Fall 2017

Chimpanzees in Court: Limited Legal Personhood Recognition for Standing to Challenge Captivity and Abuse

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CHIMPANZEES IN COURT: LIMITED LEGAL PERSONHOOD RECOGNITION FOR STANDING TO CHALLENGE CAPTIVITY AND ABUSE

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INTRODUCTION

Just as we now look back on the past 40 years with some bewilderment—and embarrassment—that we were so slow to recognise the human rights of indigenous people, children, people with a disability, older people and others—it is intriguing to wonder whether our children will look back in 40 years and wonder how we possibly failed for so long to take animal rights seriously."[1]

The sentiment of Professor David Weisbrot above encapsulates the notion that living beings deserve the right to be free, self-ruling, and dignified. These values are important in the United States and are not subject to the voting booth.[2] Statutes, and even the United States Constitution, will evolve under the common law when the times requires it to do so.[3] Human beings, no matter their legal status, cannot be deprived of life and liberty notwithstanding past precedents.[4] Although the weight of

[1] DAVID WEISBROT, COMMENT, AUSTL. L. REFORM COMMISSION REFORM J. 1 (2007), HTTP://WWW.AUSTLII.EDU.AU/AU/JOURNALS/ALRCREFJL/2007/1.HTML

[2] Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713, 736 (1964) ("One's right to life, liberty, and property and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

[3] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that the denial of marriage licenses to same-sex couples violated the Fourteenth Amendment notwithstanding centuries of historical evidence reflecting the fact that marriage was always understood to be between a man and a women).

[4] *Id.*

history, tradition, and the United States Constitution may provide guidelines they do not represent boundaries and future generations may modify these principles in order to account for new understandings.[5] The recognition of injustice, whether to a human being, a slave, or non-human animals, is not a stagnant principle, and as new generations come to pass the need to rethink old habits will be their duty.[6]

Less than two centuries ago, the Supreme Court of the United States held, "the right of property in a [human] slave is distinctly and expressly affirmed in the Constitution."[7] The patently repugnant sense we now have when reading this infamous opinion is the consequence of moral, social, and legal changes in our country. These rudimentary, but essential, principles what principles is he referring to? Unclear have taken a slow evolutionary path in American law. The evolutionary process has taken centuries of legal arguments, confrontation and even war.[8] The recognition of humanity and dignity for living beings by the Supreme Court of the United States has paralleled our nation's contemporary ideas at the time.[9] It is also true, however, that such recognition has also benefited non-humans, such as corporations, to better comport with our economic ideology.[10]

We now find ourselves at the precipice of a new legal rights class expansion—animal legal status in its own right. The holders of legal rights are afforded the ability to (1) utilize the law to address injury done to them, (2) have the court acknowledge and take account of that injury, and (3) be the direct beneficiary of legal relief in court.[11] Rights-holders' interest is recognized and protected by the law.[12] Being a rights holder does not equate to "being human."[13] The scope of this expansion of rights, however, will be key to its general acceptance as a legitimate legal theory. The expansion

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[5] *See id.* ("History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.").

[6] *Id.* at 2598.

[7] Dred Scott v. Sandford, 60 U.S. 393, 451 (1856), *superseded* (1868).

[8] Obergefell, 135 S. Ct. at 2614.

[9] *See* Lawrence v. Texas, 539 U.S. 558 (2003) (holding that statutes criminalizing consensual acts of sodomy in private could no longer endure constitutional protection in light of the modern times).

[10] Lee Hall & Anthony Jon Waters, *From Property to Person: The Case of Evelyn Hart*, 11 SETON HALL CONST. L.J. 1 (2000).

[11] David Hambrick, *A legal Argument against Animals as Property, in* 55 PEOPLE, PROPERTY, OR PETS? (Marc D. Hauser, Fiery Cushman & Matthew Kamen eds. 2006).

[12] *Id.*

[13] *Id.* at 56.

must be narrow in scope and applicability in order to take account of the competing human interest at hand.

Philosophers and jurists alike recognize the balance that must be struck between the interests of humans versus the interest of non-human animals. They can provide ample social and ethical justification for the killing of animals for sustenance or for the purposes of protecting oneself from harm. As early as Eighteenth Century, however, scholars recognized that there is little to no justification for the unnecessary mistreatment, suffering, and abuse of animals, stating:

But is there any reason why we should be allowed to torment [non-human animals]? None that I can see. Are there any reasons why we should not be allowed to torment them? Yes, several. Calling people 'slaves' and giving them the legal status that the lower animals are given in England, for example—there was a time when that was the situation of a majority of the human species, and I grieve to say in many places that time is still with us. The day may come when the non-human part of the animal creation will acquire the rights that never could have been withheld from them except by the hand of tyranny . . .. Perhaps it will someday be recognized that the number of legs, the hairiness of the skin, or the possession of a tail are equally insufficient reasons for abandoning to the same fate a creature that can feel . . . The question is not Can they reason? or Can they talk? but Can they suffer?[14]

The observations of Jeremy Bentham bring us to the special case involving our closest living relative—the chimpanzee. Chimpanzees share almost ninety-nine percent of our genetic blueprint.[15] Chimpanzees and humans share common ancestors who roamed the earth four to eight billion years ago.[16] The similarities between chimpanzees and human beings, both physically and cognitively speaking, are striking.[17] The chimpanzee's brain is stimulated in the same areas and networks as the human brain when conducting acts related to preparation, foresight, episodic memory, and memories of first-person events.[18] Chimpanzees share similar brain asymmetry which evinces sophisticated communication.[19] They possess the

[14] Jeremy Bentham, PRINCIPLES OF MORALS AND LEGISLATION 162, 144 (1789).
[15] *Chimpanzee*, NAT'L GEOGRAPHIC (Nov. 11, 2015 9:35 PM), http://animals.nationalgeographic.com/animals/mammals/chimpanzee/.
[16] *Id.*
[17] *See* Memorandum of Law in Support of Petition for Habeas Corpus at 6, Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015) (No. 28) 2015 WL 1872095.
[18] *Id.* at 7.
[19] *Id.*

intellectual aptitude to understand sign language as well as other communicative gestures and vocalization.[20] A linguistic chimpanzee, named Nim Chimpsky, had a vocabulary of 125 signs that he used with stunning accuracy.[21] Chimpanzees' communication development mirrors that of a human child.[22] The similarities are quite profound.

Despite the biological and physiological resemblance to us, the laws of the United States relegate chimpanzees to the same legal category as a car, a sponge, and at one time, a human slave—legal property.[23] Indeed, our current legal framework in this respect labels most beings as either persons with rights or chattel, with no rights.[24] Although animals, as a whole, have not fared well in challenging the legal dichotomy of the traditional person-or-property grouping, there has been both subtle and remarkable progress for animal rights here and abroad. After 200 years, France, for example, amended its Civil Code to recognize animals as "living sentient beings" as opposed to the mere property of its owner.[25] New Zealand followed suit this past May in declaring animals as sentient beings.[26] Both Germany and Switzerland were early pioneers to the recognition of animals as more than property and entitled to rights.[27] Spain has gone even further with respect to great apes by passing landmark legislation to enshrine them with human rights.[28] The United States has also taken incremental steps to further protect and enhance the quality of life for our close relatives by effectively ending their compulsory role in research.[29] The U.S. Fish and Wildlife Service (FWS) recently published its final rule which eliminates the separation classification of captive and wild

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[20] *Id.*

[21] Tim Radford & Stephen Moss, *Family Matters*, THE GUARDIAN, (Nov. 11, 2015 9:30 PM), http://www.theguardian.com/science/2003/may/21/research.highereducation.

[22] *Id.*

[23] Lee Hall & Anthony Jon Waters, *From Property to Person: The Case of Evelyn Hart*, 11 Seton Hall CONST. L.J. 1, 2 (2000).

[24] *Id.*

[25] *Animals in France Finally Recognized as 'Living, Sentient Beings,'* RT (Nov. 11, 2015 9:35 PM), https://www.rt.com/news/227431-animals-sentient-furniture-parliament/.

[26] Sophine McIntyre, *Animals are now legally recognised as 'sentient' beings in New Zealand*, INDEPENDENT (Nov. 11, 2015 9:30 PM), http://www.independent.co.uk/news/world/australasia/animals-are-now-legally-recognised-as-sentient-beings-in-new-zealand-10256006.html.

[27] Kate Connolly, *German Animals Given Legal Rights*, THE GUARDIAN, (Nov. 11, 2015 9:30 PM) http://www.theguardian.com/world/2002/jun/22/germany.animalwelfare.

[28] Lee Glendinning, *Spanish Parliament Approves 'Human Rights' for Apes*, THE GUARDIAN, (Nov. 04, 2015 9:30 PM), http://www.theguardian.com/world/2008/jun/26/humanrights.animalwelfare.

[29] Wayne Pacelle, *At Long Last, Testing on Chimps to End in the United States – and the World*, THE HUMANE SOCIETY WAYNE PACELLE'S BLOG (Nov. 11, 2015 9:30 PM), http://blog.humanesociety.org/wayne/2015/09/testing-on-chimpanzees-ends.html.

chimpanzees under the ESA.[30] Effective as of September 14, 2015, the entire species, "wherever found," are now considered endangered and protected under the ESA.[31] This means that all activities involving the use chimpanzees will require a permit.[32]The issuance of a permit will be for scientific purposes only and the applicant must show that the purpose is to benefit chimpanzees in the wild or "enhance the propagation or survival of the affected species."[33] Although progress is slowing moving forward, the recent developments, such as the FWS rule change, still preserves the person-or-property legal dichotomy that has prevented chimpanzees from seeking relief in court.

The purpose of this article is not only to accentuate the correlative traits of close relatives but also urge the courts to formally recognize their legal status as something more than mere property. Ideally, an issue of this magnitude should be, and is best, addressed by the legislative branch. However, the courts have historically served as the ultimate safeguard in ensuring that the minorities are not oppressed or denied rights by the majority in power.[34]

Part I examines the current and historical utilization of common law to effectuate change in jurisdictions throughout the United States. Understanding common law and how it works will serve as the principal foundation for appreciating how it can be used to incrementally advance the legal status of chimpanzees.

Part II addresses the contemporary legal structure for animal law in court. The current Article III "standing" doctrine in relation to third-party plaintiffs seeking to protect non-human animals and the environment will be discussed in the first section. This section will also discuss the prudential standing doctrine and how it is affected by the citizen-suit provision in the Endangered Species Act. The next section will discuss the history of common law habeas corpus and the seminal case where it was utilized to give personhood status to a legal human property. The next section will discuss the modern common law habeas corpus structure and how it is currently interpreted in relation to its applicability to confined non-human animals. The following section examines why the courts are the appropriate branch to determine who is a legal person. The section will also address the constitutional approaches to personhood for captive non-human

[30] Endangered and Threatened Wildlife and Plants; Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34,500 (June 16, 2015) (to be codified at 50 C.F.R. pt. 17).
[31] *Id.*
[32] *Final Rule to List All Chimpanzees as Captive and Wild as Endangered Questions and Answers*, U.S. FISH AND WILDLIFE SERVICE (Nov. 20, 2015, 5:45 PM), http://www.fws.gov/home/feature/2015/pdfs/ChimpanzeeFinalRuleFAQs.pdf.
[33] *Id.*
[34] Brown v. Board of Education, 349 U.S. 294 (1955).

animals via the Thirteenth Amendment. The final subpart will discuss corporations and how the courts have been utilized to expand their rights as "legal persons." The discussion of corporations is dispositive to this paper because it is a clear illustration of how the determination of legal "persons" is not confined by biological constraints.

Part III offers a proposal to help advance protections for chimpanzees. It proposes that the courts' common law should be modified to comport with the existing moral and scientific standards to allow chimpanzees limited personhood status when challenging abuse and inhumane conditions in its place of captivity. It proposes a limited expansion of common law habeas corpus for chimpanzees in those circumstances. It also recommends a limited personhood expansion to allow chimpanzees to meet legal "standing" requirements so they can sue on their own behalf with counsel under the Endangered Species Act. The article concludes that these proposed reforms do not create a slippery slope problem requiring legal personhood protections to extend beyond this limited content.

I. THE EVOLUTION OF COMMON LAW AND ANIMAL PROPERTY STATUS

Common law throughout the United States has historically recognized the legal status of animals as tangible property.[35] Traditionally, the remedy for the intentional destruction or injury of an animal typically gave the *owner* an actionable right to seek damages for the loss of inanimate forms of property.[36] The Supreme Court of Idaho summed up this traditional view when it said:

"It is a long-held legal maxim that animals are tangible property and that intentional acts leading to the destruction or loss of such chattels give rise to a cause of action for conversion."[37] *This anachronistic common law view has hindered the advancement of animals as a whole, and it has also enabled courts to deny the importance animals have on the human psyche.*[38]

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[35] *See* Sentell v. New Orleans & Carrollton Railroad Co., 166 U.S. 698, 700 (1897); Parker v. Mise, 27 Ala. 480 (Ala. 1855); Kinsman v. State, 77 Ind. 132, 133 (Ind. 1881); Perry v. Phipps, 32 N.C. 259, 260 (N.C. 1849); Wheatley v. Harris, 36 Tenn. 468, 469 (Tn. 1857); McDerment v. Taft, 75 A. 276 (Vt. 1910).

[36] Meekins v. Simpson, 96 S.E. 894, 894 (N.C. 1918).

[37] Oppenheimer Industries, Inc. v. Johnson Cattle Co., 732 P.2d 661, 664 (Ind. 1986) (quoting Graham v. Smith, 100 Ga. 434, 28 S.E. 225 (Ga. 1897)).

[38] *See generally* Gluckman v. American Airlines, Inc., 844 F. Supp. 151, 163 (S.D.N.Y. 1994) (holding that a passenger could not recover emotional distress damages based upon loss of

U.S. common law is derived from the common law courts of England and its general principles have been recognized by state courts and the U.S. Supreme Court.[39] Some of our common law systems include the unwritten laws of England as well as laws created by courts through judicial interpretation and are wholly different from laws created by legislative process.[40] As the Supreme Court of Illinois succinctly stated in a recent case: "[c]ommon law is simply the body of law derived from judicial decisions rather than from statutes or constitutions."[41] Traditionally, common law has been utilized, modified and abandoned by our courts to help ensure our laws comport with societal change and to avoid injustice notwithstanding tradition and clear precedent to the contrary.[42] The Supreme Court of Pennsylvania emphasized the core understanding of common law's adaptability when it stated that "[G]eneral faithfulness to precedent is not sufficient justification to buttress judicial decisions proven wrong in principle or which are *unsuited to modern experience and which no longer adequately serve the interests of justice*. Common law permits adjustment and development in the law . . . ."[43]

Common law is a powerful mechanism for change in American law. Illustrations of its breadth and flexibility are exhaustive. There are countless cases from high courts throughout the United States changing laws through common law in many contexts including torts,[44] and in *Hoffman v. Jones*, the Florida Supreme Court held that the common law rule of contributory negligence, which had been in force in Florida since

property when her dog died after suffering a heat stroke in the cargo hold of airplane); *See also* Daughen v. Fox, 539 A.2d 858, 865 (Pa. 1988) ("Companionship is included in the concept of consortium, which is a right growing out of a marriage relationship . . . Under no circumstances, under the law of Pennsylvania, may there be recovery for loss of companionship due to the death of an animal") (citations omitted).

[39] *See* Wheaton v. Peters, 33 U.S. 591, 592-93 (1834) ("When the ancestors of the citizens of the United States migrated to this country, they brought with them, to a limited extent, the English common law, as part of their heritage."); Peery v. Fletcher, 182 P. 143, 146 (Or. 1919) (The common law, as it existed in England at the time of the settlement of the American colonies, has never been in force in all of its provisions in any colony or state of the United States.").

[40] Hogan v. State, 441 P.2d 620, 621 (Nev. 1968).

[41] Millennium Park Joint Venture, LLC v. Houlihan, 948 N.E.2d 1, 16 (Ill. 2010) (internal citations omitted).

[42] *See* Ontiveros v. Borak, 667 P.2d 200, 204 (Ariz. 1983) ("[T]he common law, which is judge-made and judge-applied, can and will be changed when changed conditions and circumstances establish that it is unjust or has become bad public policy."); *In re* Sandy Ridge Oil Co., Inc., 510 N.E.2d 667, 670 (Ind. 1987) ("[T]he common law of today is not a frozen mold of ancient ideas, but such law in active and dynamic and thus changes with the times and growth of society to meet its need."); Kline v. Ansell, 414 A.2d 929, 931 (Md. 1980) ("[I]t may also be changed by judicial decision if this Court is convinced that it has become unsound in the circumstances of modern life.").

[43] Tincher v. Omega Flex, Inc., 104 A.3d 328, 352 (Pa. 2014) (citations omitted) (emphasis added).

[44] *See* Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973).

1886, was outmoded in light of the new conditions and circumstances. Relying on common law, the court explained that "[w]hen grave doubt exists of a true common law doctrine . . . we may . . . exercise a 'broad discretion' taking 'into account the changes in our social and economic customs and present day conceptions of right and justice."[45] In the criminal law context, the Court of Appeals of Maryland in *Price v. State* held that the common law inconsistent verdict rule could no longer be justified or tolerated.[46] The court relied on the flexibility of common law when it stated that "[b]ecause of the inherent dynamism of the common law, we have consistently held that it is subject to judicial modification in light of [new] circumstances."[47] In the context of labor law, the Supreme Court of New Jersey held that the common law doctrine of "no work, no pay," which had been in force since 1859, no longer comported with modern-day labor jurisprudence.[48] The court detailed its ability, and at times its necessity, to change the common law by stating that common law must "remain in consonance with society's needs . . . and must, change when change is appropriate."[49] The court explained that neither the doctrine of *stare decisis* nor the weight of time is proper justification to perpetuate law that no longer conforms to contemporary standards.[50] The common thread in these illustrative examples is the premise that the high court of each state has the ability to shape common law jurisprudence to conform to contemporary standards.[51]

II. CONTEMPORARY LEGAL STRUCTURE FOR ANIMAL LAW IN COURT

A. *Article III Standing and Third-Party Limitations*

The current legal framework provides that in order for an individual to bring suit, the party must satisfy the threshold question of

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[45] *Id.* at 435.
[46] *See* Price v. State, 949 A.2d 619, 630 (Md. 2008).
[47] *Id.* at 627 (alteration in original) (internal citations omitted).
[48] *See* State v. International Federation of Professional & Technical Engineers, Local 195, 780 A.2d 525 (N.J. 2001).
[49] *Id.* at 534.
[50] *Id.* ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.") (internal quotations omitted) (citation omitted).
[51] *See generally* State v. Hutton, No. 14-0603, 2015 WL 3822814, at *13 (W. Va. June 16, 2015) (using common law power to modify the common law writ of errors coram nobis); State v. Picotte, 2003 WI 42, ¶ 5, 261 Wis. 2d 249, 254, 661 N.W.2d 381, 383 (abrogating the year-and-a-day rule); Borns ex rel. Gannon v. Voss, 2003 WY 74, ¶ 1, 70 P.3d 262, 264 (Wyo. 2003) (modifying tort duty with respects to dangerous dogs).

whether they have "standing" to satisfy the "Case and Controversy" requirement under Article III.[52] The "constitutional minimum[s]" require that the plaintiff meet the three elements: (1) the plaintiff must suffer an injury in fact that is concrete and particularized, actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged action of the defendant and not the result of some third party not before the court; and (3) it must be likely, rather than speculative, that the injury will be redressed by a favorable decision.[53]

1. Injury

Perhaps the largest obstacle for third-party plaintiffs to overcome is the injury element.[54] Moreover, the concreteness and particularity of the injury is even more so difficult.[55] This is because the question of injury only extends to the injury that the *person*—the one who is bringing the suit—is harmed.[56] Justice Stewart, in *Sierra Club v. Morton*, explained that "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be *himself* among the injured."[57]

In *Sierra Club v. Morton*, representatives of the Sierra Club brought suit under the Administrative Procedure Act against the Department of the Interior to prevent the development of a multi-million dollar complex comprising of hotels and restaurants in the Mineral King Valley.[58] The complaint alleged that the development would harm, "destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations."[59] It was the inaccessibility of the area that warranted the construction of roads and power lines.[60] The Sierra Club sought to preserve the quality of the valley by maintaining its remoteness and wilderness-like features.[61] The Court acknowledged that aesthetic and environmental well-being can be used as an element to establish 'injury in fact.'[62] Ultimately, however, the Court concluded that the Sierra Club did not have standing

[52] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
[53] *Id.* at 560-561.
[54] Stacey L. Gordon, *The Legal Rights of All Living Things: How Animal Law Can Extend the Environmental Movement's Quest for Legal Standing for Non-Human Animals* 214, *in* WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW? (Randall S. Abate ed., 2015).
[55] *Id.*
[56] *Id.*
[57] Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972) (emphasis added).
[58] *Id.* at 729-730.
[59] *Id.* at 734.
[60] Gordon, *supra* note 54, at 214.
[61] *Id.*
[62] *Sierra Club*, 405 U.S. at 734.

since it failed to allege that it or its members' activities or pastimes would be affected by the Disney development.[63]

In the non-human animal context, *Animal Legal Defense Fund v. Glickman*, provides a solid case example of how the aesthetic injury in observing animals live in inhumane conditions can satisfy the injury in-fact requirement.[64] The plaintiff, trained in wildlife rehabilitation and investigating complaints about the treatment of wildlife, began visiting the Long Island Game Farm Park and Zoo to assess the living condition of the animals in the facilities.[65] The plaintiff visited the facility at least nine times.[66] During his visits, the plaintiff witnessed a number of inhumane conditions.[67] The plaintiff witnessed the continued isolation of a Japanese Snow Macaque, Samantha, and a large male chimpanzee, Barney, which in turn made him upset since he knew that chimpanzees are very social animals.[68] The plaintiff also observed the fright and extreme agitation of squirrel monkeys being caged next to adult bears.[69] After several unsuccessful attempts to have the USDA rectify the inhumane psychological conditions, the plaintiff sued.[70] The court held that the plaintiff had in fact sustained an injury and had legal standing to bring his action into federal court.[71] The court highlighted a number of cases demonstrating that standing can be based on affronts to aesthetic interest and the showing of an actual animal death is not needed.[72] The court further reasoned that it would make no logical sense to suppose that people can only sustain aesthetic harm from government action that threatens to eliminate a species, and not action that allows animals to be in a constant state of suffering.[73]

2. Causation

The next element for legal standing requires the plaintiff to show that the injury sustained is "fairly traceable" to the acts of the defendant,

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[63] *Id.* at 735.
[64] *See* Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 431 (D.C. Cir. 1998) (en banc).
[65] *Id.* at 429.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.* at 430.
[70] *Id.*
[71] *Id.* at 431. ("Mr. Jurnove's allegations solidly establish injury in fact.").
[72] *Id.* at 437.
[73] Id. at 438.

and not the consequence of the independent act of an absent third party that is not currently before the court.[74]

Massachusetts v. EPA illustrates how even minor contributions to one's injury are enough to establish causation.[75] In that case, a collective group of private organizations and states sought review of the EPA's decision not to regulate greenhouse gas emissions.[76] Injury was found in the substantial loss of state owned coastal property caused by global warming.[77] The EPA did not argue the existence of a causal connection between manufactured greenhouse gas emissions and global warming.[78] Although the EPA did not dispute this issue, the dissent explained that since the global warming phenomenon was the result of a myriad of additional factors, including global greenhouse gas contributions, it makes the causal connection "far too speculative."[79]

The issue of causation is also addressed in *Animal Legal Defense Fund v. Glickman*.[80] The causation element was illuminated by the traceability of the Secretary of Agriculture's Animal Welfare Act (AWA) rules when a third party was in fact responsible for the animal's living condition that resulted in the plaintiff's injury.[81] The court sided with the plaintiff in finding causation where a government action *permitted* a third party's conduct that results in an injury, when the conduct would have been otherwise illegal.[82] It held that the USDA's failure to adopt the specific, minimum standards that the AWA requires allowed for the injury and regulation that is in accordance with the AWA would have prohibited the inhumane conditions and protected the plaintiff from injury.

3. Redressability

The last element requires it to be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[83] The *Massachusetts v. EPA* case illustrates that even a slight relief in the plaintiff's injury by simply slowing down the rate of harm will be sufficient

[74] *Defenders of Wildlife*, 504 U.S. at 560.
[75] *See* Massachusetts v. EPA, 549 U.S. 497 (2007).
[76] *Id.* at 513- 14.
[77] *Id.* at 522.
[78] *Id.* at 523.
[79] *Id.* at 543 (Robert's dissent).
[80] *Glickman*, 154 F.3d at 438 (D.C. Cir. 1998) (en banc).
[81] Gordon, *supra* note 54, at 219.
[82] *Glickman*, 154 F.3d at 442 (D.C. Cir. 1998) (en banc).
[83] *Defenders of Wildlife*, 504 U.S. at 561 (internal quotations omitted).

to satisfy the redressability requirement.[84] In that case, the plaintiffs alleged that the rise in sea levels, in which global-warming has been named the principal culprit, has and will continue to harm the State of Massachusetts.[85] The EPA argued that its refusal to regulate the _____ emissions contributed so trivially to the injury of the plaintiffs, especially in light of the large greenhouse gas contributions from foreign nations such as India and China.[86] The Court rejected the EPA's arguments in this respect finding that accepting that line of logic would "doom most challenges to regulatory action."[87] Although the Court conceded the EPA's assertion that any ruling would only have a minor impact on an issue as internationally driven as global warming, the Court responded by stating: "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury."[88]

In *Lujan*, however, the Court found flaws in the plaintiffs' challenge of, what it deemed "a more generalized Government action."[89] The Court reasoned that challenges to Government programs established to implement the legal duties that may run afoul of the law, rather than allegations claiming specified and identifiable violations, have no place in the federal jurisdictional purview.[90] A dispositive fact in this case was that the agencies funding the projects that were allegedly causing alleged harm to the plaintiffs were not parties to the suit.[91] To compound this issue, the Government also rejected the position that the Secretary of Interior had any legal authority to bind the funding agencies if there was a favorable ruling by the Court.[92] Also, the agencies funding the projects abroad provided less than 10% of the funding.[93] These facts proved fatal for the plaintiffs' redressability claim. The Court reasoned that the first two problematic facts made the plaintiffs' case not redressable because relief would require the respondents to terminate its project funding, which was not likely possible

[84] Massachusetts v. EPA, 549 U.S. 497, 525 (2007) ("While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it.").
[85] *Id.* at 526.
[86] *Id.*
[87] *Id.* at 524. ("Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.").
[88] *Id.* at 525. (quoting Larson v. Valente, 456 U.S. 228 (1982)) (Internal quotations omitted).

[89] *Defenders of Wildlife*, 504 U.S. at 568.
[90] *Id.* (quoting Allen v. Wright, 468 U.S. 737, 759-60 (1984).

[91] *Id.*
[92] *Id.* at 568-69.
[93] *Id.* at 569.

considering the Secretary's lack of control over the agencies actually funding the alleged injury.[94] The Court also concluded that the funding by the agencies so insignificant that "it is entirely conjectural whether the non-agency activity that affects respondents will be altered or affected by the agency activity they seek to achieve," thus eliminating the plaintiffs' standing claim.[95]

4. Prudential Standing and the Endangered Species Act's Citizen Suit Provision

Standing under Article III is the "irreducible constitutional minimum" plaintiffs must show to demonstrate jurisdiction of the court.[96] It is the core and unchanging part of the "case and controversy requirement."[97] Courts have created prudential standing as its own additional layer to the analysis and it is purely discretionary.[98] Under this added requirement, the courts will not adjudicate claims brought as "generalized grievances" shared by a large class and cases where a plaintiff is resting his or her claim to relief on the legal rights or interest of a third party.[99] This analysis generally applies when there is no statute granting the plaintiff the right to seek review by the court.[100] The Supreme Court requires a plaintiff show that his or her interest falls within the "zone of interest" protected by a statute from which the cause of action arises from.[101] Notwithstanding a plaintiff satisfying the Article III requirements, courts are permitted to decline to hear his or her case based on prudential limitations.[102] This judicially created requirement does have its limitations, however, and it will not be considered when Congress legislates expressly to negate it.[103]

"Citizen-suit provisions," as they are commonly known allow citizens to bring a cause of action under specific statutes.[104] These provisions have the effect of relieving plaintiffs from prudential standing requirements.[105] Citizen suit provisions are not automatic gateways into court because plaintiffs still must meet Article III standing requirements.[106]

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[94] *Id.* at 571.
[95] *Id.*
[96] *Defenders of Wildlife*, 504 U.S. at 560.
[97] *Id.*
[98] Gordon, *supra* note 54, at 222.
[99] Warth v. Seldin, 422 U.S. 490, 499, (1975).
[100] Gordon, *supra* note 54, at 222.
[101] *Id.*
[102] Katherine A. Burke, Comment, *Can We Stand for It? Amending the Endangered Species Act with an Animal-Suit Provision*, 75 U. COLO. L. REV. 633, 643 (2004).
[103] Bennett v. Spear, 520 U.S. 154, 163 (1997).
[104] Gordon, *supra* note 54, at 222.
[105] *Id.*
[106] *Id.*

Article III standing cannot be side-stepped by an act of congress.[107] The future of prudential standing has been thrown into question, however, by the Court's recent holding that explicitly rejected the notion that an otherwise actionable case under Article III could be denied solely based on judicially created prudential considerations.[108]

With respect to the Endangered Species Act (ESA),[109] it has its own citizen-suit provision which provides that "any *person* may commence a civil suit on his own behalf to enjoin any person . . . who is alleged to be in violation of any provision of this chapter."[110] The Supreme Court has interpreted the breadth of the citizen suit provision both broadly and narrowly.[111] The term "person" is defined as "an individual, corporation, partnership, trust, association, or any other private entity . . . or any other *entity* subject to the jurisdiction of the United States."[112] Theoretically, animals that are protected under ESA should qualify as an "entity subject to the jurisdiction of the United States."[113] Does this quotation encompass both the broad and narrow interpretations mentioned by Davidson?

The standing requirements have made third-party suits, on behalf of animals, especially difficult to sustain in federal court.[114] With respect to non-human animals, there has been some success in getting their names listed in case captions,[115] as well as legal standing to bring suit in their own

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[107] *Defenders of Wildlife*, 504 U.S. at 560. ("[T]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an individual right vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to take Care that the Laws be faithfully executed[]") (internal quotations omitted).

[108] Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1388 (2014) ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because "prudence" dictates.") (citations omitted).

[109] 16 U.S.C. §§ 1531-1544 (2012).

[110] *Id.* § 1540(g) (emphasis added).

[111] Burke, *supra* note 102, at 648; *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (interpreting the citizen-suit provision narrowly to prevent citizens from maintaining lawsuit seeking enforcement by the Secretary of Interior), *with* Bennett v. Spear, 520 U.S. 154, 163 (1997) (interpreting the citizen-suit provision broadly to encompass plaintiffs who sought to prevent the implementation of environmental restrictions).

[112] 16 U.S.C. §§ 1532(13) (2012) (emphasis added).

[113] Joanna B. Wymyslo, *Standing for Endangered Species: Justiciability Beyond Humanity*, 15 U. BALT. J. ENVTL. L. 45 (2007).

[114] *See Lujan*, 504 U.S. at 562; *see also* Summers v. Earth Island Institute, 555 U.S. 488, 493 (2009).

[115] *See* Palila v. Hawaii Department of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988); Hawksbill Sea Turtle v. FEMA, 126 F.3d 461 (3d Cir. 1997); Coho Salmon v. Pacific Lumber Co., 61 F. Supp. 2d 1001 (N.D. Cal. 1999); Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231 (11th Cir. 1998).

right.[116] In *Palila v. Hawaii Dep't of Land & Natural Resources*, the Sierra Club brought an action on behalf of the endangered Palila bird asserting that the Department's decision permitting feral goats and sheep to graze in the Palila's critical habitat was a prohibited "taking" under the ESA.[117] The court held that the Palila had standing as a plaintiff in its own right, stating: "*As an endangered species under the Endangered Species Act* . . . the bird (Loxioides bailleui), a member of the Hawaiian honeycreeper family, also *has legal status and wings its way into federal court as a plaintiff in its own right*."[118] The holding permitted the Sierra Club to act as its representing attorney.[119] This apparent legal victory, however, has since been revisited to make clear that the language relied on by other courts to grant non-human animals standing was merely nonbinding dicta.[120]

B. *The Applicability of the Common Law Writ of Habeas Corpus to Non-Persons*

While the issue of standing has been vigorously argued, it is largely a procedural hurdle that does not raise any substantive issue. Lawyers have argued for the advancement of rights for non-human animals based on an array of legal theories. Some of the more recent challenges include arguing for common law habeas relief. This approach, although new in application to nonhuman animals, has been argued to expand rights to people who were once considered property.

1. The *Somerset Case* and the Historical Application of Habeas Corpus to Non-persons

Habeas corpus, Latin for "that you have the body," is defined by *Black's Law Dictionary* as "a writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal."[121] It is also known as the Great Writ.[122]

The writ of habeas corpus, in American law, is considered "a vital instrument for the protection of individual liberty . . . ."[123] The Supreme Court has explained that the purpose of the writ is to "[p]rovide a prompt

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[116] *See* Loggerhead Turtle v. County Council of Volusia County, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995); Marbled Murrelet v. Pacific Lumber Co., 880 F. Supp. 1343, 1346 (N.D. Cal. 1995).
[117] *Palila*, 852 F.2d at 1107.
[118] *Id.*
[119] *Id.* (emphasis added).
[120] Cetacean Community. v. Bush, 386 F.3d 1169, 1173 (9th Cir. 2004) ("After due consideration, we agree with the district court that Palila IV's statements are nonbinding dicta.").
[121] Habeas Corpus, BLACK'S LAW DICTIONARY (10th ed. 2014).
[122] *Id.*
[123] Boumediene v. Bush, 553 U.S. 723, 725 (2008).

and efficacious remedy for whatever society deems to be intolerable restraints."[124] State courts have similarly held that the "[t]he great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty."[125] Prior to the Civil War, slaves, were considered as property, not persons, and were not capable of seeking habeas relief.[126] The Kentucky Supreme Court summarized the repulsive reality for human slave under the U.S. Constitution in the Nineteenth Century:

It cannot be pretended that any rights secured to the slave by the constitution . . . for there are no rights secured to slaves by the constitution . . . Slaves, although they are human beings, are by our laws placed on the same footing with living property of the brute creation. However deeply it may be regretted, and whether it be politic or impolitic, a slave by our code, is not treated as a person, but (negotium), a thing, as he stood in the civil code of the Roman Empire.[127]

One of the most significant and famous cases applying common law writ of habeas corpus to legal property is the English case of *Somerset v. Stewart*.[128] James Somerset was an African kidnapped at the age of seven and sold to Charles Stewart in Virginia.[129] Under Virginia Law, Somerset was considered the property of Stewart.[130] Stewart, who was a customs officer, brought Somerset to England to sojourn.[131] Somerset absconded in England for about two months before being caught by Stewart.[132] Stewart then forced Somerset to stow on a ship called *Ann and Mary* that was scheduled to leave for Jamaica.[133] Stewart punished Somerset's rebellion by selling him to hard labor in the sugar cane fields.[134] He forced Somerset to stow on a ship called *Ann and Mary* that was scheduled to leave for

[124] Harris v. Nelson, 394 U.S. 286, 291 (1969) (internal quotations omitted) (citations omitted).
[125] *See* Sheriff of Suffolk County v. Pires, 777 N.E.2d 1231, 1234 (Mass. 2002) (citations omitted); *see also* Bryarly v. Howard, 73 N.E.2d 678, 679 (Ind. 1947) ("The purpose of the writ of habeas corpus is to bring the person in custody before the court for inquiry into the cause of restraint."); Murray v. Regier, 872 So. 2d 217, 222 (Fla. 2002) ("[T]he traditional purpose of the writ of habeas corpus is to furnish a speedy hearing and remedy to one whose liberty is unlawfully restrained").
[126] *See generally* Dred Scott v. Sandford, 60 U.S. 393 (1856).
[127] Jarman v. Patterson, 23 Ky. 644, 645-46 (Ky. 1828).
[128] Lofft 1, 98 Eng. Rep. 499 (1772).
[129] Steven M. Wise, *The Entitlement Of Chimpanzees to The Common Law Writs of Habeas Corpus and De Homine Replegiando,* 37 GOLDEN GATE U. L. REV. 219, 263 (2007).
[130] *Id.*
[131] Derek A. Webb, *The Somerset Effect: Parsing Lord Mansfield's Words on Slavery in Nineteenth Century America,* 32 LAW & HIST. REV. 455 (2014).
[132] *Id.* at 455-56.
[133] *Id.* at 456.
[134] *Wise*, *supra* note 129, at 264.

Jamaica.[135] Aboard *Ann and Mary*, Somerset was in the custody of the ship's captain, Captain Knowles.[136] While Somerset was shackled on the ship,[137] three Londoners went before Lord Mansfield and applied for a writ of habeas corpus.[138] Lord Mansfield then issued the writ and ordered that Somerset be brought before the Court of King's Bench, which had temporary dominion over Somerset,[139] and required Captain Knowles to show cause for his detainment of Somerset.[140]

Considering the fact that human slavery was a significant economic machine and was still legal in England, the legal and political ramifications of relieving Somerset by writ of habeas corpus were immeasurable.[141] Notwithstanding the external factors, Lord Mansfield used his judicial power to grant Somerset habeas relief stating: "If the parties will have judgment, *fiat justitiam ruat cœlum*, let justice be done whatever be the consequence."[142] Lord Mansfield found the practice of slavery, despite its legality, "so odious that nothing can be suffered to support it."[143] With Lord Mansfield's order, James Somerset, once legal property, walked out of the King's Bench discharged, free, and a person under the law.[144]

2. Contemporary Applications of Habeas Corpus to Non-persons

The property-or-person legal dichotomy is still as cutting-edge today as it was for Lord Mansfield centuries ago.[145] The courts are now confronting the issue of whether habeas corpus can apply to non-human animals.[146] A series of cases were brought by the Nonhuman Rights Project on behalf of chimpanzees Kiko,[147] Tommy,[148] Hercules and Leo[149] with the

[135] *Id.* at 456.
[136] Lofft 1, 98 Eng. Rep. 499 (1772).
[137] *Wise*, *supra* note 129, at 264.
[138] *Webb*, *supra* note 131, at 456.
[139] *Id.*
[140] Lofft 1, 98 Eng. Rep. 499 (1772).
[141] *Wise*, *supra* note 129, at 271.
[142] Lofft 1, 98 Eng. Rep. 499, 509 (1772).
[143] *Id.* at 509.
[144] *Id.* at 510.
[145] *See generally* Brandon Keim, *Chimpanzee Rights Get a Day in Court*, WIRED (Nov. 05, 2015, 8:34 PM), http://www.wired.com/2015/05/chimpanzee-rights-get-day-court/.
[146] *See* People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248 (N.Y. App. Div. 2014); Nonhuman Rights Project, Inc., *ex rel.* Kiko v. Presti, 999 N.Y.S.2d 652 (N.Y. App. Div. 2015) *leave to appeal denied*, 126 A.D.3d 1430 (N.Y. App. Div. 2015) *leave to appeal denied*, 38 N.E.3d 827 (N.Y. 2015).
[147] Nonhuman Rights Project, Inc., *ex rel.* Kiko v. Presti, 124 A.D.3d 1334 (N.Y. App. Div. 2015).
[148] People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248 (N.Y. App. Div. 2014).

goal of providing them relief by the court, through common law writ of habeas corpus, to effectuate their respective release.

In *People ex rel. Nonhuman Rights Project, Inc. v. Lavery,* the Nonhuman Rights Project (NhRP) brought suit on behalf of a chimpanzee known as Tommy.[150] The suit was precipitated by the NhRP upon discovering the former circus chimp living inside a small steel-mesh cell that had a rancid milk-musk odor.[151] Tommy was relegated to a barn-sized aluminum-sided shed with small windows at the rear of a property,[152] owned by Patrick Lavery,[153] that was used to sell transport trailers in Gloversville, New York.[154] NhRP sought an order to show cause to commence a habeas corpus proceeding under C.P.L.R. article 70 based on the claim that Tommy was being illegally detained.[155] NhRP also compiled and submitted several affidavits from experts outlining the cognitive complexities of chimpanzees in support of its petition.[156] The affidavits documented that chimpanzees possessed similar cognitive traits as humans in that they are, among other things, autonomous, self-aware, and self-determined.[157] The trial court found that the chimpanzee was not a "person" for the purposes of C.P.L.R. article 70 and ruled that the order to show cause cannot be signed.[158]

The appeals court recognized that the question of whether Tommy was a person within C.P.L.R. article 70 was novel and the first of its kind.[159] With this backdrop, the court held that a "chimpanzee is not a 'person' entitled to the rights and protections afforded by the writ of habeas corpus."[160] The court explained that the word "person" was purposely left

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[149] Nonhuman Rights Project, Inc. *ex rel.* Hercules & Leo v. Stanley, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015).

[150] *Lavery*, 998 N.Y.S.2d at 249.

[151] Charles Siebert, *Should a Chimp Be Able to Sue Its Owner?*, N.Y. TIMES, (Nov. 05, 2015, 9:00 PM), http://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html?_r=0.

[152] *Id.*

[153] *Lavery*, 998 N.Y.S.2d at 248.

[154] Charles Siebert, *Should a Chimp Be Able to Sue Its Owner?*, N.Y. TIMES, (Nov. 05, 2015, 9:00 PM), http://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html?_r=0.

[155] *Lavery*, 998 N.Y.S.2d at 249.; *see generally* N.Y. C.P.L.R. § 7002 (McKinney) ("By whom made. A *person illegally imprisoned or otherwise restrained in his liberty within the state*, or one acting on his behalf or a party in a child abuse proceeding subsequent to an order of the family court, may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance. A judge authorized to issue writs of habeas corpus having evidence, in a judicial proceeding before him, that any person is so detained shall, on his own initiative, issue a writ of habeas corpus for the relief of that person.") (emphasis added).

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

undefined by the legislature to ensure that it did not "change the instances in which the writ was available, which has been determined by the slow process of decisional accretion."[161] The court began its analysis by highlighting the historical fact that animals have never been considered eligible for habeas corpus relief nor have they ever been considered capable of asserting rights for the purposes of state or federal law.[162] The court acknowledged that just because there is a lack of precedent regarding the applicability of habeas corpus to animals, the writ's "great flexibility and vague scope" orders the issue be inquired in full.[163] The court emphasized that chimpanzees are incapable of bearing legal duties, carrying social responsibility, and being held legally accountable for their actions.[164] In detailing its reasoning for denying Tommy habeas corpus, the court discussed its legal theory that a "person" must have the ability to engage in the "social contract."[165] The court spelled out this theory by stating:

Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government. Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, "rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights."[166]

The next case in this trilogy, *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*,[167] concerned a chimpanzee, known as Kiko, who lives in a cage at the home of Carmen Presti in Niagara Falls, New York.[168] This case came on appeal from the Supreme Court, which dismissed NhRP's petition for habeas corpus.[169] The Fourth Department affirmed the Supreme Court's

[161] *Id.* (quoting People *ex rel.* Keitt v. McMann, 220 N.E.2d 653 (N.Y. 1966) (internal quotation omitted).
[162] *Id.* at 249-50. ("Petitioner does not cite any precedent-and there appears to be none-in state law, or under English common law, that an animal could be considered a "person" for the purposes of common-law habeas corpus relief. In fact, habeas corpus relief has never been provided to any nonhuman entity.").
[163] *Id.* at 250.
[164] *Id.* at 251.
[165] *Id.* at 250.
[166] *Id.*
[167] Nonhuman Rights Project, Inc., *ex rel.* Kiko v. Presti, 124 A.D.3d 1334 (N.Y. App. Div. 2015).
[168] Michael Mountain, *Bios on the Chimpanzees in New York Lawsuits*, NONHUMAN RIGHTS PROJECT (Nov. 05, 2015, 9:59 PM), http://www.nonhumanrightsproject.org/2013/11/30/bios-on-the-chimpanzees-in-new-york-lawsuits/.
[169] *Presti*, 124 A.D.3d at 1335.

ruling to dismiss the petition for habeas corpus.[170] The reasoning, however, was not based on whether Kiko was a "person" capable of asserting habeas corpus rights, but that NhRP was not seeking Kiko's immediate release.[171] The NhRP sought to have Kiko transferred from its current place that was alleged to be unsuitable, to a facility selected by The North American Primate Sanctuary Alliance.[172] The court reasoned that a habeas corpus claim can only lie where the petitioner is entitled to immediate release from confinement, not a transfer from one confinement to another.[173] The court assumed, arguendo, that even if Kiko was a person, habeas corpus is not available for the purpose of changing the conditions of its confinement.[174]

The final case, *Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, concerned two young adult chimpanzees, known as Hercules and Leo, who are being held at Stony Brook University.[175] The two are used as research subjects in the study of locomotion for chimpanzees and other primates, and the NhRP sought habeas corpus relief for their release and transfer to a sanctuary in Florida.[176] NhRP did not challenge the conditions of their confinement, nor did they allege that Stanley violated any state or federal law.[177]

In denying NhRP's petition for a writ of habeas corpus, the court focused its analysis on the issue of whether chimpanzees can be considered a "person" and whether it was bound by the Third Department's decision in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*.[178] The court first acknowledged that the word "person" is not defined nor is it synonymous with being a human being.[179] The court also noted the increasing recognition of non-human animals, specifically pets, as more than just property by the courts and the legislatures.[180] While the court thoughtfully discussed both primary and secondary sources that are either for or against the extension

[170] *Id.*
[171] *Id. Compare with* People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248 (N.Y. App. Div. 2014).
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] Nonhuman Rights Project, Inc. *ex rel.* Hercules & Leo v. Stanley, 16 N.Y.S.3d 898, 900 (N.Y. Sup. Ct. 2015).
[176] *Id.*
[177] *Id.* at 901.
[178] *Id.* at 911-18.
[179] *Id.* at 911.
[180] *Id.* at 912. ("[P]ets and companion animals, are gradually being treated as more than property, if not quite as persons, in part because legislatures and courts recognize the close relationships that exist between people and their pets, who are often viewed and treated by their owners as family members.").

of legal personhood status for non-human animals, it ultimately declined to make its own determination on the issue.[181]

The court then analyzed New York's *stare decisis* jurisprudence and found that the Third Department's decision was controlling absent an on point decision by the Court of Appeals or Appellate Division within its judicial department.[182] The court even went further in its opinion, in dicta, by stating: "Even were I not bound by the Third Department in *Lavery*, the issue of a chimpanzee's right to invoke the writ of habeas corpus is best decided, if not by the Legislature, then by the Court of Appeals, given its role in setting state policy."[183]

C. *Constitutional Approaches for Personhood Applied to Non-Human Animals*

1. The Courts Have the Role of Determining Who is a Legal Person

The word "person" is a term of art[184] that has been construed to equate to human personality or a form of legal fiction unrelated to human biology.[185] With that, the legislature plays a crucial role in determining who can be a legal person since its principal function is to enact legislation addressing policy and creating law.[186] Ultimately, however, it is the courts that will interpret the words of the legislature and give them legal meaning.[187] When constitutions, statutes, and case law precedent are absent, the common law prevails and courts are free to apply it accordingly.[188]

Although courts have confronted this issue throughout history,[189] no decision has drawn more attention to the issue than *Roe v. Wade*.[190] In that case, the Court acknowledged that the Constitution does not have a

[181] *Id.* at 912-15.
[182] *Id.* at 916-17.
[183] *Id.* at 917.
[184] Wartelle v. Women's & Children's Hosp., Inc., 704 So.2d 778, 780 (La. 1997).
[185] Note, *What We Talk About When We Talk About Persons: The Language of A Legal Fiction*, 114 HARV. L. REV. 1745 (2001).
[186] *In re* Involuntary Dissolution of Wiles Bros., Inc., 830 N.W.2d 474, 481 (Neb. 2013) ("[I]t is the Legislature's function through the enactment of statutes to declare what is the law and public policy.").
[187] Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Turner v. Georgia River Network, 773 S.E.2d 706, 709 (Ga. 2015) ("[S]tatutory construction belongs to the courts, legislation to the legislature.").
[188] People v. Woolfolk, 857 N.W.2d 524, 526 (Mich. 2014) ("[T]he common law prevails except as abrogated by the Constitution, the Legislature, or this Court.") (alteration in original).
[189] *See* State v. Gyles, 313 So.2d 799 (La. 1975) (holding fetus not a person within the meaning of murder statute); Byrn v. New York City Health & Hospital. Corp., 286 N.E.2d 887 (N.Y. 1972) (holding that state and federal law do not consider the unborn a legal person.).
[190] 410 U.S. 113 (1973).

definition of the word "person."[191] With this lack of clear constitutional guidance, the Court concluded that the unborn were not included in the word "person" within the language and meaning of the Fourteenth Amendment.[192] The Court detailed the historical treatment of fetuses, under common law, and their legal significance as persons before and after 'quickening.'[193] The Court noted the theories that vacillated since the Thirteenth Century and the endless debates among philosophers and theologians.[194] The Court concluded that the common law never firmly established the destruction of a quick fetus as a crime.[195] The Court also relied on constitutional evidence that showed the use of the word 'person' has application only postnatally.[196]

The legal significance of personhood is most profound, in regards to legal consequence, in the criminal law context.[197] In *State v. Courchesne*, a defendant charged with murder appealed his conviction on, among other grounds, the assertion that the unborn child was not considered a person within the meaning of Connecticut's homicide and capital felony statute.[198] The Supreme Court of Connecticut, in an opinion that spans 166 pages, ruled that an infant, if "born alive," is a person within the meaning of the state's homicide statutes.[199] The court relied on the common law "born alive" rule and it served as its basis for recognizing an otherwise non-legal person as a person under Connecticut law.[200]

In the context of non-human animals, the Court of Appeals of Oregon confronted an issue of first impression when it considered whether a horse is a "person" under the "emergency aid" doctrine.[201] In that case, the defendant appealed the court's denial of his motion to suppress evidence obtained by an officer who entered his property, without a warrant, to seize and aid an emaciated horse.[202] The emergency aid doctrine provides: "[t]hat officers may enter property without a warrant if they have an objectively

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[191] *Id.* at 157.
[192] *Id.*
[193] *Id.* at 132-33 ('[q]uickening'-the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy").
[194] *Id.* 133-34.
[195] *Id.* at 134.
[196] *Id.* at 157 ("'Person' is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators . . . qualifications for the office of President . . . and the superseded Fugitive Slave Clause").
[197] *See* State v. Courchesne, 296 Conn. 622, 998 A.2d 1 (Conn. 2010).
[198] *Id.* at 661.
[199] *Id.* at 701-02.
[200] *Id.* at 664-65. (the born alive rule states that "the death of a fetus could stand as a basis for murder as long as the fetus was born alive and subsequently died of injuries inflicted in utero.").
[201] *See* State v. Fessenden, 310 P.3d 1163 (Or. Ct. App. 2014).
[202] *Id.* at 1164.

reasonable belief . . . necessary to either render immediate aid to *persons*, or to assist *persons* who have suffered, or who are imminently threatened with suffering, serious physical injury or harm."[203] The court's reasoning fell on the reasonableness of setting the exception's boundaries to encompass non-human animals.[204] The court, after reviewing a number of animal welfare and anti-cruelty statutes as well as legislative history and state precedent, held that the exception does encompass non-human animals.[205] The court weighed the societal interest in protecting non-human animals from suffering, trauma, and death and held that warrantless searches can be justified if used to stop those harms from occurring.[206]

2. Non-Human Captivity, Servitude, Slavery and the Thirteenth Amendment

The abhorrent institution of slavery in the United States was explicitly condemned to history with the passage of the Thirteenth Amendment.[207] The Thirteenth Amendment reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[208] The Supreme Court, in the *Slaughter-House Cases,* gave early insight into the breadth in which the Thirteenth Amendment can apply stating:

"In giving construction to any of those articles it is necessary to keep this main purpose steadily in view, though the letter and spirit of those articles must apply to all cases coming within their purview . . . . While the thirteenth article of amendment was intended primarily to abolish African slavery, it equally forbids all forms of involuntary slavery of whatever class or name."[209]

With this backdrop, *Tilikum ex rel. PETA, Inc. v. Sea World Parks & Entertainment*, provided a modern test case on whether the Thirteenth Amendment's applicability could extend to a non-human animals.[210] PETA brought a Next of Friend action on behalf of five orca whales,[211] seeking,

[203] *Id.* (emphasis added).
[204] *Id.* at 1167-68.
[205] *Id.* at 1169.
[206] *Id.*
[207] *See* U.S. CONST. amend. XIII.
[208] *Id.*
[209] The Slaughter-House Cases, 83 U.S. 36, 37 (1872) (emphasis added).
[210] Tilikum *ex rel.* PETA, Inc. v. Sea World Parks & Entertainment, Inc., 842 F. Supp. 2d 1259 (S.D. Cal. 2012).
[211] *Id.* at 1260 (Tilikum, Katina, Corky, Kasatka and Ulises).

among other things, a declaration that the orcas were being held by Sea World in violation of the Thirteenth Amendment.[212] In a brief opinion, the court concluded that there is "no basis to construe the Thirteenth Amendment as applying to non-humans."[213] The court reasoned that historical sources show that the terms "slavery" and "involuntary servitude" referred only to persons.[214] The definition of slave, however, was not uniform when the Thirteenth Amendment was ratified.[215] The Johnson's Dictionary, published in 1836, defines 'slave' as "one reduced to captivity, to servitude, or bondage who is bound or compelled to serve, labour, or toil for, obey, another."[216] "Slave" is defined as "one reduced to captivity, to servitude, to bondage; who is bound or compelled to serve, labour, or toil for, obey, another" in A New Dictionary of the English Language, published in 1838.[217]

The court also referenced the "except as a punishment for crime" phrase, in the Thirteenth Amendment, as further evidence since only persons, and not non-human animals, are subject to criminal convictions.[218] The court also rested its conclusion on relevant portions of the Emancipation Proclamation issued by President Lincoln, which repeatedly referred to "person" in the context of African slaves.[219]

PETA then argued that the court should enlarge the Thirteenth Amendment to encompass orcas since other constitutional principles, such as the right to privacy, have evolved as times and circumstances have changed.[220] The court rejected this argument finding that the Thirteenth Amendment was drafted with a very narrow and singular purpose—ending slavery in the United States.[221] With PETA unable to convince the court to

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[212] *Id.*
[213] *Id.* at 1264.
[214] *Id.* ("In 1864, the term 'slavery' was defined as '[t]he condition of a slave; the state of entire subjection of one person to the will of another.'") (quoting NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 1241 (Merriam Co. 1864).
[215] *See* Jeffrey S. Kerr, Martina Bernstein, Amanda Schwoerke, Matthew D. Strugar & Jared S. Goodman, *A Slave by Any Other Name Is Still A Slave: The Tilikum Case and Application of the Thirteenth Amendment to Nonhuman Animals*, 19 ANIMAL L. 221, 268 (2013) (internal quotations omitted) (internal citations omitted).
[216] *Id.* (internal quotations omitted) (internal citations omitted).
[217] *Id.* (internal quotations omitted) (internal citations omitted).
[218] *Tilikum*, 842 F. Supp. 2d at 1263.
[219] *Id.* (the court refers in relevant part: [A]ll persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them in any efforts they may make for their actual freedom.").
[220] *Id.*
[221] *Id.* at 1264.

apply the Thirteenth Amendment to the orca whales, the court held that it lacked standing to bring the action.[222]

D. Corporations: The First Non-Human Legal Person and the Common Law Expansion of Personhood Rights

1. Corporations: Nonhuman Creatures of Statute Empowered with Substantive Rights as a Person under Common Law

"[I]t is sufficient to say that American authorities are in one accord in holding that the word "person" is a generic term of comprehensive nature, embracing natural and artificial persons, such as corporations."[223] For almost two centuries the United States has recognized corporations as more than just a business entity but also as a "being" with abilities that are co-extensive with a natural person's ability.[224] The legal recognition in the eyes of the law permits it to initiate and defend causes of actions.[225] Corporations have even been found to be a person capable of being a victim, in the criminal law context, in its own distinct right such that a defendant may be convicted of identity theft.[226] These instances, however anecdotal, are significant because like non-human animals, corporations are not human beings. Despite this fact, the courts, almost invariably, recognize corporations as legal persons. Therefore, the recognition of personhood under our laws is not innately biological.

Corporations are universally recognized as creatures of statute.[227] The twentieth century gave rise to the general acceptance of the entity theory, which views corporations as real person.[228] Today, corporations are considered "artificial creations of human beings and the law."[229] Statutory laws on corporations, however, do have their limitations and the courts

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[222] *Id.*

[223] State *ex rel.* Nw. Colonization & Imp. Co. of Chihuahua v. Huller, 168 P. 528, 530 (N.M. 1917)

[224] Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).

[225] Jones v. Martz & Meek Construction Co., 107 N.W.2d 802, 803 (Mich. 1961).

[226] *See* State v. Evans, 298 P.3d 724 (Wash. 2013) ("[A] victim of identity theft must be another person, living or dead, and corporations can qualify . . . .").

[227] *See* In *re* Involuntary Dissolution of Wiles Bros., Inc., 830 N.W.2d 474, 480 (Neb. 2013) ("We have also stated that corporations are creatures of statute, and they may be dissolved only according to statute."); Airvator, Inc. v. Turtle Mountain Manufacturing Co., 329 N.W.2d 596, 602 (N.D. 1983) ("A corporation is not in fact or in reality a person, but is created by statute and the law treats it as though it were a person by the process of fiction, or by regarding it as an artificial person distinct and separate from its individual stockholders.")

[228] Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 112 (2009).

[229] *Id.* at 106.

have stepped in to vindicate the constitutional rights of corporations.[230] In essence, the law gives corporations life, but it is the court that has been responsible for giving substantive rights. [231]

2. *Corporations Have Substantive Rights as Persons Under Common Law Precedent*

One of the earliest cases highlighting the courts role in corporate personhood and substantive rights is *Santa Clara County. v. Southern Pacific Rail Road.*[232] In that case, Chief Justice Morris Waite announced: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.[233] The U.S. Supreme Court has subsequently extended the Due Process clause to corporations and has held that their property cannot be taken without just compensation.[234]

Although the Court had previously mentioned the rights of corporations in passing or rather obliquely, the court took the most direct approach in *First National Bank of Boston v. Bellotti.*[235] In that case, the Court struck down parts of a criminal statute that prevented corporations from making contributions "for the purpose of . . . influencing or affecting the vote on any question submitted to the voter, other than one materially affecting the property . . . of the corporation."[236] The Court, after delving into the past precedence set by the Court, found that there was no tenable legal reason why corporations should not be protected by the First and Fourteenth Amendment.[237]

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[230] Citizens United v. FEC, 558 U.S. 310, 365 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity.").

[231] *See* Citizens United v. FEC, 558 U.S. 310, 365 (2010) (right to engage in political speech); Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636, 4 L. Ed. 629 (1819) (right to contract).

[232] 118 U.S. 394 (1886).

[233] *Id.*

[234] *See* Cotting v. Godard, 183 U.S. 79 (1901).

[235] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[236] *Id.* at 768.

[237] *Id.* at 784. ("We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation . . . .").

III. PROPOSAL TO ADVANCE THE PROTECTION OF CHIMPANZEES

A. *Limited Common Law Personhood Status for Chimpanzee Standing for Inhumane Conditions and Abuse*

Irrespective of where courts apply limited personhood status for chimpanzees, it must first address the threshold issue of whether chimpanzees are legal persons under common law. The first section will propose that common law should recognize chimpanzees as legal persons, in limited legal circumstances, in light of social, moral, and scientific advancements today. Once the question of personhood is answered in the affirmative, the next section will propose limited personhood status under habeas corpus. The section will address how habeas corpus can be effectively applied to chimpanzees seeking transfer to a sanctuary instead of an outright release to the wild. The following section will propose limited personhood recognition for standing under the ESA and the effects of such an extension. The final section proposes that common law personhood recognition should not be rejected because of fear that it will be the gateway for all nonhuman animals or that it will cause a burden on the court.

1. Common Law Extension of Limited Legal Personhood Status for Chimpanzees

American public opinion is shifting more favorably toward chimpanzees. More than ten years ago, public polls indicated that a significant majority of Americans—eight-five percent—believe that chimpanzees have complex, social, intellectual, and emotional lives.[238] In the same poll, a simple majority of Americans believed that chimpanzees should be "treated similar to children, with guardians to look after their interest."[239] Recently, Congress passed legislation to amend the Chimpanzee Health Improvement, Maintenance and Protection (CHIMP) Act, which now gives the National Institutes of Health (NIH) the funding it needs to move nearly all of the 360 government-owned chimpanzees to sanctuaries.[240] Support for animal rights in general has seen an upswing in

[238] Wise, *supra* note 129, at 239.
[239] *Id.*
[240] Samantha Miller, *Bipartisan Chimpanzee Retirement Legislation Passes Senate, Goes to President Obama for Signature*, THE HUMANE SOCIETY, (Nov. 20, 2015, 11:45 PM), http://www.humanesociety.org/news/press_releases/2013/11/rechimp-legislation-passes-senate-111413.html.

public opinion. This year, almost one-third of surveyed Americans believed animals should have rights equal to those of humans.[241] While this paper does not go as far as to suggest that proposition, and is narrowly focused on chimpanzees, the poll does serve as more evidence that American society is changing and our current legal positions on chimpanzees and other non-human animals are "unsuited" to the modern experience and no longer adequately serving the "interests of justice."[242]

Chimpanzees, like humans, have the capacity to suffer and an interest in not suffering.[243] Under the principle of equal consideration,[244] their natural desire to be autonomous and free should be given equal consideration unless there are compelling reasons not to give their desires equal consideration.[245] Compelling reasons usually come in the form of a competing human interest.[246] With the last of our society's most compelling human interest—animal testing on chimpanzees—close to extinction, the traditional justifications asserted for denying their interests equal consideration, are becoming more suspect. Rights are "moral notions that grow out of respect for the individual."[247] Chimpanzees, both scientifically and socially, are highly regarded animals because of their nearly human genetic makeup and intelligence. Therefore, chimpanzees should be entitled to some legal personhood protection despite the small price that would be "paid by the general welfare."[248] The price of legal personhood will be the rejection of the last few purported human interests left that wish to keep chimpanzees captive and unreasonably restrained. The price must be paid because America's modern moral conscious, in regard to chimpanzees, dictates no less. The remaining exploitative industries, namely circuses, chimpanzees, must bear this cost.

The aforementioned social, moral, and scientific[249] developments "are strengthening the argument for chimpanzee legal personhood."[250] In light of these dramatic changes, courts should not be obligated to adhere to

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[241] Tanya Lewis, *Rights for Animals*, LIVESCIENCE, (Nov. 5, 2015, 5:45 PM), http://www.livescience.com/50889-animal-rights-poll.html. (polled by Gallup).
[242] Tincher v. Omega Flex, Inc., 104 A.3d 328, 352 (Pa. 2014).
[243] Gary L. Francione, *Animals, Property, and Personhood*, *in* PEOPLE, PROPERTY, OR PETS? 77,84 (Marc D. Hauser, Fiery Cushman & Matthew Kamen eds. 2006). ("the rule that we ought to treat like cases alike unless there is a good reason not to do so").
[244] *Id.*
[245] *Id.*
[246] *Id.* at 78 (some human interest include scientific experimentation and agricultural practice).
[247] *Id.*
[248] *Id.*
[249] *See supra* notes 14-21 and accompanying text for a discussion of the scientific developments concerning the biological and cognitive abilities of chimpanzees.
[250] Wise, *supra* note 129, at 239.

the "frozen mold of ancient ideas."[251] Courts must be empowered to utilize the "active and dynamic" power of common law to comport "with the times and growth of society [in order] to meet its need."[252]

2. Limited Personhood Status for Habeas Corpus Relief

A chimpanzee's ability to seek habeas corpus relief from unreasonable confinement will also be simplified significantly. A technical, but crucial, concern highlighted in *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti* was whether habeas corpus review was proper when the petitioner, in that case Kiko, sought to not be released, but transferred to a sanctuary.[253] Petitioners, however, have routinely used habeas corpus review to obtain transfers to a better quality and less restrictive facility, especially in the context of mental health[254] and juvenile delinquency cases.[255] The diametrical differences between the housing conditions found in zoos and circuses compared to that found in sanctuaries are readily apparent. Captive entertainment chimpanzees are well documented as victims of abuse and unsafe conditions.[256] Experts have documented cases in which they have concluded that the examined chimpanzees showing signs of psychological distress including complex post-traumatic stress disorder (CPTSD).[257] Even if they no longer have to perform, their subsequent transfer to private owners usually results in worse solitary conditions as evidenced by the penurious living conditions of Tommy the chimpanzee in *Lavery*.[258] The mental and physical health of zoo chimpanzees fare no better and often show a variety of serious behavioral abnormalities.[259] Social deprivation and

[251] *In re* Sandy Ridge Oil Co., Inc., 510 N.E.2d 667, 670 (Ind. 1987).
[252] *Id.*
[253] *Presti*, 124 A.D.3d at 1335.
[254] *See generally* Mental Hygiene Legal Services *ex rel.* Cruz v. Wack, 551 N.E.2d 95 (N.Y. 1989) (holding that mental health patient in "secure" facility was to entitled to transfer to a "non-secure" facility by way of writ habeas corpus relief); McGraw v. Wack, 220 A.D.2d 291, 293 (N.Y. App. Div. 1995) (holding that a writ of habeas corpus was the proper vehicle for petitioner to seek a transfer to a non-secure facility); People *ex rel.* Schreiner v. Tekben, 611 N.Y.S.2d 734, 736 (Sup. Ct. 1994) (holding that the psychiatric detainee's writ of habeas corpus is the appropriate mechanism for transfer from a secure to non-secure facility).
[255] *See generally* State *ex rel.* B. S. v. Hill, 294 S.E.2d 126, 127 (W. Va. 1982) (granting habeas review and holding that the detention facility was non-secure despite incarcerated juvenile habeas challenge alleging the facility was in fact secure).
[256] Alicia Graef, *Behind the Scenes Suffering of Circus Chimpanzees Exposed*, CARE2 (Nov. 5, 2015, 5:45 PM), http://www.care2.com/causes/behind-the-scenes-suffering-of-circus-chimpanzees-exposed.html.
[257] *Id.*
[258] Mountain, *supra* note 167.
[259] Lucy P. Birkett & Nicholas E. Newton-Fisher, *How Abnormal Is the Behaviour of Captive, Zoo-Living Chimpanzees?* 1 (Plos One),

maternal separation have been suggested as causal factors.[260] In one study, forty chimpanzees, living in six accredited zoological institutions, were observed extensively by experts attempting to see whether they displayed abnormal behavior.[261] The results found that all forty chimpanzees showed some abnormal behavior.[262] Zoo-housed chimpanzees have also been found to have a higher propensity for heart disease.[263] Sanctuaries on the other hand, provide some of the most pristine environments for chimpanzees from all backgrounds.[264] The Save The Chimps sanctuary, the world's largest chimpanzee sanctuary located in South Florida, has a sprawling 150 acre property with 12 separate three-acre islands.[265] The sanctuary has over 250 chimpanzees that are free to live in large family groups and roam free as their psychological well-being demands.[266] Many sanctuaries throughout the United States have similar positive and healthy environments for all chimpanzees.[267]

With this information, courts would have very little issue regarding sanctuary transfers by writ of habeas corpus. Most of the U.S. owned research chimpanzees are in the process of being transferred to sanctuaries.[268] Like the restrictive and harsh conditions found in secure facilities for the juvenile delinquents and criminals with severe mental illness, zoo and circus confinements are highly detrimental to the physical and mental health of chimpanzees. Courts should find that the basis for chimpanzees' seeking a transfer from either a zoo or a circus to a sanctuary by writ of habeas corpus is well founded in analogous situations with human beings, and proper.

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http://www.plosone.org/article/fetchObject.action?uri=info:doi/10.1371/journal.pone.0020101&representation=PDF

[260] *Id.*

[261] *Id.* at 2.

[262] *Id.*

[263] Victoria Gill, *Why do Zoo Apes Get Heart Disease?*, B.B.C. (Nov. 5, 2015, 5:20 PM), http://www.bbc.co.uk/nature/17542031.

[264] Jennifer Feuerstein, *Rare Access Inside the World's Biggest Chimpanzee Sanctuary*, TAKEPART (Nov. 5, 2015, 5:45 PM), http://www.takepart.com/article/2013/07/09/chimpanzee-sanctuary-save-the-chimps-introduction.

[265] *History*, SAVE THE CHIMPS (Nov. 5, 2015, 5:58 PM), http://www.savethechimps.org/the-chimps-history/.

[266] SAVE THE CHIMPS (last visited Nov. 5, 2015, 5:58 PM), http://www.savethechimps.org/the-chimps-history/.

[267] *See* CENTER FOR GREAT APES, http://www.centerforgreatapes.org/ (last visited Nov. 5, 2015, 5:57 PM); CHIMPANZEE SANCTUARY NW, http://www.chimpsanctuarynw.org/ (last visited Nov. 5, 2015, 5:58 PM); CHIMP HAVEN, http://www.chimphaven.org/ (last visited Nov. 5, 2015, 5:59 PM).

[268] Darryl Fears, *NIH Ends Era of U.S. Medical Research on Chimpanzees*, THE WASHINGTON POST (Nov. 20, 2015, 6:45 PM), https://www.washingtonpost.com/news/speaking-of-science/wp/2015/11/18/nih-ends-the-era-of-us-medical-research-on-chimpanzees/.

3. Limited Personhood Status for Standing Under the ESA to Allow Action for Release to Sanctuary

The first and most notable practical consequence of granting limited personhood to chimpanzees is the effect it would have on Article III standing. As Professor Stacy Gordon observed when contemplating this potential development, "Although standing would not be automatic, legal personhood would entirely change the analysis for some animals."[269] As the legal "person" bringing suit, the question would center on whether the *chimpanzee's* injury is "concrete and particularized, actual or imminent, not conjectural or hypothetical"[270] If the chimpanzee can show this, then "the most problematic" element in standing will no longer be so.[271] Causation will also be much easier to satisfy since the court would now trace the defendant's actions back to the *chimpanzee's* injury and not to the attenuated aesthetic injury suffered by a Next of Friend plaintiff. Finally, when determining redressability under an ESA action, it will be more "likely, as opposed to merely speculative,"[272] that the *chimpanzee* will be redressed with a favorable decision, even if the relief only "take[s] steps to slow or reduce the injury.[273]

As a plaintiff satisfying Article III, chimpanzees will clear the "undemanding test" of prudential standing.[274] Chimpanzees, as legal persons and the direct beneficiaries of the ESA, will fall directly within the "zone of interest protected by the statute."[275] The procedural requirement of standing would thus no longer be as challenging and a chimpanzee could "wing its way into court as a plaintiff in its own right"[276] to address alleged violations of his substantive rights under the law.

The representation of chimpanzees, for all practical purposes, should mirror the guardian *ad litem* system used to assist children in defending or prosecuting lawsuits. Like children, a chimpanzee cannot initiate or defend lawsuits without adult representation.[277] Judges presiding over chimpanzee cases would have the inherent power of appointing guardians *ad litem*. They would in turn have the duty to ensure that the chimpanzee's interest is sufficiently represented in court. An issue more

[269] Gordon, *supra* note 54, at 239.
[270] *Defenders of Wildlife*, 504 U.S. at 560.
[271] Gordon, *supra* note 54, at 214.
[272] *Defenders of Wildlife*, 504 U.S. at 561.
[273] Massachusetts v. EPA, 549 U.S. 497, 525 (2007).
[274] Gordon, *supra* note 54, at 222.
[275] *Id.*
[276] Palila v. Hawaii Dept. of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988).
[277] DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN 870 (rev. 2d ed. 2005).

problematic than legal matters regarding children, however, is obvious communications barriers that would prevent guardians from asserting the actual desires of the chimpanzee. The central role of a guardian, in the context of chimpanzee representation, would be strikingly similar in the sense that guardians would not serve as an attorney for the chimpanzee but an officer appointed to protect the chimpanzee's interest in not being abused or held in inhumane conditions.[278] Following that, the scope of the guardian's duty would be limited to the matters in determining the state and condition of the chimpanzee, to investigate the facts of his or her welfare, and to report these facts to the appointing court along with recommendation based on the facts.[279]

With limited personhood status, comes limited legal relief under the law. Thus, the remedies available for chimps should be limited to injunctive relief. More specifically, the only remedy that would be available for chimpanzee's who are kept inhumanely or abused by their holders would be release and transfer to a sanctuary by injunctive relief. Injunctive relief is an equitable specific remedy designed to avoid future harm.[280] It is available only when there is a showing that a legal remedy would be inadequate.[281] One of the equitable criteria for granting an injunction is showing irreparable harm to the plaintiff.[282] This remedy is extraordinary in nature,[283] and thus requires that the guardian ad *litem* for the chimpanzee makes the strongest case possible to warrant the court to relinquish the chimpanzee from his or her legal holders and to the save care of an approved sanctuary.

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[278] *Id.* at 873.

[279] *Id.*

[280] Joan E. Schaffner, *Remedies in Animal-Related Litigation*, *in* 437 LITIGATING ANIMAl LAW DISPUTERS A COMPLETE GUIDE FOR LAWYERS (Joan E. Schaffner & Julie Fershtman eds. 2009).

[281] *Id.*

[282] *Id. See generally* Lue v. Eady, 773 S.E.2d 679, 687 (Ga. 2015) ("Courts of equity will not exercise [the power of injunctive relief] to allay mere apprehensions of injury, but only where the injury is imminent and irreparable and there is no adequate remedy at law.") (alteration in original).

[283] *See generally* Lee v. Konrad, 337 P.3d 510, 517 (Alaska 2014) ("Equitable injunctive relief is an extraordinary remedy that is appropriate only where the party requesting relief is likely to otherwise suffer irreparable injury and lacks an adequate remedy at law.")

B. *Is The Camel's Nose in Pandora's Box?: Limited Personhood Expansion Will Not Create Abuse in the Legal System*

Expansion of rights for the underrepresented will always be met with the classic slippery slope argument. The question will be: if chimpanzees are giving legal personhood, what animal will be next? "The camel's nose is in the tent" argument, which was argued passionately by Justice Stewart in *Pittsburgh Press Co. v. Pittsburgh Commission*,[284] says that an act, however harmless when taken on its own, could potentially open the door to similar actions that will be increasingly pernicious.[285]

Chimpanzees are in a unique category in the world of non-human animals. They are prime candidates for a common law extension of limited personhood status because their "human-like" qualities put them in a category that makes them the worthiest. Namely, chimpanzees are self-conscious, have elements of the theory of mind, they can understand symbols, and have the capacity for using complex communication systems.[286] These traits are bona fide distinctions that should allow chimpanzees to be rights-holders. Unlike chimpanzees, who can satisfy this very exclusive requirement, other life forms, like amoebas or echinoderms, cannot possibly be eligible for such a bestowment because they are non-sentient animals with no centralized nervous system.[287] Bodily autonomy and complex cognitive ability should be a necessary condition for rights. The ability to be self-aware and a sentient being, cuts to the heart of liberty in the sense that chimpanzees can understand and appreciate their quality of life and understand when they are being confined. As science and our understanding of other animals advance, the possibility of some limited right must be readdressed in the future. For now, chimpanzees are part of a very small percentage of candidates worthy of a limited common law grant of personhood.

The slippery slope argument forces decision makers to concentrate on the *possible*, however dubious the claim, future consequences of how they rule today.[288] Consequentialist fears that stoked suspicions in striking down the invidious practice of school segregation,[289] and granting equal protection for women,[290] while also providing decision makers with ample

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[284] Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 402 (1973) (Stewart, J., dissenting).
[285] Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 362 (1985).
[286] *The Evolving Legal Status of Chimpanzees*, 9 ANIMAL L. 1, 29 (2003).
[287] *What Beings Are Not Conscious*, ANIMAL ETHICS (Nov. 13, 2015, 5:20 PM), http://www.animal-ethics.org/beings-conscious/.
[288] Schauer, *supra* note 284, at 382.
[289] Brown v. Board. of Education, Kansas, 349 U.S. 483 (1955).
[290] United States v. Virginia, 518 U.S. 515 (1996).

justification to perpetuate the abhorrent practice of criminalizing homosexuality,[291] has no basis or place in law. The fear of potential abuse and degradation of our legal system by utilizing the power of the courts for chimpanzees can never be a legally sufficient reason to deny an opportunity to rectify the injustice or the vindications of rights they sustain. As the New York Court of Appeals stated in rejecting this species of argumentation:

[f]loodgates of litigation's alarum seems singularly unpersuasive in view of our Court's repeated admonitions that it is not a ground for denying a cause of action that there will be a proliferation of claims and if a cognizable wrong has been committed that there must be a remedy, whatever the burden of the courts.[292]

CONCLUSION

The power and scope of common law empower the courts to evolve and to make just decisions. The person-or-property legal dichotomy that currently plagues chimpanzees can no longer stand in light of the social, moral, and scientific developments made in American society today. A limited grant would give chimpanzees the ability to vindicate their own rights in court when physically injured or inhumanely confined by their legal holders. Common law has the power to modify and abandon principles when our courts conclude that the principle no longer comport to societies norms or to avoid injustice.

The current legal structure of Article III standing for nonhuman animals make legal action on behalf of chimpanzees very difficult. With the question of injury being based on the harm suffered by humans, this element will prevent many colorable third-party lawsuits from ever reaching on the merits of the case. Even when standing requirements have been met, judicially created prudential considerations serve as an additional barrier to lawsuits on behalf of harmed chimpanzees. The *Somerset Case* demonstrates that brave, bold, and just decisions by a single judge could fundamentally change the course of a court and a society. Past approaches, through the Thirteenth Amendment or writ of habeas corpus, can provide protection and relief to non-human animals if the court is willing to exercise its common law power to correct injustices. Corporations serve as an important reminder that a "legal person" is *not* synonymous with "human-being."

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[291] Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[292] Enright by Enright v. Eli Lilly & Co., 570 N.E.2d 198, 207 (N.Y. 1991) (alteration in original) (internal quotations omitted).

The proposals outlined would allow chimpanzees to exercise their positive right to seek protection under the law. A common law extension of habeas corpus relief for chimpanzees would be a critical first step in giving the court the ability to ensure that their living conditions are humane and that they are treated humanely. Current law permits habeas review to obtain transfers to better quality and less restrictive facilities in other legal contexts and would be just as effective for chimpanzees seeking a transfer to a sanctuary. Many sanctuaries throughout the United States allow chimpanzees to live and socialize freely as their psychological well-being demands. Sanctuaries create a positive, safe, and healthy environment for all of their chimpanzee residents. Limited personhood status under the ESA would give chimpanzees the ability to vindicate their rights with competent representation akin to a guardian ad *litem*. This ability would be limited in scope with respect to remedies to permit only release to a sanctuary. Unsubstantiated fears of potential abuse of our legal system can never be a legally sufficient reason to deny an opportunity for chimpanzees to seek redress for legitimate claims of abuse.