

**THE COMMON LAW AS A CRITICAL LEVER IN EXPANDING  
RIGHTS BEYOND THE HUMAN: REFLECTIONS ON THE  
VERMONT JOURNAL OF ENVIRONMENTAL LAW'S 2018  
"RIGHTS OF NATURE SYMPOSIUM"**

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*Kevin Schneider, Esq.\**

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\* Kevin Schneider has been the Executive Director of the Nonhuman Rights Project since October 2015. Previously, Kevin was a volunteer researcher for the NhRP beginning in 2010. He holds a J.D. with a certificate in Environmental and Land Use Law from the Florida State University College of Law and a B.A. in Political Science from the University of Massachusetts, Boston. He is a member of the New York Bar. Kevin would like to thank his mom for inspiring a reverence for native cultures, and his dad for showing him to care for the birds in the backyard. He would also like to acknowledge all of his colleagues at the Nonhuman Rights Project. Special thanks to Margaret Shugart and Hannah Dean for organizing the Symposium and to all the faculty, speakers, and attendees who made the event possible.

## INTRODUCTION

This Article was inspired by observations and reflections gained from participating in the “Rights of Nature Symposium”, arranged by the Vermont Journal of Environmental Law and held on October 19, 2018. This Article is meant to help integrate the work of the Nonhuman Rights Project (NhRP) into rights of nature discourse.<sup>1</sup> This Article will focus primarily on the work of the NhRP and the role of the common law in changing the legal status of at least some nonhuman animals from “things,” which lack the capacity for any rights, to “persons” who possess the capacity for at least a single right.<sup>2</sup>

The threats to nonhuman animals are enormous, growing, and well-documented elsewhere.<sup>3</sup> While “economically useful” or “necessary” animals proliferate in factory farms, the world is replete with “new dodos”: Even iconic large mammals like the Northern White Rhino will soon go extinct before our eyes (there are now just two females left in the world).<sup>4</sup> As humanity continues “developing” the planet, the idea of the “wild” increasingly becomes a distant memory. In industrial settings around the world, the number of animals killed and exploited continues to rise, while in the wild countless species face extinction, all notwithstanding that numerous “animal protection” laws of various stripes have proliferated over

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1. *See Who We Are, NONHUMAN RIGHTS PROJECT*, <https://www.nonhumanrights.org/who-we-are/> (last visited Feb. 25, 2019) (explaining that the mission of the NhRP is “to change the common law status” of at least some nonhuman animals “from mere ‘things,’ which lack the capacity to possess any legal right, to ‘legal persons,’ who possess such fundamental rights as bodily integrity and bodily liberty” and those other legal rights to which “evolving standards of morality, scientific discovery, and human experience” entitle them.).

2. International Convention on Civil and Political Rights, Mar. 23, 1976 14468 U.N.T.S. 177. G.A. Res. 217 (III) A (Dec. 10, 1948) (declaring personhood is universally regarded as a fundamental basis for human rights). That is why Article 6 of the Universal Declaration of Human Rights and Article 16 of the International Convention on Social and Political Rights guarantee that every human shall be a “person.” The reason is that only “persons” have the capacity for those legal rights that protect their fundamental interests. The only alternative is to be a “thing.” This crude dichotomy, while it does not comport with most worldviews, is nonetheless the system we have inherited. Unless and until there is some third category of “nonhuman legal persons” enshrined in the law, the only way for a nonhuman animal or natural space (river, mountain, etc.) to have even a single right is if they are a “person.” A person, like a cup, is merely a “container” for rights.

3. *Confronting The Core Issue of Nonhuman Animals’ Legal Thinghood*, NONHUMAN RIGHTS PROJECT <https://www.nonhumanrights.org/litigation/> (last visited Mar. 1, 2019).

4. *See Alejandro E. Camacho, Going the Way of the Dodo: De-Extinction, Dualisms, and Reframing Conservation*, 92 Wash. U. L. Rev. 849, 852 (2015) (describing the Dodo as a symbol as nature separated from the relationship of humans); *see also Sarah Gibbons, After Last Male’s Death, Is The Northern White Rhino Doomed?*, *National Geographic*, <https://news.nationalgeographic.com/2018/03/northern-white-rhino-male-sudan-death-extinction-spd/> (last visited Feb. 13, 2019) (describing the last two female rhinos).

the past 40 years, especially since the dawn of the environmental age in the 1970s.<sup>5</sup>

In response to this widespread devastation there is an emerging global awareness—armed with stronger science, more accessible research, and easy communication tools—pushing for bolder action on the protection of nonhuman animals and the natural world.<sup>6</sup> Like a cancer, entrenched ideas must give way to more embracing visions of justice, and reforms to our legal systems must be a part of the discussion. But in the urgency to preserve what we have left, we should be careful not to “throw the baby out with the bathwater.”

As explored *infra*, there remains unique force and persuasive power in premising “radical” ideas of nonhuman animal rights on “conservative” and classically liberal values, including autonomy and liberty. In this way, and as used before, the common law can act as a lever to pry open the calcified walls of the law and allow some nonhuman animal “things” to cross the threshold into “persons.”<sup>7</sup> As with prior new entrants to the class of persons, the larger society can then begin assigning appropriate rights to the newly-recognized rights-holders and set them loose about the task of existing in the world. And when disputes arise between humans’ interests and nonhuman animals’ interests, those claims can be heard in courts and other forums as would any otherwise normal dispute between legal persons. This process, familiar to our legal system, will continue to shape the future path of the law in a way that is more protective of the natural world, as the interests of nonhuman animals begin to be more fully reflected in decisions concerning development and harmonious coexistence.

The arguments described in this Article, in particular those to do with common law, equality, liberty, personhood, and habeas corpus, share the same foundation as our modern liberal democracies, and so courts must seriously confront them. The goal of this Article is to highlight some areas

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5. NATIONAL INSTITUTES OF HEALTH, TIMELINE: HISTORY OF ANIMAL WELFARE OVERSIGHT, available at <https://olaw.nih.gov/sites/default/files/ICARE-Timeline.pdf> (last visited Feb. 28, 2019).

6. See generally *Help Raise Awareness of The World’s First Elephant Rights Lawsuit*, NONHUMAN RIGHTS PROJECT <https://www.nonhumanrights.org/join-rumble-for-rights/> (last visited Mar. 1, 2019) (providing activists with materials to easily communicate information about nonhuman right cases).

7. See e.g., *Somerset v. Stewart* 98 ER 499 (1772) as described in Steven M. Wise, *Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery* (2005) (“James Somerset’s legal transubstantiation from thing to person at the hands of Lord Mansfield in 1772 marked the beginning of the end of human slavery.”); *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (recognizing the Native American chief Standing Bear as a legal person entitled to release under habeas corpus over the objections of the U.S. government that he was a “thing”). See also, the Emancipation Proclamation and 13th and 14th Amendments to the U.S. Constitution, and the U.N. Declaration of Human Rights.

of convergence and difference between nonhuman animal rights and environmental rights-of-nature work. The hope is to form an instructive part of evolving nature rights jurisprudence in the United States and throughout the world, which embraces natural spaces and the inhabitants who call them home. While important differences exist and challenges remain, the common law arguments advanced in favor of nonhuman animal rights can and should benefit the evolving rights of nature.

#### I. WHO “COUNTS” UNDER THE COMMON LAW IS A DYNAMIC CONCEPT

Among seminal works in the still-nascent canon of nature rights jurisprudence, the 1972 law review article “Should Trees Have Standing?—Toward Legal Rights for Natural Objects,” by Professor Christopher Stone is often cited as one of the cornerstones, and for good reason.<sup>8</sup> Professor Stone’s article took on immediate significance when it was cited by Justice Douglas in dissent in the landmark environmental law case, *Sierra Club v. Morton*.<sup>9</sup>

But, Professor Stone (and Justice Douglas) was arguably somewhat off the mark; the real foundational legal question—for a mountain, or an elephant, or a human for that matter—has always been *personhood* (the capacity for rights), *not* standing. If one does not have the capacity for a right, i.e. is not a person, it will always be premature to wonder about whether there is standing to vindicate such right (assuming it does indeed exist and is enforceable by private right of action or otherwise).<sup>10</sup> In the eyes of the law, it is like arguing about whether my cellphone or chair has standing to sue me for abuse. Even those judges who want to see nonhuman animals or nature possess rights are cabined in by the existing legal structure and legislative intent, unless they have access to the common law—the law that judges themselves make.<sup>11</sup>

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8. See generally Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972) (arguing for nature to have rights, fundamental elements of the legal system would need to be rewritten).

9. *Sierra Club v. Morton*, 405 U.S. 727, 741-42 (1972) (Douglas, J., dissenting) (“The critical question of ‘standing’ would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers, and where injury is the subject of public outrage. Contemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.”).

10. See Steven M. Wise, *Nonhuman Rights to Personhood*, 30 PACE ENVTL. L. REV. 1278, 1280-81 (2013) (arguing that without legal personhood there can be no rights for animals because without rights there is no standing question).

11. See *Litigation, NONHUMAN RIGHTS PROJECT*, <https://www.nonhumanrights.org/litigation/> (last visited Mar. 1, 2019).

Once personhood is established, however, and the capacity for a right to liberty or other right is recognized, then standing becomes in many cases a simple proposition indeed, especially in a habeas corpus context. The chimpanzee or elephant held alone in “welfare-compliant” caging suddenly becomes a wrongfully detained prisoner entitled to immediate release, once personhood and a right to fundamental liberty is recognized.<sup>12</sup> Some harms are so fundamental, so obvious, that once put under the magnifying glass for even a second, the issue of standing melts away almost entirely.

The common law and its derived legal traditions, as well as civil law systems, have long crudely divided the world in two—“persons” and “things”—also comprehended at times as “subject” and “object.”<sup>13</sup> Legal personhood has never been a biological concept, which is why humanity’s sordid history of treating vast classes of humans as “things,” often brutally so in the case of chattel slavery, made “sense” in the amoral logic of the law. Those classes of humans were treated as “things” or “property” incapable of possessing legal rights, with their personhood only being secured after fierce battles in the courts, in legislatures, and on the streets. Meanwhile, corporations and other associations have been persons under the common law for hundreds of years and have continued to gain rights and even constitutional protections over the past century.<sup>14</sup>

In short, the “parameters of legal personhood” are not “focused on semantics or biology, or even philosophy, but on the proper allocation of rights under the law, asking, in effect, who counts under our law.”<sup>15</sup> The “significant feature of legal personality is the capacity for rights.”<sup>16</sup> “Legal persons” possess inherent value; “legal things,” possessing merely

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12. See Lauren Choplin, *Habeas Corpus Experts Offer Support for Chimpanzee Rights Cases*, NONHUMAN RIGHTS PROJECT (Mar. 8, 2018), <https://www.nonhumanrights.org/blog/habeas-corpus-experts/> (last visited Mar. 1, 2019) (summarizing amicus briefs arguing for the right of captive chimpanzees to have a legal right against being held in captivity).

13. But see Visa Kurki, *Why Things Can Hold Rights: Reconceptualizing the Legal Person*, U. OF CAMBRIDGE FAC. OF L. RES. PAPER NO. 7/2015, 1, 2 (2015), available at <https://ssrn.com/abstract=2563683>.

14. See, e.g., *Santa Clara County v. Southern Pacific R.R. Co.*, 118 U.S. 394 (1886) (in a headnote and with no analysis, the Supreme Court ruled for the first time that a corporation is a “person” for purposes of the 14th Amendment to the U.S. Constitution and thereby entitled to due process. This was a radical departure from the *common law* personhood of corporations, which had long been recognized). See also, *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010) (recognizing a First Amendment right to free speech protecting political campaign donations made by political action committees); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (recognizing a First Amendment right for corporations to deny reproductive health benefits to employees on religious belief grounds).

15. Nonhuman Rights Project, Inc. v. Stanley, 16 N.Y.S.3d 898, 912 (2015).

16. 4 ROSCOE POUND, JURISPRUDENCE 197 (1959).

instrumental value, exist for the sake of legal persons.<sup>17</sup> Sometimes, though, the law gets the allocation dreadfully wrong, and needs correcting.

*A. The Common Law Definition of “Person” is Rapidly Evolving*

Legal personhood has never been synonymous with membership in the human species.<sup>18</sup> Personhood is not a biological concept, and it does not “necessarily correspond” to the “natural order.”<sup>19</sup> “Person” is a legal term of art.<sup>20</sup> Corporations and ships are but two oft-cited examples of nonhuman persons, and there are many more.

Outside the United States, courts are rapidly designating an expanding number of nonhuman entities as “persons,” including a number of environmental features. For example, in 2018 the Colombian Supreme Court designated its part of the Amazon rainforest “as an entity subject of rights,” in other words, a person.<sup>21</sup> And in 2017, New Zealand’s Parliament designated the Whanganui River Iwi a person that owns its own riverbed.<sup>22</sup> This followed its 2014 designation of a national park—Te Urewara—as a “legal entity, having all the rights, powers, duties, and liabilities of a person.”<sup>23</sup>

Courts outside the United States are embracing the personhood of nonhuman animals, as well. For example, in 2016 a court in Mendoza, Argentina ruled that a captive chimpanzee was a “nonhuman legal person”

17. See *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 Harv. L. Rev. 1745, 1746-47 (2001) (theorizing the idea of legal “personhood” to both “persons” and “objects”); accord *Stanley*, 16 N.Y.S.3d at 912 (citing Note).

18. *Byrn v. N.Y.C. Health & Hosps. Corp.*, 286 N.E.2d 887, 889 (1972) (Upon “accord[ing] legal personality to a thing the law affords it the rights and privileges of a legal person[.]”) (citing JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 28 (2nd ed. 1909)); See also JOHN W. SALMOND, *SALMOND ON JURISPRUDENCE* 279 (5th ed. 1916) (“[T]his recognition of persons who are not men—is one of the most noteworthy feats of the legal imagination.”); See also 4 ROSCOE POUND, *JURISPRUDENCE* 192-93 (1959) (providing modern examples contrary to the notion that human beings and legal persons are analogous); 1 HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 93-109 (ANDERS WEDBERG trans., 1961); GEORGE WHITECROSS PATON, *A TEXTBOOK OF JURISPRUDENCE* 349-52 (G. W. PATON & DAVID DERHAM eds., 4th ed. 1972); W. FRIEDMANN, *LEGAL THEORY* 521-23 (5th ed. 1967) (describing the distinction of personhood given to corporations and animals).

19. *Stanley*, 16 N.Y.S.3d at 912 (quoting *Byrn*, 286 N.E.2d at 889).

20. *Wartelle v. Women’s and Children’s Hosp., Inc.*, 704 So. 2d 778, 780 (1997).

21. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ. Abril 5, 2018, M.P: L. Villabona, Expediente 2018-0031901, Dejusticia (<https://www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf?x54537>) (p. 45) (Colom.).

22. See *Innovative Bill Protects Whanganui River With Legal Personhood*, NEW ZEALAND PARLIAMENT, <https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/> (last visited Mar. 1, 2019) (reporting New Zealand recognizes the river as a whole in all its elements).

23. Te Urewara Act 2014, subs 3, s 11(1) (N.Z.).

entitled to a writ of habeas corpus.<sup>24</sup> In 2014, the Indian Supreme Court held that nonhuman animals in general possess constitutional and statutory rights.<sup>25</sup>

While some of the above examples, including the Whanganui River Iwi, reflect human power struggles and essentially reparations for past colonial injustices, they also help add credence to property-by-proxy struggles.<sup>26</sup> The underlying mechanics at work—the “useful fiction” of legal personhood—can and must be worked to expand rights to nonhuman animals and, directly or indirectly, the natural systems upon which they depend. This may also reflect fundamental truths that the fates of all beings are indeed intertwined on a fundamental level.<sup>27</sup> The Colombia Amazon decision appears the clearest landmark yet, as the decision came in response to citizen suit by youth<sup>28</sup> and seems wholly premised on preserving the forest for both its own sake and for the sake of future human generations. This gives the NhRP great hope that soon the ideas sweeping Latin America and elsewhere will make their way to the United States. In the meantime, we continue to cite every instance of an environmental feature or nonhuman animal winning legal recognition of any sort as we continue to fight to persuade the American courts to accept the first nonhuman animal as a legal person. That day is rapidly approaching. As might be said, if Jeff Bezos’ “Amazon” can exist and thrive as a legal person, certainly the original (and infinitely more valuable) Amazon deserves the same.<sup>29</sup>

24. Tercer Juzgado de Garantías [Third Court of Guarantees] 3/11/2016, “Acción de hábeas corpus presentada por la Asociación de Funcionarios y Abogados por los Derechos de los Animales,” (Mendoza, Argentina) File No. P-72.254/15 (a court-certified English translation is available at [https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia\\_translation-FINAL-for-website.pdf](https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf) (last visited Sept. 27, 2018)).

25. Animal Welfare Bd. v. Nagaraja & Ors. (2014) 7 SCC 547 (2014) <https://www.supremecourtindia.nic.in/judgments> (2014).

26. See, e.g., CATHERINE IORNS MAGALLANES, FROM RIGHTS TO RESPONSIBILITIES USING LEGAL PERSONHOOD AND GUARDIANSHIP FOR RIVERS, REPRINTED IN RESPONSIBILITY: LAW AND GOVERNANCE FOR LIVING WELL WITH THE EARTH 217, (Betsan Martin & Linda Te Aho & Maria Humphries-Kil eds., 2019) (assuming that “by enumerating the relevant rights [to nature], those rights can thereby be protected by humans on nature’s behalf.” This assumption requires that an individual will step in to protect these rights given to nature “in the face of any threat.”).

27. Cf. Reed Elizabeth Loder, *Mining Asteroids: Ecological Jurisprudence Beyond Earth*, 36 VIRGINIA ENVTL L. J. 275, 287 (2018) (there is another strain of opposition that deserves discussion: we are challenged to ensure that—like by applying property law to comets—we are not simply repeating the sin by multiplying destructive property-driven models into nonhuman animals).

28. See Jose Felix Pinto-Bazurco, *Colombian Youth Sue for Recognition of the Rights of Future Generations*, COLUM. U. STATE OF THE PLANET (Mar. 21, 2018), <https://blogs.ei.columbia.edu/2018/03/21/colombian-youth-lawsuit-climate-rainforest/> (arguing that climate change is denying people of their constitutional rights to health, food, water, and healthy environment).

29. See *Charlotte C. & A.R., Co. v. Gibbs*, 142 U.S. 386, 391 (1892) (stating corporations, which are legal constructs, are nonetheless considered legal persons). It is nonsense to argue, as some do, that corporations are merely amalgamations of human interests. See Meir Dan-Cohen, *Rights*,

*B. Autonomy as a Basis for Personhood: Progress in Moving the Common Law Towards Recognition of Fundamental Rights for Nonhuman Animals*

Within the million or more animal species on the planet (about half of which are beetles), the NhRP focuses from the outset on those species which science has shown to be autonomous.<sup>30</sup> This is not a statement on the moral worth of autonomy or a celebration of high-functioning, complex animal cognition and behavior. Rather, the focus on autonomy at the outset is strategic: Courts have long held the protection of autonomy to be among the most sacred objects of the law.<sup>31</sup> While it has been the autonomy of human beings they are concerned with, that need not remain exclusively so. Armed with modern science on animal cognition and behavior, the NhRP argues in its habeas corpus petitions on behalf of chimpanzees and elephants that they too are autonomous and that the “container,” or species, through which that autonomy is exercised is irrelevant.<sup>32</sup> So, in this way, the courts are not being asked to invent a new value, but rather to find it exists in animals beyond the human being, in accord with modern scientific understanding of animal cognition and behavior.

African and Asian elephants are examples of nonhuman animals regarded as autonomous. Uncontroverted scientific evidence reveals them to share numerous complex cognitive abilities with humans, such as self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities.<sup>33</sup> Many of these autonomy components have been considered—erroneously—as uniquely human.<sup>34</sup> African and Asian elephants are autonomous, as they exhibit “self-

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*Persons, and Organizations: A Legal Theory for Bureaucratic Society* (2nd ed. 2016) (thoroughly invalidating the notion that a corporation or other large entity is merely an amalgamation of the rights and duties of its constituent human owners); Shawn J. Bayern, *Of Bitcoins, Independently Wealthy Software, and the Zero-Member LLC*, 108 Nw. U.L. Rev. 1485 (2014) (describing rapid growth of nontraditional corporate forms including zero-owner LLC’s, cryptocurrency-enabled autonomous entities, and other human-free corporate persons).

30. See Brief for Nonhuman Rights Project, Inc., as Amici Curiae supporting Appellant at 2, 5-6, *Nonhuman Rights Project, Inc., v. Lavery*, 152 A.D.3d 73 (N.Y. App Div. 2017) (No. 150149/16) (a group of 17 North American philosophers submitted an amicus curiae brief in support of chimpanzee personhood, making reference to autonomy and the philosophical bases for personhood throughout the western tradition and beyond).

31. See Robert C. Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1518 (1997); see also *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2809 (1992) (discussing constitutional developments to a women’s right to reproductive health has yet to be disturbed since the days of *Griswold v. Connecticut*).

32. Brief for Nonhuman Rights Project, Inc., *supra* note 34, at 13, 21.

33. Lucy A. Bates, et. al, *Quick Guide: Elephant Cognition*, 18 CURRENT BIOLOGY 544, [https://www.cell.com/current-biology/pdf/S0960-9822\(08\)00503-4.pdf](https://www.cell.com/current-biology/pdf/S0960-9822(08)00503-4.pdf) (last visited Feb. 13, 2019).

34. *Id.*

determined behavior that is based on freedom of choice.<sup>35</sup> As a psychological concept, autonomy implies that the individual is directing their behavior based on some non-observable, internal cognitive process, rather than simply responding reflexively.”<sup>36</sup>

The only opinion to date from an American high court judge on the question of the rights and personhood of autonomous nonhuman animals is that of New York Court of Appeals Judge Eugene Fahey, in his 2018 concurrence in *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, in a case involving two captive chimpanzees.<sup>37</sup> There, Judge Fahey concluded that “[t]he issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching . . . . While it may be arguable that a chimpanzee is not a ‘person,’ there is no doubt that it is not merely a thing.”<sup>38</sup> According to Judge Fahey, autonomous nonhuman animals should have “the right to liberty protected by habeas corpus.”<sup>39</sup>

To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect[.]<sup>40</sup>

Also of significance, a New York State Supreme Court has already issued an order to show cause pursuant to the New York Civil Practice Law and Rules (“CPLR”) Article 70 that required the State to justify its detention of two chimpanzees.<sup>41</sup> Another New York State Supreme Court

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35. Joyce Poole Aff. ¶ 22 <https://www.nonhumanrights.org/content/uploads/Aff.-Joyce-Poole-1.pdf> (last visited Mar. 1 2019).

36. *Id.* See also, Tom L. Beauchamp, Victoria Wobber, *Autonomy in Chimpanzees*, 35 *Theoretical Med & Bioethics* 117 (2014).

37. *Nonhuman Rights Project, Inc. v Lavery*, 100 N.E.3d 846 (2018) (Fahey, J., concurring) (underscoring that the questions of “can a nonhuman animal be entitled to release from confinement through the writ of habeas corpus” or “should such a being be treated as a person or as property, in essence a thing” will have to be addressed eventually).

38. *Nonhuman Rights Project, Inc.*, 100 N.E.3d at 849.

39. See *Id.* at 847-49 (describing Judge Fahey’s questioning whether the court was right to deny habeas corpus to chimpanzees).

40. *Id.* at 848.

41. See NY CPLP § 7003(a) (2012) (explaining that a state must justify detentions when “there is no disputable issue of fact.”).

did the same for an Asian elephant held in a private zoo.<sup>42</sup> On the heels of these legal developments and other shifts in thinking, the legal status of nonhuman animals has been rapidly evolving from right-less things to rights-bearing persons in New York State and throughout the world.<sup>43</sup> New York's Appellate Division, Fourth Judicial Department ("Fourth Department"), recently declared that it is now "*common knowledge* that personhood can and sometimes does attach to nonhuman entities like . . . *animals*."<sup>44</sup> While it remains unclear exactly what the Court meant, it cited in support of that conclusion, *inter alia*, *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, another Fourth Department case in which it had prior twice assumed, without deciding, that a chimpanzee (Kiko) could be a person for habeas corpus purposes.<sup>45</sup>

Outside the United States, courts have already begun to acknowledge not just the personhood of nonhuman animals, but also their specific right to habeas corpus relief. A petition for a writ of habeas corpus was filed on behalf of a chimpanzee, Cecilia, in an Argentine court to free her from the Mendoza Zoo.<sup>46</sup> In November 2016, the Argentine Court granted the writ, declared Cecilia a "non-human legal person" with "nonhuman rights," and ordered her immediate release from the zoo and subsequent transfer to a sanctuary.<sup>47</sup> Rejecting the claim that Cecilia could not avail herself of habeas corpus because she was not a human, the Argentine Court recognized that "societies evolve in their moral conduct, thought, and values" and concluded that classifying autonomous "animals as things is not a correct standard."<sup>48</sup> It is not clear to what extent Cecilia's autonomy was a factor in the decision and, most importantly for present purposes, whether autonomy was the basis for her legal personhood, as the NhRP

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42. *Nonhuman Rights Project, Inc. on behalf of Happy v. Wildlife Conservation Society, et al.*, Index No. 18-45164 (Orleans County, Nov. 16, 2018) (New York) (granting an order to show cause brought pursuant to the state's habeas corpus law requiring respondent zoo to appear and defend its keeping an Asian elephant in captivity).

43. Steven Wise, *That's One Small Step for a Judge, One Giant Leap for the Nonhuman Rights Project*, NONHUMAN RIGHT BLOG (Aug. 4, 2015) <https://www.nonhumanrights.org/blog/thats-one-small-step-for-a-judge-one-giant-leap-for-the-nonhuman-rights-project/>.

44. *People v. Graves*, 163 A.D.3d 16, 21 (N.Y. App. Div. 2018) (emphasis added, citations omitted).

45. *See generally Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*, 124 A.D.3d 1334, 1335 (2015) (alluding to, without deciding, that a chimpanzee "Kiko" could be a "person" for habeas corpus purposes).

46. Tercer Juzgado de Garantías [Third Court of Guarantees] 3/11/2016, "Acción de hábeas corpus presentada por la Asociación de Funcionarios y Abogados por los Derechos de los Animales," (Mendoza, Argentina) File No. P-72.254/15 (a court-certified English translation is available at [https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia\\_translation-FINAL-for-website.pdf](https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf) (last visited Sept. 27, 2018)).

47. *Id.* at 32.

48. *Id.* at 5, 19-20, 23-24.

argues under the United States common law of habeas corpus. Hopefully, the spirit can be replicated elsewhere in the world and magnified everywhere in advancement of the protection of nonhuman animals and natural environments.

## II. POTENTIAL CLASHES BETWEEN “ANIMAL” AND “ENVIRONMENTAL” RIGHTS AND PATHS FORWARD

Speakers at the Symposium addressed several potential tension points that could arise in seeking to vindicate both the rights of the environment as well as the rights of animals. For purposes of further conversation, offered here is merely a cursory review of some of those points. I use quotes here because, as I think is too often the case, that the two “sides” have become stubborn in their views of the other. They devolve at times into the cliché of the “anthropomorphic” or “overly emotional” “animal rights activist” people, on the one hand, or the clinical “environmentalists” deaf to the suffering of individual animals in deference to the greater ecosystem, on the other.

I contend that this perceived chasm, to the extent it is real, is largely the product of faulty assumptions and a misplaced focus. The autonomy-based species-by-species approach advanced by the NhRP, along with other novel approaches in the animal and environmental spaces, may help to bridge the “gap” between “environmental” and “animal” approaches. This can be done, in part, by forcing several convergent but distinct issues through a single prism—the autonomous, subjective experience of a nonhuman animal. While there are untold billions of animals suffering in a multitude of ways, it appears there is some value at this stage in pursuing cases that are narrow but deep, rather than broad but shallow.

### A. *The Guardian Problem*

[T]he ancestors of the Oneida once grew in population so much that some of them had to go look for a new place to live. They found a wonderful place, and the people moved there. After moving, they found that they had ‘chosen the Center Place for a great community of Wolf.’ But the people did not wish to leave. After a while, the people decided that there was not room enough in this place for both them and Wolf. They held a council and decided that they could hunt all the wolves down so there would be no more. But when they thought of what kind of people they

would then be, ‘it did not seem to them that they wanted to become such a people.’

So the people devised a way of limiting their impact: In all of their decisions, they would ask, ‘Who speaks for Wolf?’ and the interests of the non-human world would be considered.

“Who Speaks for Wolf,” Paula Underwood Spencer (Austin: Tribe of Two Press, 1983.)

To many, the deprivation of an orca’s life in a tank, an elephant on a small patch of land without a herd, or a chimpanzee alone in a barren cage for decades, is so self-evidently wrong that it boggles the mind it is legal.<sup>49</sup> Others argue that we cannot fairly know what “they” want.<sup>50</sup>

In any event, present “animal welfare” laws still regard all nonhuman animals categorically as “things.”<sup>51</sup> While protecting them from outright abuse and neglect, the laws only look to the surface of nonhuman animals’ existence in captivity or otherwise in interaction with humans.<sup>52</sup> So, as long as the cage is the bare minimum size, adequate food and water is provided, and blatant abuse is non-existent, the law is essentially silent to even the most fundamental interest of any of those beings. Meanwhile, the science appears unassailable: many nonhuman animals suffer immensely, in ways much like any normal human would in solitary confinement or in prison.<sup>53</sup> Yet still, it is common for even the best of welfare laws to prohibit merely “unnecessary” cruelty and killing.<sup>54</sup> This of course begs the question: what

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49. The Conversation, News Partner, *There is Broad Public Support for Animal Rights*, ACROSS AMERICA, (Mar. 22, 2018) <https://patch.com/us/across-america/there-broad-public-support-animal-rights> (public opinion research suggests strongly that a majority of Americans support basic legal rights for at least some species of nonhuman animals).

50. Juan Carlos Marvizon, *Not Just Intelligence: Why Humans Deserve to Be Treated Better Than Animals*, SPEAKING OF RESEARCH (Dec. 6, 2016) <https://speakingofresearch.com/2016/12/06/not-just-intelligence-why-humans-deserve-to-be-treated-better-than-animals/>.

51. See, e.g., Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527, 539–40 (2000); Richard Epstein, *Animals as Objects, or Subjects, of Rights* (Univ. Chi. Olin Law & Econ., Working Paper No. 171, 2002).

52. Animal Welfare Act of 1966, Pub. L. No. 89-543, § 89, 80 Stat. 350 (1966).

53. See e.g. The Cambridge Declaration on Consciousness, <http://femconference.org/img/CambridgeDeclarationOnConsciousness.pdf> (last visited Feb. 15, 2019) (declaring non-humans have the capacity for consciousness and intentional behaviors).

54. Animal Welfare Brd. v. Nagaraja (2014) 7 SCC 547 (2014) <https://www.supremecourtindia.nic.in/judgments> (The Indian Supreme Court ruled in 2014 that all nonhuman animals in the country are “persons” (i.e., that they have the *capacity* for rights), but it did

is “necessary” suffering? Likewise, the current mode of “sentient being” laws sweeping European cities and elsewhere is arguably itself not the answer, to the extent it does just change the thing status of animals (though it may indeed be relevant to judges in animal cases in the future).<sup>55</sup>

As some Symposium participants suggest, present threats to wildlife and environments may eventually compel a drastic new approach to rights in the law, or perhaps even a system not based on rights as we know it, but there still remains much to be done with the tools we already have.<sup>56</sup> Throughout history, rights have always been wrenched out, often by creative and persistent means, and have rarely—if ever—been gifted like manna to the masses. Judge Fahey, in the same concurring opinion referenced *supra*, called the question of nonhuman animal rights “a deep dilemma of ethics and policy that demands our attention[,]” and stated “[t]he evolving nature of life makes clear that chimpanzees and humans exist on a continuum of living beings . . . . To solve this dilemma, we have to recognize its complexity and confront it.”<sup>57</sup> On this front, and in light of the vast diversity and complexity of nonhuman life, it seems logical to eschew overly broad declarations of rights for all creation and instead focus on a narrow class of species and for those species, a single right. This process—litigating a case that is “narrow but deep”—helps illuminate the vast recesses of the law created by centuries’ ceaseless accretion of precedents, like interlocking stalactites and stalagmites in a cave, and forces a reasoned and informed reexamination of the shared pillars which underpin our laws and economies, including the assumption that the natural world and all its nonhuman inhabitants, while they may be entitled to our respect and dominion, are nonetheless things and property to be used for the advancement of human wants and desires. There is also great appeal to utilizing what has worked before, by basing rights for nonhuman animals on those fundamental human rights relevant to them, namely, bodily liberty and bodily integrity.

There are shared issues here between environmental and animal discourses, and some important differences too. Professor Stone focused on

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not recognize any specific rights, and made frequent reference to the “doctrine of necessity,” whereby, regrettable as it may be, some animals simply must be killed for the greater good of humanity.).

55. Suzanne Monyak, *When the Law Recognizes Animals as People*, THE NEW REPUBLIC (Feb. 2, 2018), <https://newrepublic.com/article/146870/law-recognizes-animals-people>.

56. Panelists, Remarks at the Vermont Journal of Environmental Law Symposium: Rights of Nature (Oct. 19, 2018).

57. *Id.* at 846 (Fahey, J., concurring) (“[T]hat denial of leave to appeal is not a decision on the merits of petitioner’s [NHRP’s] claims.”).

environmental standing for good reason (although arguably the more fundamental question of personhood must be addressed first).<sup>58</sup>

*B. Can We Rely on the Courts Alone? Moving Beyond Litigation Into Legislation*

It is important to stress from the outset of this subsection that while there exist hundreds, if not thousands, of laws, statutes, ordinances, rules, regulations, and other objects of legislation which impact or seek to protect nonhuman animals in the United States alone, none of these create rights, because none of them recognize the personhood of any nonhuman animal.<sup>59</sup> It is akin to arguing that because it is a crime to smash someone's car window, the car window itself has rights. Of course, this is not the case; the owner of the car enjoys the right, not the car itself.

This does not mean legislation cannot be part of the answer, especially where it grants rights to nonhuman animals and either implicitly or explicitly extends personhood to them. In preparation for legislative campaigns seeking rights for designated species of nonhuman animals within target municipalities, the NhRP prepared a law review article<sup>60</sup> which seeks to act as a "defensive memo" for an anticipated challenge to the passage of such a law by impacted industries (like zoos or marine amusement parks) or those which perceive themselves to be impacted (like biomedical research and industrial agriculture).<sup>61</sup> Many of the arguments that likely will arise—preemption, legislative takings, judicial takings, and others—are likely to also impact rights-of-nature practitioners for the foreseeable future, especially as impacted industries ramp up the fight in the face of increasing pressure.

While it may be argued that we cannot hope to discern the wishes and desires of a species other than our own, let alone a river, and thus any effort to effectuate those alleged desires is doomed, we do have tools at our disposal. For animals, one such tool is cognitive science; for environments, it includes ecosystem benefits, cost-benefit analysis, and other emerging disciplines that allow us to truly appreciate the value they create. The same kinds of legal and ethical tools used to help us understand what children want or what those suffering dementia or Alzheimer's want will in time

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58. Stone, *supra* note 9.

59. Steven M. Wise, et al., *The Power of Municipalities to Enact Legislation Granting Legal Rights to Nonhuman Animals Pursuant to Home Rule*, 67 Syracuse L. Rev. 31, 69 (2017).

60. *Id.* at 32.

61. *See generally, Id.*

help us understand what an elephant wants, what a river wants, or what an ecosystem wants.<sup>62</sup>

One clear advantage of recognizing and truly respecting the personhood of nonhuman animals is that it forces into motion many other gears to effectuate those rights. While rights alone are not enough to secure any given outcome, and can indeed be violated, the expansion of rights could help marshal beneficial development for natural systems and humans alike. At the end of the day, if we cannot maintain a planet on which other species can thrive, what hope do we have of a sustained tolerable existence?

### *C. The Potential For “Keystone Species” to Act as “Rights Umbrellas”*

The vehicle of common law personhood and rights described above is not just beneficial for autonomous species; it could also help protect others. As a thought experiment, assume that orcas (“killer whales”) are granted legal persons in the territorial waters of the United States and that their fundamental rights to bodily liberty and bodily integrity are recognized and protected there. This may include areas where they live naturally, and especially areas of high orca-human conflict like coastal regions. It would seem the true recognition and enforcement of those rights would require both prohibitions and appropriate interventions to ensure basic living conditions for the orcas. This should include water free of dangerous levels of contaminants, especially human-made chemicals, plastics, and other refuse, along with sufficient amounts of appropriate fish and other sources of nutrition. These bedrock necessities for orca flourishing, if recognized and enforced as rights, could, for example, compel the opening of dams, decreased catch allowances, or outright bans on fishing, especially commercial fishing. As such, it becomes possible to imagine the orca, as keystone species, acting as the lynchpin of a protective penumbra—or “rights umbrella”—that would in turn protect the wider ecosystem and the many species and individuals living within it. This in turn furthers a range of important environmental and species protection goals.<sup>63</sup> And while the fish who live to be eaten by more prolific orca numbers may protest, nonhuman animals living in the wild are not living in “conditions of

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62. See, e.g., J. B. Ruhl et al., *The Law and Policy of Ecosystem Services* 6, 13, 15, 252 (2007) (describing the use of ecosystem service tool in helping to shape law and policy). See also, Waal, F. B. M., *Are we smart enough to know how smart animals are?* (Norton, 2017) (summarizing recent scientific discovery about the remarkable intelligence and capacities of various nonhuman animals and drawing lessons that humans can learn from them).

63. Jenna Bardroff, *If These 8 Species Go Extinct, Entire Ecosystems Will Disappear*, ONE GREEN PLANET, <http://www.onegreenplanet.org/animalsandnature/if-these-species-go-entire-ecosystems-will-disappear/> (last visited Feb. 13, 2019).

justice” with one another as we humans understand it.<sup>64</sup> In other words, we cannot legislate that orcas become vegan, and for present purposes that is fine.<sup>65</sup> Focusing on protecting autonomy has many positive side effects in humans and nonhumans alike, and leaves room for natural processes to help dictate policy, rather than vice versa. It also provides a clear and compelling “narrative” for both litigation and legislation. This forces the courts to focus on the very narrow, but deep, question of whether a nonhuman animal can ever enjoy even a single legal right.<sup>66</sup>

### CONCLUSION

The rights of nonhuman animals fits the story of the common law, at least one telling of it, in which society steadily grows outward to recognize and protect a wider swath of existence as worthy of protection under the law (“the moral arc of the universe is long but it bends towards justice”). Understood in these sweep-of-history terms, the common law also, in many ways, gives life to “natural law.” Natural law (broadly, the idea that judges in some cases must consult philosophical and moral sources beyond the bare letter of the law in reaching judgments) is, however, a controversial premise in many legal circles and an active fault-line of debate, including among prominent conservative jurists.<sup>67</sup> The natural law is in many important ways the antithesis of Justice Oliver Wendell Holmes’ still-influential view of the law as a positivist, “might makes right” system of assigning rights and duties, and by extension, who counts in the law.<sup>68</sup> Among contemporary jurists, Justice Gorsuch embraces a natural law approach and has focused special attention on doctor-assisted and other

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64. Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011) (drawing on political theory to imagine systems that differentiate among “domestic,” “liminal,” and “wild” animals and which assign appropriate rights to each, and describing wild animals as not living in “conditions of justice” with one another that would, for example, make predation wrong).

65. Tatjana Visak, *The Philosophical Quarterly*, 62 Oxford University Press 654 (2012) (reviewing Donaldson & Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (2011)).

66. See OXFORD ESSENTIAL QUOTATIONS (2016). <http://www.oxfordreference.com/view/10.1093/acref/9780191826719.001.0001/q-oro-ed4-00010383> (last visited Feb. 13, 2019) (“A single death is a tragedy – a million deaths is a statistic,” is a quote attributed to Josef Stalin. It is chilling to read but few can deny the psychological truth of the statement, at least on some level. It seems to speak, in part, to the inability of our brains to process such a large amount of suffering, and/or our tendency to sympathize more closely with the suffering of an individual rather than that of an entire group).

67. See generally Richard O’Sullivan, *Natural Law and Common Law*, 11 U. Pittsburg L. Rev. 538, 157-158, 165 (1950) (describing the theory of how the common law evolved from natural law and the traditions of U.S. use of common and natural law) (compare, for example, Justice Neil Gorsuch, a staunch natural law proponent, with a positivist-originalist in the mold of Justice Antonin Scalia).

68. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

legal suicide, and “death with dignity” laws in particular.<sup>69</sup> Justice Gorsuch argues that these laws are void because they violate the natural law principle of the “inviolability” of human life.<sup>70</sup> He further argues that the intentional taking of human life is always wrong, and that state laws allowing doctor-assisted suicide should presumably be overturned.<sup>71</sup> Of course, Justice Gorsuch’s position raises policy issues that are arguably best resolved elsewhere, and there are powerful countervailing arguments (e.g., the right to refuse life-saving treatment or to choose to end one’s own life) which Justice Gorsuch himself acknowledges must sometimes take precedence pursuant to common law autonomy.<sup>72</sup> All this to say, while there will always will (and should be) much latitude for debate within the boundaries of the “natural” and “common” law, the fundamental premise appears sound: the common law, informed by natural law principles including respect for life and dignity, is a potent vehicle for advancing the shared interests of life on planet Earth.

Even the best legal arguments and comprehensive science, standing alone, will not win the day for nature or any of its nonhuman inhabitants. Rather, it seems that in order to cross the finish line we need to also marshal the forces of justice, harmony, ethics, and compassion. These values have always been at the heart of the common law and natural law, and reverberate deeper still in cultural traditions throughout the world. We have the tools and the cultural momentum to win legal personhood in the foreseeable for at least some nonhuman animals, including those who are demonstrably autonomous. To the extent human self-interest is divined as a positive side-effect of expanding rights to nature and nonhuman animals, all the better, so long as that self-interest is disallowed to hijack the interests of those newly recognized nonhuman rights-holders. While hubris can temporarily blind us to the truth (even where temporary is lifelong), eventually all must agree that slave and master alike are served better by doing away with chains for all, forever.

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69. See Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* (2009).

70. See *id.* at 157-158, 165 (describing life as a basic good that might be referred to as the inviolability-of-life principle).

71. See *id.* at 157 (arguing the law should not allow the intentional taking of human life by private person ever).

72. Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* (2009).