom.). Available at:
https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=22087.

Considering that the concept of the *person* appears in statutes and case-law on the *habeas* in different legal systems, attorneys representing animals are forced to prove at least three things in court:

(i) The animal is a person because persons have standing to file the *habeas*.
(ii) The animal is entitled to the right to bodily liberty or the right to freedom because the *habeas* protects these rights.
(iii) The animal's imprisonment is unlawful.

***

Even though the orthodox concept of legal personhood can cause theoretical dilemmas, especially regarding the contemporary theories of rights, it does not necessarily produce the same dilemmas in court, where attorneys must evaluate what strategy has more chances of success. The textbook definition of legal personhood as the capacity to hold rights or duties may enable judges to decide that if an animal is entitled to some legal rights, then the animal has legal capacity and thus, legal personhood, as occurred in Cecilia's case.

4.4 SUBJECT OF RIGHTS

The legal person as the subject of rights is another classic textbook definition (Rogel Vide and Espín Alba, 2018, p. 9). As the subject of rights has the capacity to hold rights, the concept of legal personhood as a subject of rights is often confused with the previous concept of legal personhood as the legal capacity to hold rights or duties (Corral Talciani, 1990, p. 311). This section first examines who can be a subject of rights and the following section examines the challenges of this definition of legal personhood.

a) Who Can Be a Subject of Rights?

Rights need a subject, who is identified as the legal person (de Castro y Bravo, 2008, p. 24). Scholars have argued for decades about who can be a subject of rights. On the one hand, the will theory links the capacity to choose or express one's will to bearing rights, so only those who can express their will can hold rights. Therefore, this theory excludes children, the dead, people in a vegetative state, and people who due to their age or intellectual disability cannot express their will (Casal, 2018, p. 17).

On the other hand, whether a being has a will of its own is irrelevant when deciding whom the law considers a subject of rights. The community creates subjects of rights when it recognizes a being or entity as a unit with interests deserving social protection (Nékám, 1938, p. 26). Thus, the interest theory argues that rights protect

interests, and therefore, children, the elderly, and people with intellectual disabilities can hold rights. It is obvious that the interest theory of rights, which is very widely held in philosophy, makes the case for animal rights much easier than the will theory, or even, as some argue, directly supports animal rights (Corral Talciani, 1990, p. 312).

This, however, does not mean that if the will theory is true, animals rights cannot be defended. It is unclear what it means to be able to choose, or if being able to choose certain things is enough to hold rights according to the will theory (Casal, 2018, p. 18). Perhaps it means that at least some animals are able to choose (Casal, 2018, p. 18). I offer three examples supported on scientific research that evidence animals' ability to choose:

(i) Animal welfare preference tests.
(ii) Primatological research on capuchin monkeys, sooty mangabeys, and chimpanzees.
(iii) Observation of orcas' behavior in the wild.

First, animal welfare scientists normally discuss animals' preferences, desires, and motivations (Kirkden and Pajor, 2006, p. 31) when assessing an animal's welfare through preference tests. During these tests, the animal has to choose between different options or environments, such as temperature, illumination, bedding, and flooring (Fraser and Matthews, 1997, p. 159), as well as who the animal prefers to approach and under what conditions (Erhard, 2003,

p. 349). Furthermore, animal welfare scientists have also suggested that animals' motivation is not limited to obtaining desirable outcomes and avoiding undesirable ones, but are also motivated to learn and manage the world around them (Franks, 2019, p. 7).

Second, primatologists have also observed apes' ability to choose, sometimes through unethical experiments. For instance, research has shown that capuchin monkeys refused to eat when the lever that allowed them to receive food gave another monkey an electric shock. Some monkeys did not eat for twelve days to avoid other monkeys from suffering (de Waal, 2005, p. 178). Chimpanzees are also capable of choosing. They develop complex social relations that imply choosing allies and defining the advantages and disadvantages of different options (de Waal, 2005, p. 71). Another study on sooty mangabeys and chimpanzees shows the complex decision-making process in grooming. Both species had to choose a partner from a group of available individuals. These animals had to take into account the social environment before selecting a partner, such as avoiding to groom an individual that had strong social relationships with another bystander and considering the available partners' rank in their decision (Mielke *et al.*, 2018, p. 9).

Chimpanzees show both culturally influenced preferences and idiosyncratic preferences that have no adaptive explanation. For example, even if building a nest at 3 meters is enough to obtain security against predators, chimpanzees of different areas build at different heights, ranging from 3 to 45, and within each group some

individuals make the extra effort involved in building at enormous altitudes for no apparent reasons but sheer taste (Fruth and Hohmann, 1994, p. 114; Casal and Singer, 2022, p. 219).

Third, the case of orcas is particularly striking because while all orcas are remarkably similar and can benefit from eating other mammals, some entire populations do not do so and tend to avoid those who do. Even some individual members of the populations which sometimes eat mammals can refrain from doing so. For example, on January 10, 2022, witnesses caught on video a pod of orcas freeing a trapped humpback whale off the Western Australian south coast near Bremer Bay. Even though Bremer Bay orcas often eat humpback whales, and the tangled humpback whale would have been an easy meal, the orcas decided to free the whale from the entangled rope (Prentice, 2022).

Confronted with the choice between the will and interest theory of rights, I would, I think with most, find the latter most plausible. Some, however, have responded to the choice theory attempting to combine the two. Legal scholar Alexander Nékám, for example, argues that every right needs an administrator, who can only be a human capable of expressing her will. The subject or beneficiary of the right, however, can be any being or entity, which the community considers a unit with significant interests that require legal protection (Nékám, 1938, p. 33). In other words, only administrators (e.g., guardians) must be able to express their wills, while subjects of rights merely need to possess interests that the community deems essential to protect. I consider that the legal system reflects this position

because it requires representatives and guardians to be paradigmatic adults who can express their will but does not require the wards to express their wills. As wards are vulnerable due to immaturity, disease, or cognitive abilities, they require the protection of their interests through a guardian or representative. Other examples of animal choice provided by Casal involving chimpanzees and dolphins convinced choice theorist Hillel Steiner that some animals should have rights (Casal, 2018).

b) Problems with the Subject of Rights View

There are two main criticisms to the conception of legal personhood as merely entailing a subject of rights. First, some reject identifying legal personhood with being the subject of rights because this concept overlooks the passive function of personhood related to bearing duties and responsibility, and makes personhood depend on the number of rights a being gains or loses (de Castro y Bravo, 2008, p. 29). This objection seems question begging to me, as it is far from obvious that there is something wrong with being guided by the number of recognized rights an individual or group of individuals possess.

Second, Kurki's criticism that the orthodox view of legal personhood fails to explain the contemporary theory of rights also applies to the concept of the legal person as a subject of rights. Indeed, animals are currently subjects of rights because they *hold* certain rights but are not considered legal persons. I suggest that adopting a conception of

legal personhood that takes right possession as a sufficient condition for personhood will be beneficial to animals as it will enable judges to consider animals as legal persons, if they also grant them some rights, as happened in Cecilia and Sandra's cases.

In orangutan Sandra's case, judge Elena Liberatori (a premonitory name) actually made the inverse inference, claiming that Sandra was a person and therefore a right holder: "nonhuman person, thereby, a subject of rights […] Sandra's classification as a 'nonhuman person,' and in consequence, a subject of rights […]"[51] In Cecilia's case, judge Mauricio argued that the law identifies the concept of the person with the concept of subject of rights and declared great apes in general, and Cecilia, in particular, as subjects of rights.[52] Mass media made Cecilia and Sandra famous as the first nonhuman natural legal persons in history (Moreno, 2017; González, 2019).

Are *legal perso*n and *subject of rights* interchangeable concepts? If so (let's call this the equivalence view), does it matter if animals are considered one thing or the other? Those who hold the equivalence view think that whenever a judge recognizes that an animal has some rights, the judge is granting animal personhood as occurred in Sandra and Cecilia's cases. Others believe that only some subjects of rights

[51] 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, at 6–7 (Arg.).
[52] Tercer Juzgado de Garantías de Mendoza, *supra* note 6, at 31, 33–34.

(humans) are, additionally, persons (Corral Talciani, 1990, p. 318) and some believe that animals are subjects of rights but not legal persons (Pietrzykowski, 2017, p. 67; Mañalich Raffo, 2018, p. 324).

At this point, one may think. Oh well, what's in a word? It does not really matter what label we use, so long as they receive the proper protections. But the label is not entirely inconsequential. I argue that replacing the equivalence view with the view that having rights is necessary but not sufficient for legal personhood (let us call this the subset view) is not beneficial to animals for three reasons.

First, the subset view leads to creating an intermediate category for animals. Humans recognize that animals hold some rights in this intermediate category, which may involve some fundamental rights but will most likely be limited to weak rights (Stucki, 2020, p. 544), like animal welfare and anticruelty provisions because this has been the common trend worldwide. We resist granting animals fundamental rights because we use animals for food, clothing, biomedical research, transport, and entertainment globally. If the only rights granted to animals are related to welfare, and anticruelty provisions, recognizing animals as subjects of rights will not imply including them in the personhood category, as animals can be regulated as property while being recognized as holders of some basic rights (Favre, 2010).

Second, even if we granted animals some fundamental rights, including all humans born alive and separated from the mother into

the same category (natural or physical persons) implies excluding other beings from that category, stressing the sharp contrast between humans and other beings (Esposito, 2012a, p. 23). This places humans in a higher legal category so human interests would continue generally trumping animal interests. This is the legal equivalent of a position in moral philosophy held by many self-declared anti-speciesist, like philosophers Peter Vallentyne, and Shelly Kagan, which accord animals a lower moral status than they accord humans, declaring all their interests as having lesser moral importance (Vallentyne, 2005; Kagan, 2019). As I explained in the previous chapters, persons have had the highest legal status since Antiquity, so putting all animals in a different legal category than humans supports human exceptionalism.

Third, even though sentient animals have far more in common with humans than with non-sentient beings, the category of subjects of rights could include animals, and other non-sentient beings that also hold legal rights, like nature and its elements, such as rivers, mangroves, and forests, which have been recognized as subjects of rights in different countries from India, Bangladesh, and New Zealand to Colombia and Ecuador. This category could also include other non-sentient beings like idols or ships (Tudor, 2010, p. 138) that are not legally protected due to their vulnerability like humans and animals but due to other reasons like worship or business.

The subset view leads to the following organization of the legal universe:

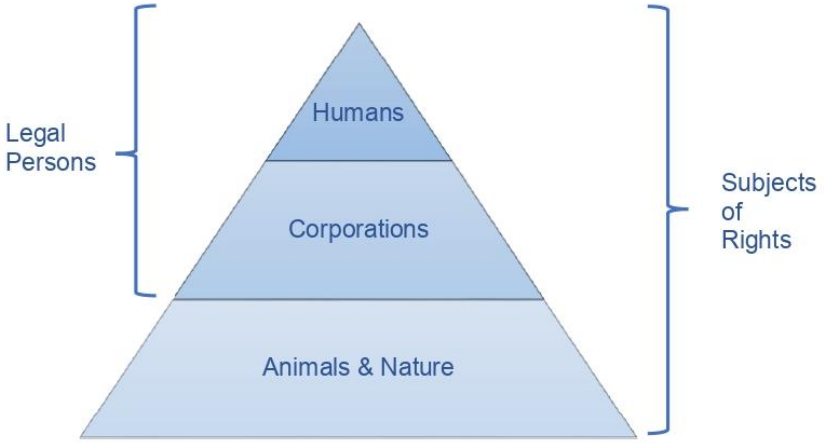

Figure 1. The Subset View.

Two important variations on this model involve classifying corporations as subjects of rights but not persons, because only natural persons are legal persons (Lacalle Noriega, 2016, p. 234) and including animal subjects of rights as physical persons with humans because animals also have a natural or physical existence. I support including animals in the natural person category instead of the juridical person category as humans and animals share their sentience as well as other characteristics (Bilchitz, 2009, p. 68), while corporations are fictitious entities created to conduct business.

The subset view looks similar to how the law regulates animals today in most countries, as the next diagram shows:

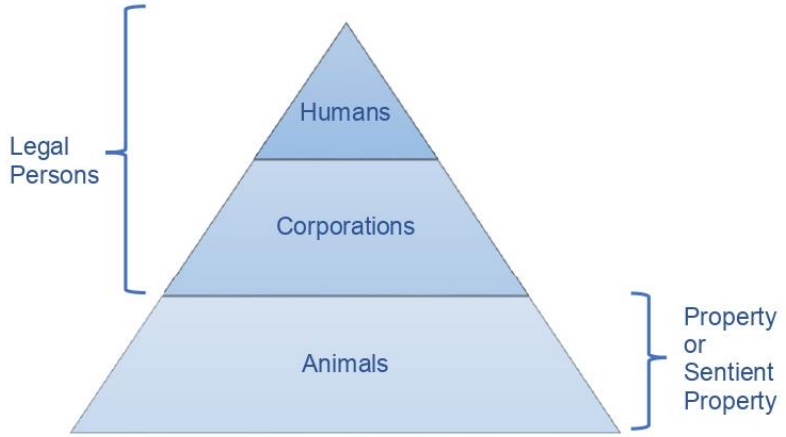

Figure 2. Animals' Current Legal Regulation.

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In sum, animals can be considered subjects of rights according to both the will and interest theories. However, the law protects vulnerable people's interests, such as children and intellectually disabled people, rather than protecting only those who can express their will. The law even protects animals through anticruelty, welfare, and environmental regulations, supporting the argument that Western legal systems adopt the interest theory instead of the will theory (Bilchitz, 2009, p. 43). The equivalence view of legal personhood has been helpful for animals because some animals have become famous as legal persons thanks to the court recognizing them as subjects of rights. The subset view of the legal person is not necessarily beneficial for animals and may lead to a similar situation to the one we have today.

CONCLUSION

As explained in Chapter One, the concept of the person has had a complex origin and development, overlapping in different fields of knowledge, making it hard to define. Hence, different conceptions of the legal person emerged. I argue that animals can be considered legal persons according to the four traditional concepts of legal personhood:

(i) Legal personhood as the personification of a set of norms.
(ii) Legal personhood as status or role.
(iii) Legal personhood as the legal capacity to hold rights and bear duties.
(iv) Legal personhood as the subject of rights.

I also argue that the diversity of definitions of legal personhood may benefit animal personhood. Throughout history, completely different entities, including idols, ships, corporations, charities, animals, rivers, mangroves, forests, and even nature in general, have been considered somewhere a legal person. It is thus unsurprising that the definition of what that means has significantly varied too.

Despite the variety of definitions of legal personhood, there is clarity on at least two aspects.

(i) The law does not consider the terms *human* and *legal person* as the same. The concept human is a biological category that indicates who belongs to the *Homo sapiens* species, which can be determined through genetic testing.

(ii) The definitions of legal personhood may vary depending on one's theoretical framework, the role of the entity (or being), legal capacity, and holding rights. However, animals can be regarded as legal persons according to each criteria.

5. LEGAL PERSONHOOD AS A CLUSTER CONCEPT

INTRODUCTION

In Chapter Two we saw how the person has been associated with many different traits such as intelligence, rationality, self-awareness, mental continuity, agency, planning, capacity to choose, and so on. Now, rather than identify any trait as necessary and sufficient to be a person, I propose thinking of personhood as a cluster concept. This means that an individual is a person if she has most of the traits to a sufficient degree, without any one trait being necessary and sufficient for personhood.

Although the analysis of cluster concepts is common in the philosophy of science, where philosophers examine if concepts like *personhood*, *art*, and *democracy* are cluster concepts, it has also extended to the law regarding the concept of *legal personhood*. Legal personhood as a cluster concept faces specific challenges that I will explain in the following sections.

5.1 SOME CLARIFICATIONS

I argue that the cluster concept of legal personhood faces three kinds of challenges:

(i) Some common definitions of legal personhood as a cluster concept misunderstand the philosophical meaning of a cluster.

(ii) Legal personhood as a cluster concept does not clarify the nature of the list of criteria. Does it refer to unverifiable metaphysical conditions, verifiable scientific traits, or legal attributes?

(iii) If the list of criteria refers to specific legal attributes, then the attributes of personality regulated in civil law systems following the French continental law tradition indicate the list of criteria legal persons' possess.

a) Common Definitions

A cluster concept is a concept that is defined by a weighted list of criteria, such that no one of these criteria is either necessary or sufficient for membership (Matthen, 2010). Art, democracy, and personhood are examples of cluster concepts.

However, legal scholar Ngaire Naffine defines legal personhood as a cluster concept in the following terms:

> legal personality is made up of a cluster of things: specifically, it comprises single or multiple clusters of rights and/or duties, depending on the nature and purpose of the particular legal relation. Rights and duties, which effectively make the person, can come in thick and thin

> bundles, in larger and smaller clusters, which means that we are actually different legal persons in different legal contexts. (Naffine, 2009, p. 46).

On the other hand, Tur understands legal personhood as a cluster concept in the following words:

> The law will ascribe legal personality to two entities even where they bear different clusters of rights and duties. So, legal personality is a cluster concept, where in some cases one cluster of rights and duties is present, and in other cases a different cluster of rights and duties is present, perhaps, overlapping somewhat with the first. (Tur, 1987, p. 122).

I argue that Naffine's and Tur's cluster concept of legal personhood either misunderstand what a cluster concept is or use it quite differently to how it is employed in philosophy. The cluster concept is a list of conditions or traits none of which is necessary or sufficient for an individual (artist, person, etc.) to qualify as such. And second, these traits or conditions are descriptive not prescriptive. If we make it prescriptive, then we run the risk of falling into a circular argument, defining a person by a set of rights in order to argue that he or she should have those very rights.

First, the above definitions of legal personhood as cluster concepts provide necessary and sufficient criteria for legal personhood:

holding rights or bearing duties (Kurki, 2019, p. 94), so these definitions are not really cluster concepts.

Second, I consider that both definitions confuse *cluster concept* with *bundle of rights* (or *incidents* in Hohfeldian terms). A *bundle* has nothing to do with a weighted list of criteria that is neither necessary or sufficient, and simply refers to a collection of something that is bound together. Hence, we should use *bundle* to refer to the collection of rights or Hohfeldian incidents that entities or beings hold. We should not use the formula *cluster of rights and duties* because this would mean that rights and duties are cluster concepts, when we really want to argue that *legal personhood* is a cluster concept. Instead, we should talk about the *bundle of rights or duties* or the *bundle of incidents* that legal persons hold.

b) Nature of the List of Criteria

Until this point, we understand that legal personhood is a cluster concept because the list of criteria is neither necessary nor sufficient, so an entity or being should possess the criteria to a sufficient degree to be considered a legal person. The next logical question to ask is what criteria appear in this list?

I argue that legal personhood as a cluster concept does not answer what the nature of the list of criteria is, which will depend on each scholars' view of legal personhood. Does the list of criteria refer to the verifiable marks of personhood explained in Chapter Two, to the

non-verifiable marks explained in Chapter Three, or does it refer to legal criteria? Considering this uncertainty, I offer two arguments that support my conclusion that the above cluster concepts of *legal* personhood are not always helpful in defending animal personhood. I am not, however, proposing that everybody should accept one particular conception of the person. On the contrary, I take an ecumenical approach and think that having a variety of definitions of legal personhood could even benefit the campaign for the recognition of some animals as persons.

First, as I explained in Chapter One, different concepts throughout history have seeped into the concept of the legal person, so legal scholars tend to characterize natural legal persons as rational (Corral Talciani, 1990, p. 306; de Castro y Bravo, 2008, pp. 28–29), free (Corral Talciani, 1990, p. 321), self-aware (Pietrzykowski, 2017, p. 65), or possessing dignity (Lacalle Noriega, 2016, pp. 49–50). Consequently, the cluster concept of legal personhood would imply that beings possessing these criteria to a sufficient degree would qualify as legal persons. This account links legal personhood with the moral and scientific marks of personhood. However, it is unclear if scholars refer to these moral and scientific marks as the list of criteria when stating that legal personhood is a cluster concept.

I consider that grounding the cluster concept of legal personhood on moral and scientific attributes to defend animal personhood has two benefits. On the one hand, it is a pragmatic approach considering that these attributes have in fact seeped into the law throughout history,

so we are always going to come across views that consider that legal persons possess these attributes. Second, scientific advances in animal cognition and behavior are evolving rapidly, offering new arguments to defend animal persons.

Third, however, not all scholars agree on *who* can be recognized as a legal person. Some scholars believe that only humans are legal persons from the moment of conception (Corral Talciani, 2014) and that corporations are human organizations (Cupp, 2009, p. 55), so corporations are not an example of nonhuman legal personhood, but rather examples of human legal personhood. This view is usually formulated in two different ways. On the one hand, some may argue that only humans are legal persons because humans possess certain unique characteristics. The cluster concept in this case would imply that beings that possess those characteristics to a sufficient degree can be legal persons even though they do not belong to the species *Homo sapiens*.

On the other hand, some may argue that the only requirement for legal personhood is membership to the *Homo sapiens* species. This view links legal personhood to philosophical and Christian theological discussions regarding human exceptionalism, human nature, and dignity. In this case, legal personhood is not a cluster concept because membership in the human species would be necessary and sufficient. Consequently, this view does not consider legal personhood a cluster concept, so arguing that personhood is a cluster concept is a way of criticizing this traditionally Christian

view. Defending animal personhood in this scenario may require a different approach like using the Roman law definition of legal personhood as a role to argue that playing a role in society does not require belonging to a specific species, considering that civil law legal systems incorporated the Roman division between persons and things and their corresponding subcategories into their Civil Codes. Another approach could be defining legal personhood in Kelsen's sense to distance the debate from human nature and dignity.

Other scholars influenced by Kelsen consider that legal persons can be anything the law considers, so the legal person is not a cluster concept because there is no list of criteria. According to this account, legal recognition as a person in a law, decree, or regulation would be necessary and sufficient. In this case, the cluster concept of legal personhood does not help defend animal persons because anything can be a legal person. In this scenario, we should defend animal personhood using Kelsen's concept of the legal person or the textbook definitions of legal persons as subjects of rights to argue that animals currently hold certain rights in our legal systems.

Therefore, as the nature of the list of criteria of the cluster concept of legal personhood is uncertain and considering the options examined above, I propose including moral and scientific attributes to argue for animal personhood as these can be supported on empirical evidence. However, considering that scholars have different conceptions of the legal person, the cluster concept will not always be helpful to argue for animal personhood, so the other concepts of legal personhood

explained throughout this chapter may be helpful in these situations to defend animal personhood.

c) Legal Marks of Personhood

In Chapter Two, I explain the verifiable marks of personhood, so in this section I focus on legal criteria. Kurki argues that legal personhood as a cluster concept means that legal persons have different bundles of incidents, which are neither necessary nor sufficient, so a being must possess a sufficient degree of these incidents to qualify as a person (Kurki, 2019, p. 94). In other words, these incidents constitute the list of criteria that legal persons must possess, so he does not examine moral or scientific attributes of persons as the list of criteria for legal personhood as a cluster concept.

Kurki calls his theory the *Bundle Theory of Legal Personhood*, stating that legal personhood is a "cluster property […] as it consists of interconnected but disseverable incidents" (Kurki, 2019, p. 94). It is important to clarify that Kurki uses the concept *incidents* in Hohfeldian terms: "incidents involve primarily the endowment of X with particular types of claim-rights, responsibilities, and/ or competences." (Kurki, 2019, p. 5). According to his account, to be a legal person it does not matter if you can hold incidents, but rather what types of incidents a being holds (Kurki, 2019, p. 5). Viewing the list of criteria of the cluster concept of legal personhood as a bundle of incidents allows us to bypass the debate on whether a being must be, for example, rational, self-aware, or social to hold these

bundles. Entirely detaching the legal person from what we have traditionally understood to be a person does not seem like a good idea. There are reasons provided by philosophers that explain why killing a person is a very serious moral harm. The severity of this crime must be connected to the kind of creature a person is (her mental continuity or hopes and plans, for example) rather than to the fact that this creature has already some legal rights (for example as property owner).

Complementing legal theorist Neil MacCormick's account, Kurki suggests that passive legal persons, such as children possess the following bundle of passive incidents (Kurki, 2019, p. 95):

(i) Fundamental protections (protection to life, liberty, and bodily integrity).
(ii) Capacity to be the beneficiary of special rights. This incident refers to rights that are limited to the parties participating in the transaction.
(iii) Capacity to own property.
(iv) Insusceptibility to being owned.
(v) Standing.
(vi) Victim status in criminal law.
(vii) Capacity to undergo legal harms.

Kurki states that infants and adults are legal persons to different degrees (Kurki, 2019, p. 94). In this sense, an entity can be a person for some purposes or sections of the law and a nonperson for others

(Peters, 2020, p. 113). Applying these incidents, Kurki suggests that Cecilia the chimpanzee, who was recognized as a nonhuman person and subject of rights by Judge Mauricio, was only recognized as a legal person *for the purposes* of the *habeas* but not as a legal person *tout court* because Cecilia lacks the other incidents of passive legal personhood (Kurki, 2019, p. 199). Hence, Kurki does not consider animals as legal persons *tout court* but rather as quasipersons belonging to an intermediate category between full legal persons and nonpersons, where animals are afforded some protection but are clearly distinguished from humans.

I present three main arguments against Kurki's account:

(i) Arguments in favor of chimp Cecilia as a legal person.
(ii) Arguments against considering legal personhood scalar.
(iii) Argument in favor of the *attributes of personality*.

•Arguments for Chimp Cecilia's Legal Personhood

I argue that Cecilia *is* a legal person although she does not possess every incident that other legal persons possess for three reasons. First, Judge Mauricio did not recognize Cecilia as a legal person *only* for the purposes of the *habeas* but recognizes her as a legal person in general, stating that she holds different fundamental rights and

recognizing she has the "cognitive abilities of a four-year-old child" (sic).[53]

Second, there is no agreement on the incidents legal persons possess, so Cecilia may not possess all the incidents mentioned by Kurki but she may possess others. In the next section, I argue that legal persons possess *attributes of personality* to a sufficient degree. Chimp Cecilia possesses a name, nationality, domicile, capacity, civil status, and certain fundamental rights linked to natural persons like the right to life, freedom, and integrity, so she *is* a legal person.

Third, legal persons possess different bundles of incidents and that does not mean that those who possess a smaller bundle are less legal persons than other legal persons. The law does not consider individuals as *full legal persons* or *semi-legal persons* or *quasipersons* or *barely legal persons*. The law considers babies, children, teenagers, adults, people of all ages with intellectual disabilities, older people, people with Alzheimer, and comatose people legal persons. However, the law recognizes that these legal persons hold different bundles of incidents because they possess different capacities and require different protection, as I explain in the next section.

Fourth, legal discourse in courts would become strenuous if legal practitioners had to clarify that each legal person *is only a legal*

[53] Tercer Juzgado de Garantías de Mendoza, *supra* note 6, at 33, 37–38.

person for certain incidents and not a legal person *tout court* or if courts had to deal with countless degrees of legal persons between *tout court* and not *tout court* legal persons. It is more practical for the exercise of law and in accordance with the standards of justice to consider legal personhood as a range property, as I explain in the next section.

•Arguments Against Scalar Legal Personhood

In this section, I argue that legal personhood should not be considered a matter of degree. Instead, the bundle of incidents should be considered a matter of degree. This is so for at least five reasons.

First, considering legal personhood as a matter of degree may lead to some entities being considered as less legal persons than others. Children's bundle of incidents may be reduced compared to a paradigmatic adult. However, it seems odd to state that the legal system views children as lesser persons than adults, especially considering that the Universal Declaration of Human Rights states that everyone has the right to recognition everywhere as a person before the law (article 6) and that we are all equal before the law (article 7).

A 5-year-old child may hold the fundamental right to life but may not be able to drive but this does not mean that the child is a legal person for constitutional law but is not a legal person regarding driving regulations. It just means that driving is not an element of the child's

bundle of incidents (as it happens to many adults). Legal personhood as a matter of degree may also mean that undocumented immigrants could be considered lesser legal persons than citizens, which could lead to more discrimination than what immigrants already withstand (Fassin, 2001; Joseph, 2011; S. Rodríguez, 2020).

Second, as legal scholars Mikko Rajavuori and Toni Selkälä suggest "a legal person was never simply a bundle of rights and duties, but a powerful idea that has shaped legal relations even when never articulated" (Selkälä and Rajavuori, 2017, p. 1064). If the law considers an entity as a legal person that entity not only belongs to the highest legal category within the legal system and is offered far more protection than beings belonging to other categories, but it also reflects how society views and values those entities. Defending that some beings are less persons than other beings may be detrimental to them because we cannot isolate the idea of legal personhood from any evaluative or metaphysical associations in the minds of the users of those terms.

> For there is then a failure to appreciate the way metaphysical ideas about what makes us what we are necessarily inform fundamental legal decisions about who should be able to bear rights and duties in different legal relationships. (Naffine, 2009, p. 32).

If there are heated discussions in bioethics around whether a fetus, or an anencephalic irreversibly comatose patient is a person it is because

we do not see the decision as a mere technicality devoid of any evaluative attitude or symbolism (Casal and Singer, 2022, p. 77).

Third, the gradation of legal personhood may lead to the creation of new categories within the category of legal persons, complicating the application of the law and reducing the protection of those beings that do not qualify as *full legal persons*. For example, we could create the categories of *nonpersons* (fetus), *quasipersons* (infant), *semi persons* (elderly), *no-longer-persons* (the patient in a vegetative state), and *anti-persons* (people with intellectual disabilities) (Esposito, 2012b, p. 97). What type of legal person would corporations or animals be? The full legal person would only be the non-disabled adult, which puts this category at the top of the legal personhood hierarchy.

Fourth, the gradation of legal personhood implies interpreting the law as separate compartments instead of an interconnected system because someone could be a legal person for the purposes of one area of the law and not another. I do not find this a plausible understanding of the law. Legal personhood does not stop or disappear when a legal person lacks a certain incident.

Fifth, instead of creating *full legal persons* and *lesser or partial legal persons* that can lead to perverse incentives in the law, I propose considering legal personhood as a range property (Rawls, 1999, p. 444). All beings or entities which pass the legal personhood threshold are considered legal persons, but their bundle of incidents will differ depending on their age, cognitive abilities, maturity, and health,

among other circumstances. Therefore, children, people with intellectual disabilities, older adults, and animals are legal persons like non-disabled adults, but their bundle of incidents may be smaller. We would never view citizenship as a matter of degree because some would be more Spanish than others. We view it as a range property, so whoever passes the requirement threshold is entitled to Spanish citizenship. Hence, we should not view legal personhood, the highest legal status within the legal system, as a matter of degree, where the non-disabled adults are the only full legal person.

•Argument for the Attributes of Personality

Kurki employs a list of attributes based on MacCormick's account. In civil law systems, following the French continental law tradition, such as Latin American countries, the law defines a list of specific characteristics inherent to legal persons as *attributes of personality* (*atributos de la personalidad*). I propose using this list of attributes instead of MacCormick's and Kurki's list because the attributes of personality are widely accepted by legal practitioners and apply to animals. These attributes include:

(i) Capacity
(ii) Nationality
(iii) Name
(iv) Domicile
(v) Civil Status
(vi) Patrimony

(vii) Fundamental rights linked to the person (right to life, freedom, physical and mental integrity, honor, intimacy, image, and copyright).

Membership to the *Homo sapiens* species is not one of the attributes of personality, so I argue that some animals possess all these attributes, and thus, should be considered as natural legal persons. I consider that animals have more in common with humans who are natural legal persons than with corporations that are juridical persons, so it is more coherent to place animals in the natural person category (Bilchitz, 2009, p. 68). For example, corporations cannot be married or have children and so lack the relevant civil status, and many are multinationals registered for legal purposes in convenient locations that have nothing to do with their actual locations. Speaking of a corporation's intimacy or physical or mental integrity makes no sense either.

The list, then, must be understood as a cluster concept, which must nonetheless remain sufficiently specific not to apply too widely. This is avoided because the seventh feature concerns a bundle of rights. These rights cannot be legal. If they were legal, we would be back to the idea that *legal persons* are "mere individuals with rights" and then deny animals rights because they lack personhood and deny them legal personhood because they lack rights. They are moral rights. This connects the cluster concept of the legal person with the cluster concept of the moral person. A legal person, if a natural person, must

also be a moral person, for it must have the verifiable traits we associate with possessing these moral rights.

5.2 ATTRIBUTES OF PERSONALITY

a) Capacity

Legal capacity is divided in two categories. The capacity to enjoy rights (*capacidad de goce*) is the ability to hold rights, duties, and legal relations (Rogel Vide and Espín Alba, 2018, p. 10) or the ability to hold Hohfeldian incidents. The capacity to exercise (*capacidad de obrar o de ejercicio*) is the ability to perform legally effective acts (Rogel Vide and Espín Alba, 2018, p. 11). All natural persons have the capacity to enjoy rights since birth. Although, some argue that natural persons have this capacity since conception because fetuses can hold certain rights. Not all legal persons have the capacity to exercise legal acts.

I argue that animals possess the capacity to enjoy rights since birth, like humans and lack the capacity to exercise, like infants and intellectually disabled people. In the latter case, a guardian could act on behalf of animals. Capacity is a legal concept, not a biological concept, so the law can recognize animals' capacity. In fact, the law currently recognizes that animals possess legal capacity as beneficiaries of pet trusts, as plaintiffs in *habeas* cases, rights of nature cases, among other constitutional and environmental actions, as beneficiaries of custody and visitation agreements in family law

cases, and as sentient beings protected by animal welfare and anticruelty laws and statutes.

b) Nationality and Domicile

I argue that animals possess nationalities and domiciles for three reasons. First, most animals have nationalities as they are born in specific places, like companion animals, domesticated animals, and even animals that live in nature like marine animals. Even marine mammals, particularly the marine mammals with a high chance of being considered a person, are born in shallow waters and so within specific countries, even if they travel internationally later. In any case, as with humans, the family's nationality can be employed as proxy for any individual of unclear origin.

Second, as many animals live under human care, they possess domiciles. In fact, a companion animal's domicile appears in vaccination documents and state registers. Even the specific areas occupied by animals that live in the wild can be determined by technology. In fact, researchers that study animals' behavior in their natural habitats know where these animals live and follow them around their territories. In any case, animals' could use their guardians domicile for legal purposes like humans do.

Third, not all human legal persons have domiciles or nationalities like stateless or homeless people. The 1954 Convention Relating to the Status of Stateless Persons seeks to protect stateless people and solve

their statelessness as persons have the right to a nationality. [54] Still, there are stateless people worldwide. Homeless people lack domiciles, but town councils register them as residents to ensure their access to the public health system and social services, as occurs in Barcelona (Subirana, 2021). Thus, the law can solve cases where there is no domicile available.

Nationality and domicile may be essential to protect animals more efficiently across borders and hold countries accountable for violating animals' rights. In fact, it may facilitate an illegally poached animal's return to her habitat because nationals have the right to return to their countries (Casal and Singer, 2022, p. 86). International recognition of animal legal personhood is needed to protect animals worldwide just like humans' personality is recognized as a fundamental right in the Universal Declaration of Human Rights.

c) Name

Names are attributes of personality that individualize and distinguish legal persons (Fayos Gardó, 2009, p. 156). Animals can also have names. I offer four arguments that support animals possessing names. First, some animals use names in nature, like bottlenose dolphins and many other cetaceans, who use unique sounds to identify each other

[54] 1954 Convention Relating to the Status of Stateless Persons. Available at: https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf (Accessed: July 18, 2022).

and to introduce themselves to a group when they approach it from a distance (King and Janik, 2013).

Second, humans not only name their children, but also name their companion animals, domesticated animals, and non-domesticated animals under their care, like zoo animals. These animals' names are recognized in official documents like the European Pet Passport, vaccination cards, and municipal registries.

Third, animals often respond to their names much as children do, turning towards whoever called them. In fact, research has shown that apes (Williams, Brakke and Savage-Rumbaugh, 1997), dolphins (Herman, 1987), parrots (Pepperberg, 1999), dogs (Kaminski, Call and Fischer, 2004; Pilley and Reid, 2011) and cats (Saito *et al.*, 2019) understand human verbal utterances, like their own names. Recent research has also shown that cats even learn their friend cats' names and human family members' names without explicit training (Takagi *et al.*, 2022). Probably many other animals also understand human words, but there is no research available yet.

Fourth, even judges identify animals by their names in trial, as the cases examined in the last chapter of this dissertation demonstrate. Only the dissenting judge in Estrellita's case has argued that animals do not have the right to identity because only natural and legal persons have this right.[55] However, most judges use the animal's

[55] Corte Constitucional del Ecuador [C.C.E.] [Ecuadorian Constitutional Court], diciembre 22, 2020, J. R. Ávila & J. A. Grijalva, Caso 253-20-JH, Judge C. Corral Ponce's Dissent, at para. 6–9. (Ecu.).

name during the proceedings. In Chucho's case, the zoo's attorney refused to call Chucho by his name during the hearing, but the Constitutional Court judges referred to Chucho by his name during the trial. This strategy is normal for those who oppose animal legal personhood as referring to an animal by his name implies that the animal has a specific biography, relevant to determining his interests and specific needs (Casal and Montes, forthcoming; Montes Franceschini, 2021, p. 42).

d) Civil Status

I argue that animals can possess a civil status for four reasons. First, animals can attach themselves emotionally and sexually to a partner or reject that relation, and humans often recognize and respect that fact, much as in the case of humans de facto couples. Obviously, animals do not spontaneously perform the human ceremony of marriage, as each species or local group has its own rituals. Since those rituals are not recognized by human law (just like not all human marriage rituals are recognized by all legal systems) this means that they cannot possess the *civil* status of single, married, divorced or widow/er, even if their actual relationship clearly corresponds to one of those conditions. However, the law can create specific civil statuses to recognize that some animals mate for life or have lost their partner or live in close groups and families to avoid their separation, as frequently occurs with animals who are taken from nature and who live in zoos.

Second, filiation is the civil status that derives from the bond between a child and the biological or adoptive parents, which unfolds an array of rights and duties, like caring for a child and inheritance. As I explained in the section on legal personhood as a status, courts have started granting custody and visitation rights over companion animals similar to children in divorce cases. Some countries, including Spain, have also started regulating this topic.[56] In the Argentinian case regarding dog Tita, Judge Castro recognized her as the "nonhuman daughter" of the human couple and recognized the plaintiff as her "father" (Rosa, 2021). Hence, he recognized Tita's filiation to her human parents, in other words, her civil status. Consequently, as laws and courts recognize companion animals like dogs as family members and *children* to human parents, these animals clearly have a civil status thanks to this unique relationship.

Third, even if the law did not recognize any of the above mentioned civil statuses to animals, animals could alternatively possess the civil status of *legally incompetent* to act in the law with a tutor or legal guardian that interprets their wishes and performs the necessary legal actions on their behalf (Rogel Vide and Espín Alba, 2018, p. 51).

Fourth, we must not forget that not all legal persons have a civil status, such as corporations, so the law could decide not to recognize animals' civil status, but they could still be considered as legal persons.

[56] Law 17/2021, *supra* note 32.

e) Patrimony

Patrimony is the set of assets and obligations legal persons have. I will not refer to obligations in this section because I examined this topic in the section on legal personhood as the capacity to bear duties. I argue that animals can have patrimony as understanding what patrimony is or how ownership works is not a requirement for having patrimony, as the following three examples evidence.

First, the law has recognized that animals can have patrimony as pet trusts in the US demonstrate (Vokolek, 2008). Pet trusts allow people to provide for their companion animal's future if they die or become incapacitated to ensure the animal's care (Vokolek, 2008, p. 1121). For example, the famous businesswoman Leona Helmsley left a $12 million dollar trust to her white Maltese dog named Trouble (*CBS News*, 2007). Moreover, in countries where pet trusts are not regulated, animals may still receive donations. Chimp Matthew Pan's case illustrates this problem.

Second, many animals build their own tools, so these objects form part of their patrimony because they are valuable to them as they use them to survive. For example, orangutans build and use more than thirty types of tools like hats, umbrellas, bee covers, fans, cushions, pillows, blankets, gloves, napkins, tooth cleaning sticks, back scratchers, and erotic tools (Meulman and van Schaik, 2013, pp. 186–187). It is not far-fetched to argue that an orangutan owns those objects, and so it would be wrong to take them away (Casal and

Singer, 2022, pp. 86–87). When Locke said that you come to legitimately own something when you mix your labor with it, leave enough and as good for others and avoid waste, he did not specify that the relevant individual had to belong to the species *Homo sapiens* for his arguments to make sense (Locke and Laslett, 1988, chap. V).

Third, not all humans have patrimony like most children, so animals could not have patrimony and still be considered legal persons. Even though a person's patrimony seeks to respond to debts to creditors, animals' patrimony, like a child's patrimony, should include things that are valuable to animals to ensure their survival and care like the tools they build, trusts, donations, and even their habitats (Bradshaw, 2020).

f) Fundamental Rights

Attributes of personality involve some fundamental rights linked to the person, such as the right to life, freedom, and physical and mental integrity, honor, intimacy, image and copyright (Fayos Gardó, 2009, p. 136). This section focuses on natural legal persons. I argue that animals are also entitled to these rights.

The right to life, freedom and physical and mental integrity are the basic rights that the GAP requests for orangutans, gorillas, bonobos, and chimpanzees. I consider that if an animal is recognized as a natural legal person, the animal automatically holds these three basic rights as these are the basic rights of natural legal persons, according

to the attributes of personality. Hence, chimp Cecilia, who judge Mauricio recognized as a legal person, cannot be hunted, imprisoned, or tortured, not even for the sake of biomedical research.[57] If a situation is sufficiently bad, as in war, we may have to end up violating a right to prevent a catastrophe, but this does not prevent us from having specific laws protecting humans, and so emergencies, such as pandemics, should not prevent us from extending certain protections to nonhuman persons.

•Right to Life

There are three main reasons why it is essential to protect the life of a person.

Value of Life

Taking a person's life deprives that being of all the experiences it would have had. Casal and Singer explain that if a mosquito dies, it only loses days or weeks of flying around with no destination or company (Casal and Singer, 2022, p. 32). However, if a human, a chimp, an elephant, or a dolphin dies, they lose years of experiencing the world, developing deep emotional relationships and friendships with others, playing, and visiting new places (Casal and Singer, 2022, p. 32)

[57] See Chimp Cecilia's case in Chapter Seven.

Value of Life for Family and Friends

Killing a person also affects that person's family and friends, with whom the deceased had strong emotional relationships (Casal and Singer, 2022, p. 32). Indeed, death can be worse for the family and friends due to the intense suffering caused by losing a loved one. Research on animal behavior has shown that many animals have thanatological behaviors and suffer the loss of their family members or friends deeply, suggesting that some animal species possess some degree of death awareness (Pokharel, Sharma and Sukumar, 2022, p. 2). For example, adult female elephants carry dead calves, guard the carcass and keep vigil (Pokharel, Sharma and Sukumar, 2022). Female primates also carry their dead infants for long periods and can produce particular vocalizations when the infant dies (Gonçalves and Carvalho, 2019, p. 1506).

Connection with the Future

Killing a person prevents her from achieving her goals and projects. Many humans and animals possess self-awareness, psychological continuity, and the capacity to plan, so their future matters to them in a very special way (Casal and Singer, 2022, p. 32). For example, research has shown that chimpanzees can delay gratification, evidencing their psychological continuity as they decide to sacrifice for a greater reward in the future (Beran and Hopkins, 2018). In other words, persons are connected to their pasts through memory and to their future through goals and projects, which they are working towards in the present. This implies that there is unity between the

person in the past and the person in the present who is planning for her future (Casal and Singer, 2022, p. 32).

Psychological continuity is relevant to determine why some beings' death is worse than others' death. To explain this, McMahan distinguishes between:

(i) *Life Comparative Account:* This account defends that the death of an individual at 30 is worse than the death of an individual at 80 (if the years the first loses in between are worth living). However, this account does not explain why most people agree that the death of a fetus or an infant is less bad than the death of an older child or an adult, considering that these have fewer years left to live (McMahan, 2002, p. 165). McMahan proposes abandoning this account because it goes against our common intuition regarding the death of a fetus or an infant (McMahan, 2002, p. 169).

(ii) *Time-Relative Interest Account:* This account evaluates the state of the victim at the time of death, so it focuses on the effect that the death produces on the victim when it occurs. Therefore, it does not evaluate the effect of the death on the victim's life as a whole like the Life Comparative Account. By "state of the victim at the time of death," McMahan refers to the individual's psychological continuity. He argues

> that a fetus or a newborn baby are very distant from the persons they will become because they are unaware of themselves and their future and have no intentions, desires, or plans. Hence, the death of a 30-year-old individual is worse than a fetus' or a newborn baby's death because the 30-year-old is a person with self-awareness, a future, desires, and intentions. (McMahan, 2002, p. 170)

McMahan's Time-Relative Interest Account also applies to animals with psychological continuity. If all things are equal, the death of an animal with psychological continuity is worse than the death of an animal that lacks psychological continuity, even if this animal has more years left to live. This is so, in McMahan's view, because the former has a concept of self, a connection with her past and future, projects, and most likely has friends and other types of relationships (McMahan, 2002, p. 173).

As I noted in the chapter on the moral implications of personhood, we may argue that persons have certain rights without assuming that a person must belong to a particular species. We do not have to support the Dual System view, like Jaworska, which argues that only persons are subject to deontological constraints. Likewise, we do not have to defend Kagan's Gradual Hierarchy view, which argues that there is a ranking of moral statuses. A Unitarian defense of the rights of persons is also possible. All three views, however, are consistent with my defense of animal personhood.

•Right to Freedom

In this section, I first explain why incarceration is bad for persons, and I then argue why persons have the right to freedom.

Incarceration is bad for persons for three reasons. First, many animals are intelligent beings with their own cultures, which they pass on to their offspring, so boredom is particularly harmful to them (Jacobs and Marino, 2020; Casal and Singer, 2022, p. 34).

Second, many animals are social and affective, so incarceration and separation from their families and friends cause extreme suffering (Casal and Singer, 2022, p. 34).

Third, persons remember their lives before losing their freedom, which is different from suffering the effects of incarceration. Some animals, like great apes, can imagine themselves in different situations and moments, so they are aware of their incarceration and the passing of time (Casal and Singer, 2022, p. 35). This capacity explains why chimpanzees display abnormal behavior despite living in the best zoo environments (Birkett and Newton-Fisher, 2011). Animals with the capacity to imagine themselves in a different situation usually become angry because they understand that they have been forced to live a different life than the one they lived or want to live (Casal and Singer, 2022, p. 35). For example, researchers have observed chimpanzees gathering objects to throw at zoo visitors (Osvath and Martin-Ordas, 2014, p. 5).

Persons have the right to freedom because they have an interest in others not interfering with their lives. It is important to note that children and many other animals are interested in living and not suffering but not interested in noninterference (Cochrane, 2006; Casal and Singer, 2022, p. 35). Incarceration causes pathologies like self-injury, tension, and aggression in humans and other animals, translating into a form of torture (Gruen, 2014; Jacobs and Marino, 2020). Thus, there is a strong connection between some marks of personhood, such as the capacity to imagine ourselves in a different time and location, which Locke stressed, and the idea that some animals have both the capacity to understand that they have been imprisoned and the right to be free.

•Right to Physical and Mental Integrity

All animals who are capable of suffering should be protected against torture and cruel treatment (Casal and Singer, 2022, p. 38). Hence, while the interest in continued existence, and the interest in non-interference affect persons in ways that do not affect nonpersons, the interest in not being tortured is universal. However, certain cognitive capacities can make the suffering worse, like emotional memory. Many tortured animals remember what happened, become frightened, develop stereotypical behavior and other mental pathologies, indicating that pain can have very specific and lasting effects on persons (Casal and Singer, 2022, p. 38).

These three rights are the rights defended by the GAP and the NhRP. I endorse these three rights very strongly. I want to note, however, that we have been too quick at closing the list here, for there are other rights of the person that we could add. I mention them below.

•Right to Honor

Honor has a personal and an exterior element. The personal element refers to one's self esteem or value, while the exterior element refers to others recognition of one's dignity (Rogel Vide and Espín Alba, 2018, p. 143). The exterior element is captured by philosopher Lori Gruen, who discusses a relational conception of dignity. This focuses on how an individual is perceived in his community and if certain behaviors express respect (Gruen, 2014, p. 234). The Spanish Constitutional Court has stated that honor is violated with insulting and degrading expressions (Fayos Gardó, 2009, p. 147), and animals are frequently the target of such actions.

Animals have a social status in their own communities, which they internalize as a certain sense of self-worth. This sense often has profound implications on how they behave in their group and some individuals who feel they deserve to be respected more take action to raise their status so that it fits with their own sense of self-worth. However, even if one denies that animals possess the first element of honor, they may accept that animals possess the exterior dimension. There are at least three reasons for this. First, as explained in Chapter Three, dignity is an ambiguous concept that we constantly use in

philosophy and law, especially, when talking about human rights. We rarely define it precisely (Beitz, 2013). It often means intrinsic value or worth. Animals have intrinsic value, and we cannot empirically prove that they do not. I explain dignity as a non-verifiable mark of personhood in Chapter Three.

Second, Constitutions, laws, and courts recognize animals' dignity. For example, Switzerland recognizes animal dignity as a constitutional principle since 1992 and protects animal dignity in the Animal Welfare Act since 2008 (Bolliger, 2016, p. 313). Courts worldwide have also recognized animal dignity, such as the Supreme Court of Costa Rica's ruling on lion Kivu, which recognized that the zoo violated Kivu's dignity due to the housing conditions.[58] Judge Liberatori also recognized Sandra's dignity.[59]

Third, humans have degraded animals for centuries by locking them up in tiny cages, torturing them, dressing them up and forcing them to entertain the masses (Gruen, 2014, p. 231; Casal and Singer, 2022, p. 85), and we can perfectly identify when an animal is being degraded (Gruen, 2014, p. 234). For example, one of the secretly filmed images in Vivotecnia laboratory, where animals were constantly mistreated, shows a veterinary technician drawing a smiley face on a monkey's genitals while restraining the monkey and

[58] Corte Suprema de Justicia, Sala Primera, Resolución Nº 01754-2021, October 21, 2021, File 16-010018-1027-CA, Judge Damaris Vargas Vásquez (Cos. Ri.).
[59] Juzgado Contencioso Administrativo y Tributario No. 4 de la ciudad de Buenos Aires, *supra* note 51, at 9.

laughing (Ferrero and Peinado, 2021). Even though this action does not qualify as animal cruelty according to the Spanish Criminal Code, and the monkey does not understand or care about his honor, most humans will agree that drawing a smiley face on a restrained animal's genitals is degrading and violates that animals' dignity. Just like we should not do certain degrading things to mentally disabled children or adults, even if they cannot understand the meaning of certain actions.

Dignity has been used to support human supremacy over other animals in the human rights theory (Kymlicka, 2017a, p. 6). For example, Lacalle believes dignity places humans in a higher order than other beings (Lacalle Noriega, 2016, p. 11), where only humans can be considered as moral and legal persons (Lacalle Noriega, 2016, p. 230). Particularly, Lacalle claims that the idea of nonhuman moral and legal personhood degrades human dignity (Lacalle Noriega, 2016, p. 45). I argue that animal dignity does not degrade human dignity for at least two reasons.

First, studies have shown that the human attitude of superiority over animals is associated with negative attitudes towards other humans, such as black people, immigrants, and women (Dhont *et al.*, 2014; Dhont, Hodson and Leite, 2016; Roylance, Abeyta and Routledge, 2016; Amiot and Bastian, 2017). Hence, using Lacalle's words, human superiority over animals "degrades" *human* dignity.

Second, constitutions, laws, and courts worldwide have recognized

animals' dignity and it has not affected humans whatsoever, as the 1992 Swiss Constitution, 2008 Animal Welfare Act (Bolliger, 2016, p. 313), Supreme Court of Costa Rica's ruling on lion Kivu,[60] and judge Elena Liberatori's judgment on orangutan Sandra prove.[61]

•Right to Intimacy

Intimacy refers to the personal sphere removed from outside knowledge and interference, necessary to maintain a minimum quality of life (Rogel Vide and Espín Alba, 2018, p. 144). Animals instinctively hide to perform actions during which they feel vulnerable, such as sleeping, intercourse, or giving birth. Mammals generally share this instinct, yet we entirely disregard this by forcing them into constant exposure at zoos, which leads to chronic stress (López-Álvarez *et al.*, 2019). As mentioned above, chimpanzees gather objects to throw at zoo visitors who come to watch them, showing their complete disdain for being watched (Osvath and Martin-Ordas, 2014, p. 5).

•Right to Image

An image represents or describes an individual's physical appearance through a painting, drawing, photography, film, or even a voice recording (Rogel Vide and Espín Alba, 2018, p. 145). The right to

[60] Corte Suprema de Justicia, *supra* note 58.
[61] Juzgado Contencioso Administrativo y Tributario No. 4 de la ciudad de Buenos Aires, *supra* note 51, at 7.

image has a positive and a negative dimension (Rogel Vide and Espín Alba, 2018, p. 145). The positive dimension refers to an individual's right to reproduce her image and publish it. Infants and animals do not have this dimension of the right to image. However, they have the negative dimension, which refers to prohibiting the reproduction and dissemination of one's image. Guardians are in charge of enforcing this negative dimension for children.

There are two fundamental reasons we protect the negative dimension of the right to image, even in the case of disabled individuals who cannot comprehend that their right to image is vulnerated. First, the right to image is protected because some images may harm the individual. For example, publishing a photograph of an individual with an intellectual disability defecating in public harms that individual and other individuals with the same disability because the public will associate an activity that most people find revolting with people with that intellectual disability. The same may happen in the case of animals. Suppose we publish photographs of zoo chimps eating their excrement. In that case, we harm chimps because the public will view these primates as repulsive animals instead of animals engaging in actions, they do not perform in nature, which are caused by the maddening effect captivity has on very intelligent animals.

Second, the right to image is protected for a symbolic reason, due to respect. Even if the intellectually disabled individual does not understand that her image is being vulnerated, the rest of society

does. Indeed, an animal does not know if her image is being degraded, but human members of society do realize that some situations undermine an animal's image.

•Right to Copyright

Animals have the right to copyright because they can create works of art like paintings, drawings, and photographs. I give three examples of animals that create works of art: chimpanzees, Naruto the black macaque, and elephants.

First, there are numerous examples of chimpanzee art. For example, Congo, "the Picasso of the simian world," painted and drew over 400 works in the 1950s shown at London's Mayor Gallery (Dafoe, 2019). Congo's collection belongs to Desmond Morris, a zoologist, and painter who studied Congo for three years (Dafoe, 2019). Congo's work is extremely valuable. In fact, a trio of his paintings sold for over $25,000, outpricing works from Warhol and Renoir at an auction (Dafoe, 2019). Like Congo, Jimmy the chimp also enjoyed painting while living in the zoo, as this was one of the only activities, he had to pass the time.[62]

Second, as I explain in Chapter Six, Naruto's case was, in fact, a copyright case because she took a selfie using a photographer's camera that became famous, earning the photographer fame and money.

[62] See Jimmy's case in Chapter Six.

Third, elephant paintings are a lucrative business where captive elephants are taught to paint, and their paintings are sold to tourists and online. For instance, *The Elephant Art Gallery* website offers paintings for up to $450 each.[63] Denying animals' copyright justifies humans exploiting animals and profiting at their expense.

CONCLUSION

In this chapter, I argue the following:

(i) The cluster concept of legal personhood does not clarify if the list of criteria refers to unverifiable metaphysical conditions, verifiable scientific traits, or legal attributes. However, animals can be considered legal persons whether the list of criteria refers to non-verifiable metaphysical conditions, verifiable scientific marks, or legal attributes.

(ii) Detaching the legal person (particularly the natural or physical person) completely from what is understood as a person in ethics is not a good idea. Philosophers have demonstrated that death, incarceration, and torture can be especially bad for creatures that qualify as persons because of the verifiable marks they possess. The legal protection of the right to life,

[63] Elephant Art Gallery. Available at: https://elephantartgallery.com/collections/sale. (Accessed on May 23, 2022).

freedom, and physical and mental integrity must take these philosophical arguments into account.

(iii) If the list of criteria refers to specific legal attributes, I propose using the attributes of personality regulated in civil law systems that descend from the French continental law tradition. Animals can possess all attributes of personality. Legal persons must satisfy sufficient criteria from the list of attributes of personality or satisfy them to a sufficient degree to qualify as legal persons.

6. ANIMAL PERSONHOOD IN COURT: THE FIRST WAVE (1972–2015)

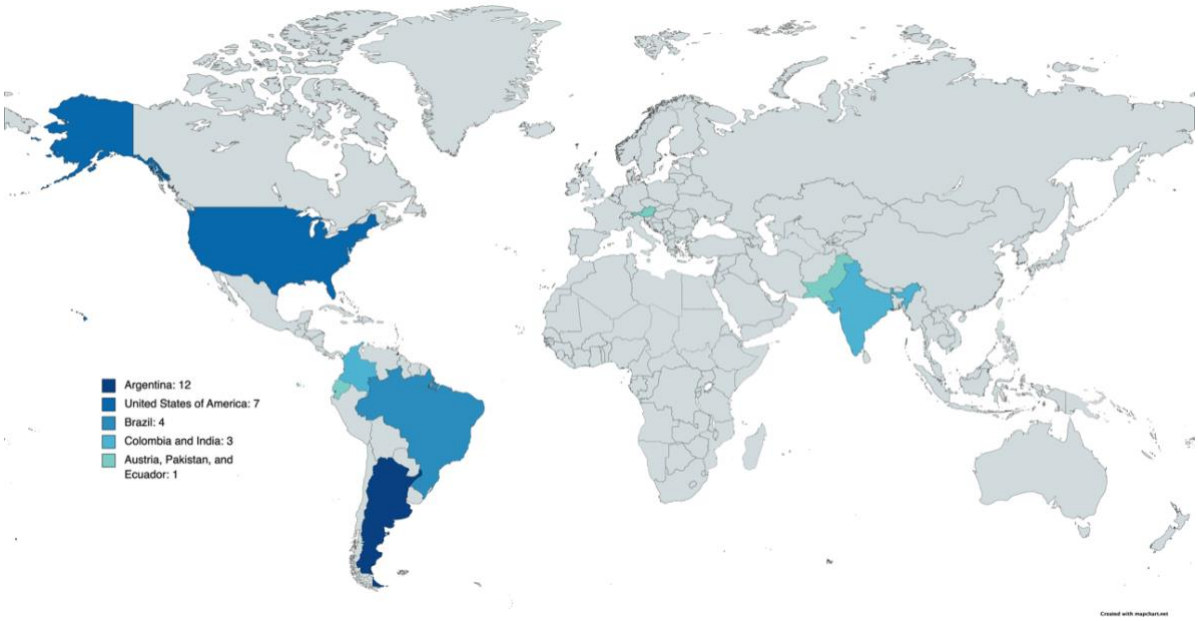


Figure 3. World Map of Animal Legal Personhood Cases.

INTRODUCTION

Courts around the world have discussed animal personhood in different types of procedures.[64] Chapter Six and Seven examine thirty-two cases from Argentina, Austria, Brazil, Colombia,

[64] There have been other paths outside courts to recognize animals' fundamental rights. For example, in the Swiss canton of Basel-Stadt, a citizen's initiative was launched in 2016 to amend the Cantonal Constitution by including primates' fundamental rights to life and bodily and mental integrity. The Swiss Federal Supreme Court decided that the initiative was legally valid (Blattner and Fasel, 2022). Unfortunately, voters declined to grant fundamental rights to primates on February 13, 2022 (Wey, 2022).

Ecuador, India, Pakistan, and the US, as the world map shows. This chapter examines the first sixteen cases, most of which are *habeas* filed on behalf of chimps incarcerated in a zoo or laboratory in the hope that a court will find that the imprisonment is unlawful and order their transfer or release. However, the *habeas* has also been filed to make a political stance, more than to argue for the animal's personhood, like in the caged bird cases.

This chapter presents three difficult dilemmas. The first argument pertains to the pros and cons of employing legal or political means; the second argument examines the relative advantages of *habeas* versus other legal strategies; and the third argument explores whether legal practitioners should attempt certain cases with a very low probability of success.

This chapter is divided into two sections. The first section explains the pioneer cases, including the very first case, a *habeas* filed on behalf of all imprisoned birds sold, used, hunted, or poached in Brazil. The second section parses out the period between 2013 and 2015, during which there was a personhood boom, and such cases became far more common, involving not only chimpanzees, but other species as well.

6.1 THE PIONEERS (1972–2012)

a) Caged Birds (Brazil, 1972)

Hyacinth macaws in the Brazilian Amazon [Photo: Tarcisio Schnaider, iStock].

In 1972, a Brazilian animal protection association filed a *habeas* on behalf of all imprisoned birds that were sold, used, hunted, or poached in the country.[65] The writ stated that any natural or legal person who prevented a bird from flying without a reasonable justification was in violation of birds' freedom of flight.[66]

[65] S.T.F., No. 50.343, Relator: Des. Djaci Falcão, 3/10/1972, DIARIO DA JUSTIÇA [D.J.], 10.11.1972, at 808 (Braz.).
[66] *Id*. at 808-809.

The court rejected the *habeas*, holding that such lawsuits could only be filed on behalf of humans.[67] The court also stated that the writ had to be filed on behalf of an identified person, whereas the petitioner had filed it on behalf of all caged birds, adding that the objective of an *habeas* is to protect people against abuses from public authorities rather than private individuals.[68] Finally, the court declared that animals are things, not subjects to any rights.[69]

The animal protection association appealed this ruling. However, the Supreme Federal Court dismissed the appeal and affirmed that the *habeas* only protects human beings whose right to freedom is illegally violated by public authorities. The court added that animals are objects of law, so they cannot stand in a legal relationship as subjects of rights.[70]

Some have interpreted this pioneer case as a metaphor directed against the dictatorship of Humberto de Alencar Castelo Branco, who ruled Brazil between 1964 and 1985, rather than as a genuine attempt to obtain the recognition of legal personhood for animals.[71] This case is noteworthy for two reasons: first, because it was highly progressive for its time, and second, because it set forth the various arguments that could be employed against animal *habeas*. These arguments focus on the fact that *habeas* only protect against public

[67] *Id*. at 813.
[68] *Id*. at 809-812.
[69] *Id*. at 812.
[70] *Id*. at 814.
[71] Facebook Interview with Daniel Braga Lourenço, Professor of Law & Animal Ethics Expert, Centro Universitário Faculdade Guanambi, (Nov. 22, 2019).

authorities and offer no protections or relief from the actions of individuals; reject *habeas* filed on behalf of a class of animals requiring cases to relate to specific animals; state that birds (and animals generally) are not human, which is not a legal argument *per se*; and finally, that only humans can have legal personhood, which is false: throughout history, the law has granted the status of legal personhood to various non-human entities (Deiser, 1908; Clark, 1922; Duff, 1927; Smith, 1928; Nesteruk, 1990; Abate and Crowe, 2017; Vicente Giménez, 2020).

b) Chimp Suiça (Brazil, 2005)

Suiça in the Zoo [Photo: Great Ape Project Brazil].

Suiça lived alone in Getúlio Vargas Zoo in Salvador, Brazil (Azevedo Clayton, 2005). She had previously lived with a chimpanzee named Geron, who died from cancer on March 19, 2005 (de Santana Gordilho, 2015, p. 333). Heron de Santana Gordilho and Luciano Santana, public prosecutors, filed a *habeas* on behalf of Suiça to the Ninth Criminal Trial Court on September 19, 2005 (Azevedo Clayton, 2005). The prosecutors argued that Suiça was kept in an unsuitable enclosure that affected her right to movement and that she was kept in cruel and inhumane solitary confinement (Azevedo Clayton, 2005). The prosecutors requested that the court grant the *habeas* preliminarily because the legal

requirements were fulfilled: *fumus boni iuris* and *periculum in mora* (Azevedo Clayton, 2005). They asked the court to order Suiça's transfer to the Great Ape Sanctuary in Sorocaba, Brazil (Azevedo Clayton, 2005).

Judge Edmundo Lucio da Cruz admitted the writ, but did not grant it immediately due to its complexity (de Paula, 2005). Instead, judge Cruz granted the respondent, Thelmo Gavazza, Director of the Biodiversity, Environmental and Hydrological Resource Department (the governmental agency responsible for the zoo), 72 hours to present his counter-arguments (de Paula, 2005). Gavazza filed a petition requesting an extension of the deadline by another 72 hours, which judge Cruz granted (de Paula, 2005).

Unfortunately, on September 28, 2005, the day the court was supposed to decide the case, the respondent informed the court that Suiça had died the day before in the zoo. As a result, the judge dismissed the case explaining that he had granted the second 72-hour extension because the defendant was a governmental agency rather than the police, the usual defendants in *habeas* cases, and because he believed that the government needed time to gather information as the petitioners had (de Paula, 2005). The judge also added that the news of Suiça's death surprised him, as he had visited her at the zoo the week before and she did not seem ill (de Paula, 2005). Evidence has since emerged indicating that Suiça was poisoned. Her killers were never found (Pozas Terrados, 2010).

Even though this case ended tragically, it is notable, because it was the first time that an animal was granted legal standing to claim her right to freedom in a court: Judge Cruz was willing to admit the *habeas* and hear the case, rather than declare it inadmissible on procedural grounds (de Santana Gordilho, 2017, p. 736). Upon the conclusion of Suiça's case, judge Cruz stated:

> I am sure that with the acceptance of the debate, I caught the attention of jurists from all over the country, bringing the matter to discussion. Criminal Procedure Law is not static, rather subject to constant changes, and new decisions have to adapt to new times. I believe that even with "Suiça's" death the matter will continue to be discussed, especially in Law school classes, as many colleagues, attorneys, students and entities have voiced their opinions, wishing to make those prevail. (de Paula, 2005).

Suiça's story sparked conversations regarding the rights of animals among legal experts in Brazil. Her case is remembered as the first instance a court recognized an animal as a subject who can claim her rights in court. Suiça's legacy lives on as the debate on legal personhood for animals in Brazil and around the world continues.

c) Chimp Matthew Pan (Austria, 2007)

Matthew Pan [Photo: Lilli Strauss/Associated Press. NBC News].

There has only been one case in Europe where the personhood of an animal has been debated in judicial proceedings: Matthew Pan (also known as Hiasl), a chimpanzee. Matthew Pan was born in Sierra Leone in 1981 (Balluch and Theuer, 2007, p. 335). In 1982, he was poached and sold to a wild animal trader, who sold baby chimps to people and companies in Austria who wanted them for experimentation or exhibition in zoos (Balluch and Theuer, 2007, p. 335). In this case, the company Immuno had purchased Matthew Pan and Rosi, a female baby chimp, for AIDS and hepatitis research (Balluch and Theuer, 2007, p. 335).

The baby chimps arrived at the Vienna Airport on April 29, 1982, but the day before Austria signed the Convention on International Trade in Endangered Species (CITES), meaning the chimps did not have the necessary documents to legally enter the country (Balluch and Theuer, 2007, p. 336). Accordingly, on May 6, 1982, the court seized Matthew Pan and Rosi, as well as Henry, another baby chimp, and placed them in the care of a Viennese animal shelter (Balluch and Theuer, 2007, p. 336).

On July 14, 1983, the court ruled that Immuno was not entitled to legal possession of Matthew Pan and Rosi, because it had breached the CITES regulation (Balluch and Theuer, 2007, p. 336). Immuno appealed the decision, which the court rejected on October 10, 1983. As a result, the laboratory took the case to the High Court, which, on April 10, 1984, ruled in favor of Immuno and ordered the animal shelter to release the chimpanzees to Immuno (Balluch and Theuer, 2007, p. 336).

On November 20, 1984, the Mayor of Vienna issued an order instructing the animal shelter to comply with the court's ruling and hand the chimpanzees over to Immuno (Balluch and Theuer, 2007, p. 336). Agents of Immuno visited the animal shelter on November 29, 1984 to remove the chimps, but their efforts were stopped by animal rights activists (Balluch and Theuer, 2007, p. 336). As a result, Immuno initiated legal proceedings against the state to

request the use of physical force to remove the chimpanzees on July 10, 1985 (Balluch and Theuer, 2007, p. 336).[72]

On December 10, 1986, the High Court decided in favor of Immuno and ordered the government to enforce the ruling. On March 23, 1987, the government gave the animal shelter fourteen days to hand over the chimpanzees to Immuno, which the animal shelter again refused to comply with. Rather than use force to remove the chimpanzees, the government initiated its own legal proceedings against the animal shelter on June 11, 1987 (Balluch and Theuer, 2007, p. 336). The Provincial Court of Civil Law in Vienna held a hearing on February 18, 1988, where the shelter argued that it had a legal obligation to protect animals from suffering that it would breach if it gave the chimpanzees to Immuno (Balluch and Theuer, 2007, p. 336). The court stated that animals are things and have no interests and that only Immuno had an interest in this case as the owner of the chimpanzees (Balluch and Theuer, 2007, p. 336). The animal shelter appealed the ruling, fearing that Immuno would infect Matthew Pan and Rosi with the diseases it had previously infected other Immuno chimpanzees with.

During this time, the Austrian Parliament added Section 285 (a) to the Austrian Civil Code, which states that animals are not things and unless other laws rule differently, are subdued to the rules of

[72] On December 16, 1985, Henry was sold to the animal shelter. From there, Henry was transferred to the Heidelberg Zoo on December 10, 1986, as the animal shelter lacked the appropriate facilities to house him. Henry died at the zoo.

property (Balluch and Theuer, 2007, p. 336).[73] Despite this favorable legal amendment, on September 27, 1989, the court insisted on its ruling that animals are things, have no value in themselves, and that Immuno should take possession of the chimpanzees (Balluch and Theuer, 2007, p. 336).

Immuno was eventually taken over by a different company named Baxter, which decided to stop experiments on chimpanzees in 1999 and donated Matthew Pan and Rosi to the animal shelter three years later (Balluch and Theuer, 2007, p. 336). In 2005, the Austrian Parliament unanimously voted to ban all experimentation on apes. As of January 1, 2006, it is illegal to conduct experiments on great apes and gibbons in Austria (Balluch and Theuer, 2007, p. 336).

According to Balluch and Theuer, the animal shelter underwent a bankruptcy procedure in 2006, as Matthew Pan and Rosi's care cost around ten thousand euros a month. The bankruptcy placed Matthew Pan and Rosi in danger of being transferred to a zoo, circus, or laboratory abroad to raise money for the creditors (Balluch and Theuer, 2007, p. 337). The President of the Animal Rights Association (ARA), received a large anonymous donation with the condition that he could only use the money if Matthew Pan were appointed a legal guardian who could receive the money and decide with ARA's President what to do with it (Balluch and Theuer, 2007, p. 337).

[73] Allgemeines Bürgerliches Gesetzbuch [ABGB] [Civil Code] § 285(a) (Austria). Available at: https://www.jusline.at/gesetz/abgb/paragraf/285.

The ARA initiated legal proceedings to appoint a guardian before the District Court in Mödling on February 6, 2007 (Balluch and Theuer, 2007, p. 337). Two hearings took place during this judicial procedure. At the first hearing, the court stressed that Matthew Pan lacked the necessary documents to prove his identity, which the ARA refuted by presenting witnesses of Matthew Pan's arrival in Austria and continued identity thereafter (Balluch and Theuer, 2007, p. 337). At the second hearing, the ARA and the judge debated the required conditions needed to qualify for a legal guardian (Balluch and Theuer, 2007, p. 337). Ultimately, the court found that Matthew Pan was neither threatened nor intellectually disabled and dismissed the petition (Balluch and Theuer, 2007, p. 337).

The ARA appealed, arguing that though Matthew Pan was not intellectually disabled, he was traumatized and had lived an unnatural life in captivity that required him to have a guardian to protect his interests (Balluch and Theuer, 2007, p. 337). The ARA also explained that the bankruptcy proceedings were threatening Matthew Pan's interests and stressed the fact that Matthew Pan would lose the donation without a legal guardian to act on his behalf (Balluch and Theuer, 2007, p. 337). The court rejected the ARA's appeal on May 9, 2007 after determining that the ARA had no legal standing to appeal and dismissed the case on procedural grounds without ever addressing the fundamental issue of the case: whether Matthew Pan is a person or not (Balluch and Theuer, 2007, p. 337 and 339).

The ARA appealed to the Provincial Court in Wiener Neustadt on May 22, 2007 (Balluch and Theuer, 2007, p. 339). The court rejected the appeal on September 5, 2007, again on procedural grounds, stating that the law only allowed the legal guardian or person for whom the legal guardian is being appointed to appeal (Balluch and Theuer, 2007, p. 339).

The ARA appealed this finding to the Austrian Supreme Court for Civil and Criminal Matters on September 26, 2007, where it argued that the lower court had based its dismissal on a law that only applied *after* a legal guardian had been appointed (Balluch and Theuer, 2007, p. 339). The ARA further noted that the court had previously allowed close relatives to appeal on behalf of an intellectually disabled person and therefore, Matthew Pan's close friends should likewise have the ability to appeal on his behalf, as Matthew Pan had lost all his close relatives when he was poached (Balluch and Theuer, 2007, p. 340). Finally, the ARA argued that it had legal standing because it had an interest in using the donated money, which would only be possible if Matthew Pan were appointed a legal guardian (Balluch and Theuer, 2007, p. 340). The Supreme Court again failed to address the question of whether Matthew Pan was a person and dismissed the case, citing the ARA's lack of standing (Balluch and Theuer, 2008).

The case was then taken to the European Court of Human Rights, based on a violation of the right to a fair trial (Balluch and Theuer, 2008). However, the European Court of Human Rights dismissed

the case on the grounds of its lack of subject matter jurisdiction (Peters, 2016, p. 44).

Ultimately, none of the Austrian courts analyzed the fundamental question of whether Austrian Civil law recognized Matthew Pan's personhood; every court involved in Matthew Pan's case dismissed the matter on procedural grounds. As some of the other cases on animal legal personhood will show, this has been an unfortunate trend in courts. However, this was still an unprecedented case that caught the media's attention around the world (Cao, 2007, p. 2).

d) Chimps Lili and Debby Megh (Brazil, 2008)

Debby playing with a skateboard [Photo: María do Carmo].

Lili and Debby Megh were born in the Fortaleza Zoo and seized by the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA) because the zoo lacked the necessary environmental permits (de Santana Gordilho, 2010a, p. 8). Lili was born on May 17, 2004, and Debby was born on October 17, 2005. The chimpanzees were donated to Rubens Fortes, who transferred them to a sanctuary in Ubatuba (Cavalcanti Rollo, 2016, p. 178). IBAMA questioned the animals' donation, and so Fortes initiated legal proceedings to keep the chimpanzees (Cavalcanti Rollo, 2016, p. 178). There was also a problem with the location of the sanctuary,

since it was located within ten kilometers of a state park where constructions are banned (Cavalcanti Rollo, 2016, p. 179).

Fortes built another sanctuary in Ibiúna, São Paulo (Miyuki Oyama Matsubara, 2008, p. 362). The Federal Regional Court of the Third Region later ordered that the chimpanzees be reintroduced into nature (Miyuki Oyama Matsubara, 2008, p. 363). Considering that Brazil is not the natural habitat for chimpanzees and that both Lili and Debby Megh were born in captivity, it is very likely that the enforcement of such a ruling would have led to the chimpanzees' deaths (de Santana Gordilho, 2010a, p. 8).

Therefore, Fortes filed a *habeas* on behalf of the chimpanzees to the Superior Tribunal Court of Justice of Brasilia where he requested the court protect Lili and Debby Megh's right to life by keeping them in the sanctuary (Cavalcanti Rollo, 2016, p. 179). In September 2008, the *habeas* was suspended by the petition of Herman Benjamin, a judge who wished to study the case in greater detail (Cavalcanti Rollo, 2016, p. 181). However, the chief judge assigned to the case, Rapporteur Castro Meira, dismissed the case in December 2008, reasoning that the Brazilian Constitution clearly states that *habeas* only protects human beings (Cavalcanti Rollo, 2016, p. 180). The chief judge also held that there was no unlawful incarceration in this case, but rather an order to release the animals into nature (Cavalcanti Rollo, 2016, p. 182). In August 2012, Castro Meira accepted Fortes' withdrawal of the writ because the chimpanzees' situation had been formalized (Cavalcanti Rollo,

2016, p. 181). While Lili and Debby Megh were moved to a sanctuary, it was not because of a *habeas*, but rather because of parallel, administrative procedures that resulted in the zoo's closure.

e) Chimp Jimmy (Brazil, 2009)

Jimmy in the sanctuary [Photo: Great Ape Project Brazil].

The Roman García Circus brought Jimmy the chimpanzee to Brazil as an infant, he drank from a bottle, used a diaper, and slept on a bed in a trailer (Rogar, 2010). Jimmy worked in this circus for many years, where they forced him to balance on a wire and ride a bicycle around the stage (Rogar, 2010). When this circus closed in 1987, he was sold to the Circus D'Italia, where he was forced to continue working for thirteen years (Rogar, 2010). When this second circus closed in 2000, he was donated to ZOONIT, which was the zoo of Niteroi, a city located in the State of Rio de Janeiro (Rogar, 2010). At the zoo, Jimmy lived alone and became famous because he enjoyed painting (Rogar, 2010).

In 2009, the International and Brazilian divisions of the Great Ape Project filed a *habeas*, arguing that Jimmy had lived alone in a small cage for more than ten years and that the zoo was not in compliance with the minimum conditions to house animals (de Santana Gordilho, 2010b, p. 341). Jimmy was 26 years old when the writ was filed. The Criminal Chamber of the Rio de Janeiro State Court of Justice was supposed to deliver its judgment on December 16, 2010, but one of the judges asked for a revision (Ynterian, 2010a). On April 19, 2011, the court rejected the *habeas* arguing that Jimmy was not human and that the Superior Federal Court, rather than a state Court, was the proper venue to hear the case (Ynterian, 2011a).

At the same time, the Great Ape Project informed IBAMA about the deplorable conditions of the zoo (Ynterian, 2011b). IBAMA investigated and found that the zoo mistreated the animals and was not in compliance with the regulations for housing animals (Ynterian, 2011a). IBAMA further discovered that animals who had been confiscated and given to the zoo by police officers had mysteriously disappeared (Ynterian, 2011a). Following its investigation, IBAMA filed a petition to the Federal Court, which requested the zoo's closure and the confiscation of all the animals (Ynterian, 2011a). The Federal Court granted the petition and Jimmy was transferred to the Great Ape Sanctuary (Pozas Terrados, 2011).

As in the prior case, Jimmy was transferred to the sanctuary due to a parallel administrative procedure initiated against the zoo, which

managed to close it despite the judges' denial of *habeas* (Ynterian, 2011a). This demonstrates that parallel administrative procedures that seek to close the facility where the mistreated animal at issue is confined are useful backups to *habeas*, should the latter procedure fail.

f) Orcas Tilikum, Katina, Corky, Kasatka, and Ulises (US, 2012)

Orcas in SeaWorld [Photo: Scooby12352, Pixabay].

In 2012, PETA, in conjunction with some marine mammal experts and former trainers, filed a lawsuit asking a federal court to declare the five orcas that lived in SeaWorld to be slaves and their condition a violation of the Thirteenth Amendment of the US Constitution (*PETA Sues SeaWorld for Violating Orcas' Constitutional Rights*, 2011). PETA explained that the language of the Thirteenth Amendment, which prohibits slavery, does not refer to any type of person or a specific victim (*PETA Sues SeaWorld for Violating Orcas' Constitutional Rights*, 2011). This case marks the first attempt to obtain the recognition of legal rights for animals on a

constitutional basis; although the petition was not a *habeas*, it resembled one in various ways (Miller, 2012).

SeaWorld argued that the Thirteenth Amendment applies only to humans, and judge Jeffrey Miller dismissed the case on February 8, 2012, ruling that the Thirteenth Amendment only applies to persons. (Miller, 2012). Wise stated that it has been a mistake to file this lawsuit because its likely failure could be used as a legal precedent against animal personhood in the future (Wise, 2011). Great care is needed, thus, not to make things worse for animals. Animals generally may be harmed by unsuccessful legal battles through the creation of negative legal precedents. Yet, individual animals may also be greatly harmed by legal proceedings that are likely to succeed, as one way to stop promising cases is to kill the plaintiff, as occurred in Suiça's case.

6.2 THE PERSONHOOD BOOM (2013–2015)

a) Chimp Toti (Argentina, 2013)

Toti in the zoo [Photo: Great Ape Project Argentina].

Toti was born in captivity in Cutini Zoo in Buenos Aires, Argentina on August 29, 1990 (Ynterian, 2014). In 2008, at the age of eighteen, he was transferred to Córdoba Zoo in Argentina, where he mostly lived alone.[74] In December 2013, when Toti was twenty-three, the Great Ape Project filed a *habeas* on his behalf to the Court of Control No. 4 of Córdoba to request Toti's transfer to the Sorocaba Great Ape Sanctuary in Brazil.[75] The Great Ape Project argued that the zoo was going to transfer Toti to Bubalcó Zoo in the

[74] Juzgado de Control 4 de Córdoba [J.C.Cor.] [Court of Control No. 4], 26/12/2013, "Hábeas Corpus Presentado por Juárez, María Alejandra – Representante Argentina del Proyecto Gran Simio [PSG]," No. 293 (Arg.).
[75] *Id.*

south of Argentina in exchange for a white tiger, which would harm Toti due to the weather and inadequate enclosure[76]

On December 26, 2013, the court rejected the *habeas in limine*, stating that the *habeas*'s function is to protect a persons' right to freedom and that the law refers to human persons.[77] The court further stated that chimpanzees are not human and that animals cannot be persons.[78] Finally, the court added that any discussion related to the legal status of apes required debate and evidence, which exceeded the purpose and brevity of the *habeas* procedure.[79] The Great Ape Project filed an appeal that was also dismissed, a finding that the Supreme Court of Justice ultimately upheld (Brondo, 2014d).

At the end of 2013, Toti was transferred to Bubalcó Zoo, located in Río Negro in Argentinean Patagonia (Brondo, 2014b). He was locked up alone in a small cage and lost most of his hair due to severe depression (Brondo, 2014b). Therefore, the AFADA (*Asociación de Funcionarios y Abogados por los Derechos de los Animales*, in English, Association of Public Officials and Attorneys for Animal Rights) filed another *habeas* in the Federal Court No. 2 of Corrientes (Brondo, 2014a). On January 31, 2014, the Federal Court declared itself incompetent (Brondo, 2014c). Jimmy's case was sent to the Investigating Court No. 2 of General Roca, which

[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*

rejected the case *in limine* (*Agencia Digital de Noticias*, 2014). This writ was also declared inadmissible by the Superior Court of Justice (Werner, 2014).

Toti's case is an example of courts' unwillingness to step away from the humanity argument and deeply analyze legal personhood, which is unfortunately common in many courts around the world. However, the AFADA and Rio Negro's public prosecutor (*Ministerio Público de la Defensa)* filed another *habeas* on Toti's behalf on November 6, 2020 to the Family Court No. 11 of General Roca (Proyecto Gran Simio, 2020).

Judge Moira Revsin conducted an on-site inspection of Toti and his enclosure on November 18, 2020 (Ministerio Público, 2020). The judge was especially interested in learning about Toti's diet, environmental enrichment, veterinary attention, as well as the exact size of his cage to understand Toti's situation in the zoo (Ministerio Público, 2020). Although the ruling is pending, unlike the past courts that dismissed Toti's *habeas*, judge Revsin has shown a willingness to hear the case and personally determine what Toti's current condition is at the zoo. Hopefully, determining Toti's condition at the zoo will not confuse the judge to think this case is an animal welfare case when the purpose of the *habeas* is to obtain Toti's recognition as a nonhuman person and his consequent release to a sanctuary.

b) Chimp Tommy (US, 2013)

Tommy in his cage in Gloversville [Photo: Pennebaker Hegedus Films].

Tommy was born in the early 1980s and raised by Dave Sabo, the former owner of Sabo's Chimps, a company that provided chimps for movies (*The NhRP's first client*, 2013). Tommy was used to portray Goliath, a cigarette-smoking chimp, in the 1987 film *Project X* (*The NhRP's first client*, 2013). There were allegations of trainers beating the chimpanzees during the making of this movie (*AP News*, 1987). Sabo died in 2008, so the Laverys became Tommy's owners (*The NhRP's first client*, 2013). The NhRP found him caged, alone in a shed on a trailer lot in Gloversville, New York with nothing but a television and a stereo for company (Churchill, 2013).

The NhRP filed a *habeas* in the New York Supreme Court of Fulton County on December 2, 2013, requesting the recognition of

Tommy's legal personhood and right to bodily liberty, and his transfer to a sanctuary (*The NhRP's first client*, 2013). On December 3, 2013, the court rejected the *habeas*, but the judge offered his support to the NhRP venture.[80]

On January 10, 2014, the NhRP filed a Notice of Appeal with the New York State Supreme Court, Appellate Division, Third Judicial Department, and filed an appellate brief against the lower court's ruling (*The NhRP's first client*, 2013). On October 8, 2014, the Third Judicial Department heard oral arguments and on December 4, 2014 the court ruled that Tommy was not a person protected by the *habeas* because he could not bear duties.[81]

The NhRP filed a motion to appeal to the Court of Appeals, the highest court in New York, which the Third Judicial Department denied, so on February 23, 2015, the NhRP filed its motion directly with the Court of Appeals (*The NhRP's first client*, 2013). Several scholars and legal advocacy organizations filed *amicus curiae* briefs in support of the NhRP's motion to appeal, such as Laurence H. Tribe and the Center for Constitutional Rights, but on September 1, 2015, the Court of Appeals denied the motion (*The NhRP's first client*, 2013).

[80] Transcript of Hearing at 27, Nonhuman Rights Project v. Lavery, No. 2013-02051 (N.Y. Sup. Ct. Fulton County, Dec. 3, 2013), https://www.nonhumanrights.org/content/uploads/Fulton-Cty-hearing-re.-Tommy-12-2-13.pdf.
[81] Nonhuman Rights Project v. Lavery, *supra* note 34, at 4.

On December 4, 2015, the NhRP filed a new *habeas* on behalf of Tommy with the New York State Supreme Court of New York County, which especially focused on the fact that the capacity to bear duties is merely a sufficient condition for legal personhood, rather than a necessary one; and that chimpanzees bear duties within their communities (*The NhRP's first client*, 2013). The court denied this second *habeas* because the Third Judicial Department had already denied it and the petition lacked new allegations. Consequently, the NhRP filed an appeal with the New York Supreme Court, Appellate Division, First Judicial Department (*The NhRP's first client*, 2013). In a joint hearing for Tommy and Kiko held on March 16, 2017, the NhRP argued against the claim that legal personhood requires the capacity to bear duties (*The NhRP's first client*, 2013).

The NhRP also informed the First Judicial Department about a mistake regarding the definition of *legal person* in Henry Campbell Black's *Law*, the most widely used legal dictionary in the US, in March 2017. The source Black cited does not state that a person is a being that the law recognizes as capable of rights *and* duties, but rather of rights *or* duties, so the source the Third Judicial Department relied upon in their decision did not support its denial of acknowledging Tommy's legal personhood (Salmond and Fitzgerald, 1966, p. 299).

On June 8, 2017, the First Judicial Department ruled that the NhRP could not seek a second *habeas*, so the NhRP filed a motion for

permission to appeal to the Court of Appeals, which the First Judicial Department denied. The NhRP filed the same motion directly with the Court of Appeals, which the Court of Appeals denied on May 8, 2018, although judge Eugene M. Fahey issued a concurring opinion that indicated some judges disagreed with the allegation that chimps were mere things, but were not willing to recognize them as persons either:

> In the interval since we first denied leave to the Nonhuman Rights Project, I have struggled with whether this was the right decision. Although I concur in the Court's decision to deny leave to appeal now, I continue to question whether the Court was right to deny leave in the first instance. The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing. (*The NhRP's first client*, 2013).

This case triggered a renewed debate on chimpanzee legal personhood around the world, including discussion in major media outlets (Kelly, 2014; King, 2014; Brulliard, 2018; Sebo, 2018) and in Chris Hegedus and Donn Alan Pennebaker's documentary *Unlocking the Cage* (2016).

c) Chimp Kiko (US, 2013)

Kiko, captive [Photo: NhRP].

The Presti family keep primates, including a male chimpanzee named Kiko, as part of their non-profit Primate Sanctuary in Niagara Falls (*A former animal 'actor,' partially deaf from past physical abuse*, 2013). Kiko is partially deaf, due to the physical abuse he suffered on *Tarzan in Manhattan*'s (1989) movie set when he was owned by an exotic animal collector and trainer and caged alone (*A former animal 'actor,' partially deaf from past physical abuse*, 2013).

On December 3, 2013, the NhRP filed a *habeas* in the New York State Supreme Court of Niagara County requesting Kiko's move to a sanctuary, which was rejected on December 9, 2013, by judge Boniello, who did not want to take this "leap of faith" on what he

deemed a legislative rather than a judicial matter.[82] The NhRP appealed, and the Fourth Judicial Department denied the petition, arguing that the *habeas* challenges an illegal confinement, whereas the NhRP requested a change in the conditions of confinement (*A former animal 'actor,' partially deaf from past physical abuse*, 2013). The NhRP filed a motion seeking permission to appeal, but the Fourth Judicial Department denied it on March 20, 2015. Consequently, the NhRP filed a motion to appeal directly to the Court of Appeals, which also denied it (*A former animal 'actor,' partially deaf from past physical abuse*, 2013).

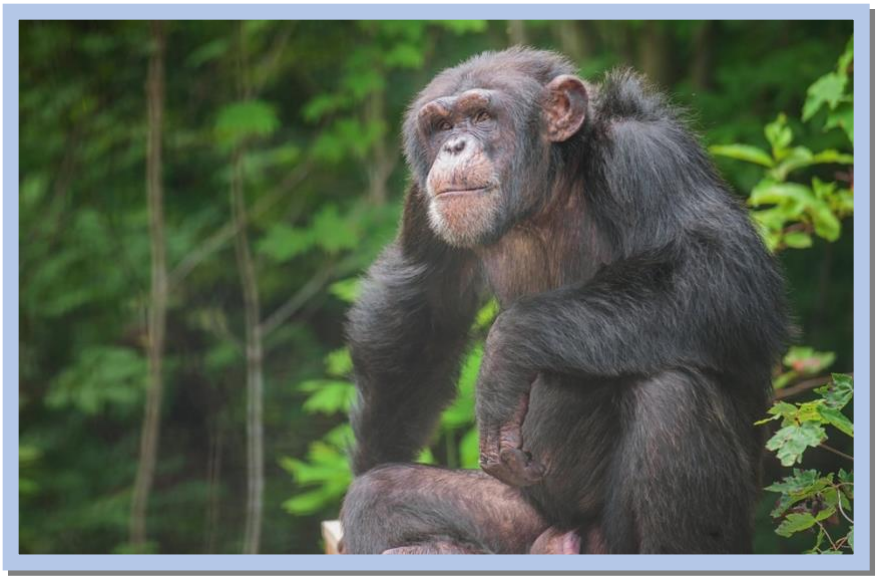
The NhRP then filed a second *habeas* in the New York State Supreme Court of New York County (*A former animal 'actor,' partially deaf from past physical abuse*, 2013). The court denied it, so the petitioner filed an appeal in the New York Supreme Court, Appellate Division, First Judicial Department, on May 26, 2016. After being denied the right to appeal, the First Judicial Department recognized that the NhRP had a right to appeal (*A former animal 'actor,' partially deaf from past physical abuse*, 2013).

The joint hearing for Tommy and Kiko took place on March 16, 2017 (*A former animal 'actor,' partially deaf from past physical abuse*, 2013). At the hearing, the NhRP argued against the claim that legal personhood requires the capacity to bear duties, explaining that many humans who are considered legal persons are

[82] Transcript of Oral Argument at 15, Nonhuman Rights Project v. Presti, 124 A.D.3d 1334 (2013) (No. 151725).

incapable of bearing duties and that chimpanzees bear duties within their communities (*A former animal 'actor,' partially deaf from past physical abuse*, 2013). The First Judicial Department ruled that the NhRP could not file a second *habeas* on behalf of Tommy and Kiko on June 8, 2017 and denied the motion to appeal (*A former animal 'actor,' partially deaf from past physical abuse*, 2013).

d) Chimps Hercules and Leo (US, 2013)



Hercules at Project Chimps sanctuary [Photo: Crystal Alba/Project Chimps].

Hercules and Leo are two male chimpanzees who lived in the New Iberia Research Center (NIRC) at the University of Louisiana, Lafayette (*Two former research subjects and the first nonhuman animals to have a habeas corpus hearing*, 2013). In 2009, when they were one year old, NIRC leased them to Stony Brook University's Department of Anatomical Sciences. There, Hercules and Leo were kept in a basement lab, forced to undergo general anesthesia, and had electrodes inserted into their muscles as part of a research project on how humans evolved into walking upright (*Two former research subjects and the first nonhuman animals to have a habeas corpus hearing*, 2013).

The NhRP filed a *habeas* in New York State Supreme Court of Suffolk County, which requested the recognition of Hercules' and Leo's legal personhood and right to bodily liberty, as well as their transfer to a sanctuary (*Two former research subjects and the first nonhuman animals to have a habeas corpus hearing*, 2013). The court denied the *habeas* without a hearing, so on January 10, 2014, the NhRP filed an appeal with the Appellate Division of New York State Supreme Court, which dismissed it as well.

On March 19, 2015, the NhRP presented the case again in the New York Supreme Court of New York County because the law in New York state allows the writ to be filed more than once. In April, justice Jaffe issued Hercules and Leo's *habeas* and an order to show cause, which required the New York Attorney General's office to represent Stony Brook in court. The NhRP celebrated this progress because it was the first time in history that a court had granted a hearing to determine the lawfulness of an animal's detainment (*Two former research subjects and the first nonhuman animals to have a habeas corpus hearing*, 2013).

The hearing took place on May 27, 2015, and the parties debated the substantive issues of the case for two hours. The NhRP considered this hearing a victory, but on July 30, 2015, justice Jaffe denied the *habeas* because she was bound to follow the Appellate Division of the New York State Supreme Court's decision in Tommy's case (*Two former research subjects and the first nonhuman animals to have a habeas corpus hearing*, 2013). While

justice Jaffe recognized that efforts to extend legal rights to chimpanzees as understandable, she noted the reluctance of courts to embrace change.[83]

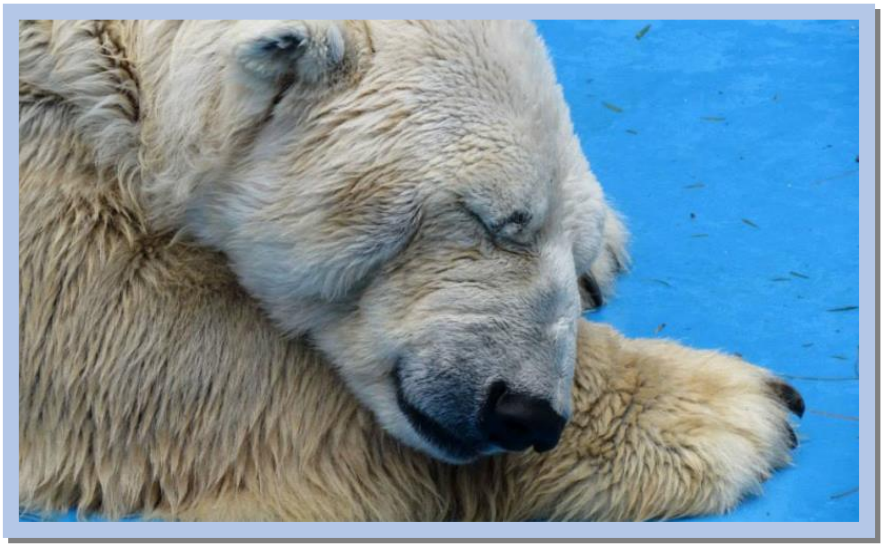
The court also recognized that the NhRP had standing to bring an action directly on behalf of a nonhuman animal, without alleging any injury to human interests.[84] As the NhRP explains, lack of standing is the most common reason that courts dismiss animal welfare cases (*Two former research subjects and the first nonhuman animals to have a habeas corpus hearing*, 2013). Justice Jaffe also argued that being a person is a question of public policy and principle, not biology (*Two former research subjects and the first nonhuman animals to have a habeas corpus hearing*, 2013). During 2015, Stony Brook decided it would no longer use Hercules and Leo in research and they were finally transferred to Project Chimps Sanctuary two and a half years later (*Two former research subjects and the first nonhuman animals to have a habeas corpus hearing*, 2013).

Though the court eventually dismissed this case, the fact that the judge held a hearing and discussed the substantive issues with both parties was an achievement in itself. Courts often dismiss such cases on procedural grounds to avoid addressing an animal's personhood. Moreover, as in Lili, Debby, and Jimmy's cases, it was external

[83] Nonhuman Rights Project v. Stanley, No. 152736/15, slip op. at 15 (N.Y. Sup. Ct., July 30, 2015).
[84] *Id.* at 12.

factors (the lab decided to stop using these chimps), not the *habeas*, that secured the rescue.

e) Bear Arturo (Argentina, 2014)



Arturo in the Zoo [Photo: ExpokNews].

Arturo was born in 1985, and arrived at Mendoza Zoo in Argentina at the age of eight (*La Vanguardia*, 2016). Arturo was famously known in the media as the saddest animal in the world after he became severely depressed when his partner, Pelusa, a female bear from Germany, died (*El Periódico*, 2016). During the summer of 2014, the refrigeration system used to cool Arturo's cage broke, and many visitors witnessed how he desperately rambled around his cage (de Baggis, 2017, p. 2). In 2014, several NGOs asked for his transfer to the Assiniboine Park Zoo in Canada (*La Vanguardia*, 2014). However, the zoo's veterinary committee decided it was too dangerous for him to travel, due to his advanced age (de Baggis, 2017, p. 3).

The AFADA filed a *habeas* on his behalf in 2014, which was denied by the court because it considered the writ inadmissible on procedural grounds (de Baggis, 2017, p. 3). Arturo died in Mendoza on July 3, 2016, at the age of 30 (*La Vanguardia*, 2016).

This case ended tragically because Arturo suffered greatly until his death, but it triggered a debate regarding the closure of Mendoza Zoo (de Baggis, 2017, p. 16), and led to the zoo's definite closure in early 2017. This was the first bear *habeas*, and the third non-chimp and nonhuman *habeas* (after the birds' and the orcas' cases).

f) Chimp Monti (Argentina, 2014)

Monti in the Zoo [Photo: Proyecto GAP Internacional].

Monti arrived at San Francisco de Asis Zoo in Santiago del Estero after being abandoned by a circus because of his epilepsy (*Infobae*, 2014). Alone in a small cage for over forty-five years, Monti suffered irreversible physical and psychological damage, but he is nonetheless the chimpanzee who has survived captivity the longest in Argentina (*Infobae*, 2014).

In June 2014, the AFADA filed a *habeas* on his behalf (Cavalcanti Rollo, 2016, p. 185). In November 2014, the judge named a commission of experts that included biologists, veterinarians, and a psychiatrist to determine if Monti could travel to the Great Ape Sanctuary in Sorocaba, Brazil (Ynterian, 2010b). The zoo was in the process of closure. The court took too long to rule and on

February 3, 2015, Monti died of cardiac arrest, after five decades of intense suffering (*El Liberal*, 2015).

g) Chimp Toto (Argentina, 2014)

Toto in the zoo [Photo: Uno Entre Ríos].

In 1979, Toto arrived in Argentina and subsequently lived in a small cage in Concordia's *El Arca Enrimir* Zoo (*Elonce*, 2016). The AFADA filed a *habeas* in the Criminal Court of Concordia on July 7, 2014, requesting the recognition of Toto's personhood and his right to life, freedom and physical and psychological integrity, and his transfer to a sanctuary (*Uno Entre Ríos*, 2014). The case was dismissed *in limine* on December 23, 2014 (*Diario Junio*, 2016). On April 13, 2016, after 37 years of suffering alone in a small cage, Toto passed away (*Elonce*, 2016).

h) Orangutan Sandra (Argentina, 2014)

Sandra in the Center for Great Apes [Photo: Center for Great Apes].

Sandra was born on February 14, 1986, at the Rostock Zoo in Germany (*Sandra*, 2019). Sandra and Max, a male orangutan, were sent to Buenos Aires in 1994 (*Sandra,* 2019). She lived alone in the zoo until she was finally transferred to the Center for Great Apes in Florida, in September 2019 (Jara, 2019).

In November 2014, the AFADA filed a *habeas* in Buenos Aires' Investigating Court No. 47, requesting Sandra's transfer to the Great Ape Sanctuary in Sorocaba, Brazil, arguing that her arbitrary incarceration had damaged her physical and mental health (de

Baggis, 2015, p. 2). Judge Berdión de Crudo rejected the writ. The AFADA appealed to the Sixth Chamber of the Criminal Court of Appeals, which also rejected it (de Baggis, 2015, p. 2). The AFADA filed a cassation appeal against this ruling, and the Second Chamber of the Federal Criminal Cassation Court stated as an *obiter dictum* that Sandra is a subject of rights through a "dynamic legal interpretation," and ordered the case to be sent to a competent Criminal Court.[85] Argentinian courts always considered animals to be things, not subjects of rights, and this judgment, even if it lacked arguments, set an important precedent (de Baggis, 2015, p. 5). It was the first time a court in Argentina had recognized that a *habeas* could be filed on behalf of an animal (de Baggis, 2015, p. 6).

On March 16, 2015, the AFADA filed a protective action on Sandra's behalf against the government of Buenos Aires and the zoo (Adre, 2018, p. 143).[86] This action sought to protect a person's fundamental rights, except their right to freedom, which is protected by the *habeas.* It might seem strange of the AFADA to file this action instead of pursuing the *habeas*. This decision was likely based on selecting the action that would obtain Sandra's liberation to a sanctuary the fastest. This was the first time that a protective action was filed on behalf of an animal in Argentina (Adre, 2018, p. 138).

[85] 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.).
[86] In Argentina, this is called *acción de amparo*.

The AFADA argued that Sandra's rights to freedom, physical and psychological integrity were being violated and requested her release to a sanctuary, arguing that she was a subject of certain fundamental rights that should be protected by this action (Adre, 2018, p. 143). Judge Liberatori held several hearings and admitted the participation of experts through Skype hearings and *amicus curiae* briefs during the proceedings (Adre, 2018, p. 144). On October 21, 2015, judge Liberatori granted the action.[87] She stated that Sandra is a nonhuman person, and thus a subject of rights. She also recognized that Sandra has her own rights as a sentient being. However, the court stated that the zoo and the city of Buenos Aires could exercise their rights regarding Sandra, albeit in a non-abusive manner.[88]

This statement in the judgment could have had dangerous consequences for Sandra's well-being because it allowed the zoo and the government to continue exercising their rights over Sandra, which they had already exercised, affecting her physical and mental health negatively. The judgment should have prohibited any conduct or action by the zoo and government that contradicted her recognition as a nonhuman person, and that was not strictly related to protecting and improving Sandra's life while she waited for her transfer to a sanctuary. However, the judge decided that experts should determine what conditions Sandra should live in, because this exceeded the court's mandate. Consequently, she did not order

[87] Juzgado Contencioso Administrativo y Tributario No. 4 de la ciudad de Buenos Aires, *supra* note 51, at 9.
[88] *Id*.

Sandra's immediate transfer to a sanctuary, leaving her fate in the hands of a group of experts: Dr. Miguel Rivolta, Héctor Ferrari, and Dr. Gabriel Aguado. In sum, this ruling did not immediately recognize Sandra's right to freedom by ordering her transfer to a sanctuary, nor did it improve her enclosure or conditions at the zoo (Adre, 2018, p. 145).

The zoo and the government appealed, arguing that the AFADA lacked standing and the protective action was an inappropriate course of action to examine Sandra's situation in the zoo.[89] The AFADA also appealed, arguing that the lower court had all the necessary information to decide what conditions Sandra should live in.[90] On June 14, 2016, the higher court confirmed the ruling and ordered the government to carry out improvements in Sandra's cage and daily activities.[91] Most importantly, the court stated that scholars currently disagree on whether animals are subjects of rights, so it revoked this part from the lower court's ruling.[92] The court concluded that Sandra should be adequately treated, and the decision to transfer her to a sanctuary depended on the government, because none of the expert reports had advised that this be done.[93]

[89] Cámara Contencioso Administrativo y Tributario de la Ciudad Autónoma de Buenos Aires [C.C.A.T.B.A.] [Contentious Administrative and Tax Court of the city of Buenos Aires], 14.6.2016, "Orangutana Sandra-Sentencia de Cámara- Sala I del Fuero Contencioso Administrativo y Tributario CABA," at 2 (Arg.).
[90] *Id.*
[91] *Id.* at 11.
[92] *Id.* at 12.
[93] *Id*. at 11.

In 2016, the zoo announced it was going to close and become *Ecoparque*, so the animals were transferred elsewhere (González, 2019). After some struggle between *Ecoparque*, the AFADA, and judge Liberatori, the judge finally chose Florida's Center for Great Apes over Brazil's Great Ape Sanctuary (González, 2019). Sandra became famous around the world as the first animal to be recognized as a person by a court, even though this recognition was later reversed by a higher court.[94] Moreover, although the Federal Criminal Cassation Court merely stated as an *obiter dictum* that Sandra is a subject of rights, this nonetheless set a positive legal precedent for numerous animals such as Poli, Cecilia, Tita, Coco, Guillermina, and Pocha.

[94] *Id*. at 12.

i) Dog Poli (Argentina, 2015)

Poli [Photo: Diario Uno].

Poli was a stray dog living in Palmira, Mendoza province, Argentina (de Baggis, 2017, p. 5). On January 4, 2013, a man tied Poli to the rear bumper of his van due to her barking, dragging her along the road at twenty to fifty kilometers per hour.[95] Two witnesses ran after the van and called the police, who took Poli to a veterinarian, identified the man, and arrested him.[96] Poli's four legs and abdominal area were severely injured.

[95] Primer Juzgado Correccional de la Ciudad de General San Martín [J.C.Gral.S.M.] [First Criminal Court of General San Martin], 20/4/2015, "F. c/ Sieli Ricci, Mauricio Rafael p/ Maltrato y Crueldad Animal," (Arg.).
[96] *Id.*

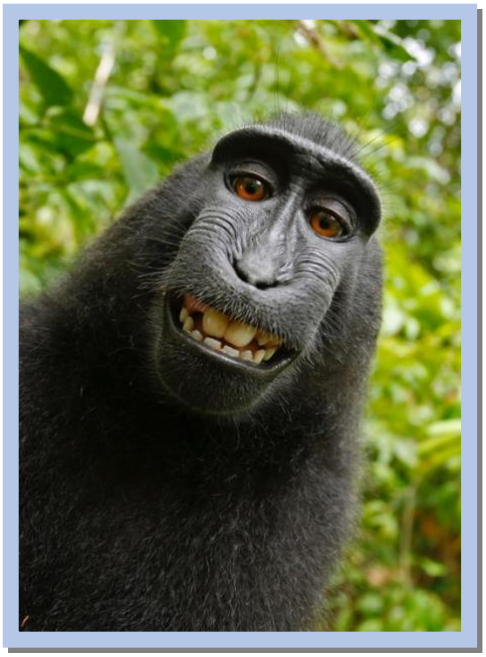
Animal cruelty is a criminal offence in Argentina, so on April 20, 2015, the First Criminal Court of San Martín approved the agreement between the Public Prosecutor, the complainant, *Asociación Mendocina de Protección, Ayuda y Refugio del Animal* (AMPARA), an animal protection NGO that cared for Poli after the accident, and the defendant. The defendant agreed to six months of conditional imprisonment and the obligation to give the complainant 120 kilograms of dog food.[97]

Judge Darío Dal Dosso argued that the criminal law protects animals as right holders, that dogs are sentient beings, and that animals have cognitive and emotional capacities, concluding that dogs are nonhuman persons with fundamental rights, like the right not to be tortured or mistreated.[98]

This case is unique for two reasons: there was no *habeas*, but the judge nonetheless deemed the dog a subject of rights and a nonhuman person; and the case derived from a cruelty offence, but the judge based his verdict on the Federal Criminal Cassation Court in Sandra's case (de Baggis, 2017, p. 6).

[97] *Id.*
[98] *Id.*

j) Macaque Naruto (US, 2015)



Naruto [Photo: Naruto, Wikipedia].

This famous case started in the Tangkoko Reserve, on the island of Sulawesi, Indonesia in 2011, when Naruto, a female crested black macaque (*Macaca nigra*) took several selfies using David Slater's camera, a British wildlife photographer (*Monkey 'selfie' picture sparks Wikipedia copyright row*, 2014). These selfies started two disputes. The first dispute started when Slater licensed the selfies to an agency which published them in the British media at the start of July 2011. On July 9, 2011, *Wikimedia Commons* uploaded the selfies, considering them to be public domain, as Naruto could not hold copyright because she is not human (Stewart, 2014). *Techdirt Blog* defended the same position and also posted the photographs

(Masnick, 2011a, 2011b). Slater argued that he had a valid copyright claim because he was the one who travelled to Indonesia, earned the macaques' trust, and set up his camera on a tripod in order to obtain a selfie picture (*BBC*, 2014; Cheesman, 2014). In December 2014, the US Copyright Office stated that works created by nonhumans are not copyrightable and gave the examples of photographs taken by monkeys and paintings by elephants.[99]

The second dispute was triggered when Slater included the photographs in his book *Wildlife Personalities*, published by the company Blurb. On September 21, 2015, PETA filed a lawsuit against Slater and Blurb, requesting that the District Court for the Northern District of California assign Naruto copyrights to the pictures and appoint PETA to administer the proceeds from the photos for the benefit of Naruto and other crested black macaques in the Tangkoko Reserve.[100] PETA filed the lawsuit as Naruto's next friend, arguing that she could not bring the action due to inaccessibility and incapacity, and thus needed a representative.[101] Blurb responded that a crested black macaque cannot own a copyright, and that PETA had filed the lawsuit on behalf of the wrong crested black macaque, as PETA was representing a six-year-old male crested black macaque, whereas the pictures were taken by a female macaque (Kravets, 2015). On January 6, 2016,

[99] US Copyright Office, Compendium of US Copyright Office Practices § 101 (3d ed. 2014), 68, https://www.copyright.gov/comp3/docs/compendium-12-22-14.pdf (last visited May 21, 2020).
[100] Complaint at 2, Naruto v. Slater, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016), *aff'd*, 888 F.3d 418 (9th Cir. 2018).
[101] *Id*. at 3.

the judge heard oral arguments, and on January 28 the court dismissed the case, arguing that the Copyright Act does not confer animals standing and that animals cannot own copyrights.[102] The court also stated that the claim on animals' right to own copyrights should be addressed by Congress and the President, not by the courts.[103]

The judge claimed that US courts "have repeatedly referred to 'persons' or 'human beings' when analyzing authorship under the Act." [104] Therefore, the judge did not recognize Naruto as a legal person. In the judge's defense, PETA did not argue that Naruto is a legal person. In fact, PETA only argued that Naruto took the photographs autonomously while operating Slater's camera, and that she understood the relationship between pressing the shutter release, the noise it makes, and the change in her reflection in the camera lens.[105] PETA's reference to Naruto's autonomy calls to mind the argument about practical autonomy that Steven Wise and the NhRP set forth in their *habeas* (Wise, 2013, p. 1283).

However, unlike the NhRP, PETA lacked a strong and explicit argument on behalf of Naruto's legal personhood, at least within the

[102] *Id*. at 1.
[103] *Id.* at 6.
[104] *Id.* at 5.
[105] In a press release, Jeff Kerr, PETA's general counsel and part of Naruto's legal team, stated: "Despite this setback, we are celebrating that legal history was made in our unprecedented argument to a federal court that Naruto, a crested macaque monkey, should be the *owner* of property (specifically, the copyright to the famous 'monkey selfie' photos that he undeniably took), rather than a *mere piece of property himself*." (PETA, 2016).

scope of the Copyright Act. This argument would have explained why Naruto is one of those beings that can create works of art and own copyright and would have aimed to convince the judge that not only human beings and corporations can own copyright. As I argue in Chapter Five, copyright is one of the attributes of legal personhood. Unfortunately, even though it seems that PETA wanted the court to recognize Naruto as a legal person within the scope of the Copyright Act, it did not make this argument, nor did it present the necessary evidence; leaving the court with no other option than to dismiss the case (Nonhuman Rights, 2018).

On March 20, 2016, PETA filed a notice to appeal to the Ninth Circuit Court of Appeals (Papenfuss, 2016). On July 12, 2017, the court held an oral argument,[106] and on August 4, 2017, all parties informed the court that they were going to settle the case outside the court, and asked the court not to rule on the case (Kravets, 2017). On September 11, 2017, Slater, Blurb, and PETA reached an agreement. Slater agreed to donate twenty-five percent of any future revenue from the crested black macaque selfies to protect crested black macaques (Fingas, 2017). However, the court did not accept the settlement. The parties asked the court to dismiss the appeal and vacate the judgment (Duffy and Hanswirth, 2017). In April 2018, the court denied the motions to vacate the case, and issued its ruling on behalf of Slater, arguing that animals cannot hold copyright

[106] US Court of Appeals for the Ninth Circuit, Calendar for James R. Browning US Courthouse, San Francisco, *Oral Argument Notice* (July 12, 2017), https://www.ca9.uscourts.gov/calendar/view.php?caseno=16-15469 (last visited May 20, 2020).

claims, nor can animals be represented in court by a next friend. The court questioned whether PETA had any significant relationship to Naruto that would qualify it to act as a next friend.[107]

The judges repeatedly confused the concepts of a *human* and a *person*, using these terms as synonyms, and the concurring opinion claimed humans cannot know what animals want, so they cannot be appropriately represented in court by a next friend (Nonhuman Rights, 2018). The court forgot that many animals have complex cognitive abilities, and some of their interests can be easily presumed, much as we presume the interests of many humans that cannot express what they want due to age or disease, but are still represented in court (Nonhuman Rights, 2018). The court also considered PETA's lawsuit to be frivolous, because the court considered it easy to conclude that animals do not have copyright ownership according to property law and the Copyright Act.[108]

Finally, the court expressed serious concern about PETA's motivations, which seemed to promote their own interests, rather than to protect Naruto.[109] The court claimed that to prevent a negative precedent against its institutional interests, PETA had filed a motion to dismiss Naruto's appeal and vacate the lower court's adverse judgment, reaching a settlement with the defendants.[110] Naruto, the supposed plaintiff, did not appear as a party to the

[107] Naruto v. Slater, No. 16-15469 at 7 (9th Cir. 2018).
[108] *Id.* at 20.
[109] *Id.* at 40.
[110] *Id.*

settlement; rather, PETA appeared to be settling its own claims, even though as a next friend it was not a party to the action .[111]

Even though this case was a defeat for the animal rights movement (especially considering that the court openly criticized PETA's motivations and actions), thanks to the selfies and both disputes, crested black macaques, a critically endangered species (Supriatna and Andayani, 2008), became known worldwide, and animals' right to copyright over their works of art can be considered as another mechanism to argue for animal legal personhood in court (Livni, 2018).

In sum, between 2013 and 2015, the NhRP became the main legal advocate for animal personhood, which ceased to be associated exclusively with chimps and was extended to macaques, orangutans, bears, and even dogs in Latin America.

[111] *Id*. at 7 n.3 & 39 n.11.

6.3 DISCUSSION

a) Political Strategy

In some of the examined cases—both *habeas* and other types of lawsuits—judges have argued that a petition to recognize animals as legal persons should be made to Congress and not the judiciary, as occurred in chimp Kiko's and macaque Naruto's cases.

As mentioned in orca Tilikum's case, the objective of these lawsuits is to make things better for animals, not worse. However, there is a dilemma when deciding whether to fight for animal personhood in court. On the one hand, when a certain case has a low chance of success, there is a risk of creating a negative precedent, which can harm the animal plaintiff, as well as other animals in similar conditions. This is especially problematic in common law countries. On the other hand, a case with a high chance of success could lead to the animal in question being killed, as in chimp Suiça's case. The political struggle for a bill on animal personhood does not face this dilemma, because a bill would not target an individual animal, but instead one or more species.

A utilitarian may quickly resolve this dilemma by saying that it does not matter so much if an individual chimp dies if the legal proceedings cause an improvement for the chimp kind or animals in general. This, however, would be an incongruent line of defense for those who, like Jaworska, stress that we can sacrifice a chicken

to save five but not a chimp because the chimp is a person. I will pursue nonutilitarian arguments to support the utilitarian conclusion that argues that we should continue pursuing these cases.

First, the fact that several animals have died during related lawsuits—such as chimps Suiça, and Monti—or a couple of years after the case ended—such as polar bear Arturo, chimp Toto, orcas Tilikum, and Kasatka—shows that these cases are truly urgent. All these animals suffered greatly from physical and psychological illness due to captivity and isolation (Jacobs and Marino, 2020). Therefore, in most cases, there is no time to start a political process in Congress. Political strategies for animal personhood might be a good option in the long run, but they may not be enough to help animals that are currently suffering the consequences of captivity. These animals died as a side-effect of the process, but their death was not intended (McIntyre, 2019).

Furthermore, seeking a bill on animal personhood is not only a slow endeavor, but a difficult one, due to all the lobbies that would oppose it. Hence, animal rights advocates are forced to seek help from courts, and mainly do so through *habeas*. Some might argue that all the judicial defeats prove that this option is even harder than the political endeavor. However, as I explain in the next chapter, judges have started to accept the *habeas* as an adequate legal action, because there are no other available mechanisms for requesting the animal's freedom.

Before women won their rights, there was a massive accumulation of negative precedents. However, eventually, that very accumulation became evidence of social pressure in favor of change. Those who support Dworkin's view on interpreting the law may see this more clearly, but even those who focus on precedents should be able to see it. Accumulating precedents of either sort was a legitimate avenue for women, and it is a legitimate avenue for animals that is beginning to prove successful too.

b) Legal Strategy

Some have argued, however, that the numerous defeats indicate that the *habeas* is not an adequate mechanism to argue for animal legal personhood. Even though most cases filed during this period were *habeas*, it is not the only mechanism to argue for an animal's legal personhood in court. Naruto's case shows that a similar lawsuit could lead to the recognition of personhood through copyright ownership. Poli's case shows that criminal court judges may be inclined to recognize animal legal personhood on their own motion, to stress how much the animal suffered and the seriousness of the offence. Similarly, Lili's, Debby's, and Jimmy's cases show that parallel administrative procedures regarding the violation of animal welfare regulations in zoos can also lead to the animal's transfer to a sanctuary.

In this sense, having different strategies is positive, as there is uncertainty about which approach has more chance of succeeding in

a particular country considering its legal system, judicial structure, history, and development of animal protection, among other circumstances. Nonetheless, advocates must bear in mind that animals in zoos and labs are physically and psychologically fragile, so any administrative procedure or other type of lawsuit that might take years, could take too long, and the animal could die in the meantime.

c) Low Probability of Success Cases

There is always a risk of creating a negative precedent when deciding to litigate, particularly in animal rights and legal personhood cases that are generally novel issues for courts, even though these cases are becoming more common. The point of contention is how animal advocates should act in view of certain cases with a very low probability of success. On the one hand, as Steve Wise noted in orca Tilikum's case, presenting such a case was likely to generate negative precedents, and thus make any eventual success less likely (Wise, 2011). On the other hand, going ahead despite the low probability of success a case might have, according to some, has had several beneficial consequences.

First, several animals still relocated to sanctuaries despite the *habeas* failing, such as chimps Lili, Debby Megh, Jimmy, Hercules, and Leo. Orangutan Sandra also moved to a sanctuary even though a higher court reversed judge Liberatori's judgment. Hence, even failed cases –legally speaking– have served to pressure

governments, zoos, and labs to relocate the animals. If the purpose of these lawsuits is to make things better for animals, then these cases may be rightfully considered as victories.

Second, even fragments of judgments that were inconsequential or unsuccessful can be exported to other cases with a positive effect. For example, *obiter dictum* declarations in judgments can still influence other national or international judgments. In fact, the Federal Criminal Cassation Court's judgment in Sandra's case inspired the judge in Poli, Tita, Guillermina, Pocha, and Coco's case in Argentina, as well as the judge in the Marghazar Zoo case in Pakistan, which I examine in Chapter Seven. Furthermore, overturned rulings are still quoted as exemplary cases around the world, like when the Marghazar Zoo judgment mentioned judge Liberatori's decision that recognized Sandra as a nonhuman person with basic rights. The Marghazar Zoo judgment even mentioned cases that at that time had not yet ended as examples of jurisprudence on animal rights, such as Happy's case, which I also examine in Chapter Seven.

Third, partly as a result of this phenomenon, animal legal personhood has become increasingly supported by judges, well-prepared attorneys, renowned academics, and scientists from around the world, as the NhRP's lawsuits reveal, showing that these cases are neither ridiculous nor frivolous, which normalizes the topic among the general public.

Fourth, impact on the media, and the general public's growing familiarity with the possibility of animal personhood, as well as the general public's emotional involvement with specific individuals like Sandra and Tilikum, mobilizes courts and governments to act.

CONCLUSION

During 1972–2012, the *habeas* were primarily filed on behalf of chimpanzees and dismissed by courts. However, these public defeats opened the door to a personhood boom between 2013–2015. In only two years, ten cases were filed involving chimpanzees, a polar bear, an orangutan, a black macaque, and a dog. In short:

(i) Initially, the cases mostly involved chimpanzees, and courts commonly dismissed the cases on procedural grounds.

(ii) However, the number of cases still increased and were filed on behalf on different animals, not only chimpanzees.

(iii) Judges started to show more interest in these cases, spending more time debating them, holding hearings, and asking for amicus curiae from experts. Some cases also reached higher courts, like Sandra's case shows.

7. ANIMAL PERSONHOOD IN COURT: THE SECOND WAVE (2016–2021)

INTRODUCTION

This chapter examines the second wave of lawsuits filed between 2016 and 2021, including a deeper discussion of chimp Cecilia's success, and Andean bear Chucho's fascinating case, which reached the Colombian Constitutional Court. Cecilia's case has been the only *completely* successful *habeas* proceeding.[112] The remaining legal cases this chapter examines are other *habeas* filed on behalf of different animals, and administrative and criminal proceedings, where the topic of an animal's legal personhood has been an issue.

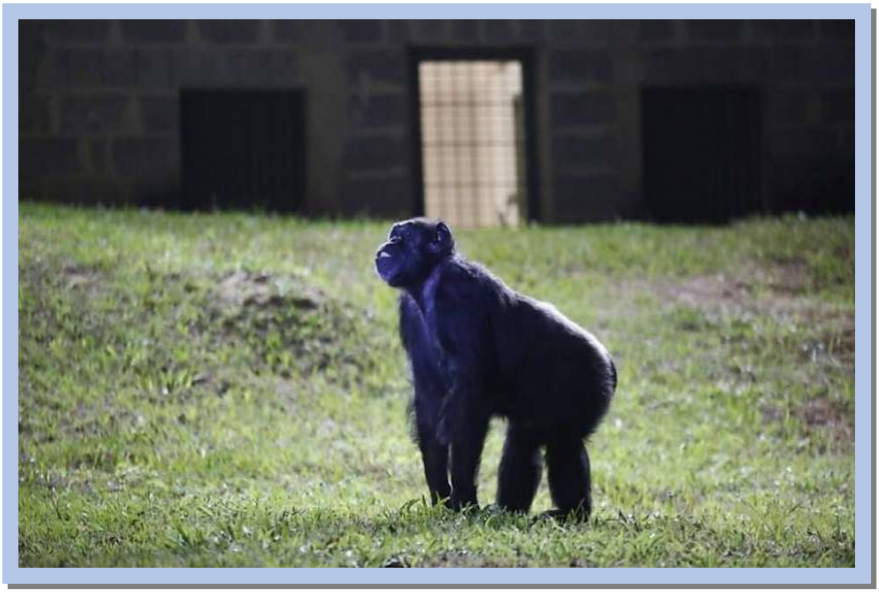
Between 2018–2021 there was a growing diversity of cases from different countries regarding different animals. Indeed, this section examines three cases that took place in Uttarakhand, Haryana, and New Delhi in India, as well as one case that took place in Islamabad, Pakistan, which led to the relocation of elephant Kaavan to a Cambodian sanctuary, thanks to the help from Free the Wild, Cher's animal protection NGO. This chapter also examines drug lord Pablo Escobar's hippos in Colombia, dog Tita's and howler monkey Coco's cases in Argentina, and the groundbreaking case of woolly monkey Estrellita in Ecuador. Finally, this chapter teases out the

[112] Tercer Juzgado de Garantías de Mendoza, *supra* note 6.

trends that emerge from this historical analysis of case law on animal personhood.

7.1 THE FIRST SUCCESS (2016–2019)

a) Chimp Cecilia (Argentina, 2016)



The night Cecilia was liberated in the Great Ape Sanctuary [Photo: Los Andes].

Cecilia was born in captivity.[113] She lived in Mendoza Zoo for more than twenty years, first with Charlie, who died in July 2014, and Xuxa, who died in January 2015, leaving Cecilia alone and depressed—roasting or freezing in a small, unprotected cement cage, without plants or anywhere to hide from visitors.[114]

The AFADA filed her *habeas* in the Third Court of Guarantees in Mendoza in 2016, proving she was living in deplorable conditions,

[113] Tercer Juzgado de Garantías de Mendoza, *supra* note 6.
[114] *Id.* at 3.

as the judge could see during the judicial proceedings' inspection.[115] The state attorney opposed the *habeas*, arguing that since Cecilia was not human, her incarceration was not illegal.[116] However, during one of the hearings, the parties agreed to send Cecilia to the sanctuary.[117] The judge in charge of this case, María Alejandra Mauricio, granted Cecilia the *habeas* on November 3, 2016.[118] The judge declared that Cecilia is a nonhuman person and the subject of rights,[119] and ordered her transfer before the start of autumn.[120]

The judge argued that Cecilia was owed protection (i) as an environmental collective good,[121] (ii) as Argentinean wildlife, which is also protected by law, [122] (iii) as a zoo animal,[123] (iv) as a sentient being,[124] and (v) as a great ape nonhuman person subject of rights, with the cognitive abilities of a four-year-old child.[125] She also affirmed that the rights such animals might have should be determined by the state, not by judges.[126] Finally, the court stated that the *habeas* is an adequate tool to assess the condition of incarcerated animals, as national and local Argentinean law does

[115] *Id.* at 42.
[116] *Id.* at 6.
[117] *Id.* at 9.
[118] *Id.* at 44.
[119] *Id.* at 36.
[120] *Id.* at 45.
[121] *Id.* at 19.
[122] *Id.* at 13.
[123] *Id.* at 19.
[124] *Id.* at 35.
[125] *Id.* at 33.
[126] *Id.* at 37.

not provide other procedural mechanisms.[127] In other words, as the judge was forced to rule on the case, she decided to accept the *habeas* (Capacete González, 2016, p. 5). On April 6, 2017, Cecilia moved to Brazil's Great Ape Sanctuary (Ynterian, 2017).

This is one of many cases in which *habeas* have been supported with environmental considerations, as in Chucho the bear's case, discussed below. This is understandable, but it can leave members of non-threatened species insufficiently protected. Cecilia's case was easier than Sandra's because, despite the state's initial opposition, the parties reached an agreement and Cecilia was soon transferred to a sanctuary.

[127] *Id.* at 44.

b) Elephants Beulah, Karen, and Minnie (US, 2017)

Beulah being forced to perform [Photo: Animal Defenders International].

Beulah and Minnie, Asian elephants, and Karen, an African elephant, were all born in the wild and imported to the US between 1969 and 1984. Beulah was born in Myanmar in 1967, Karen was born in an unknown country in 1981, and Minnie was born in Thailand in 1969 (*Torn from their families and forced to perform for humans for decades*, 2017; Koehl, 2021b). They were all sold to Commerford Zoo between 1973 and 1984, a zoo that has been cited more than fifty times by the USDA for contravening the Animal Welfare Act (*Torn from their families and forced to perform for humans for decades*, 2017).

Since their importation to the US, they were used as attractions in petting zoos, circuses, fairs, parties, commercials, and even political gatherings (*Torn from their families and forced to perform for humans for decades*, 2017). Beulah suffered from foot problems for many years, and died from blood poisoning caused by a uterine infection at a fair on September 15, 2019 (Fern, 2020). Although Karen died in March 2019, Commerford Zoo did not announce her death or explain what happened to her. The NhRP has stated that she died of kidney disease (Fern, 2020). Minnie is still alive and Commerford Zoo still forces her to work, even though she has attacked her handlers several times (*Torn from their families and forced to perform for humans for decades*, 2017).

On November 13, 2017, the NhRP filed a *habeas* in Connecticut Superior Court, Litchfield County, requesting the recognition of the three elephants' legal personhood, right to bodily liberty, and their release to Paws Ark 2000, a natural habitat sanctuary (*Torn from their families and forced to perform for humans for decades*, 2017). On December 26, 2017, judge James M. Bentivegna dismissed the petition because the NhRP lacked a relationship with the detainees and it was seen as frivolous in Connecticut, where animal *habeas* were unknown (Choplin, 2017b). As the NhRP argued, the case was novel, not frivolous (Choplin, 2017b).

On January 16, 2018, the NhRP filed a motion to reargue, requesting the court to reverse its dismissal (*Torn from their families and forced to perform for humans for decades*, 2017).

Judge Bentivegna denied the motion and the request to amend the petition on February 27, 2018. The NhRP filed a notice of appeal and a motion for articulation with the Connecticut Appellate Court with the objective of clarifying the legal and factual basis for judge Bentivegna's decisions (*Torn from their families and forced to perform for humans for decades*, 2017). The judge only granted one of the sixteen requests for articulation and insisted that the petition was frivolous (*Torn from their families and forced to perform for humans for decades*, 2017).

Therefore, the NhRP filed a motion for review and a brief in the Appellate Court of Connecticut, requesting the revision of the lower court's dismissal. The court scheduled a hearing on April 22. During this hearing, the NhRP argued not only against the decision's lack of standing and frivolity, but also that elephants are legal persons entitled to *habeas* (*Torn from their families and forced to perform for humans for decades*, 2017). The Appellate Court of Connecticut dismissed the case, so the NhRP filed a motion for *en banc* reconsideration, which was denied.

On June 11, 2018, the NhRP filed a second *habeas* in Tolland County (*Torn from their families and forced to perform for humans for decades*, 2017). In February 2019, judge Shaban dismissed the petition, stating that it was the same as the first one. The NhRP argued that the petitions were different, and that the NhRP could bring a second petition since the first petition was not dismissed on

its merits (*Torn from their families and forced to perform for humans for decades*, 2017).

Beulah died in the Big E fair in West Springfield in September, while Karen had already died in March. Finally, the NhRP filed a supplemental brief on the issue of their standing to sue to the Appellate Court. On January 8, 2020, the court held oral arguments, and the NhRP insisted that the court was wrong to rule against the merits of the case without actually hearing them (*Torn from their families and forced to perform for humans for decades*, 2017). The Appellate Court denied Minnie's *habeas*, so the NhRP filed a motion requesting permission to appeal with the Connecticut Supreme Court, who declined the petition (Wise, 2020). Finally, on December 16, 2020, the NhRP announced that it had decided to end litigation in Connecticut given the courts' unwillingness to hear Minnie's case (*Torn from their families and forced to perform for humans for decades*, 2017).

This case is relevant because it was the first elephant *habeas*. There is nothing frivolous about caring for elephants' suffering and exploitation; and yet frivolity was the inappropriate but recurrent argument for dismissing this *habeas*.[128]

[128] The NhRP has recently filed a *habeas* on behalf of three African elephants: Nolwazi, Amahle, and Vusmusi. In 2016, they were taken from their natural habitat in Swaziland and imported to US zoos. The three elephants currently living in Fresno Chaffee Zoo, recognized as one of the ten worst zoos for elephants in the US. On May 3, 2022, the NhRP filed a *habeas* on the elephants' behalf in the San Francisco Superior Court, requesting the court to recognize their personhood and right to bodily liberty and transfer them to an elephant sanctuary. The case is pending (*Denied family and freedom*, 2022).

c) Chimps Martín, Sasha, and Kangoo (Argentina, 2017)

Martin, Sasha, and Kangoo in *Ecoparque* [Photo: Clarín].

Martin, Sasha and Kangoo lived together in *Ecoparque*, a facility for native wildlife in Buenos Aires, located in the former Buenos Aires Zoo (*Infobae*, 2017). The AFADA filed a *habeas* on behalf of these three chimpanzees on November 28, 2017 (*Rechazan Habeas Corpus de los Chimpancés del Ecoparque – Argentina*, 2017). The chimpanzees were forty-nine, twenty and ten years old at the time the *habeas* was filed. The AFADA requested the court recognize these chimpanzees as nonhuman subjects with rights and transfer them to a sanctuary in Brazil (*Rechazan Habeas Corpus de los Chimpancés del Ecoparque – Argentina*, 2017).

According to the AFADA's public release, the writ was rejected the same day by the Criminal Court; the AFADA appealed, but the Court of Appeals confirmed the lower court's ruling (*AFADA ONG: Comunicado sobre los chimpancés del Ecoparque - Argentina*, 2018). The AFADA requested constitutional review of the case but the Court of Appeals declared it inadmissible on March 14, 2018. Finally, the AFADA filed a complaint[129] to the Superior Court of Justice (*AFADA ONG: Comunicado sobre los chimpancés del Ecoparque - Argentina*, 2018), which was also rejected (Sánchez, 2019).

The zoo explained that Martin was too old to travel, and that the family cannot be broken up by transferring only Sasha and Kangoo because the chimpanzees would become depressed (Sánchez, 2019). The family of chimpanzees continued to live together in Buenos Aires' zoo until Martin's death in February 2021 due to cardiorespiratory arrest (*Muere el Chimpancé Martín en el Zoológico de Buenos Aires*, 2021). Though Martin's death is unfortunate, his advanced age can no longer serve as an argument against the chimps' transfer to a sanctuary. In fact, the zoo will transfer Sasha and Kangoo to the sanctuary Monkey World in Dorset, England, during the third trimester of 2022 (Sánchez, 2022).

[129] In Argentina, this is referred to as *recurso de queja*.

d) Dog (Argentina, 2018)

A boy and his dog [Photo: Fcscafeine, iStock].

During July 2018, judge Elisa Zilli from the Court of Guarantees No. 6 in Paraná, Argentina recognized a dog as a subject of rights in a criminal offense case (*Paralelo32*, 2018). A minor was walking his dog when another dog came along, and the animals started to fight. A neighbor stabbed the minor's dog to death. It seems the court declared the dog a subject of rights when the court communicated the judgment without further argumentation (*Paralelo32*, 2018). A local NGO association, *Amor Animal Paraná*, decided not to appeal the court's decision to disallow them from being complainants in the case in order to secure the declaration that the dog is a subject of rights (*Paralelo32*, 2018).

e) Elephant Happy (US, 2018)

Happy at the Bronx Zoo [Photo: Gigi Glendinning].

Happy is a female Asian elephant born in the wild in 1971, who arrived at Bronx Zoo in 1977 after being relocated from Lion Country Safari, Inc. (Koehl, 2021a). During the 1980s, the elephants that lived in the zoo were forced to perform tricks (*First elephant to pass mirror self-recognition test; held alone at the Bronx Zoo*, 2018). In 2005, Happy became the first elephant to pass the mirror test (Choi, 2006). In 2006, "the zoo announced [that] it would end its captive elephant program once one or more elephants had died." (*First elephant to pass mirror self-recognition test; held alone at the Bronx Zoo*, 2018). Since 2006, Happy has lived alone in a 1.15-acre area.

On October 2, 2018, the NhRP filed a *habeas* in the New York Supreme Court, Orleans County, requesting the court to recognize Happy's legal personhood and right to bodily liberty and order her transfer to a sanctuary (*First elephant to pass mirror self-recognition test; held alone at the Bronx Zoo*, 2018). The Wildlife Conservation Society filed a Memorandum of Law in opposition to the order to show cause. On November 16, 2018, judge Bannister issued an order to show cause, setting a hearing on December 14 to determine Happy's release. December 14, 2018 was the first time that a US court heard arguments about elephants' legal personhood (*First elephant to pass mirror self-recognition test; held alone at the Bronx Zoo*, 2018).

Happy's case was sent to Bronx County. The Supreme Court of Bronx County scheduled a preliminary conference for August 15, 2019. During this conference, the court determined that all motions would be argued before justice Tuitt (*First elephant to pass mirror self-recognition test; held alone at the Bronx Zoo*, 2018). On September 23, 2019, the justice heard arguments for more than four hours, and scheduled a second hearing for October 21 regarding the pending motions and the merits of the *habeas* (*First elephant to pass mirror self-recognition test; held alone at the Bronx Zoo*, 2018). Justice Tuitt granted the NhRP a temporary restraining order to prevent the zoo from taking Happy out of New York State before the hearing on October 21. On the day of the hearing, the arguments lasted four hours and focused on Happy's personhood (*First*

elephant to pass mirror self-recognition test; held alone at the Bronx Zoo, 2018).

The judge scheduled another hearing for January 6, 2020, where justice Tuitt heard the NhRP's arguments for more than three hours. On February 18, 2020, justice Tuitt issued a decision denying the *habeas*, arguing that she was "regrettably" bound to the appellate courts' decisions on Tommy, Kiko, Leo and Hercules' cases.[130] The NhRP appealed to the New York Supreme Court, Appellate Division, First Department, and after hearing the NhRP's arguments, the First Department denied Happy's *habeas* (*First elephant to pass mirror self-recognition test; held alone at the Bronx Zoo*, 2018). Though the appeal was finally denied, the courts showed readiness to hear the substantive arguments related to Happy's personhood, and the lower court recognized that Happy is not a mere thing, but "an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty."[131]

The NhRP then filed a motion requesting the New York Court of Appeals to hear arguments, which is rarely granted. However, the Court of Appeals granted the motion and the hearing took place on May 18, 2022 (*First elephant to pass mirror self-recognition test; held alone at the Bronx Zoo*, 2018). Unfortunately, the court

[130] Reply Memorandum in Support of Supplemental Memorandum of Law Upon Transfer at 15, Nonhuman Rights Project, Inc. v. Breheny, 134 N.Y.S.3d 188 (2019) (No. 260441/2019).
[131] *Id.* at 16.

dismissed Happy's case arguing that the NhRP sought to transfer Happy, not free her from captivity and that the *habeas* only protects humans.[132] Legal scholar Kristin Stilt has rightly noted in a recent interview that the court's argumentation is circular: "habeas only applies to humans, because only humans have been given the right to habeas." (Reed, 2022). The court also argued that animals cannot bear duties[133] and stated that they "cannot turn a blind eye" to the disruption the ruling may cause on property rights, agricultural industry, and medical research.[134] In this line, the court considered that it is not the judiciary's role to make this decision.[135] However, judges Jenny Rivera and Rowan D. Wilson dissented, arguing in favor of granting Happy the *habeas*, which constitutes an advance in favor of animal personhood considering there was no dissent in Minnie's case.

[132] In the Matter of Nonhuman Rights Project, Inc., &c., Appellant, v. James J. Breheny, &c., et al., Respondents, *supra* note 41, at 9, 10.
[133] *Id.* at 11.
[134] *Id.* at 12.
[135] *Id.*

f) Bear Chucho (Colombia, 2017)

Chucho in the Río Blanco Reserve [Image: RCN Radio].

Chucho is an adult Andean bear (*Tremarctos ornatus*), also known as a spectacled bear, living in Barranquilla Zoo in Colombia (Tallardà, 2019). Andean bears are the only surviving species of bears native to South America, and the International Union for Conservation of Nature classifies them as vulnerable (Velez-Liendo and García-Rangel, 2017). Andean bears survive mainly in Venezuela, Colombia, Ecuador, Peru, Bolivia, and Argentina.

Chucho and Clarita, his sister, were born in La Planada Natural Reserve, located in the municipality of Ricaurte, Nariño, Colombia (J. Rodríguez, 2020). They lived there for four years, and were then transferred to Manizales' Río Blanco Reserve as part of a

conservation program, although they did not reproduce because they were siblings (Sarralde Duque, 2019). They lived in semi-captivity (*El Tiempo*, 2020). The Manizales Water Company was in charge of managing the reserve and developing the conservation program for both bears (Contreras López, 2018). Clarita died from cancer on October 16, 2008. Chucho became very depressed (Sarralde Duque, 2019). The *Corporación Autónoma Regional de Caldas* (CORPOCALDAS), the environmental authority of that region, decided to transfer him to the zoo on June 14, 2017, after living in Río Blanco for 18 years.[136]

A local attorney, Luis Domingo Gómez Maldonado, filed a *habeas* on June 16, 2017, and argued that:

(i) Chucho had the right to return to his natural habitat, La Planada, a reserve protecting the Andean bear.[137]

(ii) Section 3(a) of the Animal Protection Law 1774/2016 states that the eradication of captivity is one of the principles of animal protection in Colombia.[138]

(iii) Environmental regulation in Colombia determines that humans must respect nature and all of its components, animals included.[139]

[136] Tribunal Superior del Distrito Judicial de Manizales [T.S.D.J.Man.] [Superior Court of the Judicial District of Manizales], Sala Civ. Fam. julio 13, 2017, M.S: C. Cruz Valencia, Expediente 17001-22-13-000-2017-00468-00, at 132-133 (Colom.).
[137] Gómez Hab. Corp. pg. 9, June 16, 2017.
[138] *Id.* at 3.
[139] *Id.* at 5-9.

(iv) Barranquilla is a coastal Caribbean city, scorching hot and extremely humid all year round, instead Nariño, Chucho's natural habitat, is a high-altitude, cold, and rainy mountain range.[140]

The petitioner recognized that the Colombian legal system does not provide mechanisms to urgently seek the protection of animals in captivity, hence the *habeas*.[141]

The Civil Family Chamber of the Superior Court of the Judicial District of Manizales denied the petition on June 17, 2017, but the Supreme Court annulled the procedure due to procedural errors.[142] The Superior Court of the Judicial District of Manizales conducted the procedures and decided the case again.[143] The zoo argued that Chucho had always lived in captivity, depended on humans for food and water, and that unlike the zoo, Río Blanco lacked expert veterinary assistance.[144] CORPOCALDAS presented similar arguments against the *habeas*, stressing that since Clarita's death, Chucho had become sedentary, passive, overweight, stressed, depressed, and had escaped several times from his enclosure, which

[140] *Id.* at 9-11.
[141] *Id.* at 3.
[142] Tribunal Superior del Distrito Judicial de Manizales [T.S.D.J.Man.] [Superior Court of the Judicial District of Manizales], Sala Civ. Fam. junio 17, 2017, M.S: C. Cruz Valencia, Expediente 17001-22-13-000-2017-00468-00 (p. 44), (Colom.).
[143] Tribunal Superior del Distrito Judicial de Manizales [T.S.D.J.Man.] [Superior Court of the Judicial District of Manizales], *supra* note 136 at 130.
[144] *Id.* at 133-134.

evidenced a lack of safety and care for the bear.[145] This situation was dangerous for Chucho and the nearby community.[146]

The Civil Family Chamber of the Superior Court of Manizales denied the petition on July 13, 2017.[147] The decision was appealed by the plaintiff to the Civil and Agrarian Cassation Chamber of the Supreme Court of Justice.[148] The reporting judge, Villabona, overruled the judgment and granted the *habeas* on July 26, 2017.[149] He ordered the parties to transfer Chucho within thirty days to a place that better resembles his habitat, stating the Río Blanco Reserve should have priority.[150]

The zoo presented a protective action before the Labor Cassation Chamber of the Supreme Court of Justice.[151] This court granted the action on August 16, 2017, and agreed with the plaintiff that the *habeas* violated fundamental rights, such as the right to due process and the right to defense.[152] CORPOCALDAS argued that they had moved Chucho for his own sake, as he was fed dog food, lived alone, had no specialized veterinary care, and had escaped several times.[153] CORPOCALDAS also argued that they had asked every

[145] *Id.* at 135.
[146] *Id.*
[147] *Id.* at 143.
[148] Corte Suprema de Justicia [C.S.J.] [Supreme Court], *supra* note 37, at 4.
[149] *Id.* at 21.
[150] *Id.*
[151] This action is called *tutela* in Colombia: a constitutional action that seeks to protect people against the violation of their fundamental rights.
[152] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Lab. agosto 16, 2017, M.P: F. Castillo Cadena, Expediente STL12651-2017 (No. 47924), at 127 (Colom.).
[153] *Id.* at 117.

Colombian environmental authority for a place for Chucho, and that only the zoo had proved to be appropriate.[154]

Luis Domingo Gómez Maldonado challenged this decision before the Criminal Cassation Chamber of the Supreme Court of Justice, which confirmed the decision on October 10, 2017.[155] He argued the violation of his right to defense, on the basis of the court notifying the admission of the protective action on August 15, 2017, and ruling on August 16, 2017.[156] He also claimed that the Labor Cassation Chamber did not recognize the Constitutional Court's opinion in prior jurisprudence against animals being left defenseless.[157]

The Constitutional Court selected the case for revision. This court has the faculty of revising protective action judgments according to Section 33 of Decree 2591/1991, which states that at least two judges can select the judgments that will be revised.[158] Judge Antonio José Lizarazo Ocampo insisted on the selection of the case for its novelty and the opportunity to expand the court's jurisprudence on animal rights on the basis of Section 51 of the Internal Regulation of the Constitutional Court.[159] On January 26,

[154] *Id.* at 118.
[155] Corte Suprema de Justicia [C.S.J.] [Supreme Court], *supra* note 42, at 31.
[156] *Id.* at 11-12.
[157] *Id.* at 12.
[158] Law 2591, Noviembre 19, 1991, DIARIO OFICIAL [D.O.] pg. 6 (Colom.).
[159] Law 5/1992, Corte Constitucional [Constitutional Court Agreement], octubre 21, 1992, DIARIO OFICIAL [D.O.] (Colom.), https://www.ramajudicial.gov.co/web/corte-constitucional/portal/corporacion/corte/reglamento-interno.

2018, the Selection Chamber bowed to this insistence and put judge Diana Fajardo Rivera in charge of the revision.[160] On August 8, 2019, the Constitutional Court held a hearing in which various experts were heard, such as Paula Casal, Anne Peters, and Steven Wise.[161] On January 22, 2020, the Constitutional Court rendered its verdict.[162]

In sum, two different actions were filed in this case.[163] First, a *habeas* that was denied by the lower court and then granted by the higher court.[164] Second, a protective action was filed against the court, which granted the *habeas* based on the violation of certain rights, and which was granted by the lower and higher courts, and was selected for revision by the Constitutional Court.[165] Therefore, this case has involved two of the highest courts in the country: the Supreme Court of Justice and the Constitutional Court. What follows is an account of the substantive aspects of this case, according to the proceedings followed in each Court.

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[160] Corte Constitucional [C.C.] [Constitutional Court], febrero 8, 2018, Mónica Britto Vergara, T-6480577, (Colom).

[161] The author also participated in the hearing, by giving a presentation on legal personhood with Carlos Contreras. The public hearing can be watched online. *See* Corte Constitucional. (2019) Audiencia Pública "Oso Chucho", 8 August. Available at: https://www.youtube.com/watch?v=_X0BHUJWPwo (Accessed: July 8, 2022).

[162] Corte Constitucional [C.C.] [Constitutional Court], enero 23, 2020, M.P: Luis Guillermo Guerrero Pérez, Expediente T-6.480.577, Sentencia SU-016/20, (No. 03, at 2 (Colom.).

[163] Tribunal Superior del Distrito Judicial de Manizales [T.S.D.J.Man.] *supra* note 136; *see* Corte Suprema de Justicia [C.S.J.] [Supreme Court] *supra* note 152.

[164] *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court] *supra* note 37.

[165] Corte Constitucional [C.C.] [Constitutional Court], Sala. Prime. Selec. Tute., enero 22, 2018, A. Rojas Ríos & A. Linares Cantillo, T-6480577, (Colom).

•Superior Court of Manizales, *Habeas* (July 13, 2017)

The Superior Court recognized that animal protection is a constitutional duty according to the Constitutional Court's jurisprudence.[166] In this sense, Colombian case law acknowledges that animals are part of the environment, have dignity, and are objects of care.[167] The court also stated that according to the Constitution, the *habeas* is a fundamental right and constitutional action.[168]

Additionally, the court accepted that simply stating that the *habeas* can only be filed by or on behalf of a human being is insufficient, considering Colombian case law and the social pressure regarding the protection of animals.[169] This argument is commonly used by courts to deny *habeas* on behalf of animals, as the pioneer caged birds case in Brazil shows.[170] However, this argument does not prevent people from filing remedies that seek to protect human rights with the purpose of protecting animal rights. For example, even though the caged birds case was dismissed, it did not stop other Brazilian attorneys from filing a lawsuit on behalf of Suiça (Azevedo Clayton, 2005).

[166] Tribunal Superior del Distrito Judicial de Manizales [T.S.D.J.Man.] [Superior Court of the Judicial District of Manizales], *supra* note 136, at 137.
[167] *Id.* at 138.
[168] *Id.* at 137.
[169] *Id.* at 139.
[170] S.T.F., No. 50.343, Relator: Des. Djaci Falcão, *supra* note 65, at 813

Finally, the Superior Court concluded that the *habeas* is a fundamental right, and that animals are not recognized as subjects of rights in Colombia.[171] Therefore, they cannot be protected by a right that they are not entitled to. The court added that the adequate action for these cases is the *acción popular*, which is similar to American class actions in the sense that it seeks to protect the rights of groups of people affected by a particular damage, such as environmental damages or damages caused by defective products (Páez-Murcia, Lamprea-Montealegre and Vallejo-Piedrahita, 2017, p. 212), and allows the court to issue interim measures in cases where there is an urgent matter at stake.[172] The court also stated that this type of action is better suited to analyze Chucho's welfare.[173]

In sum, the Superior Court's ruling determined that only persons are entitled to the *habeas*, and adhered to the traditional approach that considers animals to be objects of rights, even though the legal system recognizes them as sentient.[174] In other words, this judgment amounts to arguing that animals in Colombia are "very special things" (Contreras López, 2018, p. 25).

[171] Tribunal Superior del Distrito Judicial de Manizales [T.S.D.J.Man.] [Superior Court of the Judicial District of Manizales], *supra* note 136, at 142.
[172] *Id.*
[173] *Id.* at 143.
[174] *Id.* at 138.

•Supreme Court (Civil), *Habeas* (July 26, 2017)

The court granted the *habeas* on the basis of Chucho's sentience, granting him the status of a subject of rights that ought to be protected, particularly in view of the rate at which humans are destroying the environment and native territory of this species.[175] The judge also argued that treating animals as things, rather than as subjects of rights, had clearly produced disastrous consequences, and that, like children, animals do not have to bear duties to be subjects of rights.[176] The judge emphasized Chucho's membership of an endangered and protected species most likely to stress that Chucho deserves some legal protection and that recognizing him as a right-bearer was not that far-fetched.[177]

•Supreme Court (Labor), Protective Action (August 16, 2017)

The zoo filed a protective action based on the violation of the right to due process, defense and the principles of legality and contradiction against the second instance judgment in the *habeas corpus* proceedings.[178] The court claimed that a *habeas* was not even appropriate for all legal persons, like corporations, so even granting Chucho personhood did not suffice for a *habeas*.[179] In

[175] Corte Suprema de Justicia [C.S.J.] [Supreme Court], *supra* note 37, at 11.
[176] *Id.* at 10 -11.
[177] *Id.* at 17-19.
[178] Corte Suprema de Justicia [C.S.J.] [Supreme Court], *supra* note 152, at 117.
[179] *Id.* at 125.

Colombian law, animals are normally considered sentient beings, an intermediate category between persons and things.[180]

The court acknowledged the current trend to expand legal personhood to animals, but stated that this had not yet happened in Colombia.[181] The court also argued that the *habeas* is based on the *pro homine* principle, according to Section 1 of Law 1095 of 1996.[182] This principle states that judges must choose the interpretation that is more favorable to human dignity.[183] Therefore, the court stated that the *habeas* can only be used to protect humans.[184] Even though granting a *habeas* to an animal does not affect human dignity or human rights in any way, the court chose to stick to the letter of the law.[185]

Finally, the court concluded that the *habeas* is not the appropriate mechanism to seek the protection of animals.[186] This court argued that there are other mechanisms to protect animals such as the *acción popular*, or the preventive apprehension mechanism regulated in Section 8 of Law 1774 of 2016.[187] However, the latter is contemplated for domesticated animals rather than wild animals.

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[180] *Id.* at 124.
[181] *Id.*
[182] Law 1095/06, noviembre 2, 2006, DIARIO OFICIAL [D.O.] (Colom.), http://www.secretariasenado.gov.co/senado/basedoc/ley_1095_2006.html (last visited May 20, 2020).
[183] Corte Suprema de Justicia [C.S.J.] [Supreme Court], *supra* note 152, at 124.
[184] *Id.* at 125.
[185] *Id.*
[186] *Id.* at 127-28.
[187] *Id*. at 126.

The court also added that using a petition of liberty for an animal that will live in semi-captivity was an oxymoron.[188]

In this judgment, judge Clara Cecilia Dueñas Quevedo clarified her vote.[189] She shared the decision and main arguments, but stated that the court had affirmed that in every legal system only human persons are entitled to the *habeas even though* this had not been proven.[190] On the contrary, the petitioner mentioned the case of the river Atrato in Colombia and Sandra the orangutan.[191]

•Supreme Court (Criminal), Protective Action (October 10, 2017)

This court confirmed the decision, arguing that the *habeas* can only be presented by a human person because it is based on the *pro homine* principle.[192] The court added that the fact that animal protection is acknowledged as a constitutional duty does not mean that animals have a fundamental right to welfare, but rather that humans have a duty to protect them.[193] The court referred to Chucho's right to welfare, but the whole case is based on his right to freedom.[194] Talking about welfare is confusing because welfare seeks to avoid the unnecessary suffering of the animals used in

[188] *Id.* at 125.
[189] *Id.* at 171.
[190] *Id.*
[191] *Id.*
[192] Corte Suprema de Justicia [C.S.J.] [Supreme Court], *supra* note 42, at 10.
[193] *Id.* at 24.
[194] *Id.*

different activities, but does not necessarily recognize animals as legal persons. In fact, the zoo argued throughout the procedure that Chucho's welfare was being taken care of, but did not recognize him as a legal person nor as a subject of rights with the right to freedom.[195]

•Constitutional Court, Revision (January 23, 2020)

In 2019, the Constitutional Court invited me, as an expert in animal law and personhood, to give my opinion on Chucho's case. The court organized an extremely well-attended hearing on August 8, so the judges could hear the Barranquilla Zoo's arguments and the arguments of various Colombian groups concerned with the problems granting animals rights could cause. For example, some were worried about the problems hippos were causing and that recognizing Chucho as a legal person would affect controlling the hippo population. In other words, these groups were afraid of the slippery slope. The court also heard the opinions of international experts in animal law, including Anne Peters, Carlos Contreras, Paula Casal, and Steve Wise. The court showed great willingness to revise its views on animal personhood and rights but was also concerned with how to distinguish between a person and a nonperson clearly and publicly.

[195] Corte Constitucional, *supra* note 161.

On January 23, 2020, the Constitutional Court rendered its verdict.[196] The court decided to confirm the protective action judgment; thus, it denied the *habeas*.[197] The court stated that the *habeas* is not the appropriate mechanism to resolve an animal welfare dispute because the writ seeks to protect persons against the illegal deprivation of their right to freedom, and that there are other mechanisms to protect animals, such as the popular action.[198] Hence, the judges have taken the term *person* to be a synonym for *human*.[199] The judges have also stated that animals are considered sentient beings and therefore, do not qualify for rights.[200] The court designated judge Luis Guerrero to write the judgment that denied the *habeas* and ordered Chucho to stay in the zoo.[201] The judgment was finally published on March 11, 2021.

However, judge Fajardo proposed a ruling that would recognize Chucho as a subject of rights, including the right to freedom, and grant him the *habeas*.[202] She also proposed the appointment of a committee to decide whether Chucho should live in the zoo or in a reserve.[203] If the committee chose the zoo, Chucho's enclosure should be adapted to ensure his right to life.[204] This proposal was supported by only two of the nine judges: judge Diana Fajardo and

[196] Corte Constitucional, *supra* note 162.
[197] *Id.* at 2.
[198] *Id.* at 2-3.
[199] *Id.* at 6.
[200] *Id*. at 2.
[201] *Id.*
[202] *Id*, at 3.
[203] *Id.* at 5.
[204] *Id.*

judge Alberto Rojas.[205] By proposing this committee, judge Fajardo has communicated her dissenting vote.[206] She has stated that animals have intrinsic interests that are relevant to the law and must be protected as rights.[207] She also argued that the *habeas* is an adequate mechanism to solve the dispute, because there is no other mechanism for these types of cases in Colombia.[208] Judge Fajardo's dissent concluded that the Constitutional Court has remained locked in the formalist labyrinth of procedural law without being able to build effective protective mechanisms for animals.[209]

Judge Rojas's vote concluded that the court interpreted the concept of person restrictively because it considered *person* and *human* to be synonyms.[210] He also stated that personhood is not a biological concept, but rather a legal fiction used to grant rights and duties to different entities.[211] In sum, he claimed that a sentient animal can be considered a legal person.[212]

Chucho's legal ordeal has been a historic case, not only because a higher court granted a *habeas* to an Andean bear, but also because this debate has elicited contradictory opinions on legal personhood and animal rights from different chambers of the Supreme Court of Justice while also involving the Constitutional Court. Thus, such

[205] *Id.* at 3-7.
[206] *Id.* at 3.
[207] *Id.*
[208] *Id.* at 4.
[209] *Id.* at 6.
[210] *Id.*
[211] *Id.*
[212] *Id.*

cases are dismissed at the lower court level, but Chucho's case reached the highest courts in the country.

Even though the Constitutional Court decided to deny the *habeas*, its active and serious role has been unique at a global level (Montes Franceschini, 2021, p. 44). The court had no obligation to review the case, especially considering that it would have to review the judgment of one of the other highest courts in the country, i.e. the Supreme Court of Justice.[213] However, the court was more interested in reviewing such a novel case and expanding its jurisprudence on animal rights.[214] Additionally, judge Fajardo asked for reports from experts in animal law as soon as she received the case in 2018.[215] She then held a hearing and invited many experts, not only from Colombia, but also from other countries, to give their opinions on the matter.[216] She not only accepted presentations in person during the hearing, but was flexible enough to accept videos from the experts who lived abroad.[217] It is important to note that the Constitutional Court is not required to hold a hearing during the review of a protective action, but nonetheless, judge Fajardo considered expert interventions on animal rights and ethics before deciding the case.[218]

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[213] Law 2591, *supra* note 158.
[214] Corte Constitucional [C.C.] [Constitutional Court], *supra* note 165.
[215] Corte Constitucional [C.C.] [Constitutional Court], octubre 4, 2018, M.S. Diana Fajardo Rivera, T-6480577, (Colom).
[216] Corte Constitucional, *supra* note 161.
[217] *Id.*
[218] *See Módulo de Preguntas Frecuentes Realizadas por la Ciudadanía a la Corte Constitucional Historia y Aspectos Generales*, CORTE CONSTITUCIONAL, https://www.corteconstitucional.gov.co/preguntasfrecuentes.php (last visited Feb. 26, 2021).

g) Bear Remedios (Colombia, 2019)

Remedios in the zoo [Photo: Área Metropolitana].

Luis Domingo Gómez Maldonado filed a *habeas* on behalf of Remedios, the Andean bear, with the Superior Court of Medellín (*Semana Sostenible*, 2019a). Remedios was born in the wild in Antioquia, but then got lost and separated from her family. A family of farmers rescued her when she was only two months old (*Semana Sostenible*, 2019a).

On December 23, 2017, a group of biologists and veterinarians from the Metropolitan Area of Valle de Aburrá, experts from CES University, and public officials from *Corporación Autónoma Regional de Antioquia* (Corantioquia), the environmental authority of the region, removed her from the farm. The government agency decided to transfer her to Santa Fe Zoo in Medellín because she was

suffering from anemia due to an inappropriate diet (*Semana Sostenible*, 2019a). The objective was to correct her eating habits and rehabilitate her natural behavior in order to reintroduce her into her natural habitat. However, almost two years later, she was still in captivity (*Semana Sostenible*, 2019a).

The petitioner argued that Remedios's reintroduction was urgent because the longer she stayed at the zoo, the harder it would be for her to return to her natural habitat. The petitioner also argued that Remedios has a right to live in her natural habitat. He added that the provisions of Law 1774 of January 2016 of the Animal Protection Law in Colombia advocates for the eradication of captivity. He explained that the government agency had ignored the expert recommendations for her reintroduction and warned that the zoo was arranging to donate Remedios to a zoo in the US (*Semana Sostenible*, 2019a). The objective of the *habeas* is to free Remedios as soon as possible.

During the proceedings, the Superior Court of Medellín requested the zoo and government agencies to inform it about Remedios's captivity (*El Espectador*, 2019b). The court finally denied the *habeas* because it decided that the zoo was not inflicting any suffering on Remedios (*Semana Sostenible*, 2019b). On the contrary, it considered the zoo to be taking care of her. The court also argued that the writ is a remedy that can only be used to protect human beings who are illegally incarcerated, not animals, even if animals are considered to be sentient (*Semana Sostenible*, 2019b).

The petitioner appealed to the Supreme Court of Justice (*El Espectador*, 2019a). The Labor Cassation Chamber denied the *habeas*, arguing that it can only be used to protect persons, and that *habeas* derives from human dignity, which animals lack (*El Espectador*, 2019a).

In sum, the Labor Cassation Chamber of the Supreme Court of Justice maintains the traditional approach that animals are not persons, which it used to grant the protective action against Chucho's *habeas*.[219]

[219] *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], *supra* note 152.

7.2 THE GROWING DIVERSITY (2018–2021)

a) Animals in Uttarakhand (India, 2018)

Animals in India [Photo: Simon, Pixabay].

On July 4, 2018, the Uttarakhand High Court recognized animals as legal persons (Boruah, 2018, p. 22). Justices Rajiv Sharma and Lokpal Singh recognized the entire animal kingdom as legal persons, with rights and duties, and gave guidelines for preventing cruelty to animals (Boruah, 2018, pp. 22–23). The court also declared Uttarakhand's residents to be persons *in loco parentis*, enabling residents to act as guardians of the animals (Boruah, 2018, p. 23). According to the *Telegraph*, animals would be considered juridical persons (Ray, 2018). The court also argued that article 21

of the Indian Constitution protects the right to life, which includes other forms of life, such as the animal kingdom (Boruah, 2018, p. 22). Scholars have considered this interpretation to be revolutionary because it shifts the understanding of article 21 from anthropocentrism to ecocentrism (Boruah, 2018, p. 22).

This case started as an animal welfare petition concerning the health of transport animals used on the route from Banbasa Uttarakhand to Nepal (*Order of the Uttarakhand High Court regarding protection and welfare of animals*, 2018). The petitioner requested the court to order the vaccination and medical checkup of the horses before entering Indian territory. The court ordered the State to ensure the medical examination of all animals on their way in or out of India and from or to Nepal. The court also banned the use of spike sticks and harnesses that can harm animals (*Order of the Uttarakhand High Court regarding protection and welfare of animals*, 2018).

This ruling caught the media's attention because it declared all animals to be legal persons (*The Hindu*, 2018; Santoshi, 2018). However, it seems like more of a symbolic declaration than an actual recognition of animal rights because the court was ordering the state to implement and comply with animal welfare legislation. Additionally, the court did not mention what rights or duties animals would be entitled to or how animal legal personhood would be implemented, nor has this been regulated by the State (*Order of the Uttarakhand High Court regarding protection and welfare of animals*, 2018). Furthermore, it is curious that the court stated that

animals would also bear duties when this is not a necessary condition for legal personhood (Salmond and Fitzgerald, 1966, p. 299).

b) Animals in Haryana (India, 2019)

Animals in India [Photo: Simon, Pixabay].

The High Court of Punjab and Haryana recognized the entire animal kingdom as legal entities having a distinct *persona* with rights, duties, and liabilities in the State of Haryana on May 31, 2019 .[220] This case was triggered by an incident involving twenty-nine cows transported in deplorable conditions for more than six hundred kilometers from Uttar Pradesh to Haryana.[221] Following the Uttarakhand ruling, the court declared Haryana's citizens to be

[220] Karnail Singh and Others v. State of Haryana, AIR 2019 (P&H) at 1, 104 (India).
[221] *Id*. at 1-5.

persons *in loco parentis* enabling them to act as guardians for animals.[222]

Justice Rajiv Sharma, one of the judges who participated in the Uttarakhand ruling, ruled that animals should be healthy, comfortable, well-nourished, safe, able to express innate behavior and free from pain, fear, and distress — thus referring to the five freedoms, which are basic standards of animal welfare. [223] The judge also added that animals are entitled to justice, and that humans cannot treat them as objects,[224] such as animals used to pull heavy carts, stating that people must respect the maximum load.[225]

Like the Uttarakhand judgment, this ruling is also a symbolic declaration, because it attempted to improve animal welfare in India, rather than recognizing animals as legal persons entitled to basic rights such as freedom.

[222] *Id.*
[223] *Id.* at 30.
[224] *Id.* at 97.
[225] *Id.* at 13.

c) Elephant Laxmi (India, 2020)

Laxmi in her new home [The Times of India].

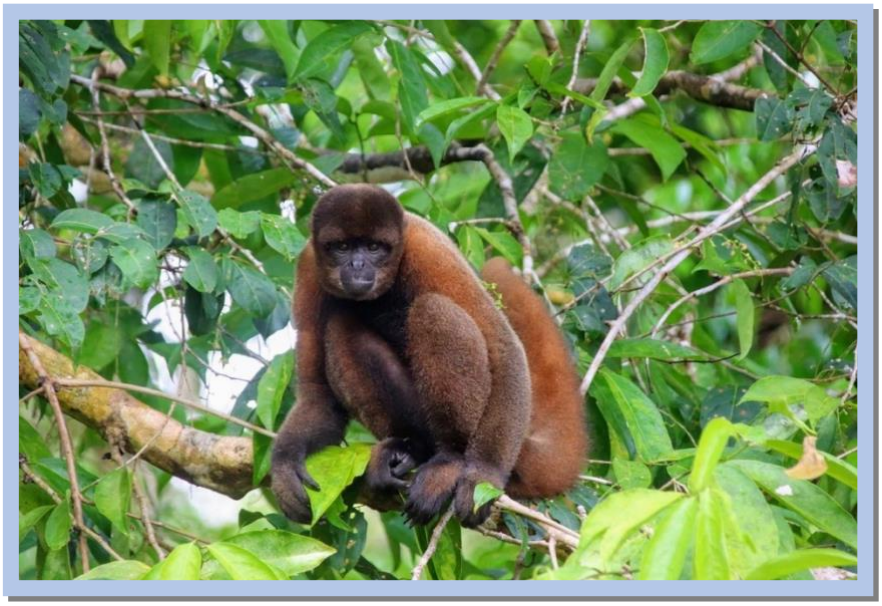
At the beginning of January 2020, the Supreme Court dismissed the first *habeas* filed on behalf of an elephant in India (Mahapatra, 2020). Laxmi, also known as Lakshimi, had appeared in the news some months before, because the Delhi Police had arrested a mahout called Saddam for allegedly stealing and hiding her (Tripathi, 2020). The police found Laxmi and took her to a rehabilitation center. Therefore, Saddam filed a *habeas* asking the court to release Laxmi from her illegal detention at the rehabilitation center (*The Hindu*, 2020). He argued that since animals have a right to life, as the Supreme Court

had ruled in 2014,[226] a *habeas* could be filed by a mahout to locate elephant Laxmi (Mahapatra, 2020).

Chief justice Bobde asked if Laxmi is a citizen of India and how a *habeas* could apply to animals. The court also claimed that granting the *habeas* would allow villagers to present the writ on behalf of their cattle (Mahapatra, 2020). Finally, the court asked if the mahout had a document to show his legal right of possession over Laxmi (Tripathi, 2020). In sum, this case seems to be more of a dispute for Laxmi's custody than a trial for the recognition of her legal personhood and fundamental rights.

[226] Animal Welfare Board of India v. A. Nagaraja and Ors, (2014), 5 SCJ 1, 37 (India).

d) Monkey Estrellita (Ecuador, 2020)



Woolly monkey in the Amazon [Photo: Mark Alexander, iStock].

Estrellita, a woolly monkey (*Lagothrix lagothricha*), lived with a human family since she was one month old. Estrellita was 18 years old when she was confiscated by the Ecuadorean environmental authority because the Organic Code of the Environment prohibits the breeding, possession, and commercialization of wild animals.[227]

The authorities quarantined Estrellita at the San Martín de Baños Zoo, where she died on October 9, 2019.[228] Before learning of her death, on January 28, 2020, Estrellita's human family filed a *habeas*

[227] Corte Constitucional del Ecuador [C.C.E.] [Ecuadorian Constitutional Court], *supra* note 55, at para. 29–30.
[228] *Id.* at para. 35.

on her behalf, requesting her return and that a wildlife license be issued to legally keep her at their home.[229]

The lower court and the Court of Appeals denied the *habeas*. Despite Estrellita's death, the Constitutional Court of Ecuador selected the case to develop its jurisprudence on whether animals are subjects of rights protected by the rights of nature in the Ecuadorian Constitution and the scope of the *habeas* regarding the protection of animals.[230]

On January 27, 2022, the Constitutional Court of Ecuador issued its ruling in the case. Seven of the nine judges of the court decided to recognize Estrellita as a subject of rights protected by the rights of nature, thereby acknowledging that animal rights constitute a specific dimension of the rights of nature with its own particularities.[231] The court challenged the traditional view that only regards ecosystems and species as protected by the rights of nature, recognizing that individual animals are also protected due to their intrinsic value.[232] Moreover, the Court acknowledged that failing to protect individuals has led to the extinction and endangerment of numerous species.[233]

[229] *Id.* at para. 38–39.
[230] *Id.* at para. 1–2. The Brooks McCormick Jr. Animal Law & Policy Program at Harvard Law School (ALPP) and the NhRP filed a joint *amicus* arguing that the rights of nature should protect individual animals such as Estrellita. It argued that species are made up of individual animals, and what happens to an individual animal can have an important impact on the species. See, *id.* at para. 126 n. 117, para. 128, n. 119.
[231] *Id.* at para. 91.
[232] *Id.* at para. 79.
[233] *Id.* at para. 126.

The Constitutional Court not only recognized animals as subjects of rights protected by the rights of nature, but also outlined the rights that apply to animals that live in the wild like the right to exist,[234] the right not to be hunted or captured,[235] the right to freedom,[236] and the right to habitat.[237] The court also outlined some general rights that apply to all animals like the right to food,[238] and water,[239] the right to physical, mental, and sexual integrity,[240] the right to demand their rights from the competent authorities,[241] and the right to live in harmony.[242]

Regarding the scope of the *habeas*, the Constitutional Court considered that, although the *habeas* was inadmissible in Estrellita's case due to her death, it can be an appropriate action to request the release of a wild animal depending on the circumstances of the case.[243] Therefore, the court stated that judges must examine which action best suits the context and the claims of the case.[244]

Additionally, the Constitutional Court of Ecuador ordered the Ministry of Environment to develop a protocol that considers and evaluates the circumstances of captive wild animals to guarantee their

[234] *Id.* at para. 111.
[235] *Id.* at para. 112.
[236] *Id.* at para. 119.
[237] *Id.* at para. 119.
[238] *Id.* at para. 119.
[239] *Id.* at para. 137.
[240] *Id.* at para. 133.
[241] *Id.* at para. 121.
[242] *Id.* at para. 119.
[243] *Id.* at para. 164.
[244] *Id*. at para. 167

protection.[245] Furthermore, the court ordered the Ombudsman and Congress to prepare and approve a bill on the rights of animals, based on the rights and principles developed in the ruling.[246]

In short, the Constitutional Court of Ecuador's judgment connects the rights of nature with animal rights, fields that have had an "uneasy relationship" (Stilt, 2021), opening the door to the constitutional protection of animals as subjects of rights in Ecuador, under the rights of nature.

[245] *Id.* at para. 182.
[246] *Id.* at para. 183.

e) Animals in the Marghazar Zoo (Pakistan, 2020)

Kaavan in the Wildlife Sanctuary in Cambodia [Photo: Four Paws].

On April 25, 2020, the Higher Court of Islamabad decided a case involving animals living in deplorable conditions at Marghazar Zoo.[247] Justice Minallah referred to animals in zoos as inmates[248] and claimed that animals are not mere property,[249] but subjects of rights: "Do the animals have legal rights? The answer to this question, without any hesitation, is in the affirmative."[250]

[247] *See* Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad, etc., (2020) W.P. No. 1155/2019 PLD (ISL) at 1, 4 (Pak.).
[248] *Id.* at 12.
[249] *Id.* at 57.
[250] *Id.* at 59.

Recognizing that zoos are not appropriate places for elephants and that zoos around the world are phasing them out,[251] judge Minallah ordered Kaavan, an Asian elephant, to be transferred to a sanctuary.[252] Kaavan had spent more than thirty years chained in a small enclosure at the zoo, with serious health issues and an inadequate diet.[253] He had been kept in isolation for more than eight years since his companion, Saheli, died in 2012, and suffered severe stereotypical behavior and neurological problems due to his captivity.[254] Free the Wild, an organization whose mission is to transfer animals in captivity into sanctuaries or better equipped zoos,[255] filed the legal action on Kaavan's behalf and transferred him to the Cambodia Wildlife Sanctuary (Nonhuman Rights Project, 2020).

The court also decided to relocate the rest of the animals kept at the zoo to sanctuaries.[256] The court specifically mentioned two brown bears that had been kept in a small concrete enclosure with no shade, whose health and welfare had been severely neglected.[257] Additionally, the court referred to a marsh crocodile that was ill and kept in a small enclosure where he could barely move.[258] This is the first examined case where a reptile has been considered a subject of

[251] *Id.* at 12.
[252] *Id.* at 62.
[253] *Id.* at 10-11.
[254] *Id.* at 11.
[255] *About Us*, FREE THE WILD, https://www.freethewild.org/about (last visited Feb. 27, 2021).
[256] Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad, *supra* note 247, at 62.
[257] *Id.* at 14.
[258] *Id.*

legal rights and where an order has been issued to relocate a reptile to a sanctuary.[259] Finally, the judge also mentioned other animals that were suffering at the zoo, such as lions, birds, wolves, and ostriches.[260] The judge ordered that the board constituted under the Wildlife Ordinance 1979 take over management of the zoo until all the animals had been relocated.[261] The court explicitly prohibited the board from keeping any new animals in the zoo until an international agency specializing in zoological gardens had certified that the zoo can ensure the behavioral, social, and physiological needs of the animals.[262]

Finally, the court ordered the board to inspect other zoos in Islamabad,[263] and recommended that the federal government include teachings on the importance of caring for animals, their welfare, and wellbeing in the Islamic studies curriculum[264] and recommended the media to educate and inform the general public on the treatment of animals.[265]

[259] *Id.* at 14, 15, 59, 62, and 63.
[260] *Id.* at 15-16.
[261] *Id.* at 62.
[262] *Id.* at 63.
[263] *Id.*
[264] *Id.* at 64.
[265] *Id.*

f) Hippos (Colombia, 2021)

Hippos near estate *Hacienda Nápoles* [Photo: Fernando Vergara, El País].

Among the famous Colombian drug trafficker Pablo Escobar's displays of power, domination, and defiance of the government is the construction of a private zoo at his famous estate *Hacienda Nápoles* in Medellín in the 80s. Escobar had almost 2,000 species, including four imported hippos from the US (Ruiz, 2020).

Forty years later, Escobar has died, his zoo has closed, and the animals have been transferred to various zoos in Colombia. However, the administrative authority kept the hippos on the estate because they did not have a suitable place to house them. The hippos managed to escape, settle in the Magdalena River, and reproduce successfully. There are currently around a hundred hippos in the area (*Animals Recognized as Legal Persons for the First Time in U.S. Court*, 2021).

Due to the hippos' successful reproduction, the administrative authority has considered that they endanger the native biodiversity, proposing euthanasia and surgical sterilization as measures to control the population (Castelblanco-Martínez *et al.*, 2021). Therefore, the Colombian attorney, Luis Domingo Gómez Maldonado (also Chucho's attorney), filed an action on behalf of the hippos requesting their sterilization with the drug PZP (porcine zona pellucida), instead of euthanizing or sterilizing them surgically. He also required the declaration in the procedure of two experts in wild animal non-surgical sterilization from the US (*Animals Recognized as Legal Persons for the First Time in U.S. Court*, 2021).

Consequently, the NGO Animal Legal Defense Fund requested the US District Court for the Southern District of Ohio to authorize the two experts to take depositions before the competent court in the US on behalf of the "hippo community that lives in the Magdalena River." (*Animals Recognized as Legal Persons for the First Time in U.S. Court*, 2021). The US statute allows any *interested person* in a foreign litigation to request authorization from a federal court to take depositions in the US in support of the foreign case. Therefore, the District Court for the Southern District of Ohio has considered that the hippo community qualifies as an interested person, being the first court in the US to recognize animals as legal persons, according to the Animal Legal Defense Fund's press release (*Animals Recognized as Legal Persons for the First Time in U.S. Court*, 2021). However, others are more cautious when interpreting these results because the

court did not examine animal personhood but authorized depositions in the U for a foreign case where hippos are litigants (Wise, 2021).

g) Dog Tita (Argentina, 2021)

Tita the dog at home [Photo: Clarín].

On September 26, 2020, dog Tita bit a policeman's leg, causing a minor injury, without putting his physical integrity or life at risk.[266] However, the policeman shot Tita in the chest when she was walking away, which caused her euthanasia some hours later because the wound was too severe.[267]

[266] Oficina Judicial de Rawson, Provincia del Chubut [O.J.R.] [Criminal Court of Rawson], 10/6/2021, "C., M. M. M. s/ Denuncia Maltrato Animal," at 1, 7 (Arg.).
[267] *Id*. at 2,11.

Criminal judge Gustavo Daniel Castro convicted the policeman for abuse of authority and damages on June 10, 2021.[268] Judge Castro recognized Tita as the "nonhuman daughter" of her human caregivers[269] and the claimant as Tita's "father."[270] Hence, he recognized the multispecies family.[271] Moreover, the judge recognized Tita as a subject of rights and a nonhuman person, citing the Criminal Cassation Court's ruling in Sandra's case.[272] Hence, Tita's case is another example of criminal judges grounding the animal victim's personhood on Sandra's case. However, in Tita's case, the judge took a step further by recognizing the animal's role as a family member, which I explain in the section on legal personhood as role or status.

[268] *Id.* at 23.
[269] *Id.* at 3.
[270] *Id.* at 4, 5
[271] *Id.* at 22.
[272] *Id.* at 13–14.

h) Elephants Guillermina and Pocha (Argentina, 2021)

Pocha and her daughter Guillermina starting their trip to the Elephant Sanctuary [Photo: Infobae].

Pocha was born in 1965, arriving in Mendoza in 1982 from London. In 1998, Guillermina, her daughter, was born. Since then, they have always been together in the Mendoza zoo (*Clarín*, 2022). The NGO *Fundación Tekove Mymbra* filed a *habeas* on behalf of Pocha and Guillermina, requesting the court to order their transfer to their

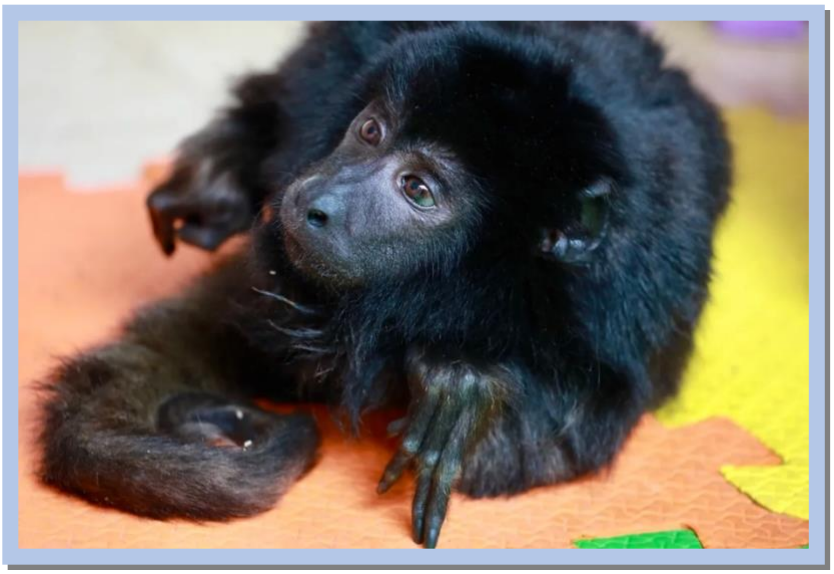
property in the Entre Ríos province instead of the Elephant Sanctuary in Brazil.[273]

The lower court dismissed the *habeas* on September 6, 2021, arguing that the *habeas* is not an adequate procedural mechanism to argue against the administrative decision that ordered the elephants' transfer to Brazil, so the NGO appealed.[274] The Mendoza Federal Court dismissed the appeal on September 14, 2021, concurring with the lower court. The court considered that there is no illegal detention or restriction of freedom, stressing that the *habeas* cannot be used to challenge an administrative decision issued by the competent authority.[275]

Most importantly, the court stated that the elephants are nonhuman persons, citing the Cassation Court's ruling in Sandra's case.[276] Pocha and Guillermina's transfer to Brazil is part of a governmental plan to move the Mendoza zoo animals, like chimps, lions, and elephants, to better-suited places (*Clarín*, 2022).

[273] 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, at 1 (Arg.).
[274] *Id.* at 2.
[275] *Id.* at 3–4.
[276] *Id.* at 5.

i) Monkey Coco (Argentina, 2021)



Coco [Photo: Clara de Estrada].

Male howler monkey (*Alouatta caraya*) Coco is around six years old. Howler monkeys are protected in Argentina as an endangered species. Coco was the victim of a gruesome animal cruelty case. He was kept illegally by a couple in Buenos Aires, so when the environmental authority confiscated him, they found Coco lying on a blanket on the floor in a closet with no access to water, food or sunlight.[277] The veterinarian determined that Coco possibly had tetraparesis, considering his four limbs were extremely weak and could not move independently. He was also missing his four canine

[277] 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] 22/12/2021, "Robledo, Leandro Nicolas y otros sobre 239 – Resistencia o desobediencia a la autoridad" [Expte. Nro.] IPP 246466/2021-0, at 1 (Arg.).

teeth, a standard procedure on primates exploited as pets, had nutritional deficiencies, and deformities in his chest cavity.[278]

The court convicted the couple for animal cruelty and illegally possessing animals acquired from illegal wildlife trafficking on December 22, 2021.[279] The public prosecutor requested the court declare Coco a subject of rights and order his transfer to Project Carayá, a rescue center specializing in primates.[280] The court recognized Coco as a sentient being and a subject of rights, ordering his freedom and transfer to Project Carayá, citing the Cassation Court ruling and judge Liberatori's ruling in Sandra's case and the ruling in Cecilia's case.[281] Even though this case was a criminal matter, the judge recognized Coco as a subject of rights thanks to Sandra and Cecilia's cases.[282]

[278] *Id.* at 1–2.
[279] *Id.* at 2.
[280] *Id.*
[281] *Id.* at 5–6.
[282] Coco's lawsuit was not the latest case that sought to obtain the recognition of animals as subjects of rights in Argentina. In July 2019, Greenpeace presented a protective action to the Supreme Court, on behalf of all the jaguars (*Panthera oncas*) that live in the Argentinean Gran Chaco area. This is the first case in Argentina where the petitioner has asked the court to recognize a whole species as subjects of rights. There are less than twenty jaguars left in the Gran Chaco area, mainly due to habitat loss. This case is not included above because it is still pending. (*Greenpeace Se Presenta ante la Corte Suprema en Representación del Yaguareté*, 2019; *Avanza en la Corte el Amparo para Proteger al Yaguareté*, 2020). The AFADA has also filed a new *habeas* on behalf of Toti (*La Asociación de Abogados AFADA de Argentina, en Colaboración con el Proyecto Gran Simio España, Presentan Habeas Corpus para Liberar al Chimpancé Toti*, 2020).

7.3 DISCUSSION

a) Case Frequency

As this historical account shows, legal personhood for animals has come a long way. Initially, there was one case a year at the most, usually regarding a chimpanzee. Now we see several a year, regarding different species. The list of animals now includes thirty-nine mammals, including one polar bear, one orangutan, one crested black macaque, one howler monkey, one woolly monkey, two Andean bears, three dogs, five orcas, seven elephants, and sixteen chimps, as well as, the animals of India, and the animals in Islamabad's Marghazar Zoo, including a crocodile, the Colombian hippos, and countless birds.

As the frequency of cases has increased, the attitude of judges has also begun to change. The opinion that these lawsuits are ridiculous and frivolous, as stated in elephant Minnie's case, has been replaced by long deliberations at higher courts, as in the cases of bear Chucho, Uttarakhand, Haryana, and Marghazar Zoo. Moreover, courts have started to recognize that they can no longer simply dismiss a *habeas* because the animal is not human, considering social pressure and the evolution of case law on animal protection, as indicated by bear Chucho's case.

b) Species Membership

Reflecting on the development of the thirty-two cases discussed in Chapter Six and Chapter Seven, only 21.87 percent of these cases were dismissed strictly because the animal was not human, while 56.25 percent of the cases analyzed legal personhood or directly considered the animal to be a legal person or a subject of rights, and 15.62 percent were dismissed on procedural grounds; leaving another 6.25 percent that do not fit into any of these categories. 40.62 percent of these cases recognized animals as nonhuman persons or subjects of rights. Surprisingly, dismissal strictly based on membership of the human species did not emerge as a major argument.

Additionally, the success of such cases does not depend on the animals' species or genetic closeness to humans or cognitive abilities, but instead on other factors such as legal and argumentative strategy, the technical aspects of a *habeas*, and the judge's empathy towards animals, willingness to hear a novel case, and general philosophical outlook on the law. If such cases depended strictly on cognitive abilities or genetic closeness, then chimps would be the most successful species in courts, but in fact only one chimp case has been successful. The other *habeas* cases that were granted by a court, but later reversed, involve an orangutan—the great ape that is genetically most distant from humans—and an Andean bear. Even though Estrellita's *habeas* was dismissed, the court still recognized animals as subjects of

constitutional rights under the rights of nature. Beyond *habeas* cases, there have been three successful dog cases, perhaps because everybody knows what dogs are like, two cases in India where all animals were recognized as legal persons to promote and guarantee animal welfare, and a case in Islamabad where all animals mistreated in the zoo were recognized as subjects of rights and were relocated to sanctuaries. Furthermore, the dog cases might suggest that this species could be a candidate in legal personhood lawsuits, considering their close relationship to humans, which could generate more empathy in judges who share their lives with dogs.

c) Strategical Litigation

The examined cases indicate that animal rights advocates must consider three difficulties when litigating animal legal personhood cases. First, courts mistakenly consider the terms *human* and *person* as synonyms to argue that only humans can be persons, as judge Rojas's dissent in Chucho's case highlighted. Second, some courts confuse the legal attempts to obtain the recognition of the animal in question as a legal person with animal welfare disputes, as Chucho's case also shows.

Third, some courts fear the effects that they believe their judgment might cause in other activities that use animals rather than focusing on the specific animal plaintiff. For example, the court in elephant Happy's case claimed they could not turn a blind eye to the disruption of property, the livestock industry, and medical research

that recognizing Happy as a legal person could cause. Additionally, in elephant Laxmi's case, the court stated that granting the *habeas* would allow villagers to present the writ on behalf of their cattle. Therefore, this judicial fear affects the animal plaintiff's chances of being recognized as a legal person with certain fundamental rights (Montes Franceschini, 2021). However, advocates should not be discouraged from litigating these types of cases. After all, the slippery slope argument is not a problem of the *habeas* or other lawsuits but rather a problem that arises from arguing for animal rights, as people refuse to change their treatment of animals.

CONCLUSION

During 2016–2021, sixteen cases were filed. Only nine were *habeas*; some were criminal cases involving dogs and a primate, procedures regarding the closure of a zoo, and the violation of animal welfare regulation. Several successful cases characterize this period, and a growing diversity of countries and animals were involved. We now have cases regarding chimpanzees, elephants, dogs, Andean bears, hippos, howler monkeys, and woolly monkeys. The account of case law on animal legal personhood examined in this chapter allows us to reach several conclusions.

(i) Attempts to accord rights to animals or achieve the recognition of legal personhood have significantly increased in number, in the variety of species and

countries involved, and in their ability to reach higher courts.

(ii) Given the fame obtained by the successful chimpanzee *habeas*, one would have expected species membership and genetic closeness to humans to play a crucial role. However, neither has emerged as a determining factor in the rulings. In practice, the legal philosophy of those involved and the severity of the animal suffering have played more significant roles than proximity to humans.

(iii) Judges have started to accept the *habeas* as an adequate legal action because there are no other available mechanisms for requesting the animal's freedom, and judges are obliged to solve the case, as demonstrated by Cecilia and Estrellita's cases, as well as by judge Fajardo's dissent in Chucho's case.

(iv) It is true that the *habeas* on behalf of Cecilia has been the only *entirely* successful *habeas* case so far, in the sense that a higher court did not reverse it. However, other cases can be considered successful because they have reached higher courts, judges have shown a willingness to hear the merits of such cases, and the cases have received copious amounts of media attention. For example, Chucho's case reached

Colombia's Constitutional Court. Moreover, even though Estrellita died, and so the Ecuadorian Constitutional Court dismissed the *habeas*, the court recognized animals as subjects of constitutional rights under the rights of nature. In other lower-profile animal cruelty cases, such as the case filed on behalf of dog Tita, judges declared animals to be nonhuman persons with certain fundamental rights, as well as members of an interspecies family.

CONCLUSIONS

My most important conclusion is that there is no insurmountable legal or ethical objection to the view I want to defend: that some animals may be considered persons from a moral and legal point of view. The main obstacles are not theoretical, but they emerge from the fear of a slippery slope and the fear that important and trivial but popular human interests may be set back if we grant members of other species, not just moral but legal rights.

Chapter One offers a historical account of the concept of the person, which shows that nonhuman persons have always existed, so the person has generally not been identified with the human. The person refers to a sentient, conscious, self-aware, intelligent, and unique individual, and it also refers to an individual that participates in social life, relates to others, and plays a role in society and law. On the whole, the concept of the person employed in legal defenses of animals does not clash in any way with what has been the understanding of personhood in our intellectual tradition from Ancient Greece to today.

Drawing on this historical research, Chapter Two explores not what has been said, but the main authors or points of reference to best understand personhood today. Some have argued that the legal person is anything the law recognizes as such, while others argue that interpreting the law requires turning to moral arguments and scientific evidence. We can argue for animal personhood following

either path. Both are consistent with a definition of personhood that refers to possessing certain verifiable marks traditionally associated with personhood, which this chapter lists.

There are at least four ways to define animal personhood:

(i) We may adopt a particular account of personhood, such as Locke's, Warren's, or Fletcher's.
(ii) We may focus on a single necessary and/or sufficient trait, such as Jaworska's capacity to care.
(iii) We may declare any trait or plausible traits as necessary and/or sufficient that have been associated with personhood.
(iv) We may understand personhood as a cluster concept using a list of weighted and related criteria without deeming any of them, in particular, necessary, or sufficient.

My conclusion is that the last option is the one that coheres more with our legal and philosophical shared understandings of the person, the one that suits better with my attempt to produce an ecumenical defense, and the most plausible. For example, in deciding if cleaner wrasse are persons, it seems extreme to make mirror self-recognition sufficient, but it would be absurd to make it necessary. It is more plausible to consider a broader range of traits.

I propose a list of plausible and verifiable marks of personhood and argue that personhood should be considered a cluster concept instead of arguing that certain marks are necessary or sufficient.

Having discussed who is a person (the descriptive aspect of personhood), Chapter 3 turns to what we owe persons (the evaluative dimension). This chapter first discusses some non-verifiable marks of personhood, which have an evaluative dimension, such as the possession of a soul, dignity, and human nature, which are quite different from other traits that scientists can test and have been commonly used to place humans in a superior moral status or confer inviolable rights to humans.

Turning to the implications of personhood, I distinguish three views that examine what difference it makes morally that someone is a person: the Dual System, the Gradual Hierarchy, and Unitarianism.

(i) The Dual System argues that we should adopt Kantianism for persons and utilitarianism for animals. This view considers that persons have rights that are side constraints and are inviolable, while nonpersons are not. You can kill a chicken to save five chickens but cannot kill Koko the gorilla to save five gorillas.

(ii) The Gradual Hierarchy argues that there is a gradation of statuses with humans at the top. Each level has a multiplier, so the trivial interests of an individual at the

top may count more than the most fundamental interests of an individual from a lower status.

These two types allow for various combinations. For example, the Dual System may classify all animals in just two categories but distinguish them by the weight we give to their interests rather than applying more stringent deontological constraints. Conversely, we may employ the scalar model of the Gradual Hierarchy view but argue that there is no such multiplier of the weight of interests and that all that distinguishes those from the higher levels from those of the lower levels is the number of individuals at risk that justify sacrificing one of them. This is the view for which there is research that confirms it fits widespread intuitions. Of course, one can also have either a Dual model with two moral statuses or a Scalar model with several moral statuses and attach both types of implications to them.

(iii) Finally, there is Unitarianism, the view that there is only one status but that specific actions like death, captivity, and torture are particularly harmful to persons.

Having discussed the philosophical aspects of personhood regarding both who should be considered a person and how this classification should alter how we treat him or her, I turn to legal personhood. The law is no stranger to the complexity of defining the person so we can find four traditional concepts of the legal person: the personification of a set of norms, status or role, legal capacity, and the subject of

rights. Despite these different concepts, there is clarity regarding two aspects:

(i) Animals can be considered legal persons according to these four concepts.
(ii) The law does not consider the terms *human* and *legal person* as the same.

Like the philosophical persons, the legal person has been associated with unverifiable metaphysical conditions, verifiable scientific traits, and legal attributes. Again, we may fixate on just one trait and declare it necessary and sufficient, or, more plausibly, we may adopt a cluster conception of the legal person. I again argue in favor of the latter and, in the ecumenical spirit of the thesis, also argue that animals can be considered as legal persons whether the list of criteria refers to non-verifiable metaphysical conditions, verifiable scientific marks, or legal attributes.

Animal legal personhood can be advocated by those who define the legal person as whatever the law defines as a legal person. I agree that this is a distinct possibility. However, detaching the natural legal person entirely from what ethics understands as a person is not a good idea, considering that death, incarceration, and torture are especially bad for beings that qualify as persons because of the verifiable traits I associate with philosophical personhood.

Moreover, if the list of criteria refers to legal attributes, I propose using the attributes of personality, which are widely accepted in civil law systems following the French continental law tradition. Many animals can possess all the attributes of personality.

My contribution to the discussion of legal personhood has various dimensions. First, legal scholars and practitioners sometimes confuse the moral and legal person or aspects of either rather than neatly distinguish them and seek to connect them with coherence. Second, there is no good philosophical understanding of the concept of a cluster concept, as discussed in philosophy, particularly in the philosophy of science and language. In addition, since we normally think that persons have a bundle of rights, authors often confuse a *cluster* and a *bundle*, whereas a cluster and bundles differ, particularly when the cluster is a *cluster of traits* that is part of a cluster definition, and the bundle is a *bundle of (moral and or legal) rights* that is a normative implication of the satisfaction of the verifiable traits of personhood. All of this needed urgent clarification. In addition, it is essential to understand that the legal person can have its cluster definition and, of course, that both this second cluster definition and the marks of personality that have traditionally been listed in legal systems following the French continental law tradition apply to animals very well.

Having discussed the theoretical aspects of legal personhood, suggesting a plausible way to understand it, and its applicability to animals, I examine thirty-two cases on animal legal personhood,

mostly *habeas*, from different countries around the world. My extensive research on this topic has yielded the following conclusions. Initially, there was one case a year at the most, usually regarding chimpanzees, and courts commonly dismissed the cases on procedural grounds. However, as the number of cases has increased, the attitude of judges has also begun to change. Higher courts now select these cases for revision, deliberate more, hold public hearings, and ask for experts' opinions.

The research also shows that the success of these types of cases does not depend on the animals' species or genetic closeness to humans or cognitive abilities but on other factors such as strategy, the technical aspects of a *habeas*, the judge's empathy towards animals, willingness to hear a novel case, and general philosophical outlook on the law in general and the theoretical discussions surrounding personhood in particular.

Currently, we see several cases a year regarding different species. The list of animals now includes thirty-nine mammals, including one polar bear, one orangutan, one crested black macaque, one howler monkey, one woolly monkey, two Andean bears, three dogs, five orcas, seven elephants, and sixteen chimps, as well as, the animals of India, and the animals in the Marghazar Zoo, the Colombian hippos, and countless birds. Over time, we can see a process of increasing diversification: initially, only chimp *habeas* came to accompany the human *habeas*.

Gradually, we see greater diversity entering the law, with a broader range of species, legal procedures (not just *habeas* but also copyright, and criminal and family law cases), more countries, and very different juridical systems. The cases are also reaching higher courts and acquiring increasing media notoriety. The impact of such cases is also growing, as practitioners involved in any such case seek academic expertise and can draw on many previous cases. The fact that most of them were ultimately unsuccessful is a problem because it creates a negative precedent. However, my conclusion, given everything that I see happening, is that the overall impact is positive, and even unsuccessful cases have left us a legacy of very positive dissenting opinions, *obiter dicta*, and philosophical and legal argumentations that will make the recognition of legal personhood and fundamental legal rights for animals in many countries more and more likely every day.

My final conclusion then is that all this research was worthwhile. Many concepts needed clarification, and many arguments had to be made, but the movement for the recognition of animal personhood has a future and is experiencing increasing success. I hope that this research I have completed will be a helpful resource for all the philosophers, legal scholars, and legal practitioners interested in supporting *habeas* cases or other legal procedures and joining me and so many other authors from Antiquity in affirming that it is not necessary to be human to be a moral or legal person.

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Glossary

- **Amicus Curiae:** Latin for "friend of the court," it refers to an individual or an organization who is not a party to a legal case, but who can assist a court by offering insight on the issues of the case.

- **Capacity:**

  - Capacity to enjoy rights: (*capacidad de goce*) the ability to hold rights or bear duties. Generally, the law considers that all humans who were born alive and separated from the mother have this type of capacity until death, as well as corporations since their legal establishment. Some consider that human fetuses also have the capacity to enjoy rights because they can hold some limited rights.

  - Capacity to exercise: (*capacidad de ejercicio*) the ability to exercise rights or duties on one's own. Not all humans have the capacity to exercise, so guardians act on behalf of children, and people with intellectual disabilities. Animals are also in the group of beings that lack this type of capacity.

- **Civil Law and Common Law Legal Systems:** In civil law systems the law is mainly made up of codes and laws that

judges apply, whereas in common law systems, the law is mainly made up of case law that creates precedent, which other courts must respect.

- **Bundle of Rights or Incidents:** A collection of rights or Hohfeldian incidents. For instance, humans as legal persons have a bundle of different rights, such as the right to life, the right to vote, the right to property, the right to form a family, the right to intimacy, among many others. Entities and beings have different bundle of rights depending on their circumstances.

- **Cluster Concept:** A concept that is defined by a weighted list of criteria, such that no one of these criteria is either necessary or sufficient for membership (Matthen, 2010). Art, democracy, and personhood are examples of cluster concepts. The cluster concept of personhood should not be confused with a bundle of rights or a bundle of incidents. Personhood is a cluster concept because none of the criteria listed to be considered a person is either necessary or sufficient. A being is considered a person when it meets a sufficient number of criteria from the list. Therefore, a sentient, intelligent, highly social animal like a bear may qualify as a person even though it may not pass the mirror test for self-recognition.

  On the other hand, a bundle of rights or incidents refers to the different rights or incidents that a being or entity holds. The

bear may possess the right to life, the right to bodily integrity, and the right to freedom but does not possess the right to vote like an adult human person. Hence, the human and the bear may both be considered as persons, but they have different bundles of rights or incidents. Humans also have different bundles. A child's bundle of rights is different from an adult's bundle, as a citizen's bundle of rights differs from a foreigner's bundle of rights.

- **Copyright:** Copyright is a type of intellectual property, which protects original works of authorship as soon as the author fixes the work in a tangible form of expression. Copyright law protects different types of works like paintings, photographs, illustrations, musical compositions, books, poems, movies, among others (*What is Copyright?*, 2022).

- **Duty:** Obligation created by the law or a contract.

- **Equivalence View:** I use this concept to refer to views that consider the legal person and the subject of rights as the same.

- **Filiation:** civil status that derives from the bond between a child and the biological or adoptive parents, which unfolds an array of rights and duties.

- **Hohfeldian Incidents:** Wesley Hohfeld, American legal theorist (1879–1918), discovered the four basic components of rights: the privilege, the claim, the power, and the immunity (Wenar, 2021).

  – Privileges or Liberties: one has a privilege to do something when one has no duty not to do that something. For example, the right to pick up a rock that I found on a trail in the forest is a privilege because I have no duty not to pick it up.

  – Claim: claim rights correlate to a duty, so the right holder is owed a duty by the duty bearer. For example, an employee has a claim that the employer pays the wage, thus, the employer has a duty to the employee to pay the wage. Claim rights may also refer to a duty that everybody has, such as the duty not to abuse children, and may also refer to refraining from performing certain actions. Animals have claim rights because they have a right not to be treated cruelly and humans have the duty not to treat animals cruelly.

  – Power: one has a power if and only if one has the ability to alter one's own or another's Hohfeldian incidents. For example, a restaurant manager has the power-right to order a waitress to clear a table,

thus, imposing a new duty upon the waitress and changing the waitress' Hohfeldian privilege not to clear the table. Ordering, promising, waiving, abandoning, consenting, selling, and sentencing are examples of powers that change one's Hohfeldian incidents or those of another.

– Immunity: when someone lacks the ability to alter someone else's Hohfeldian incidents, then the latter has an immunity. For example, witnesses have an immunity-right not to be ordered to incriminate themselves. Spouses also have an immunity-right not to declare against each other in trial.

Hohfeld also identified the incidents' opposites and correlatives (Wenar, 2021):

OPPOSITES	CORRELATIVES
If A has a **Claim**, then A lacks a **No-claim**.	If A has a **Claim**, then some person B has a **Duty**.
If A has a **Privilege**, then A lacks a **Duty**.	If A has a **Privilege**, then some person B has a **No-claim**.
If A has a **Power**, then A lacks a **Disability**.	If A has a **Power**, then some person B has a **Liability**.
If A has an **Immunity**, then A lacks a **Liability**.	If A has an **Immunity**, then some person B has a **Disability**.

Hohfeldian incidents can be categorized as active and passive incidents. The privilege and the power are active rights that concern the holder's own actions, while the claim and the immunity are passive rights that regulate the actions of others. Hence, children and intellectually disabled people usually hold passive incidents, while paradigmatic adults also hold active incidents.

- **Juridical Persons:** A fictitious type of nonhuman legal persons consisting of organizations, such as corporations, governmental agencies, and non-governmental organizations.

- **Natural Persons:** (Also called physical persons). An individual human being granted legal personhood by the law. Normally, the law recognizes humans as natural persons if they are born alive and are completely separated from the mother.

- **Organic Laws:** The Constitution may require an organic law to regulate certain important matters like fundamental rights. Usually, these laws require a qualified majority to pass in Congress.

- **Patrimony:** All of a person's assets and liabilities that are capable of monetary valuation and subject to execution for a creditor's benefit ('Patrimony', 2009).

- **Plaintiff:** An individual who makes a legal complaint against someone else in court.

- **Right:** Frequently, legal practitioners use the term right in general terms, not with Hohfeld's precise meaning ('Right', 1992):

    - A legally enforceable claim held by someone as the result of specific events or transactions, like entering a contract.

    - A power or privilege held by the public as the result of a constitution, statute, regulation, judicial precedent, or other type of law.

- **Right to Bodily Integrity:** The right to the inviolability of the physical body, which protects against torture and cruel treatment, among others.

- **Right to Bodily Liberty:** The right that protects freedom from unlawful detention by a private party or the state (Mills and Wise, 2015, p. 161). The Nonhuman Rights Project (NHRP) files *habeas* on behalf of certain animals like chimps and elephants arguing that they are persons with the right to bodily liberty.

- **Subset View:** I use this concept to refer to views that defend that legal persons are a subset of subjects of rights, so all legal persons are subjects of rights, but not all subjects of rights are legal persons. Thus, being a subject of rights is a necessary condition for being a legal person, but it is not a sufficient condition.

- **Trust:** Fiduciary relationship where property rights are divided between a trustee, who is under the legal obligation to manage such property for the benefit of others, and the beneficiary, who enjoys the benefits of the trust (Vokolek, 2008, p. 1116).

- **Writ:** In common law, a writ is a formal written order issued by a court or another legal authority to act or abstain from acting in a particular way.

- **Writ of *Habeas Corpus* (*habeas)*:** A legal recourse where an individual reports unlawful detention or imprisonment to a court. The court must bring the prisoner to court, determine whether the detention is unlawful, and, if so, order the prisoner's freedom. This legal recourse has been fundamental during dictatorships when unlawful detentions are common.