THE STRUGGLE FOR THE LEGAL RIGHTS OF NONHUMAN ANIMALS BEGINS – THE EXPERIENCE OF THE NONHUMAN RIGHTS PROJECT IN NEW YORK AND CONNECTICUT

By
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Twenty-five years ago, in the first issue of Animal Law*, the author offered an account of why legal rights do not need to be restricted to human beings. Here the author expands upon that account to provide a review of the ongoing struggle of the Nonhuman Rights Project (NhRP) to obtain legal rights for nonhuman animals. The Author outlines habeas corpus cases the NhRP has brought on behalf of chimpanzees and elephants in New York and Connecticut and provides a view of the New York and Connecticut Pet Trust Statutes, which grant certain nonhuman animals the right to be named a beneficiary of a trust, thereby implicitly creating their legal personhood. This Article further argues that legal personhood does not attach to humans alone and illuminates the varieties of judicial responses it has encountered in its effort to persuade courts to assign legal personhood to nonhuman animals.*

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I. INTRODUCTION

I wrote an article for the first issue of *Animal Law*. It was entitled *How Nonhuman Animals Were Trapped in a Nonexistent Universe*.[1] "Today," I wrote, "the common law denies all justice to all nonhuman animals,"[2] and noted that Oliver Wendell Holmes, Jr. emphasized that "an understanding of history 'is the first step toward an enlightened skepticism, that is, toward a *deliberate reconsideration* of the worth of those rules'; the alternative is mere 'blind imitation of the past.'"[3] I intended for "[this] article [to] begin the 'deliberate reconsideration' of this wholesale . . . [in]justice by examining the philosophies, science, and theologies from which the common law sprang."[4]

There was no talk then of legal rights or legal personhood, that is the capacity for legal rights, for nonhuman animals. Their thinghood—their incapacity to bear legal rights—was so deeply embedded in the law that it was invisible. Talk of 'animal rights' was really talk about 'animal welfare' as nonhuman animals had never had legal rights from the time the Romans divided persons from things, and none were on the horizon in 1995 either.[5] My article constituted the opening of "one long argument" about the true and just place for nonhuman animals in the legal world.[6] It would soon turn directly to the question of whether nonhuman animals could actually be legal 'persons,' and if so, why, and if not, why not.

A "person," the noted judge and legal scholar, Sir John Salmond, observed, "is any being whom the law regards as capable of rights or

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[1] Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15 (1995).

[2] *Id.* at 17.

[3] *Id.* at 15 (emphasis added) (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

[4] *Id.* at 17.

[5] *See* J.R. Trahan, *The Distinction Between Persons & Things: An Historical Perspective*, 1 J. CIVIL L. STUDIES 9 (2008) (describing the civil law tradition of separating persons and things).

[6] CHARLES DARWIN, THE ORIGIN OF SPECIES 399 (John Murray ed., 6th ed. 1873).

duties."[7] "One who has rights but no duties, or who has duties but no rights, is . . . a person."[8] For Dean Roscoe Pound the "significant feature of legal personality is the capacity for rights."[9] Professor John Chipman Gray observed that "[t]here is no difficulty in giving legal rights to a supernatural being and thus making him or her a legal person."[10] To the point, Gray noted there may be "systems of law in which animals have legal rights . . . [and] animals may conceivably be legal persons."[11] And why not? There was no inherent reason why all nonhuman animals had to be legal things. In short, legal persons possess inherent value; legal 'things' possess merely instrumental value and exist for the sake of legal persons.[12] 'Person' has long been defined both more narrowly and more broadly, or qualitatively different than 'human being.' Human slaves were not persons in New York until the last slave was freed in 1827[13] and were not persons throughout the United States until 1865.[14] Women were not persons for many purposes until well into the twentieth century.[15] Jews were once not persons,[16] while the first time a Native American sought a writ of habeas corpus, the United States Government claimed he was not a person either.[17]

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[7] P. J. FITZGERALD, SALMOND ON JURISPRUDENCE 299 (12th ed. 1966); *see also* Wartelle v. Women's & Children's Hosp., 704 So. 2d 778, 780 (La. 1997) (stating a "'Person' is a term of art [used] . . . to signify a subject of rights or duties").

[8] JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (2nd ed. 1921).

[9] 4 ROSCOE POUND, JURISPRUDENCE 197 (1959).

[10] GRAY, *supra* note 8, at 39 (The court of appeals cited chapter II of Gray with approval in Byrn v. N.Y.C Health & Hosp. Corp., 31 N.E.2d 194, 201 (N.Y. 1972)).

[11] GRAY, *supra* note 8, at 42–43.

[12] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 16 (1762).

[13] *E.g*., Trongett v. Byers, 5 Cow. 480 (N.Y. Sup. Ct. 1826); Smith v. Hoff, 1 Cow. 127, 130 (N.Y. 1823); *In re* Mickel, 14 Johns. 324 (N.Y. Sup. Ct. 1817); Sable v. Hitchcock, 2 Johns. Cas. 79, 83 (N.Y. Sup. Ct. 1800); David Levine, *African American History: A Past Rooted in the Hudson Valley*, HUDSON VALLEY MAGAZINE (Jan. 26, 2017), http://www.hvmag.com/Hudson-Valley-Magazine/February-2017/African-American-History-A-Past-Rooted-in-the-Hudson-Valley/ [https://perma.cc/SN3D-XEVJ] (accessed Apr. 20, 2019) (expressing how pre-1827 courts in New York recognized slaves as property).

[14] *See, e.g.*, Jarman v. Patterson, 23 Ky. (7 T.B. Mon.) 644, 645–46 (1828) (noting how "[s]laves, although they are human beings . . . [are] not treated as a person, but (*negotium*), a thing").

[15] *See, e.g.*, Nonhuman Rights Project, Inc. *ex rel.* Hercules & Leo v. Stanley, 16 N.Y.S.3d 898, 912 (N.Y. Sup. Ct. 2015) ("Married women were once considered the property of their husbands, and before marriage were often considered family property, denied the full array of rights accorded to their fathers, brothers, uncles, and male cousins.") (citation omitted); *see* ROBERT J. SHARPE & PATRICIA I. MCMAHON, THE PERSONS CASE – THE ORIGINS AND LEGACY OF THE FIGHT FOR LEGAL PERSONHOOD 71 (2007) (detailing how "[m]arried women had no legal rights" in the ownership of their family home); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 430 (1765–1769) (noting "the very being or legal existence of the woman is suspended during the marriage . . . ").

[16] R.A. Routledge, *The Legal Status of the Jews in England 1190-1790*, 3 J. LEGAL HIST. 91, 94 (1982) (explaining how thirteenth century Jews were chattels of the King).

[17] United States *ex rel*. Standing Bear v. Crook, 25 F. Cas. 695, 697 (D. Neb. 1879).

Outside of the United States, courts are beginning to recognize that some nonhuman entities, including nonhuman animals, have legal rights. In 2014, the Indian Supreme Court held that nonhuman animals in general possess constitutional and statutory rights.[18] In 2016, an Argentine trial court granted a writ of habeas corpus to a chimpanzee named Cecilia designating her a "non-human legal person" with "nonhuman rights," and ordering her release from the Mendoza Zoo and subsequent transfer to a sanctuary.[19] Rejecting the claim that Cecilia could not avail herself of habeas corpus because she was not a human, the court recognized that "societies evolve in their moral conducts, thoughts, and values" and concluded that classifying autonomous "animals as things is not a correct standard."[20] In 2000, the Indian Supreme Court designated the Sikh's sacred text, the Sri Guru Granth Sahib, a person,[21] thereby permitting it to own and possess property. Pre-Independence Indian courts designated certain Punjab mosques as legal persons,[22] and a Hindu idol as a person with the capacity to sue.[23] In 2018, the Colombia Supreme Court designated the Columbian part of the Amazon rainforest "as an entity subject of rights," in other words, a person.[24] In 2017, the New Zealand Parliament designated New Zealand's Whanganui River Iwi as a person that owns its riverbed.[25] In 2014, New Zealand's Te Urewara park was designated a "legal entity, having all the rights, powers, duties, and liabilities of a person."[26]

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[18] Animal Welfare Board of India v. A. Nagaraja & Ors., (2014) 6 SCR 468 ¶77 (India).

[19] Tercer Juzgado de Garanías, [Third Court of Guarantees], 3/11/2016, "Presented by A.F.A.D About the Chimpanzee "Ceclia" – Non Human Individual" (Arg.) at 22-2, 24 (as translated from original Spanish by attorney Ana María Hernández), a certified copy of which is available at https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf [https://perma.cc/6Y5P-MU2A] (accessed Apr. 30, 2019).

[20] *Id.* at 5, 19–20, 23–24.

[21] Shiromani Gurdwara Parbandhak Committee Amritsar v. Shri Som Nath Dass & Ors., AIR 2000 SC 1421 (India).

[22] Masjid Shahid Ganj Mosque. v. Shiromani Gurdwara Parbandhak, 140 AIR 369 (Bom.) 15 (India).

[23] Pramath Nath Mullick v. Pradyumna Nath Mullick, (1925) 52 IA 245, 264 (India).

[24] *See* Claudia Fonseca, *Supreme Court Orders Immediate Protection of the Colombia Amazon*, REPÚBLICA DE COLOMBIA: CORTE SUPREMA DE JUSTICIA (Apr. 5, 2018), http://www.cortesuprema.gov.co/corte/index.php/2018/04/05/corte-suprema-ordena-proteccion-inmediata-de-la-amazonia-colombiana/ (accessed Apr. 20, 2019), *excerpts available at* https://www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf?x54537 [https://perma.cc/DKZ5-UWQM] (accessed Apr. 30, 2019) (describing the Colombia Supreme Court's opinion determining the Amazon entitled to legal rights and protection).

[25] *Innovative Bill Protects Whanganui River with Legal Personhood*, N.Z. PARLIAMENT (March 28, 2017), https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/ [https://perma.cc/9NXW-E66R] (accessed Apr. 30, 2019).

[26] Te Urewara Act 2014, Subs 3, s 11(1) (N.Z.).

Peter Birks' 2000 treatise makes clear that personhood does not necessarily entail the possession of any specific legal rights.

> A human being *or* entity which has been said by Parliament or the courts to be capable of enforcing a particular right, or of owing a particular duty, can properly be described as a person with that particular capacity. But it can be easy to forget the qualifier, and to assume when the question later arises, whether the individual or entity has the further capacity to enforce some other right, or to owe some other duty, that this must be so because he or it has previously been said to be a person with an unlimited set of capacities, or to be a person who possesses the powers normally attendant on legal personality. In other words, the careless use of the terms person and 'personality' can create the false impression that a particular human being or entity has been said to possess a larger set of right-owning, duty-owning capacities than is in fact the case.[27]

An entity possessed of any legal right is, by definition, a legal person. Conversely, one may be a person with the capacity to have a legal right, but not yet have one, have just one, or have ten. When the Supreme Court Appellate Division Fourth Department in *People v. Graves* stated that it is "common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals," it meant that it is 'common knowledge' that nonhuman animals can have the capacity for rights, with the remaining question being: To which rights are they entitled?[28] For example, in New York, companion and domestic animals have long had the legal rights of a trust beneficiary pursuant to Estates, Powers and Trusts Law (EPTL) §§ 7–8.1 (New York Pet Trust Statute), yet do not have the right to the appointment of a guardian *ad litem*.[29] As Birks makes clear, legal rights are not an all or nothing proposition for humans or nonhuman animals.

This is what New York Court of Appeals Judge Eugene M. Fahey was referring to when he stated that the issue in a habeas corpus case is not "whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the *right to liberty protected by habeas corpus* . . . the answer to that question will depend on our assessment of the intrinsic nature of [the nonhuman animal] as a species."[30] In New York, this necessarily involves the application of the sophisticated facts inherent in such a judicial assessment to the mature evaluation of public policy.[31]

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[27] 1 ENGLISH PRIVATE LAW § 3.24 (Peter Birks ed., 2000) (footnotes omitted).

[28] People v. Graves, 78 N.Y.S.3d 613, 617 (App. Div. 4th Dept. 2018).

[29] *In re* Ruth H. v. Marie H. (*Matter of Ruth*), 72 N.Y.S.3d 694, 696 (N.Y. App. Div. 4th Dept. 2018).

[30] *In re* Nonhuman Rights Project, Inc. v. Lavery (*Tommy III*), 100 N.E.3d 846, 847 (N.Y. 2018) (emphasis added).

[31] Byrn v. N.Y.C. Health & Hosps. Corp., 286 N.E.2d 887, 889 (N.Y. 1972), *appeal dismissed*, 410 U.S. 949 (1973), *reh'g denied*, 411 U.S. 940 (1973); *see Graves*, 78 N.Y.S.3d at 617 (quoting *Byrn*, 266 N.E.2d at 889).

II. THE STRUGGLE TO OBTAIN LEGAL RIGHTS FOR CHIMPANZEES AND ELEPHANTS IN NEW YORK STATE

A. Introduction

Millions of New Yorkers and Americans are legal persons with legal rights despite their inability to bear duties.[32]

As will be seen, on the one hand, the court of appeals in *Byrn v. New York City Health & Hosps. Corp.* and the fourth department in *Graves,* were decided in harmony with an Anglo-American personhood law rooted in a millennium of common law and centuries-old habeas corpus law. On the other hand, the decision of the Supreme Court Appellate Division Third Department in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, (*Tommy I*)[33] and the Supreme Court Appellate Division First Department in *Tommy II* defy centuries of Anglo-American personhood jurisprudence as well as *Byrn* and the public policy in favor of the personhood of nonhuman animals necessarily implicit in the Pet Trust Statute.

B. The Court of Appeals Decision in Byrn

The leading case on the meaning and implications of personhood in New York is *Byrn.* There, the court of appeals considered a challenge to the constitutionality of a 1970 statute that raised the question of "whether children in embryo are and must be recognized as legal persons" entitled to a right to life under the New York State and Federal Constitutions.[34] The court stated that who is a person "simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person."[35] The court noted that while human fetuses are human beings, they are not persons.[36] In other words, person and 'human' are not synonyms. It made plain that a human "treated anywhere in the law as a person" is not necessarily "so treated for all purposes."[37] This is because the "legal order" does

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[32] *In re* Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery, 54 N.Y.S.3d 392, 396 (App. Div. 1st Dept. 2017) (*Tommy II*), *appeal denied*, 100 N.E.3d 846 (N.Y. 2018) ("[I]nfants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights."); *Tommy III*, 100 N.E.3d at 847 ("Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child.").

[33] *In re* Nonhuman Rights Project, Inc. v. Lavery, (*Tommy I*) 998 N.Y.S.2d 248 (3d Dept. 2014), *appeal denied,* 26 N.Y.3d 902 (2015).

[34] *Byrn*, 286 N.E.2d at 888.

[35] *Id.* at 889 (citing HANS KELSEN, GENERAL THEORY OF LAW AND STATE, 93–109 (2005); GEORGE WHITECROSS PATON, Jurisprudence 349–56 (3d ed. 1967); WOLFGANG FRIEDMANN, LEGAL THEORY, 521–23 (5th ed. 1967); and GRAY, *supra* note 810, at Chapter II).

[36] *Byrn*, 286 N.E.2d at 891.

[37] *Id.* at 889.

not "necessarily correspond[ ] to the natural order,"[38] and that the determination of whether an entity is a legal person is not a matter of "biological or 'natural' correspondence."[39] Instead, "it is a policy determination whether legal personality should attach."[40]

As explained below, the initial 'policy determination' regarding nonhuman animals in New York was made more than twenty years ago.

C. The New York Pet Trust Statute

Twenty-four years after *Byrn*, the New York Legislature in 1996 enacted EPTL 7-6 (now EPTL 7-8) (the New York Pet Trust Statute).[41] This statute grants "domestic or pet animals" the rights of trust beneficiaries and, as only persons may be trust beneficiaries,[42] implicitly designated them as persons capable of possessing legal rights.[43] "Before [EPTL 7-8.1] was enacted, trusts for nonhuman animals were void, because a private express trust cannot exist without a beneficiary capable of enforcing it, and because nonhuman lives cannot be used to measure the perpetuities period."[44] New York did not even recognize honorary trusts for nonhuman animals, which lack beneficiaries.[45] In 2010, when the legislature removed "Honorary" from the statute's title and amended section (a) to read, in part: "Such trust shall terminate when the living *animal beneficiary or beneficiaries* of such trust are no longer alive"[46] it dispelled any doubt that a nonhuman animal was capable of being a beneficiary.[47]

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[38] *Id.*

[39] *Id.*; *See Stanley*, 16 N.Y.S.3d at 901 (discussing the history of legal property).

[40] *Byrn*, 286 N.E.2d at 889.

[41] N.Y. EST. POWERS & TRUSTS LAW (EPTL) § 7-8.1 (McKinney 1996).

[42] EPTL § 7-8.1; *See In re* Fouts, 677 N.Y.S.2d 699, 699 (Sur. Ct. 1998) (stating how five chimpanzees were the principle beneficiaries of the trust); Lenzner v. Falk, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947) (discussing who can be a beneficiary); Gilman v. McCardle, 12 Abb. N. Cas. 414 (N.Y. Super. 1883) ("Beneficiaries . . . must be persons."), *rev'd on other grounds*, 99 N.Y. 451 (1885); RESTATEMENT (THIRD) OF TRUSTS § 43 (AM. LAW. INST. 2003) ("A person who would have capacity to take and hold legal title to the intended trust property has capacity to be a beneficiary of a trust of that property; ordinarily, a person who lacks capacity to hold legal title to property may not be a trust beneficiary."); RESTATEMENT (THIRD) OF TRUSTS § 43 (AM. LAW. INST., Tentative Draft No. 2, approved 1999); RESTATEMENT (SECOND) OF TRUSTS § 116 (AM. LAW. INST. 1959); *Beneficiary*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[43] The Sponsor's Memorandum stated that its purpose was "to allow animals to be made the beneficiary of a trust." SUPPORT MEM., N.Y. BILL JACKET, S.B. 5207, 1996 Reg. Sess. at ch. 159 (N.Y. 1996); *see also* MEM. OF SENATE, N.Y. BILL JACKET, S.B. 5207, 1996 Reg. Sess. at ch. 159 (N.Y. 1996) (explaining the same purpose of the bill); *Stanley*, 16 N.Y.S.3d at 901 (describing the history of legal property).

[44] EPTL § 7-8.1; *see In re* Mills' Estate, 111 N.Y.S.2d 622, 624–25 (Sur. Ct. 1952) (holding that the lifespans of the decedent's pets could not measure the perpetuities period).

[45] *In re* Estate of Voorhis, 27 N.Y.S.2d 818, 821 (Sur. Ct. 1941).

[46] EPTL § 7-8.1 (emphasis added).

[47] The Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York's report to the legislature proclaimed: "[W]e recommend

New York's Legislature thereby made a policy determination on "whether legal personality should attach to" certain nonhuman animals, and determined that they should.[48] For the purposes of the New York Pet Trust Statute, nonhuman animals are not required to bear legal duties, which is in harmony with *Byrn*'s teaching that "upon according legal personality to [nonhuman animals] the law affords [them] the *rights and privileges* of a legal person[s]."[49] The statute thus directly contradicts the claim that the ability to owe legal duties is necessary for legal personhood and precludes the assertion that nonhuman animals cannot be legal persons simply because they are not human. Statutes are a "seminal source of public policy to which common law courts can refer."[50] The *Stanley* court recognized that the New York Pet Trust Statute represents a policy in favor of common law personhood for nonhuman animals, noting that animals "are gradually being treated as more than property[.] . . . Consonant with these recent trends, New York enacted [EPTL 7-8] providing that a domestic or pet animal may be named as a beneficiary of a trust."[51]

D. The Third Department's Decision in Tommy I

In 2014, *Tommy I* held, for the first time in common law history, that the capacity to bear legal rights *and* duties was necessary for personhood, and not just for the purpose of habeas corpus, but for any purpose.[52] This contradicted the *Byrn* decision in which the court of appeals had held that whether an entity is a legal person is a "policy determination . . . 'which each legal system must settle for itself.'"[53] With the 1996 enactment of the Pet Trust Statute New York's Legislature made the policy determination, consistent with *Byrn*, to extend legal personhood status to pets and domestic animals, without requiring them to bear legal duties.[54] Thus, the personhood status of nonhu-

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that the statute be titled 'Trusts for Pets' instead of 'Honorary Trusts for Pets,' as honorary means unenforceable, and pet trusts are presently enforceable under subparagraph (a) of the statute." N.Y. BILL JACKET, ASSEMB. B. 5985, 2010 Reg. Sess. at ch. 70 (2010). *See also* Feger v. Warwick Animal Shelter, 870 N.Y.S.2d 124, 126 (App. Div. 2008) (stating how "[t]he reach of our laws has been extended to animals in areas which were once reserved only for [humans]. For example, the law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner.").

[48] *See Byrn*, 31 N.Y.2d at 201 (confirming whether or not legal personality should attach is a decision for the legislature; the New York legislature made this decision in favor of nonhuman animals when it enacted EPTL § 7-8).

[49] *Id.* (emphasis added).

[50] Reno v. D'Javid, 379 N.Y.S.2d 290, 294 (N.Y. Sup. Ct. 1976) (citations omitted).

[51] *Stanley*, 16 N.Y.S.3d at 912–13 (internal citations omitted). *See also id.* at 901 (referring to "this state's recognition of legal personhood for some nonhuman animals under the [EPTL]"). The NhRP automatically sets up a trust for each of the nonhuman animals it represents in New York and Connecticut.

[52] *Tommy I*, 998 N.Y.S.2d at 250–51.

[53] *Byrn*, 286 N.E.2d at 889 (quoting Gray, *supra* note 810, at 38–39).

[54] EPTL § 7-8.1.

man animals in general, irrespective of whether they can bear duties, has been established in New York for twenty-three years.

Moreover, *Byrn* noted that by according 'legal personality' to an entity, "the law affords it the rights and privileges"—but not necessarily the duties—"of a legal person."[55] The third department's statement that the "incapacity to bear any legal responsibilities and duties" renders it inappropriate to confer legal rights upon chimpanzees conflicted both with the public policy embodied in the New York Pet Trust Statute and with *Byrn*.[56] The third department also ignored *Byrn* by relying upon Black's Law Dictionary's (Black's) definition of legal personhood (which ultimately did not support its position, discussed *infra*, Section II.B), rather than making the required policy determination as to whether "legal personality should attach" to chimpanzees.[57]

The court summarily disposed of the problem that millions of New Yorkers were unable to bear duties, yet possessed rights:

> To be sure, some humans are less able to bear legal duties or responsibilities than others. These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise.[58]

Then the court took judicial notice that "[n]eedless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions."[59]

Here the court made several errors. It mistook petitioner's demand for the Hohfeldian 'immunity-right' of bodily liberty, to which the ability to bear duties is irrelevant, with an Hohfeldian 'claim-right.'[60] Linking personhood to an ability to bear duties is particularly inappropriate in the context of a common law writ of habeas corpus to enforce the fundamental common law immunity-right to bodily integrity.

Hohfeld began his famous article by noting that:

> One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to "rights" and "duties" . . . [and that] the term "rights" tends to be used indis-

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[55] *Byrn*, 286 N.E.2d at 889 (emphasis added).

[56] *Tommy I*, 998 N.Y.S.2d at 251.

[57] *Id.* at 250; *Byrn*, 286 N.E.2d at 889.

[58] *Tommy I*, 998 N.Y.S.2d at 251, n.3.

[59] *Id.* at 251.

[60] *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32–33, 41 (1913) (showing the Yale jurisprudential professor, Wesley N. Hohfeld's, conception of the comparative structure of rights has, for a century, been employed as the choice of courts, jurisprudential writers, and moral philosophers when they discuss what rights are).

> criminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense.[61]

Hohfeld pointed out that even the distinguished jurisprudential writer, John Chipman Gray, in his *The Nature and Sources of the Law,* made the same mistake as did the third department:

> In [Gray's] chapter on "Legal Rights and Duties" the distinguished author takes the position that a right always has a duty as its correlative; and he seems to define the former relation substantially according to the more limited meaning of "claim." Legal privileges, powers, and immunities are prima facie ignored, and the impression conveyed that all legal relations can be comprehended under the conceptions, "right" and "duty."[62]

A claim-right is comprised of a claim and a duty that correlates one with the other.[63] The most conservative, but hardly the most common, way to identify which entity possesses a claim-right is to require that an entity have the capacity to assert claims within a moral community.[64] This is roughly akin to the personhood test the third department applied. However, an immunity-right correlates not with a duty, but with a disability.[65] In *Tommy I*, the NhRP did not seek a claim-right for Tommy the chimpanzee, but the fundamental immunity-right to bodily liberty protected by a common law writ of habeas corpus.[66] This immunity-right is what the United States Supreme Court was referring to when it famously stated that:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . 'The right to one's person may be said to be a right of complete immunity: to be let alone.'[67]

Two other examples of fundamental immunity-rights are provided by the First and Thirteenth Amendments to the United States Constitution, which guarantee the right to free speech and the immunity from enslavement.[68] One need not have the capacity to bear duties to

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[61] *Id.* at 28, 30.

[62] *Id.* at 34. Gray's error becomes obvious when one recalls that Gray also agreed that both animals and supernatural beings could be persons. *See* Gray, *supra* note 810, at 39 (stating "there is no difficulty in giving legal rights to a supernatural being . . . making him or her a legal person").

[63] STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 56–57 (2000); Steven M. Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793, 807–09 (1998).

[64] RATTLING THE CAGE, *supra* note 63, at 57; *Hardly a Revolution*, *supra* note 63, at 810.

[65] RATTLING THE CAGE, *supra* note 63, at 57; *Hardly a Revolution*, *supra* note 63, at 810–15.

[66] *Tommy I*, 998 N.Y.S.2d at 251.

[67] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (citing THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (1880)).

[68] U.S. CONST. amends. I, XIII.

possess these fundamental rights to bodily liberty, freedom from enslavement, and free speech.[69]

The decision of the United States Supreme Court in *Harris v. McRea* illustrates the difference between a claim-right and an immunity-right. Eight years prior to *Harris*, the United States Supreme Court in *Roe v. Wade* recognized a woman's Fourteenth Amendment immunity-right to privacy and against state interference with her decision to have an abortion in the earlier stages of her pregnancy.[70] The *Harris* plaintiff claimed she therefore had the right to have the state pay for an abortion she was unable to afford.[71] The Supreme Court, however, recognized that a woman's *immunity-right* to an abortion correlates with the state's *disability* to interfere in her decision to have the abortion; it does not correlate with the state's *duty* to fund the abortion.[72] Therefore she had no claim against the state for payment for her abortion.[73]

The third department also partially rested its decision on "principles of social contract," stating that "[t]he ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principals of social contract . . . ."[74] But the court misunderstood what those principles are. Social contract is irrelevant to the NhRP's claims for bodily liberty and habeas corpus, for it merely addresses the authority of the State over the individual, which was not an issue presented to the third department.[75] Social contract is grounded upon the idea that individuals submit some freedoms to the power of the State in exchange for the State's protection of their other freedoms.[76] Social contract theorist John Locke argued that individuals are bound morally by the law of nature not to harm each other but that an individual's rights are not secure without government to defend them.[77] Under the social contract, as Locke imagined it, "the State has an interest in protecting its citizens . . . [T]his surely is at the core of the Lockean 'social contract' idea."[78] To this end, fundamental rights impede and temper the exercise of *state* power. Thus, rights cases invoke a breach of *state* responsibilities, not social responsibilities of the indi-

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[69] *Id*. (showing the text of the constitutional amendments do not condition their application on the abilities of those it protects).

[70] Roe v. Wade, 410 U.S. 113, 114 (1973).

[71] Harris v. McRea, 448 U.S. 297, 301 (1980).

[72] *Id.* at 316.

[73] *Id.* at 317.

[74] *Tommy I*, 998 N.Y.S.2d at 250.

[75] *See* J.W. GOUGH, THE SOCIAL CONTRACT 2–3 (2d. ed. 1936) (discussing Locke's social contract theory).

[76] *See, e.g.*, Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1874) ("There are limitations on [State] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.").

[77] 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Thomas I. Cook ed. 1947).

[78] Roberts v. Louisiana, 431 U.S. 633, 646 (1977).

vidual.[79] Social contract does *not* require a correlation between rights and duties. The holder of the *right* is *the individual* while the holder of the *responsibility* is the *government*.

The third department's reliance on social contract to deny all rights to Tommy ignored the fact that habeas corpus has long been available to those who are not part of the social contract because of culture, disability, or choice.[80] Thus the United States Supreme Court allowed petitioners imprisoned at Guantanamo Bay, who were not part of any American social contract, to seek a writ of habeas corpus.[81] And rather than analyze public policy as required by *Byrn,*[82] the third department erroneously relied upon *Black's* for the proposition that only an entity with the capacity for both rights *and* duties may be a legal person. *Black's* had solely relied upon the 10th edition of *Salmond on Jurisprudence* to support its definition of "person" as an entity able to bear rights *and* duties.[83] However, the 10th edition of *Salmond,* like every edition of *Salmond* for the previous 116 years, stated that "a person is any being whom the law regards as capable of legal rights *or* duties."[84] When the NhRP realized the third department's error it contacted the editor in chief of *Salmond*, who promptly agreed to correct it in its next edition.[85] But it was too late for Tommy.

E. The Fourth Department's Decision in Presti

A few months after *Tommy I,* the fourth department decided *Nonhuman Rights Project* ex rel. *Kiko v. Presti* which involved the habeas

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[79] *E.g.*, Moore v. Ganim, 660 A.2d 742, 762 (Conn. 1995) ("[S]ocial compact theory posits that all individuals are born with certain natural rights and that people, in freely consenting to be governed, enter a social compact with their government by virtue of which they relinquish certain individual liberties in exchange 'for the mutual preservation of their lives, liberties, and estates.'") (quoting 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 184 (Hafner Library of Classics ed. 1961); *see also* 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 12–13 (1795) (noting that a person gives up some individual liberties to the government in order to acquire civil liberty); State v. Santiago, 122 A.3d 1, 210 (Conn. 2015), *reconsideration denied*, 124 A.3d 496 (Conn. 2015) ("[S]ocial compact is an agreement 'between the people and the government they create [that] binds the agencies of government to respect the blueprint of government and the rights retained by the people.'").

[80] *E.g.*, Jackson v. Bulloch, 12 Conn. 38, 43, 54 (1837) (freeing a slave pursuant to habeas corpus despite court acknowledging that slaves are excluded from the social compact).

[81] Rasul v. Bush, 542 U.S. 466, 481 (2004).

[82] *Byrn*, 286 N.E.2d at 889.

[83] *Person*, BLACK'S LAW DICTIONARY (7th ed. 1999).

[84] *See, e.g.*, JOHN SALMOND & GLANVILLE LLEWELYN WILLIAMS, JURISPRUDENCE 318 (Sweet & Maxwell, Ltd. 10th ed. 1947) (emphasis added) (indicating uniform definition of "person" among definitions); JOHN SALMOND, JURISPRUDENCE 7TH ED. 329 (Sweet & Maxwell, Ltd. 7th ed. 1924); JOHN SALMOND, JURISPRUDENCE 334 (1902).

[85] James Trimarco, *Chimps Could Soon Win Legal Personhood*, YES! MAG. (Apr. 28, 2017), http://www.yesmagazine.org/peace-justice/chimps-could-soon-win-legal-personhood-20170428 [https://perma.cc/E9Y6-AFRM] (accessed Apr. 30, 2019).

corpus claim by another chimpanzee, Kiko.[86] There it implicitly declined the opportunity to adopt *Tommy I's* personhood reasoning.[87]

F. The First Department's Decision in Tommy II

In 2017, the first department decided *Tommy II*.[88] It did not accept the third department's summary dismissal of the fact that millions of New Yorkers are unable to bear duties, yet possess rights on the ground that "it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility."[89] Instead, it recognized the difficulty in the third department's claim[90] that a person must have the capacity for rights and duties, stating that "infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights."[91] But, like the third department, the first department did not attempt a reasoned public policy determination; it merely declared, without any legal support, that the NhRP "ignores the fact that these are still human beings, members of the human community."[92] The court's entire personhood analysis thereby morphed into the biological determination that chimpanzees are not human beings and therefore cannot be "persons," which *Byrn* forbids.[93] This decision was therefore irreconcilable with *Byrn* because it ignored *Byrn's* teaching that personhood is a policy determination and "not a question of biological . . . correspondence."[94] It also ignored the New York rule that when an entity is accorded legal personhood "the law affords it the *rights and privileges*"—not necessarily the *duties*—"of a legal person."[95] Finally, it was irreconcilable with the New York Pet Trust Statute's "policy determination" that personhood can—and does—extend to nonhuman animals irrespective of their biology.[96]

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[86] Nonhuman Rights Project *ex rel.* Kiko v. Presti, 999 N.Y.S.2d 652, 653 (App. Div. 4th Dept. 2015).

[87] *Id.* at 653–54.

[88] *Tommy II*, 54 N.Y.S.3d at 397.

[89] *Tommy I*, 998 N.Y.S.2d at 251, n.3.

[90] *Tommy II*, 54 N.Y.S.3d at 396.

[91] *Id.*

[92] *Id.*

[93] *Byrn*, 286 N.E.2d at 889. The First Department's decision was shot full of legal errors and internal inconsistencies, which the NhRP annotated. Steven Wise, *Why the First Department's Decision in Our Chimpanzee Rights Case is Wildly Wrong*, NONHUMAN RIGHTS BLOG (June 22, 2017), https://www.nonhumanrights.org/blog/first-department-wildly-wrong/ [https://perma.cc/6RSP-5FFB] (accessed Apr. 30, 2019).

[94] *Byrn*, 286 N.E.2d at 889.

[95] *Id.*

[96] *See infra* Section II.C. (discussing the New York Pet Trust Statute, which grants domestic or pet animals the rights of trust beneficiaries and its implications for personhood).

G. Judge Fahey's Court of Appeals Concurrence in Tommy III

In 2015, the NhRP sought further review of both *Tommy I* and *Presti* by the court of appeals, which unanimously declined to hear either.[97] This came as no surprise, as that court hears only about 5% of the appeals brought to it.[98] One judge who voted not to hear either appeal was Eugene M. Fahey, who had sat in the fourth department at the time *Presti* was decided, though he did not participated in the decision. He would come publicly to regret his vote.

In 2018, the NhRP sought further review of *Tommy II* in the court of appeals. In May 2018, that request was denied.[99] But this time Judge Fahey issued a separate opinion and thereby became the first U.S. high court judge to opine on the merits of the NhRP's arguments.[100] He said that both the third department in *Tommy I* and the first department in *Tommy II* had been wrongly decided.[101] In harmony with the general theory of legal personhood, the authority of *Byrn*, and the public policy implicit in the Pet Trust Statute, Judge Fahey explicitly declared that the ability of an entity to bear duties and responsibilities is irrelevant to her ability to have rights:

> Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child . . . or a parent suffering from dementia[.] . . . In short, being a "moral agent" who can freely choose to act as morality requires is not a necessary condition of being a "moral patient" who can be wronged and may have the right to redress wrongs.[102]

Unlike the decision in *Tommy I,* Judge Fahey's opinion is faithful to *Byrn*'s teaching that by "according legal personality to a thing the law affords it the rights and privileges"—not necessarily the duties—"of a legal person."[103] Consistent with both *Byrn* and the New York Pet Trust Statute, Judge Fahey correctly criticized "the [first department's] conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief" because it "is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species."[104] The question, Judge Fahey said, is not "whether a chimpanzee has the same rights and duties as a human being, but in-

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97 People *ex rel*. Nonhuman Rights Project, Inc. v. Lavery, No. 2015-293 2015 WL 5125518 (N.Y. Sept. 1, 2015); Nonhuman Rights Project, Inc. *ex rel*. Kiko v. Presti, No. 2015-464, 2015 WL 5125507 (N.Y. Sept. 1, 2015).

98 *See* N.Y. Court of Appeals, 2017 Annual Report of the Clerk of the Court, app. 7 (2017), http://nycourts.gov/ctapps/news/annrpt/AnnRpt2017.pdf [https://perma.cc/PN2G-HUWN] (accessed Apr. 20, 2019) (indicating an average of 4.8% of motions for leave to Appeal were granted from 2013 to 2017).

99 *Tommy III*, 100 N.E.3d at 846.

100 *Id.* at 846 (Fahey, J., concurring).

101 *Id.* at 848–49.

102 *Id.* at 847.

103 *Id*.; *Byrn*, 286 N.E.2d at 889.

104 *Tommy III*, 100 N.E.3d at 847 (Fahey, J., concurring).

stead whether he or she has the right to liberty protected by habeas corpus."[105] He added that "amici law professors Laurence H. Tribe, Justin Marceau, and Samuel Wiseman question [the first department's] assumption."[106] He 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."[107]

H. The Fourth Department's Decision in People v. Graves

One month after Judge Fahey's opinion, the fourth department decided *People v. Graves*, where a man was charged with "damaging the property of a person," for vandalizing automobiles at an auto dealership.[108] Graves argued that 'person' could only have referred to a human being.[109] The court rejected this argument, as it is "common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals."[110] The first proposition followed inescapably from the second. *Graves* not only cited *Presti* in support of its position, but *Byrn*, specifically quoting the proposition that "personhood is 'not a question of biological or "natural" correspondence.'"[111] *Graves* was thus in step with the centuries old Anglo-American personhood jurisprudence, with *Byrn,* and with the public policy implicit in the New York Pet Trust Statute.

Graves is of particular interest, as the fourth department decided it just a few months after it decided *In re Ruth*. In *Ruth,* the court said the family court lacked authority to send a cat to a foster home as nonhuman animals are property and the family court lacks jurisdiction over property matters.[112] But there is no conflict between *Graves*' recognition that "personhood can and does sometimes attach to nonhuman entities like . . . animals," for some purposes, and *Ruth*'s recognition of the property status of nonhuman animals for other purposes.[113] Recall that a person has the *capacity* for legal rights, while a thing lacks that capacity.[114] It is therefore possible for a person to possess the right to bodily liberty protected by common law habeas corpus or have the rights of a trust beneficiary under a state's Pet Trust Statute, yet lack the right not to be considered property.

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105 *Id.*

106 *Id.*

107 *Id.* at 509.

108 *Graves*, 78 N.Y.S.3d at 613, 616.

109 *Id.* at 616–17.

110 *Id.* at 617 (citations omitted).

111 *Id.* (citing *Byrn*, 286 N.E.2d at 887).

112 *Matter of Ruth*, 72 N.Y.S.3d 694, 696 (2018).

113 *Graves*, 78 N.Y.S.3d at 617.

114 SALMOND, *supra* note 7, at 299 ("So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties.").

As explained in Birks' treatise, an "entity which has been said by . . . the courts to be capable of enforcing a particular right, or of owing a particular duty, can properly be described as a person with that particular capacity," and that "it can be easy to forget the qualifier."[115] *In re Ruth* was merely commenting on the particular capacity of animals to obtain a specific right in family court. On the other hand, a New York habeas corpus case on behalf of a nonhuman animal—such as an elephant or a chimpanzee—concerns the particular capacity of an extraordinary, cognitively complex, autonomous being to obtain a completely different right; the right to bodily liberty protected by the common law writ of habeas corpus, in the Supreme Court.

I. The Orleans Supreme Court in Happy's Case

On November 16, 2018, the Orleans County Supreme Court issued the English-speaking world's second habeas corpus order on behalf of a nonhuman animal, this time an order to show cause under New York's habeas corpus statute.[116] This nonhuman animal was Happy, a 47-year-old Asian elephant who has been imprisoned in the Bronx Zoo for almost forty years.[117]

J. The Law of the Personhood of Nonhuman Animals in New York Today

Today, a New York State Court faced with the argument that a nonhuman animal is a person deserving of one or more legal rights must choose one from two sets of decisions. First, the court may follow the decision of the court of appeals in *Byrn,* the fourth department in *Graves*, and the Legislature's public policy that nonhuman animals may be legal persons in New York, irrespective of whether they can bear duties, as set forth in the New York Pet Trust Statute. Second, the court could follow the decision of the third department in *Tommy I* that only entities able to bear rights and duties can be legal persons for any purpose, and that of its epigone, the first department in *Tommy II* that only humans can be legal persons, despite the fact that they conflict both with *Byrn* and with New York public policy as set forth in the New York Pet Trust statute.

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115 ENGLISH PRIVATE LAW, *supra* note 2727, § 3.24.

116 Lauren Choplin, *World's First Habeas Corpus Order Issued On Behalf Of An Elephant*, NONHUMAN RIGHTS BLOG (Nov. 19, 2018), https://www.nonhumanrights.org/blog/first-habeas-corpus-order-happy/ [https://perma.cc/XDH5-ZD4L] (accessed Apr. 20, 2019); Order to Show Cause, The Nonhuman Rights Project, Inc., *In re* Happy v. Breheny, No. 18-45164 (N.Y. Sup. Ct. 2018).

117 Choplin, *supra* note 116.

III. THE STRUGGLE TO OBTAIN LEGAL RIGHTS FOR ELEPHANTS IN CONNECTICUT

A. The Litchfield Superior Court in Beulah, Minnie, and Karen's First Case

The Nonhuman Rights Project (NhRP) filed its first Connecticut habeas corpus petition on behalf of three female elephants who the Commerford Zoo had imprisoned for decades and forced to work in a traveling circus.[118] Pursuant to Connecticut Practice Book §23-24(a), a Connecticut superior court must issue a writ of habeas corpus upon request unless the court lacks jurisdiction, the petition is wholly frivolous on its face, or the relief sought is not available.[119] The superior court refused to issue the writ under Practice Book § 3-24(a)(1) on the grounds that the NhRP lacked standing and, in the alternative, under § 23-24(a)(2), that the Petition was "wholly frivolous on its face as a matter of law" because the issues had never been litigated before.[120]

NhRP filed its appeal in the Connecticut Appellate Court.[121] The NhRP argues that the trial court disregarded a Connecticut Supreme Court case that permitted an abolitionist stranger to seek habeas corpus relief on behalf of a slave, that it erroneously applied federal standing requirements under Article III of the United States Constitution that apply to inmates, and not to one imprisoned by a private person, to the petitioner instead of traditional Connecticut common law third party standing requirement. Finally, that the court erroneously denied the NhRP's motion to amend its petition.[122] The brief further argues that the case cannot be frivolous as a matter of law, as evidenced by the number of courts that have issued writs of habeas corpus on behalf of nonhuman animals in the United States and abroad. Additionally, courts have determined that nonhuman animals possess legal rights, and have opined that nonhuman animals are not things, but likely persons, because the NhRP's arguments have been the subject of over one hundred books and law review articles that discuss their merits, and because novel cases generally cannot be deemed frivolous.[123]

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118 *Clients, Beulah, Karen, Minnie (Elephants)*, NONHUMAN RIGHTS PROJECT https://www.nonhumanrights.org/clients-beulah-karen-minnie/ [https://perma.cc/M4LA-NWVF] (accessed Apr. 20, 2019).

119 CONNECTICUT PRACTICE BOOK § 23-24(a), 278 (2019).

120 Verified Petition for a Common Law Writ of Habeas Corpus, Nonhuman Rights Project, Inc. *ex rel*. Beulah, Minnie and Karen v. R. W. Commerford & Sons, Inc. (*Commerford I*), 2017 Conn. Super. LEXIS 5181 (No. LLI-CV17-5009822-S) (Nov. 13, 2017).

121 Memorandum of Law in Support of Motion to Reargue and for Leave to Amend the Petition at 4 *Commerford I*, 2017 Conn. Super. LEXIS 5181 (No. LLI-CV17-5009822-S).

122 *Id.* at 4–5.

123 *Id.* at 8.

B. The Litchfield Superior Court in Beulah, Minnie, and Karen's Second Case

On June 7, 2018, the NhRP filed a second habeas corpus case on behalf of Beulah, Minnie, and Karen, this time in the Superior Court for the Judicial District of Tolland at Rockland.[124] That court transferred the case to Litchfield County Superior Court.[125] After the NhRP moved for the court to decide the case after seven months, the court dismissed the case on February 13, 2019 on the ground that the case was an improper successive petition. An appeal is pending.[126]

C. The Connecticut Pet Trust Statute

Connecticut *expressly* allows nonhuman animals to be trust "beneficiaries."[127] The first part of the statute makes clear:

> A testamentary or inter vivos trust may be created to provide for the care of an animal or animals alive during the settlor's or testator's lifetime. The trust shall terminate upon the death of the last surviving animal. A trust created pursuant to this section shall designate a trust protector in the trust instrument whose sole duty *shall be to act on behalf of the animal* or animals provided for in the trust instrument. A trust protector shall be replaced in the same manner as a trustee under section 45a-474.[128]

Moreover, "[t]rust property not required for its intended use . . . shall be distributed . . . to the *remainder beneficiaries* identified in the trust instrument . . ."[129] This statute thereby acknowledges these nonhuman animals as 'persons' capable of possessing legal rights.[130]

The legislative history of § 45a-489a fully supports the notion that the legislature intended to make nonhuman animals the beneficiaries, and thus persons, in the same way humans can be beneficiaries. Senator McDonald explained that:

> [U]nder this legislation — and this is a strike-all amendment — someone would be able to create such an inter vivos trust for the benefit of one or more animals and would generally follow the ordinary provisions of trust law. However, there is a unique feature of this legislation that is worthy of note, and that is that when such a trust document would be prepared, it

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124 Verified Petition for a Common Law Writ of Habeas Corpus, *supra* note 120.

125 Order 436946, Nonhuman Rights Project, Inc. On Behalf of Beulah, Minnie, and Karen v. R. W. Commerford & Sons, Inc., No. TTD-CV18-5010280-S (Tolland Judicial District 2018).

126 Beuhlah, Minnie and Karen's case has developed since the publication of this article *see* https://www.nonhumanrights.org/ for details and updates.

127 CONN. GEN. STAT. § 45a-489a (2018). "Section 45a-489a of the Connecticut General Statutes allows for the creation of enforceable trusts for pets, provided certain requirements are met. RALPH H. FOLSOM & LAURA WEINTRAUB BECK, DRAFTING TRUSTS IN CONN. § 11a Appendix B (2d ed. 2018).

128 CONN. GEN. STAT. § 45a-489a (a) (emphasis added).

129 *Id*. at § 45a-489a (g).

130 See also Kate McEvoy, "§ 2:16. Pet trusts," 20 Conn. Prac., Conn. Elder Law § 2:16 (2014 ed.). ("the trust document must designate a trust protector to act on behalf of the beneficiary animal(s)") (emphasis added).

> would require that both a trustee be named as well as a trust protector. The notion of a trust protector is one that is acknowledged and recognized in our common law and would essentially be an individual named in the trust document who would be charged with responsibility for ensuring that the trustee was properly discharging his or her responsibilities under the trust.[131]

Senator Frantz opined:

> In the amendment, you call for the trust protector to provide services to the animal. It begs the question that certainly I have, which is there's a wide range of levels of standards of care, and I want to make sure that we aren't getting too carried away, so for legislative intent purposes, can you give us a few phrases on what level of care you had in mind in this particular bill?[132]

Senator McDonald answered as follows:

> Well, thank you, Mr. President. The role of a trustee and of a trust protector is well defined in the law and is a *fiduciary relationship* which requires the fiduciary to put the interests of the individual *or, in this case, the animal* over their own personal interests. It is the highest standard of responsibility under the law.[133]

Senator Frantz then remarked:

> [G]iven that there are errors, testator's errors, there could be *potential beneficiaries* given special circumstances, I just want to be sure that we're talking about the *same levels that would apply to those of us with two legs, regardless of whether we have four or wings or spears on our heads, or whatever*.[134]

Senator McDonald responded:

> Yes, the general principles of trust law would apply. This was merely creating a separate framework to deal with the situation of *animals as beneficiaries of a trust*, but the legal responsibilities of the trustee would be very familiar to our courts.[135]

Senator Frantz concluded: "Senator McDonald. It's a great amendment and a great bill, and I now sit in favor of it."[136] Senator Boucher chimed in, adding: "Thank you, Mr. President. Mr. President, I rise in strong support of this amendment . . . Many Connecticut residents invest a great deal of time and care for their pets and consider them *like their human loved ones*."[137] Senator Kissel also approved, stating that "the creation of a protector is novel, and I think it's an ingenious idea,

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[131] Connecticut General Assembly, Senate Session Transcript at 13–14 (May 28, 2009) (emphasis added).
[132] *Id*. at 26.
[133] *Id*. at 26–27 (emphasis added).
[134] *Id*. at 27 (emphasis added).
[135] *Id*. (emphasis added).
[136] *Id*.
[137] *Id*. (emphasis added).

certainly with founding in our common law[.]"[138] By allowing animals to be trust beneficiaries able to own the trust corpus, Connecticut recognizes these nonhuman animals as "persons" with the capacity for legal rights.[139] Beulah, Minnie, and Karen are beneficiaries of an *inter vivos* trust created pursuant to § 45a-489a for the purpose of their care and maintenance once they are transferred. Consequently, they are "persons" under that statute, as only "persons" may be trust beneficiaries.[140]

IV. CATEGORIZING THE JUDICIAL RESPONSES

For years, the Nonhuman Rights Project (NhRP) has prepared to litigate its nonhuman civil rights cases by studying the fundamental values and principles that courts of a potential target jurisdiction claim constitute justice. These values include *liberty*. Nearly every jurisdiction embraces the paramount importance of autonomy: liberty to freely choose how to live one's life. For example, the New York Court of Appeals, referring to the right to make decisions about one's own medical treatment, wrote:

> In our system of government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires.[141]

These judicial values and principles also include multiple senses of *equality*. Broadly, equality as applied to the NhRP's work means that one is entitled to a legal right because she is similar to someone who holds that right in some relevant way.[142] A petitioner seeking to prevent a respondent from illegally holding a chimpanzee or elephant captive may argue that the relevant similarity between a chimpanzee and a human being, with respect to whether the chimpanzee may legally be held captive, is autonomy. The captor may argue that the relevant dissimilarity is species in the same way that race, gender, heterosexuality, and other biological differences were once employed to deprive others of their rights.

But equality can mean other things. In *Romer v. Evans,* the United States Supreme Court struck down Amendment 2 of the Colo-

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138 *Id*. (emphasis added).

139 Connecticut's statute is broader than most states' animal trust statutes, as Connecticut's permits a trust to be created for any animal. In responding to a question by Senator Kissel as to its scope, Senator McDonald stressed that the statute: "does not distinguish what types of animals could be part of such an inter vivos trust." *Id*.

140 *See* New York E. Annual Conference of Methodist Church v. Seymour, 151 Conn. 517, 520 (1964); *Gilman*, 12 Abb. N. Cas. at 338 (N.Y. Super. 1883) ("Beneficiaries may be natural or artificial persons, but they must be persons . . . In general, any person who is capable in law of taking an interest in property, may, to the extent of his legal capacity, and no further, become entitled to the benefits of the trust."),

141 Rivers v. Katz, 495 N.E.2d 337, 341 (N.Y. 1986).

142 *Equal Protection*, BLACK'S LAW DICTIONARY (10th ed. 2014).

rado Constitution that repealed all existing anti-discrimination laws based upon sexual orientation.[143] The Court said "it will uphold a law that neither burdens a fundamental right nor targets a suspect class so long as the legislative classification bears a rational relation to some independent and legitimate legislative end."[144] However a classification that employs a single trait to deny a class protection across the board was "at once too narrow and too broad, identifying persons by a single trait and then denying them the possibility of protection across the board."[145] The resulting "disqualification of a class of persons from the right to [seek] specific protection from the law is unprecedented" in our jurisprudence.[146] A federal appellate court would later conclude that *Romer* had found that the Colorado constitutional amendment was "so obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violated basic equal protection values."[147] To win, the NhRP must persuade judges that the values and principles the court says it believes in compels the recognition of the personhood and fundamental legal rights of our nonhuman animal petitioners, as a matter of liberty, equality, or both. For example, the NhRP argues that the possession of 'autonomy' is a sufficient, though not a necessary, condition for personhood and the fundamental right to bodily liberty both as a matter of liberty and quality.[148] This leaves judges with four responses.

'Evenhanded Judges' fairly apply their fundamental values and principles of justice to the claims of nonhuman animals. This occurred in Judge Fahey's decision in *Tommy III*, in the fourth department's *Graves* decision, and to a degree in the *Stanley* and *Happy* cases.

'Temporizing Judges' deny that liberty and equality constitute justice in their jurisdictions. While the NhRP cannot predict what fundamental values and principles a jurisdiction will state constitute justice, it is confident that none exist that would rationally and non-arbitrarily entitle only humans to legal rights and to be legal persons. This response would allow the NhRP to file new lawsuits that invoke the correct values and principles. To date this has not happened.

'Implicitly Biased Judges' undermine their own fundamental values and principles of justice by grounding their decisions upon implicit personal bias that causes them to enact "prejudice in the form of law."[149]

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143 Romer v. Evans, 517 U.S. 620, 624, 636 (1996).

144 *Id.* at 621.

145 *Id.*

146 *Id.*

147 Equal. Found. v. City of Cincinnati, 128 F.3d 289, 297 (6th Cir. 1997).

148 Memorandum of Law in Support of Motion for Permission to Appeal to The Court of Appeals at 24–25, Nonhuman Rights Project, Inc., *ex rel*. v. Lavery (No. 162358/15) and Nonhuman Rights Project, Inc., *ex rel*. Kiko v. Presti (No. 150149/16).

149 *See* Leon R. Yankwich*, Social Attitudes as Reflected in Early California Law*, 10 HASTINGS L. J. 250, 257 (1959) (explaining how decisions may be made through bias instead of law).

> Present judges have been raised in a culture that pervasively views all nonhuman animals as "things." As are most of their fellow citizens, most judges are daily and routinely involved in the widespread exploitation of nonhuman animals, eating them, wearing them, hunting them, and engaging in other of the numerous exploitive ways that the culture has long accepted. When thinking about humans, different clusters of neurons are subconsciously triggered depending upon the degree to which one identifies with the subject. Imagine how differently a judge is likely to view even such a close relative to humans as a chimpanzee.[150]

Many judges are therefore likely and unconsciously to be implicitly biased against nonhuman animals, just as they are, like most, likely to be biased about race, gender, sexuality, religion, weight, age, and ethnicity.[151] This is because "our minds have been shaped by the culture around us. In fact they have been invaded by it. . . . Think, for example, about a judge. She must routinely make decisions about other people, some similar to herself, others quite different. How can she take into account the way in which her judgment may be affected by the different neural processes . . . ?"[152] Implicit biases[153] can be so powerful that people's decisions to uphold the existing social hierarchy may unconsciously enact a "stereotype tax" against their own self-interests.[154]

These judges bypass their own most fundamental values and principles of justice to insist, *ad hoc*, that they simply do not apply to chim-

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150 Steven M. Wise, *Introduction to Animal Law Book*, 67 SYRACUSE L. REV. 7, 13–14 (2017).

151 *See generally* JENNIFER EBERHARDT, BIASED – UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES HOW WE THINK, SEE, AND DO (2019) (discussing what factors are considered in implicit and explicit bias); Terry Carter, *ABA Annual Meeting: Implicit bias is a challenge even for judges*, ABA J. (Aug. 5, 2016) http://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges [https://perma.cc/SD9A-D3EC] (accessed Apr. 30, 2019); *see generally Implicit Association Test*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/selectatest.html [https://perma.cc/K4KR-23DH] (accessed Apr. 30, 2019) (providing Implicit Association Tests for the public to take online).

152 MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT – HIDDEN BIASES OF GOOD PEOPLE 98, 138–39 (2014).

153 Two recent examples of implicit judicial bias occurred in Italian courts. One judicial panel sharply reduced the sentence of a man convicted of stabbing his wife to death because of the killer's "anger and desperation [and] profound disappointment and resentment" over his wife's relationship with another man, while a second panel doubted a woman's story of being raped because the judges believed the victim was 'too masculine' to be attractive enough. All judges in both panels were female. Gaia Pianigiani, *A Sexism Storm Over Italy's Courts, With Female Judges at Its Center*, N.Y. TIMES (Mar. 18, 2019), https://www.nytimes.com/2019/03/18/world/europe/italy-sexism-courts.html [https://perma.cc/SDW6-CSPQ] (accessed Apr. 20, 2019).

154 BANAJI & GREENWALD, *supra* note 138, at 117–18 *citing* Dolly Chugh, *Societal and Managerial Implications of Implicit Social Cognition: Why Milliseconds Matter*, 17 SOCIAL JUST. RES. 203, 215 (2004); *see also The Price of Prejudice*, ECONOMIST (Jan. 17, 2009), https://www.economist.com/science-and-technology/2009/01/15/the-price-of-prejudice [https://perma.cc/7GBM-A69X] (accessed Apr. 20, 2019) (defining 'stereotype tax' as "the price that the person doing the stereotyping pays for his preconceived notions").

panzees or to nonhuman animals. Personhood and rights, they say, without reasoned explanation or support, apply only to human beings for no other reason than they are human beings.[155] Because, as Martin Luther King, Jr. noted, "[i]njustice anywhere is a threat to justice everywhere,"[156] this *ad hoc* undermining of the rationale for the fundamental rights of nonhuman animals inevitably undermines any rationale for fundamental human rights. Decisions motivated by explicit biases that deprive all nonhuman animals of personhood and legal rights are merely the latest examples of American biased judging. American judges have long, and not infrequently, passed through periods in which their explicit biases have caused them to undermine their own fundamental values and principles, rather than acknowledge their application to those who have long been excluded from justice.

Thus, American judges once limited legal personhood and legal rights to white people and refused to grant them to nonwhite people, especially black people. The North Carolina Supreme Court explained in 1829 that

> The end [of slavery] is the profit of the master . . . such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect.[157]

The acme of implicitly biased American judging was the decision of the United States Supreme Court in the infamous *Dred Scott v. Sandford* case, which was "[h]ands down the worst Supreme Court decision ever."[158] In *Dred Scott,* Chief Justice Taney attempted to rely on a Western history (and in doing so showed his own deeply held racism) that referred to blacks as:

> [B]eings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.[159]

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155 *See* Memorandum of Law *supra* note 134, at 40 (showing that some judges only consider biology in a factor of personhood).

156 Martin Luther King Jr., *Letter from Birmingham Jail* (Aug. 1963), https://web.cn.edu/kwheeler/documents/Letter_Birmingham_Jail.pdf [https://perma.cc/ZN6D-VWB5] (accessed Apr. 20, 2019).

157 State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829).

158 Casey C. Sullivan, Esq., *13 Worst Supreme Court Decisions of All Time*, FINDLAW: U.S. SUP. CT. (Oct. 14, 2015), https://blogs.findlaw.com/supremecourt/2015/10/13-worst-supreme-court-decisions-of-all-time.html [https://perma.cc/24NG-R4SD] (accessed Apr. 20, 2019).

159 Scott v. Sandford*,* 60 U.S. 393, 407 (1857). Taney "use[d]" the *Dred Scott* case to vindicate his extreme views at length and graft them authoritatively onto American constitutional law." DON E. FEHRENBACHER, THE DRED SCOTT CASE – ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 340 (1978). "As 'historical narrative' (Taney's) statement was a gross perversion of the facts." *Id.* at 349.

The biographer of the *Dred Scott* case wrote that Taney's opinion:

> was written with an emotional commitment so intense that it made perception and logic utterly subservient. The extraordinary cumulation of error, inconsistence, and misrepresentation, dispensed with such pontifical self-assurance, becomes more understandable with the realization that the opinion was essentially visceral in origin – that law and history were distorted to serve a passionate purpose. Taney's real commitment, one must also emphasize, was not to slavery itself, for which he had no great affection, but rather to southern life and values, which seemed organically linked to the peculiar institution and unpreservable without it. He uses the Dred Scott case to reinforce the institution of slavery at every possible point of attack . . . .[160]

The California Supreme Court once came close to *Dred Scott* when it refused to grant certain important legal rights to Chinese people, calling them "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown . . . ."[161]

The United States Supreme Court limited the legal right to have sex to heterosexuals.[162] It allowed thousands of American citizens to be interned in camps solely because they were of Japanese descent.[163] Courts once limited personhood to men and refused to grant equal rights to women because they were women. For example, in 1875, Miss Lavinia Goodell sought admission to the bar of the State of Wisconsin.[164] The Wisconsin Supreme Court refused her request on the ground she was, alas, a woman.[165] The Court Stated:

> The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it.[166]

That court appeared oblivious to the irony of its own footnote that Goodell had actually written the appellate argument her lawyer presented.[167] It concluded that, "[i]f, as counsel threatened, these things are to come, we will take no voluntary part in bringing them about."[168]

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160 FEHRENBACHER, *supra* note 159, at 559.

161 People v. Hall, 4 Cal. 399, 405 (1854).

162 *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that Georgia's sodomy statute did not violate fundamental rights).

163 *See* Korematsu v. United States, 323 U.S. 214 (1944) (affirming the conviction of a man of Japanese ancestry who challenged the unjust law by remaining outside of the internment camp).

164 *In re* Goodell, 39 Wis. 232 (1875).

165 *Id.* at 246.

166 *Id.* at 245.

167 *Id.* at 232, n.a1.

168 *Id.* at 246.

Faced with the NhRP's claim that imprisoned autonomous beings such as chimpanzees are entitled to the right to bodily liberty protected by habeas corpus, some courts have dismissed cases on grounds that would not allow chimpanzees that right, or any rights, even if they too wrote their own appellate argument, as shall be discussed. The *Tommy I* and *Tommy II* decisions are examples. However, the NhRP's long-term strategy assumes that fair-minded judges can be consistently exposed to compelling expert evidence of a chimpanzee's complex cognition and autonomy. This, coupled with legal arguments derived from values and principles the judges themselves espouse, will cause the judges to struggle in good faith to overcome their implicit biases and arrive at the legally, historically, politically, and morally correct decision. The NhRP hopes these judges will decide that autonomous nonhuman animals deserve those rights that protect their fundamental interests.

Finally, 'Deflecting Judges' are judges who do not wish to decide whether nonhuman animals are persons. They may dismiss cases on procedural points that allow them to avoid reaching the merits of the NhRP's personhood claims. In doing so, these judges sometimes ignore their own rules or refuse to provide adequate explanations for their rulings. Such cases are illustrated first, by the *Stanley* court's claim that it was bound by the ruling in *Tommy I*, when the court was actually bound by the *Byrn* decision. Second by the the *Presti* court's statement that the NhRP is merely "an organization seeking better treatment and housing of, inter alia, nonhuman primates," that was not entitled to habeas corpus because it was merely seeking to change the conditions of the chimpanzees' confinement, rather than "seek[ing] Kiko's immediate release, [or] alleg[ing] that Kiko's continued detention is unlawful," when that was the entire subject of the NhRP's petition.[169] Lastly, by the decision of the court in *Commerford I* to refuse to issue a writ of habeas corpus because the NhRP failed to meet federal, rather than Connecticut, standing requirements and found the petition frivolous on its face as a matter of law because no one had brought such a petition in Connecticut before.[170] A clear example emanated from the New York State Supreme Court, Appellate Division,

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[169] *Presti*, 999 N.Y.S.2d at 653; *cf. Tommy II*, 54 N.Y.S.3d at 393–94 (stating NhRP "is a Massachusetts nonprofit corporation whose stated mission is 'to change the common-law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal rights, to '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' to certain fundamental rights which include entitlement to habeas relief"); *Stanley*, 16 N.Y.S.3d at 900 ("Petitioner is a non-profit organization with a mission to 'change the common law status of at least some nonhuman animals from mere things,' which lack the capacity to possess any legal rights, to '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.").

[170] *Commerford I*, 2017 Conn. Super. Ct. LEXIS 5181, at *1, 14–15.

Second Judicial Department in 2014 when it took the extraordinary step of summarily and erroneously dismissing the NhRP's appeal of Hercules and Leo's dismissal without allowing the NhRP to file a brief or argue on the ground that the NhRP had no right to appeal.[171] While the Commentary to CPLR 7001, a section of Article 70, which regulates the use of habeas corpus, noted that "[t]he Second Department seems to have overlooked CPLR 7011" in dismissing the NhRP's appeal. The court affirmed its mistake even after the NhRP pointed out CPLR 7011 gave it the absolute right to appeal.[172]

However, the NhRP's strategy, again, is grounded upon the assumption that fair-minded judges can be exposed to expert evidence, mainstream legal arguments that derive from the values that the judges themselves espouse both inside and outside the courtroom. With this, especially when these facts and legal arguments are frequently validated by third parties whom they respect, we assume the judges would struggle in good faith to overcome any implicit bias to arrive at the decision that at least some nonhuman animals deserve legal personhood. This is precisely what occurred in *Tommy III*, as Judge Fahey wrote:

> In the interval since we first denied leave to the Nonhuman Rights Project (citation omitted), 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.[173]

V. CONCLUSION

I concluded in the article I wrote for that first issue of *Animal Law* twenty-five years ago that:

> The heart of this curious and imaginary world of the Ancients lies beating within the breasts of common law judges, animating the common law that regulates the modern relationships between human and nonhuman animals. Stagnant and dead as the Great Chain from which it derived, it has fixed within the living common law . . . this Aristotelian-Stoic-Biblical un-

171 Dismissal of Appeal, *Stanley*, 16 N.Y.S.3d 898 (No. 13-32098) (Apr. 3, 2014).

172 Vincent C. Alexander, Practice Commentary, N.Y. C.P.L.R. §7001 (McKinney 2017). In 2016 the First Department took the same action when the NhRP sought to appeal a judgment con concerning Kiko, the chimpanzee, then affirmed it. In response, the NhRP took the unusual, perhaps unique, step of seeking a writ of mandamus *against* the First Department *in* the First Department, which then allowed the appeal to proceed. *Client Kiko (Chimpanzee)*, NONHUMAN RIGHTS PROJECT https://www.nonhumanrights.org/client-kiko/ [https://perma.cc/WHT8-GSGA] (accessed Apr. 30, 2019).

173 *Tommy III*, 100 N.E.3d at 1059.

> derstanding of the relationship between human and nonhuman animals was codified by the Emperor Justinian in the sixth century, based largely on the writings of the great Roman jurists of the second and third centuries, who wrote in and about this imaginary physical world. Roman law passed into common law through the writings of, among others, Bracton, Britton, Fleta, Coke, Locke, Blackstone, Kent, and Holmes. "[T]he evidence of it is to be found in every book which has been written for the last five hundred years . . . we still repeat the reasoning of the Roman lawyers, empty as it is, to the present day." Its foundation has collapsed, yet its dead hand rules from the rubble. Simply knowing that is the first step towards its "deliberate reconsideration" and the recognition that some nonhuman animals may possess fundamental common law rights.[174]

Put another way: "The law that regulates animals remains essentially grounded upon a Cartesian ethology and a pre-Darwinian biology."[175]

Nothing of what I have written today could reasonably have been envisioned in 1995. What it took then, and what it takes today, is an unreasonable envisioning, firmly grounded in jurisprudence, science, and history, of the coming world in which many nonhuman animals will unthinkingly be seen as the subjects of justice. How that was done will be told in the 50th anniversary volume of *Animal Law*.

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[174] Wise, *supra* note 1, at 44, 45 (citing OLIVER WENDELL HOLMES, JR., THE COMMON LAW 7 (Mark deWolfe Howe. ed. 1963)).

[175] *Id.* at 45 (citing Steven M. Wise, *Of Farm Animals and Justice*, 3 PACE ENVTL L. REV. 191, 203 (1986)).