

“Scientists have reported that elephants grieve their dead, monkeys perceive injustice and cockatoos like to dance to the music of the Backstreet Boys.”
— Hal Herzog¹

“‘Believe me,’ said Horton . . . ‘I know there’s a person down there.’”
— Dr. Seuss²

CONSIDER THE ELEPHANT: CAN THE WRIT OF HABEAS CORPUS CHANGE SOCIETY’S APPROACH TO ANIMAL RIGHTS?

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On June 14, 2022, the Court of Appeals for the State of New York⁴ issued an opinion addressing a metaphorical and literal “elephant in the room” in modern jurisprudence.⁵ Indeed, many news sources had a field day with the case. Readers found themselves the targets of columns bearing creative titles seeking to capture the nuance and novelty of the case’s progression over time.⁶ What could capture the attention of so many throughout the country and around the world? The answer is found in an animal rights group’s attempt to redefine the limits of personhood under the law. In the case of Happy, the zoo elephant, the animal rights group filed a Writ of Habeas Corpus (“Habeas Corpus”) petition against the owners and operators of the Bronx Zoo. The petitioners sought appellate review for the trial court’s earlier dismissal of the case.⁷

This case is the most recent chapter in the ongoing saga of defining legal personhood. Specifically, this case focuses on how rights and the law apply to nonhuman animals (“animals”); or in the eyes of the dissent, where rights

1. SOME WE LOVE, SOME WE HATE, SOME WE EAT: WHY IT’S SO HARD TO THINK STRAIGHT ABOUT ANIMALS (2010).

2. HORTON HEARS A WHO 11 (1954).

3. A special note of thanks to Brian Tamanaha, Lech Garlicki, and Jacob Cogdill for their insights and helpful comments. Thank you also to Adrienne Hughbanks, Dot, and Ike for all of their support during this process.

4. For those unfamiliar, this is New York State’s high court.

5. Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921 (N.Y. 2022).

6. See Lawrence Wright, *The Elephant in the Courtroom*, THE NEW YORKER (Feb. 28, 2022), <https://www.newyorker.com/magazine/2022/03/07/the-elephant-in-the-courtroom>; Robbie Sequeira, *Happy Days? The Bronx Zoo’s star attraction is a tough case for Court of Appeals and court of public opinion*, BRONX TIMES (May 4, 2022), <https://www.bxtimes.com/bronx-zoo-elephant-court-case/>.

7. See *Breheny*, 197 N.E.3d at 924.

do not—but should—apply to animals.⁸ Ultimately, the Court’s majority affirmed the lower court’s decision and dismissed the case, finding in part that Habeas Corpus only applies to “human beings,”⁹ which elephants are not.¹⁰

Although this case focuses on a particular zoo animal,¹¹ its holding—and the holdings of other cases with animals in similar circumstances—carries significance for animals across the country and world, whether on the porch, in a cage, in the wild, on the job, or sharing a bed with the biped reading this note. This case was not the first of its kind in a U.S. courtroom. In dictum, the Court referred to its Connecticut sister court, which was also hearing a case involving zoo elephants brought by the same organization that represented Happy.¹² Both courts noted that any decision they may make affecting the legal classification of animals as anything beyond property would carry major implications for agriculture, medical research, pet ownership, service animals, and anywhere animals are used for work.¹³ Thus, at least at first glance, a decision in favor of Happy could carry sweeping impacts.

The New York State Court—should they have decided for the petitioner—would have made a novel jurisprudential decision in the United States by granting legal personhood to an animal.¹⁴ Instead, the Court washed its hands of the issue and determined that redefining Habeas Corpus to encompass nonhumans is “not a matter for the courts.”¹⁵ However, in its

8. See *id.* at 926 (“Habeas corpus is a procedural vehicle intended to secure the liberty rights of human beings who are unlawfully restrained, not nonhuman animals.”).

9. See *id.* at 928.

To be sure, as our dissenting colleagues observe, the writ of habeas corpus is flexible and has long existed as a mechanism to secure recognition of the liberty interests of human beings—even those whose rights had not yet been properly acknowledged through established law. That flexibility, however, is not limitless and the extension of the writ would far exceed its bounds here, where petitioner seeks its application to a nonhuman animal.

Id.

10. See *id.* at 932 (stating elephants and other nonhuman animals “are not *persons* with a common law right to liberty that may be secured through a writ of habeas corpus.”) (emphasis added).

11. Throughout this note, I will refer to “zoo and exotic” animals as a category. It should be interpreted to include animals not considered domesticated—domesticated animals include breeds of dogs, cattle, etc.—but still kept by humans in monitored and regulated areas with a dependency on humans for their survival.

12. See *id.* at 924 (citing *Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc.*, 192 Conn. App. 36 (2019)).

13. See *Breheny*, 197 N.E.3d at 929-62 (concurring with *Commerford & Sons*, 192 Conn. App. at 44) (“Granting legal personhood . . . would have significant implications for . . . property rights, the agricultural industry, . . . medical research efforts . . . pet ownership, the use of service animals, and the enlistment of animals in other forms of work.”).

14. *Id.* at 927 (“[T]hroughout the centuries, no court of this State—or any other—has ever held the writ applicable to a nonhuman animal.”).

15. *Id.* at 931 (citing *Byrn v. New York City Health & Hosps. Corp.*, 286 N.E.2d 887 (N.Y. 1972)) (emphasizing the legislature, not the courts, should address the issue of designating

next breath, the Court undermined that stance by noting its role in defining Habeas Corpus and the doctrine's application. While the majority hesitated to reclassify elephants as legal persons, at least two justices were willing to make that jump, using Happy as a prototype.¹⁶

Thus, this case presents a curious phenomenon: by filing a Habeas Corpus petition on behalf of zoo animals, a non-government organization ("NGO") sought to move the needle on legal personhood in the U.S. Specifically, the NGO appeared to target conversations of how certain rights apply or pertain to animals. They are doing this by leaning on a state court's deference for choosing when and how to apply Habeas Corpus.¹⁷ The NGO intentionally chooses to represent zoo and exotic animals when bringing suit, and the choice of zoo animals carries significance in and of itself relative to other types of animals.¹⁸ Likely underlying this choice is the argument that a zoo animal is a more sympathetic plaintiff than a pet or agricultural animal based on societal views.

In the future, society may determine that some species of animals could or should be recognized as right-holders and enshrine this belief in the law. But today, such a move would require the abandonment of several well-established legal concepts and is not something the courts appear ready to implement. This note first explores the history and development of animals as personal property in the United States. Next, three subcategories of animals—farm animals, pets and companion animals, and zoo and exotic animals—are analyzed to show some of the nuance in how the law and public sentiments have developed over time for each subgroup, which has culminated in the use of Habeas Corpus for animals. This note seeks to identify and explain some of the philosophical rationales undergirding the different approaches to rights and animals—such as animal *welfare* as compared to animal *rights*. Ultimately, based on these philosophical underpinnings, this note seeks to explain why zoo and exotic animals are a growing focal point in the discussions and litigation of how "rights" are—

"personhood").

16. *See d.* at 932, 966.

17. *Id.* at 932 ("[I]t is true that the courts—not the legislature—ultimately define the scope of the common law writ of habeas corpus . . .").

18. At least initially, it is not precisely clear why NGOs would choose to file suit on behalf of zoo and exotic animals. Though multiple factors may be elicited, I propose that zoo and captive exotic animals—such as elephants—are among a third category of animal ownership that does not fit particularly well into concepts of care or justice that often underly distinction between such groups of animals as for agriculture or pets and companion animals. Additionally, because the ownership of zoo and exotic animals are not as culturally engrained as those surrounding animal agriculture and companion animals, there is a greater likelihood of NGOs overcoming some of the deeply entrenched cultural customs surrounding animal ownership as property, creating more room for opportunity to shift public opinion, and therefore the law.

or could be—associated with animals. Further, because the status of animals as property is solidly established in the law and because NGOs will presumably continue to pursue new arguments to alter the status quo, this note also anticipates one such argument that may arise in the evolution of this dialogue.

I. ANALYSIS

A. *Property Laws in the United States*

The common law legal history of the United States has a steadfast tradition of property rights with a notable influence from Roman law. As a foundational principle, Roman law produced two categories for interpreting the world around them: “persons” and “things.”¹⁹ Within this binary system, “things” encompass everything deemed non-person—accordingly, domestic property law developed with this fundamental binary separation engrained. Contemporary property law is currently undergirded by four distinct propositions: (1) rights are held by persons, (2) relationships exist between persons, (3) non-persons, otherwise called “things” or “objects,” have property concepts attached to them, and (4) sanctions against persons exist for violations of any rules.²⁰

Although there is disagreement over property law’s existence, application, and origin,²¹ this note will operate under the premise that property law exists and is deeply woven into our societal functions and legal framework. The Constitution addresses the importance of individual property rights under the Fifth Amendment by requiring “due process of law” before an individual is deprived of property.²² The Constitution also limits a governmental taking of property to instances in which the government can prove a proper public purpose exists for the taking and use and requires just compensation for a property owner after governmental seizure.²³ Through its case law, the Supreme Court has established a relatively high legal standard for when a state is justified in depriving an individual of their property rights.²⁴ However, the Supreme Court has also

19. David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1024 (2010) (“Persons had access to the law and property law was written about things.”).

20. See 1 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 2.02 (Michael Allan Wolf ed., 2009).

21. See 3 ROSCOE POUND, *JURISPRUDENCE* 103, 105-55 (195a9) (providing and describing a thorough compilation of views towards the existence and efficacy of property and property law over time).

22. U.S. CONST. amend. V.

23. *Id.*

24. See *Kelo v. City of New London*, 545 U.S. 469, 483-84 (2005) (holding that the City of New

established that the Constitution does not create property interests.²⁵ Rather, property interests and their subsequent governing laws are typically implemented at the state level.²⁶ This deference to states allows for potential nuance and differences in how states regulate different categories and types of property.

Conceptually, contemporary property can be generally categorized under three basic umbrellas: real property, personal property, and intellectual property.²⁷ Real property includes land and “anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land.”²⁸ Personal property is every “movable or intangible thing that is subject to ownership and not classified as real property.”²⁹ These two forms of property exist under common law.³⁰ Intellectual property is a distinct category comprised of “intangible rights protecting commercially valuable products of the human intellect,”³¹ and these are statutorily created.³² For our purposes, we will focus on animals, which have traditionally been treated as personal property.³³

London could take title over the plaintiff’s property and transfer it to another private party for development only after the city established a *substantial* public good to be realized by the private project and development).

25. See *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (“Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .”).

26. *Id.* Thus, under Federalism, one should compare property rights in the United States on a state-by-state basis, and each state is able to set the parameters on how the laws will affect this property. In *Breheny*, one of the fundamental distinctions is whether animals are property with rights imposed upon them—as to be decided by the states—or if they are “persons” under the doctrine of habeas corpus and contain certain inherent rights independent of some “property” status and delegation of rights. See *Breheny*, 197 N.E.3d at 923-24.

27. See Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL’Y 108, 112-18 (1990) (comparing intellectual property and tangible property and drawing similarities); David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 670-702 (2010) (advocating for intellectual property). *But see* Julie E. Cohen, *Property as Institutions for Resources: Lessons from and for IP*, 94 TEX. L. REV. 1, 32-56 (2015) (distinguishing intellectual property characteristics from other categories of property).

28. *Property*, BLACK’S LAW DICTIONARY (11th ed. 2019).

29. *Id.*

30. Traditionally, the distinction between the two would arise from the “types of assets administered on death” by the king’s courts. 1 RICHARD R. POWELL, POWELL ON REAL PROPERTY §§ 5-7 to -8 (Patrick J. Rohan ed., rev. ed. 1998).

31. *Intellectual Property*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The category comprises primarily trademark, copyright, and patent rights, but also includes trade-secret rights, publicity rights, moral rights, and rights against unfair competition. 2. A commercially valuable product of the human intellect, in a concrete or abstract form, such as a copyrightable work, a protectable trademark, a patentable invention, or a trade secret.”).

32. See *United States v. Line Material Co.*, 333 U.S. 287, 330-31 (1948) (“[Section VI of the Statute of Monopolies] has become the foundation of the patent law securing exclusive rights to inventors . . . throughout the world.”).

33. For an in-depth discussion on this, see GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 119-33 (1995).

B. Animals as Personal Property

Under the common law, an owner's right to property was considered a "natural right" and supported an owner's "absolute" possession of personal property.³⁴ However, animals have not always been considered personal property in the American legal system. English common law's recognition of certain animals as personal property—and the subsequent force of law protecting an owner's property rights in the animal—took time to develop and was applied in a mosaic fashion by selective application to different species.³⁵ As recently as the early twentieth century, whether animals were designated personal property largely depended upon their "use."³⁶ This concept largely lent itself to farm animals. In fact, an owner's property interest in a common pet animal, a dog, did not have widespread support and application as personal property until the early 1900s.³⁷ Additionally, because animals could move, the laws governing animals developed categories—wild or domestic—to determine the extent of property law's coverage and protection.³⁸ An animal's designation as "wild" required taming or domestication for legal protection, but the protection ceased once the animal was out of the control of the human owner.³⁹ Conversely, a

34. Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 68 (2002). When taken to its logical extreme, this implicates the idea that under the common law, there exists no line of demarcation for what one can do to an owned chair versus an owned dog if both are their personal property. Should the owner wish to take either out back and destroy it however they see fit, no matter how brutal it may seem, the owner would be well within their rights to do so. This idea ties directly to the line of reasoning most famously stated by the seventeenth-century French philosopher René Descartes, who claimed that animals were no different than inanimate objects and they could not feel pain. See RENÉ DESCARTES, DISCOURSE ON METHOD AND MEDITATIONS ON FIRST PHILOSOPHY 36 (David Weissman ed., Elizabeth S. Haldane & G. R. T. Ross trans., Yale Univ. Press 1996) (1637) ("[T]hat [animals] do better than [humans] do, does not prove that they are endowed with mind, for in this case they would have more reason than any of us, and would surpass us in all other things. It rather shows that they have no reason at all, and that it is nature which acts in them according to the disposition of their organs.").

35. See Favre, *supra* note 19, at 1026.

36. *Id.* (quoting FRANK HALL CHILDS, PRINCIPLES OF THE LAW OF PERSONAL PROPERTY, CHATTELS AND CHOSSES 35–36 (1914)).

The common law regards and gives the greatest protection to those animals designated as "useful," and the least protection to those *ferae naturae*. Useful animals [e.g., cattle and sheep] are regarded as having intrinsic value, and are given the same protection as is given to goods; but, at common law, animals of a base nature are not regarded as property to the extent of being subjects of larceny, nor could a criminal action be brought for maliciously killing an animal of a base nature [e.g., dogs and cats].

Id.

37. See Favre, *supra* note 19, at 1027 ("In a curious twist of social development, the interests of the dog would come to be recognized by the law, by the adoption of anti-cruelty laws, before the property status of the dog, protecting the interests of the owners, was established.").

38. See Huss, *supra* note 34, at 68–69.

39. *Id.*

domesticated animal's owner maintained possession and property rights in the animal, even if it ran away.⁴⁰

In the case of *Sentell v. New Orleans & C.R. Co.*,⁴¹ the Supreme Court provided a useful overview of the early concepts governing property rights and animals. In the late 1800s, the Court observed how the law treated a particularly valuable pregnant female dog that was killed by an electric vehicle in Louisiana. Because the dog had not been registered with the state, as required by statute, the Court determined that the plaintiff was without recourse.⁴² Initially, the Court pointed out how dogs were recognized as property.⁴³ It also pointed out that the protections dogs received as items of personal property included limitations⁴⁴ and that dogs are of a lesser value or existence relative to the property interests of other animals.⁴⁵ Notably, this case provides a concrete example of how property rights associated with animals largely depend on the animal's usefulness. This concept of usefulness was assigned to the species as a whole rather than through different breed variations, even though dogs "are peculiar in the fact that they differ among themselves more widely than any other class of animals, and can hardly be said to have a characteristic common to the entire race."⁴⁶ Next, the Court conveyed the principle that a dog, especially when hostile, "ha[s] no right to his life which man is bound to respect."⁴⁷ Thus, there were

40. Eric W. Neilsen, *Is the Law of Acquisition of Property by Find Going to the Dogs?*, 15 T.M. COOLEY L. REV. 479, 483 (1998) ("The common law protected the owner's interest in his animals because domesticated animals were valuable to society; thus, the captor's effort to tame wild animals was to be rewarded through the recognition of ownership.").

41. 166 U.S. 698 (1897).

42. *See id.* at 700.

43. *Id.* ("By the common law, as well as by the law of most, if not all, the states, dogs are so far recognized as property that an action will lie for their conversion or injury").

44. *Id.* at 700-01 ("although, in the absence of a statute, they are not regarded as the subjects of larceny").

45. *See id.* at 701.

[Dogs] are not considered as being upon the same plane with horses, cattle, sheep, and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds, and similar animals, kept for pleasure, curiosity, or caprice. They have no intrinsic value, by which we understand a value common to all dogs as such, and independent of the particular breed or individual. Unlike other domestic animals, they are useful neither as beasts of burden, for draught (except to a limited extent), nor for food.

Id.

46. *Id.* The Court then proceeded to discuss the range of such use and appears to do so to provide justification (at least in part) to why the killing of some dogs is beyond question.

While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all, for their natural companionship with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance.

Id.

47. *Id.* at 702-03. The Court then went on to discuss how state police powers would apply to dogs to protect the general public, even if dogs were considered "property in the fullest sense of the

legal statutes and precedent enabling the killing of dogs “without a warrant,” especially in the absence of a collar.⁴⁸ Even though it was decided over 120 years ago, the case has been cited in federal court decisions as recently as 2022.⁴⁹

When viewed historically, the absolute possession of animals as personal property meant that no crime existed for abuse or mistreatment of animals because no such “abuse or mistreatment” could manifest against property.⁵⁰ However, such is not the case for a modern animal owner. Their property interests in the owned animal are limited by whatever anti-cruelty statutes their states have implemented.⁵¹ Historically, a society’s views towards animals are intimately intertwined with the law in that jurisdiction, and this relationship helps to shape the law’s contents and applicability.⁵² In fact, a change in societal views drove anti-cruelty legislation and its implementation. Early conversations about whether to allow the state to dictate what an owner could or could not do with their animal property was a major development. For the first time, communities, and therefore the law, began looking to and considering an animal’s best interest relative to its owner’s interest—effectively breaking up an individual owner’s prior

word.” *Id.* at 704. Again, it is notable how the Court begins their discussion of police power and the confiscation of animal property as compared to other material forms of personal property rather than instances affecting animals. For example, the Court emphasizes the police power over decaying food, “rags and clothing” and “one’s home” before citing instances of forced killing of “diseased cattle.” *Id.* at 704-05. Through a more modern lens, such categorical distinctions, as one’s home from one’s pet, seem more distinct and obvious, but the question remains of whether the law reflects this status.

48. *Id.* at 701-05. This court also discussed the Fourteenth Amendment arguments. Here, the Court highlights statutes in states such as New Hampshire, Massachusetts, Wisconsin, Indiana, and Texas, among others, in its explanation of why dogs may be killed without violating the Fourteenth Amendment’s guarantee of due process. Curiously, the Court notes that the general killings of collarless dogs without a warrant were justified. “The constitutional objection against general warrants, which was the occasion of so much controversy in that state in its colonial days, was held not to apply to dogs, and a warrant was sufficient which ordered the killing of all dogs, living in a town, not duly licensed and collared.” *Id.* at 703 (citing *Morewood v. Wakefield*, 133 Mass. 240 (1882)).

49. See *Sekulovski v. Charter Twp. of Com.*, No. 21-10792, 2022 WL 3084472, at *1 (E.D. Mich. Aug. 1, 2022) (involving a Pit Bull Terrier which was removed from its owner by the town after biting a child). Notably, this case out of Michigan first references *Sentell* in the following context before diving into the case’s discussion of depriving a citizen of a federal right: “Michigan law recognizes that dogs are ‘property.’ But a dog owner’s property right in a dog has been characterized as ‘imperfect or qualified.’” *Id.* at *6 (internal citations omitted).

50. See DESCARTES, *supra* note 34, at 1637; Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 539 (1996).

51. Wise, *supra* note 50, at 539-42 (describing the development of anti-cruelty statutes in the United States within various state jurisdictions). For an example of a criminal anti-cruelty statute, see Kan. Stat. Ann. § 21-6412 (West 2019) (using culpability language and imposing obligations on animal owners).

52. See Favre, *supra* note 19, at 1027-28 (describing how a shift from an owner’s economic interests in an animal gave way to society’s belief that “an animal’s interest in being free from unnecessary pain and suffering [which] should be recognized as a value within the legal system.”).

monopoly over how their animal property should exist and be treated.⁵³ Even so, when New York enacted the first set of anti-cruelty laws in the 1860s, there were exceptions to the animal's interest in being free from unnecessary or needless pain and suffering. The animal's interests were limited through a balancing with an owner's interest or desire for certain outcomes.⁵⁴ Anti-cruelty laws vary in the scope of their protections by state,⁵⁵ but a fundamental distinction in allocating status and rights to animals includes gauging the societal views towards an animal and appropriate uses for such an animal.⁵⁶

An important conceptual dichotomy in anti-cruelty laws materialized between the different subcategories of animals, especially in the different policies concerning farm animals and pets/companion animals.⁵⁷ This divide exists—at least in part—because of urbanization across the United States, which has affected how society views and interacts with animals.⁵⁸ With less than two percent of the United States population living on farms,⁵⁹ a substantial geographic and livelihood shift has occurred in the United States in a relatively short period.⁶⁰ Whereas in the early 1900s, nearly one-third of Americans were involved with animals in a purely economic capacity,⁶¹ today, Americans primarily interact in a relational capacity with companion animals and pets.⁶²

i. Farm Animals as a Commodity

Farm animals have a unique status compared to pets or exotic animals, which is intimately tied to the concept of use and commercial use—this

53. *Id.*

54. *Id.* at 1028-30 (“Thus, if a horse had to be hit to make him start pulling the wagon, or if an animal had to be killed to be eaten, such actions did not violate the law.”).

55. *Id.* at 1034-39 (discussing the differences in scope and allocation of rights to animals between Michigan, North Carolina, and other state laws).

56. *Id.* at 1056 (“Ultimately, what is an acceptable use of an animal, of living property, is a political decision that balances any number of factors during the legislative process.”).

57. See Grace Clement, “*Pets or Meat?*” *Ethics and Domestic Animals*, 1 J. OF ANIMAL ETHICS 46, (2011).

58. Richard L. Cupp, Jr., *Focusing on Human Responsibility Rather Than Legal Personhood for Nonhuman Animals*, 33 PACE ENV'T. L. REV. 517, 526 (2016).

59. See AM. FARM BUREAU FED'N, FOOD AND FARM FACTS 10-13 (2021).

60. JZ KALBACHER & D DEARE, FARM POPULATION OF THE UNITED STATES: 1985 1 (1986), <https://babel.hathitrust.org/cgi/pt?id=uiug.30112046948235&seq=1> (“In 1920, when the farm population was first identified as a separate group, 30.2% of the Nation's residents lived on farms. . . .”).

61. *Id.*

62. See AM. PET PRODUCTS ASS'N., *Pet Industry Market Size, Trends & Ownership Statistics* (2022), https://www.americanpetproducts.org/press_industrytrends.asp (“70% of U.S. households own a pet, which equates to 90.5 millions homes.”).

status is deeply entrenched in the law. In the United States, ownership interests in farm animals have a longer history of legal protection relative to other animals. This is because of “use” principles, and it reflects how animals generate value for their owners.⁶³ Although thoughts of animal husbandry and ownership conjure up nostalgic images of small, family farms or agricultural student projects for 4H or the National FFA Organization, it is notable that corporations are also legally recognized “persons” with the ability to own animals.⁶⁴ Over time, the increased automation and mechanization of animal agriculture has raised awareness and increased the scrutiny on producers and processors for the practices that go into raising and generating the nation’s food.

Private ownership by entities with greater access to capital and investment has contributed to major consolidation across animal agriculture,⁶⁵ and this trend began as early as the 1920s.⁶⁶ The continuing consolidation of animal agriculture systems includes elements of vertical integration⁶⁷ and horizontal integration.⁶⁸ Naturally, as individual and corporate owners continue to grow, consolidate, and integrate, fewer participants exist in each animal agriculture market. Today, continuing agricultural consolidation in the United States has led to four corporations being responsible for most beef slaughter and processing.⁶⁹ The trend is similar for pork and chicken.⁷⁰

Thus, it is clear that corporations continue to make internal decisions geared towards increasing efficiency in animal processing rather than

63. See Favre, *supra* note 19, at 1027.

64. See Darian M. Ibrahim, *A Return to Descartes: Property, Profit, and the Corporate Ownership of Animals*, 70 LAW & CONTEMP. PROBS. 89, 91-93 (2007).

65. *Id.* at 93 (“Corporate ownership of farm animals has become increasingly consolidated in the hands of large agribusiness corporations . . . This consolidation has occurred in the last fifty years through both vertical and horizontal integration.”).

66. *Id.* at 93-94 (citing STEVE STRIFFLER, *CHICKEN: THE DANGEROUS TRANSFORMATION OF AMERICA’S FAVORITE FOOD* 34 (2005)), (“In the 1920s, however, farmers in the Delmarva region (the eastern shore of Delaware, Maryland, and Virginia), tired of the ‘highly risky business of farming table vegetables, which had to be sold quickly and locally,’ began to raise thousands and then millions of broilers to sell to market.”).

67. *Id.* at 93 (“Vertical integration occurs when one corporation comes to own or control virtually every step of production.”).

68. *Id.* at 95 (“Horizontal integration occurs when major corporations in an industry continue to grow by acquiring competitors . . .”).

69. See Cody McCracken, *Old Macdonald Had A Trust: How Market Consolidation in the Agricultural Industry, Spurred on by a Lack of Antitrust Law Enforcement, Is Destroying Small Agricultural Producers*, 13 WM. & MARY BUS. L. REV. 575, 590 (2022) (“[F]our companies control eighty-five percent of the market [for beef].”).

70. *Id.* at 591 (“The top four pork processors process eighty percent of the nation’s hogs and control sixty-six percent of the market, up from thirty-seven percent in 1987. In poultry, over sixty percent of the market is controlled by only four corporations, nearly doubling their market share since the 1970s.”).

focusing on increasing competition or allowing greater resiliency in the market in the form of more players operating at lower capacities. As corporations continue to emphasize efficiency, this process of turning animals into consumable products has become increasingly mechanized to increase supply while decreasing costs.⁷¹ There have been some trends and governmental programs toward countering some of the barriers to entry for new and small-scale farmers and ranchers, especially with the rise in popularity of farmer's markets and direct-to-consumer marketing.⁷² However, the direct-to-consumer market is more niche and has not significantly impacted larger, more consolidated food production enterprises. But, there have been notable gains for producers involved in direct-to-consumer sales of organic crops.⁷³

In describing the public's reaction to *The Jungle*, the 1906 novel about the plight of workers in the Chicago meatpacking industry, Upton Sinclair famously stated, "I aimed at the public's heart, and by accident, I hit it in the stomach."⁷⁴ Modern trends have arguably done the inverse. This has increased scrutiny on producers and processors. Some recent examples include limiting certain reproduction practices in sows⁷⁵ and even debates about whether animals should be eaten at all.⁷⁶ Although there is a vast amount of literature on animal ethics and morality from an academic standpoint, what is particularly curious is the apparent polarity in how the general public is interacting with food. The increase in plant or alternative protein options demonstrates a growing interest in removing traditional animal proteins and products from diets.⁷⁷ Further, Americans increasingly identify themselves with specialty diets and lifestyles, including veganism, vegetarianism, pescatarianism, and flexitarianism.⁷⁸ However, these trends

71. *Id.* at 594 ("The focus is therefore on anticompetitive output restrictions and supra-competitive prices as well as any cost-lowering effects of, or consumer benefits from, mergers or certain business practices."). See also Ann M. Eisenberg, *Distributive Justice and Rural America*, 61 B.C. L. REV. 189, 192 (2020) (describing how globalization and automation has affected rural communities).

72. See Nicholas J. Gral, *Homegrown: Iowa's Farmers' Markets, the Benefits of Direct Farm Marketing, and the Surrounding Legal Considerations*, 22 DRAKE J. AGRIC. L. 229, 231 (2017).

73. See Nicholas A. Rauch, *Against the Grain: Why Middle-Sized Farmers Should Stray from Mass-Distributors and Sell Direct*, 23 DRAKE J. AGRIC. L. 273, 278 (2018).

74. Upton Sinclair, *What Life Means to Me*, COSMOPOLITAN MAG., Oct. 1906, at 594.

75. See Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021), *aff'd*, 598 U.S. 356 (2023).

76. See Rachel Tackman, *Humanity Has Beef with the Meat Industry: The Cultural Push to Change the Way Beef Is Produced, Harvested, and Consumed Stemming from the Adverse Effects of Beef on the Environment and Human Health*, 17 ANIMAL & NAT. RES. L. REV. 151 (2021).

77. See Steph Tai, *Legalizing the Meaning of Meat*, 51 LOY. U. CHI. L.J. 743, 746 (2020).

78. See Lauren McRae, *Vegan, Vegetarian, Pescatarian, Flexitarian and Macrobiotic Diets – What's the Difference?*, N. SHORE UNIV. HEALTH SYS. (June 26, 2019), <https://www.northshore.org/healthy-you/vegan-flexitarian-vegetarian-pescatarian-and-macrobiotic-diets--whats-the-difference/>.

coexist with American consumer demand that has recently hit a thirty-year high for beef,⁷⁹ strong demands for pork and chicken,⁸⁰ and, more generally, a global increase in animal protein consumption.⁸¹ The fact remains that a large part of society still views farm animals as a commodity for protein production, and the demand for these products is—if not growing—holding strong.

Alongside this economic analysis, one should also briefly consider the geographic divide regarding the types of animals with which the public may interact. Specifically for farm animals and agricultural operations, it is well known that public policy favors their placement away from cities and residential areas. These localities prefer to designate agricultural animals and operations outside of their city limits or be zoned within specific confines.⁸² Each year, numerous first-year law students read *Spur Indus., Inc. v. Del E. Webb Dev. Co.*⁸³ and study a prime example of how agricultural operations and farm animal ownership can constitute legal nuisances for residential communities. Although nuisance attaching to larger agricultural operations may seem more obvious, there are also examples of individual or small groups of animals that catch the ire of neighbors and city administrations. In the North Carolina case of *Herron v. Town of Jamestown*,⁸⁴ the court had to determine whether an individual keeping potbellied pigs as pets should be exempt from a local ordinance prohibiting residents from keeping livestock within the city limits, including swine.⁸⁵ Ultimately, in affirming the lower court’s finding that Herron had violated the city ordinance, the court held in part that regardless of how the owners subjectively classified the pigs—whether they be pets or livestock—

79. See AgTV, *Consumer and Wholesale Beef Demand Hit 30-Year Highs Despite Near-Record Beef Prices*, AGWEB.COM (Aug. 11, 2021), <https://www.agweb.com/news/livestock/beef/consumer-and-wholesale-beef-demand-hit-30-year-highs-despite-near-record-beef>.

80. See Matthew Miller et al., *Poultry Expected To Continue Leading Global Meat Imports as Demand Rises*, ECON. RSCH. SERV. (Aug. 1, 2022), <https://www.ers.usda.gov/amber-waves/2022/august/poultry-expected-to-continue-leading-global-meat-imports-as-demand-rises/>.

81. See M. Henchion et al., *Review: Trends for Meat, Milk and Egg Consumption for the Next Decades and the Role Played by Livestock Systems in the Global Production of Proteins*, 15 ANIMAL 1 (2021).

82. This has given rise to state governments passing “Right-To-Farm” statutes to protect farmers in rural areas. The National Agricultural Law Center has a useful online interactive tool that can show these different statutes in their respective states. *State’s Right-To-Farm Statutes*, THE NATIONAL AG. LAW CENTER, (last updated Apr. 15, 2022), <https://nationalaglawcenter.org/state-compilations/right-to-farm/>.

83. 494 P.2d 700, 701 (Ariz. 1972) (concerning a cattle feedlot that is lawful in the first instance, but becomes a nuisance by reason of a nearby residential area).

84. No. COA21-605, 2022 WL 3364119, at *1 (N.C. Ct. App. Aug. 16, 2022).

85. *Id.*

the town's ordinance outlawing "agricultural production" in residential areas legally limited ownership of such animals within city limits.⁸⁶ Thus, farm animals have a status that is unique from pets or exotic animals, tied to the concept of use and commercial use, and this status appears to be deeply entrenched in the law.⁸⁷

*ii. Pets as Family*⁸⁸

While ownership rights for individuals possessing pets and companion animals have not been recognized and protected by law in the United States for as long as farm animals,⁸⁹ this category of animal ownership has witnessed marked growth and popularity over time, especially throughout the 2000s.⁹⁰ Recently, this trend witnessed a period of substantial gain as the COVID-19 pandemic generated a "boom" in the number of pet sales, which has increased the number of first-time and existing pet owners adding an additional "member to their family."⁹¹ This is true both figuratively and literally.⁹² As pets continue to stake more significant claims as members of the American family, so too have owners changed the way these animals are cared for and treated. For example, the costs associated with pet ownership have increased substantially over time and generated record

86. *Id.* at *4-5.

87. What should be noted is how farm animals' commercial use and desirability can change alongside economic conditions. Consider the spike in egg prices that took place in early 2023. This triggered a renewed interest in owning chickens in backyard coops within municipalities. A flurry of articles in early January 2023 address this phenomenon. For one example, see Bob Hallmark, *Rising Egg Costs Have East Texans Looking to Bring Chickens Home to Roost*, KLTV (Jan. 6, 2023 at 3:23 PM), <https://www.kltv.com/2023/01/06/webxtra-rising-egg-costs-have-east-texans-looking-bring-chickens-home-roost/>.

88. This category focuses on animals generally recognized as pets by society and does not consider the categorical sub-class of animals that could be pets, but are owned for a purpose of specific line of work (such as police dogs). For an in-depth look at police dogs specifically, see Craig Ian Scheiner, *Statutes with Four Legs to Stand on?: An Examination of "Cruelty to Police Dog" Laws*, 5 ANIMAL L. 177, 178 (1999).

89. See Sara Mickovic, *Fur-Ever Homes After Divorce: The Future of Pet Custody*, 28 ANIMAL L. 47, 48 (2022) ("U.S. state legislation has historically failed to label companion pets as anything more than personal property, despite this increasing trend towards viewing companion animals as members of the family and the recognition of the importance of pets in American homes.").

90. See *id.* (citing the findings of the American Veterinary Medical Association pointing to marked growth of pet ownership in the United States in 2017 compared to the last poll in 2012). "As of 2017, an estimated 71.5 million households own pets in the United States. Considering that fifty-seven percent of all households in the country owned a pet in 2016, one can clearly see just how many Americans lives are affected by companion animals." *Id.*

91. See Kim Kavin, *Dog Adoptions and Sales Soar During the Pandemic*, WASH. POST (Aug. 12, 2020, 8:00 AM), <https://www.washingtonpost.com/nation/2020/08/12/adoptions-dogs-coronavirus/> [<https://perma.cc/BFF3-PF3A>] (focusing primarily on dogs, but referencing how the summer months of 2020 saw strong demand for all pets).

92. See Mickovic, *supra* note 89, at 48 (emphasizing that the AVA polling found familial tendencies from owners towards their pets primarily for dogs, cats, pet birds, and pet horses).

profits for animal health and supplement companies.⁹³ Whether it be specialized surgeries and procedures, pet boarding and grooming, specialty diets,⁹⁴ or pet insurance,⁹⁵ it is hard to refute the idea that modern pet ownership stands in stark contrast to the pets of yesteryear. Recalling how societal views impact how the law treats animals and rights, the growing trend of personifying pets—with owners seeing themselves as “pet parents”—carries significant weight in how future laws or changes to the law may be structured.⁹⁶ The phenomenon of pets as members of the family is already impacting some state laws affecting divorce proceedings⁹⁷ and has moved the law closer to weighing a pet’s interest in a divorce as being similar to that of a child’s in such jurisdictions.⁹⁸

For example, an Alaskan statute describing the division of property upon divorce includes language that states, “if an animal is owned, for the ownership or joint ownership of the animal, [the court may] tak[e] into consideration the well-being of the animal.”⁹⁹ Some have heralded this language as “monumental” for animal rights groups at the time it was passed,¹⁰⁰ though some advocates have also raised concerns about the language not going far enough.¹⁰¹ During the same year, but before the statute was amended to include language for considering the pet’s well-being, the Alaska Supreme Court addressed a request¹⁰² to change a divorce decree involving the custody of a chocolate lab named Coho.¹⁰³ Though the

93. See Ana-Ioana Ciocchia, *Pet Spending Statistics (2022): How Much Do Americans Spend On Pets?*, FINMASTERS (June 16, 2022), <https://finmasters.com/pet-spending-statistics/> (“In total, Americans spent \$124 billion on pet products and services in 2021.”).

94. *Id.* (emphasizing the top three expenses were veterinarian visits, pet food, and boarding).

95. See Angela Colley, *Renters, You May Need Pet Insurance for Your Four-Legged Friend*, REALTOR MAG. (Feb. 13, 2017), <https://www.realtor.com/advice/rent/renters-may-need-separate-insurance-for-pets/> [<https://perma.cc/7CPG-6ULY>].

96. See Mickovic, *supra* note 89, at n.23 (“Past ideas that dogs and cats are meant to have jobs on farms, and not have a place in the house, have been replaced by ‘furbabies,’ ‘pet parents,’ and bumper stickers that read ‘who rescued who?’ and ‘my kid has four paws.’”) (quoting Emily Gelmann, *See Spot. See Spot. Run. See Spot Every Other Weekend? Mire Than Just Animals: The Evolution of Pet Custody Cases*, 49 MD. BAR. J. 36, 37 (2016)). See generally Grace Hambuchen, *Dog Process or Due Pupcess? Federal Court Misses Opportunity to Modernize Pet Due Process*, 86 MO. L. REV. 1333 (2021).

97. See Mickovic, *supra* note 89, at 57-60 (showing how a minority of states including Alaska, Illinois, and California permit courts to consider the well-being of companion animals in divorce proceedings).

98. *Cf. id.* at 55 (“Though nearly all states have refused to apply the ‘best interest standard’ used in child custody cases to pet custody dispute cases, there has been a ‘growing acceptance of something else,’ by which courts may choose to consider what is best for all parties when determining in whose care a pet is placed.”).

99. ALASKA STAT. ANN. § 25.24.160 (West 2016).

100. Mickovic, *supra* note 89, at 58.

101. *Id.* (“[T]he state divorce law is only permissive in nature. The new amendment provides that ‘the court may’ consider the well-being of pets.”).

102. *Juelfs v. Gough*, 41 P.3d 593, 595 (Alaska 2002).

103. *Id.* at 593.

Court made no mention of the statutory consideration of a pet's interest—as it had not yet been codified—in reviewing the lower court's determination on the custody of Coho, it noted language stating how it was “in the best interests of Coho” that Coho be awarded to Steve Gough solely.¹⁰⁴ However, it remains unclear whether the codification of judicial deference to consider an animal's well-being has had a measurable impact on outcomes in other judicial decisions.¹⁰⁵ What is clear is that pets are growing in popularity among owners, owners are treating their pets more like persons, and this trend is slowly but surely making its way onto the desks of legislators and judges.

iii. *Zoo and Exotic Animals as Luxurious Novelties*

The practice of owning exotic animals is anything but novel.¹⁰⁶ Throughout history and in popular culture, ownership of rare or exotic animals has often been associated with wealth and prestige.¹⁰⁷ Exotic animals have been owned and used by humans for war,¹⁰⁸ decoration or ornaments,¹⁰⁹ hunting partners,¹¹⁰ and alternative food sources.¹¹¹ In more

104. *Id.* at 597. The court was determining whether under the Alaskan Rules of Civil Procedure, a judge's decision going against enforcement of the initial marriage dissolution was proper under the specific rule's “catch-all” provision. In so doing, the supreme court found persuasive Gough's opposition to joint agreement was sufficient independent action or remedy prescribed by the rules.

Such language is enough to warrant the trial court's action. Although there is an interest in the finality of judgments, it is clear the judgment would never have been final under the circumstances that faced the court. The arrangement between Julie and Stephen assumed a state of facts, namely, cooperation between them, that proved not to exist, requiring judicial intervention. As Judge Beistline aptly noted, the arrangement between Julie and Stephen was not working: “[T]he parties were unable to share custody of Coho without severe contention.”

Id.

105. At least for the Alaskan, Californian, and Illinois statutes, the only recent court decision where the animal welfare provision was explicitly addressed was in a 2021 case out of Washington state. See *Matter of Marriage of Niemi*, 496 P.3d 305, 309 (2021) (holding that the trial court exceeded its authority in awarding visitation rights to two dogs after marriage dissolution).

106. See Dana Mirsky, “*Very Complex Questions*”: *Zoos, Animals, and the Law*, 46 WM. & MARY ENVTL. L. & POL'Y REV. 217, 217 (2021) (“[T]he elite of Hierakonpolis, Egypt, housed elephants, hippos, and baboons in the world's oldest known zoo.”).

107. See Maja Miziur, *Exotic Animals as a Manifestation of Royal “luxuria”*. *Rulers and Their Menageris: From the Pompe of Ptolemy II Philadelphus to Aurelian*, PHASIS 451-465 (2013).

108. Historically, some of the most famous instances of this phenomenon include Hannibal's use of elephants in attacking Rome. See Patrick J. Kiger, *How Hannibal Crossed the Alps (With Elephants)*, HISTORY, (May 9, 2023), <https://www.history.com/news/hannibal-crosses-alps>.

For modern instances by the United States military, See *U.S. Navy Marine Mammal Program*, NAVAL INFO. WARFARE CENTER, <https://www.niwcpacific.navy.mil/About/Departments/Intelligence-Surveillance-and-Reconnaissance/Marine-Mammal-Program/>.

109. See Mark Mitchell, *History of Exotic Pets*, VETERINARY CLINICAL MED., 1-3 (2009) (describing the evolution of exotic fish).

110. *Id.* (describing the evolution of ownership of ferrets).

111. *Id.* (describing the evolution generally of birds and rabbits).

modern times, American zoological enterprises have placed increased importance and emphasis on animal welfare over mere ownership rights.¹¹² This development demonstrates that society is placing greater weight on how and why people seek to own these animals. Documentaries such as *Blackfish* and streaming series such as *Tiger King* have attained global recognition and brought greater scrutiny to the private ownership of exotic animals. Particularly, this scrutiny has placed private ownership of zoo and exotic animals for either strictly economic or entertainment purposes in a negative light.¹¹³ The ownership of certain exotic animals, especially for entertainment, has increasingly been seen as less favorable socially.¹¹⁴ Most of the disfavor focuses on animals shown as having greater intelligence, particularly in instances of self-recognition, memory, and complexity of trainability. But even as a general disfavor towards exotic animal ownership grows, a global black market for exotic animals and their byproducts exists, with annual revenues in the billions.¹¹⁵ The United States has federal and state laws directly regulating the ownership of such animals.¹¹⁶ Similar to the laws affecting farm animals and pets, the federal laws affecting zoo and exotic animals notably focus on animal *welfare* as opposed to animal *rights*.¹¹⁷ Even under internal policies championing enhanced animal welfare standards, there are persuasive arguments that internet access, climate change, and other environmental factors are removing some of the luster of owning exotic animals and require greater justification by the private owners to continue their practice of ownership.¹¹⁸

112. See Mirsky, *supra* note 106, at 217-18.

113. *Id.* at n.9. (providing an in-depth review and explanation of responses to the cultural phenomena of private ownership of big cats and sea creatures popularized by documentaries and streaming services).

114. See *Breheeny*, 197 N.E.3d at 954-55 (Wilson, J.,dissenting) (citing Sarah M. Nir, *Ringling Circus Is Returning. Lions, Tigers and Dumbo Are Not*, N.Y. TIMES (May 18, 2022), <https://www.nytimes.com/2022/05/18/arts/ringling-circus-returning.html>).

115. See Rene Ebersole, *The Black-Market Trade in Wildlife Has Moved Online, and the Deluge Is 'Dizzying'*, NAT'L GEOGRAPHIC (2020), <https://www.nationalgeographic.com/animals/article/how-internet-fuels-illegal-wildlife-trade> (“The internet is now a global bazaar for the multibillion-dollar black market for exotic pets and animal parts, used for everything from curios and medicines to leather boots and skin rugs.”).

116. See Mirsky, *supra* note 106, at 221 (“This includes—but is not limited to—the Animal Welfare Act (‘AWA’), the Endangered Species Act (‘ESA’), and the Marine Mammal Protection Act (‘MMPA’).”).

117. *Id.* at n.104. Animal rights are different than animal welfare. Animal welfare focuses on treating animals humanely, while animal rights typically emphasize a belief that animals deserve rights equal to human rights, and therefore that humans “should not use or own animals in any way.” Ralph A. DeMeo, *Defining Animal Rights and Animal Welfare: A Lawyer's Guide*, 91 FLA. B.J. 42, 42 (2017); AKC Government Relations, *Understanding the Difference Between Animal Rights and Animal Welfare*, AM. KENNEL CLUB (Mar. 6, 2017), <https://www.akc.org/expert-advice/news/difference-between-animal-rights-animal-welfare/> [<https://perma.cc/7GT8-L2FG>].

118. See Robin McKie, *Is It Time to Shut Down the Zoos?*, THE GUARDIAN, (Feb. 2, 2020),

Conversely, the ownership of exotic pets as emotional support animals has also shed light on a unique area of law. Specifically, tension exists when evaluating the nuance between a disabled human's right to own an animal and limitations under federal guidelines¹¹⁹ and local ordinances.¹²⁰ Thus, although there appears to be growing public discontent with owning zoo and exotic animals for entertainment, these animals have also found a faction of support in ownership by individuals that parallels the status of other domesticated pets and sometimes serves a human welfare function.

C. The Writ of Habeas Corpus and Its Application to Animals

The Writ of Habeas Corpus has a longstanding presence in the American Common Law legal tradition. It was first introduced in 1295 as part of the Magna Carta, signed by King John of England.¹²¹ Federally, the right to exercise Habeas Corpus is protected in the United States Constitution,¹²² statutory law,¹²³ and case law.¹²⁴ It is generally understood to allow the courts an opportunity to determine whether a prisoner is being unlawfully detained.¹²⁵ Under federalism and the limitations imposed by the federal government, individual states determine most of the specifics for how Habeas Corpus operates within their respective jurisdictions.¹²⁶ What is

<https://www.theguardian.com/world/2020/feb/02/zoos-time-shut-down-conservation-education-wild-animals>.

119. One of the more prevalent of these issues includes service animals on airplanes. See *APHIS Pet Travel*, APHIS, <https://www.aphis.usda.gov/aphis/pet-travel> (interactive tool for seeing what animals are considered pets and can or cannot travel to various locations). See also Heather Murphey, *The Completely Reasonable Reason People Are Flying With Mini Horses*, THE NEW YORK TIMES, (2019), <https://www.nytimes.com/2019/08/17/travel/mini-horse-service-plane.html> (“Last week, after months of deliberation, the Department of Transportation released formal guidance regarding animals on planes. The 28-page document makes it clear that three types of service animals should be prioritized for travel: cats, dogs and miniature horses.”).

120. One particularly unique case comes from a federal district court in Texas and involves a lemur with a history of biting individuals—including a rural mail carrier—that was kept as an emotional support animal in violation of a city ordinance. See *Baughman v. City of Elkhart*, No. 6:17-CV-326, 2018 WL 1510678 (E.D. Tex. Mar. 27, 2018).

121. Ralph C. Chandler, Richard A. Enslen, & Peter G. Renstrom, *Constitutional Law Deskbook* § 1:16 Magna Carta (September 2023 Update) (“The Magna Carta was the ‘Great Charter’ issued by King John at Runnymede on June 15, 1215.”).

122. U.S. CONST. Art. I § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

123. 28 U.S.C. §§ 2241–2256 (outlining procedure for Habeas Corpus).

124. See *Johnson v. Hoy*, 227 U.S. 245 (1913); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

125. See *Schick v. United States*, 195 U.S. 65, 69 (1904) (stating Habeas Corpus “is the appropriate remedy to ascertain . . . whether any person is rightfully in confinement or not.”). See also 3 William Blackstone, *Commentaries on the Laws of England*, 137 (“[Habeas is the appropriate vehicle to] remov[e] the injury of unjust and illegal confinement.”)

126. One such example can be found in the New York State statutes. See N.Y. C.P.L.R. 7002 (McKinney).

consistent across all U.S. jurisdictions is that Habeas Corpus applies to “persons.”¹²⁷

In the United States, Habeas Corpus petitions filed on behalf of what the law declares to be nonhuman or lacking legal rights is not a novel practice. When enslaved people were considered property, Habeas Corpus was used by interested parties to challenge their bondage and incarceration.¹²⁸ Similar cases were brought more generally on behalf of women and children.¹²⁹ However, the use of Habeas Corpus for animals is something of a new phenomenon.¹³⁰ The most recent and notable cases involving petitions of Habeas Corpus on behalf of animals have been filed by the Nonhuman Rights Project and taken up by state courts in Connecticut and New York.¹³¹ Still, there is disagreement over the use of Habeas Corpus for animals. Some argue that use of the Habeas Corpus should be seen as progress and the beginnings of a natural next step in the progression of the law. Others see this use of Habeas Corpus as a new fad and a waste of judicial time and resources. However, when viewed globally, the practice of petitioning for Habeas Corpus relief on behalf of an animal has been documented in instances as early as the 1970s.¹³²

The first documented filing of a Habeas Corpus petition on behalf of an animal took place on behalf of “all imprisoned birds” in Brazil in 1972.¹³³ It is unclear whether the petitioner, an animal protection association, was filing for the actual release of birds. “Some have interpreted this pioneer case as a metaphor directed against the dictatorship of Humberto de Alencar Castelo Branco, who ruled Brazil between 1964 and 1985, rather than as a genuine attempt to obtain the recognition of legal personhood for animals.”¹³⁴ What is undisputed is the effect of the case: it generated a

127. *Id.* (“A *person* illegally imprisoned or otherwise restrained . . .”) (emphasis added).

128. *See* *Lemmon v. People*, 20 N.Y. 562 (1860).

129. *See* *Wales v. Whitney*, 114 U.S. 564, 571, (1885) (“Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a mad-house, as well as those under military control, may all become proper subjects of relief by the writ of *habeas corpus*.”).

130. *Three Elephants Forced to Perform for Decades*, NONHUMAN RTS. PROJECT, <https://www.nonhumanrights.org/client/beulah-karen-and-minnie/> (last visited Oct. 12, 2022) (showing the first identifiable instance of a writ of habeas corpus being filed on behalf of an elephant in the United States in 2017).

131. The case out of Connecticut had to do with the fate of several chimpanzees. *See* *Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc.*, 192 Conn. App. 36 (2019); *Nonhuman Rts. Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73 (2017).

132. Macarena Montes Franceschini, *Animal Personhood: The Quest for Recognition*, 17 ANIMAL & NAT. RES. L. REV. 93, 95 (2021).

133. *Id.* (citing S.T.F., No. 50.343, Relator: Des. Djaci Falcão, 3/10/1972, DIÁRIO DA JUSTIÇA [D.J.], 10.11.1972, 807 (Braz.), pg. 808).

134. *Id.* (quoting from Facebook interview with Daniel Braga Lourenco, Professor of Law & Animal Ethics Expert, Centro Universitário Faculdade Guanambi, (Nov. 22, 2019)).

procedural gameplan for future petitioners and laid the substantive foundation for argument styles and content in similar cases worldwide.¹³⁵ Although no court has provided Habeas Corpus relief to an animal in any federal or state filing in the United States, the framework established by earlier petitions has become a certifiable and arguable position as state appellate courts continue to grant review.¹³⁶ As the practice has developed over time, the high courts of some nations, such as the Uttarakhand High Court in India, have gone as far as to formally recognize animals as legal persons.¹³⁷ In these situations, the country grants human residents the status of “guardians” for animals, who may act on the animal’s behalf and exercise the animal’s rights.¹³⁸ In this way, the concept of animal welfare is overridden by that of animal rights, which affords a higher level of protection and autonomy to the animals themselves. It should come as no surprise that the use of Habeas Corpus for animals has found its way into the toolbelts of animal rights groups and NGOs seeking to move the needle on the public’s perception towards their legal relationship with animals or change the relationship entirely. This is the case even if the petitioners claim their goal is immediate success for their animal client.¹³⁹

It is arguable whether the use of Habeas Corpus in this manner can be deemed a success in terms of immediate outcomes. To date, no U.S. court has ruled in favor of petitioners representing the animals in Habeas Corpus cases.¹⁴⁰ Nevertheless, these cases have grabbed the attention of the general public and impacted discourse on the topic. As more judges draft opinions in favor of recognizing animals, like elephants, as legal persons—inherently containing rights and protection under the law—the traditional practice of rights attaching to animals through duties imposed on the animal’s owner may very well be up for grabs in the foreseeable future.¹⁴¹

D. The Camps of Thought

Here, the main point of contention is how rights are or should be

135. *Id.*

136. *See Breheny*, 197 N.E.3d at 921.

137. *See Franceschini*, *supra* note 132, at 142.

138. *Id.*

139. *See Breheny*, 197 N.E.3d at 929 (“[Petitioner] maintain[s] that affording such a remedy merely seeks to establish one right for Happy that would allow her to live her remaining years in captivity but in a more natural environment.”).

140. *Id.* at 930-31. While this is certainly the case in the United States, the only successful Habeas Corpus case that resulted in a re-homing of the animal came from a decision in Argentina. *See Tercer Juzgado de Garantías de Mendoza [J.G.Men.] [Third Criminal Court of Mendoza]*, 3/11/2016, “Presentación Efectuada Por AFADA Respecto del Chimpancé ‘Cecilia’ Sujeto No Humano,” [Expte. Nro.] P-72.254/15, (Arg.).

141. *Id.* at *7-*43 (Wilson, J., dissenting) (Rivera, J., dissenting).

attributed to animals, because how one views the relationship between rights and animals subsequently determines how the law should be—and ultimately will be—constructed. As mentioned previously, the dynamic of rights and animals is evident through an analysis of the term “animal rights.” In common vernacular, the term tends to act as a catch-all for a wide range of animal issues.¹⁴² The current arguments surrounding rights and animals have materialized through the jurisprudence of cases like those brought by the Nonhuman Rights Project. In these cases, the opposing parties and their respective approaches towards rights and animals can be sorted into three general Camps: those who desire to (1) promote an unimpeded property interest in their animal property, (2) dramatically alter the approach to animals and rights by redefining legal personhood to include some or all animals, and (3) operate within current legal standards and change current laws emphasizing animal welfare by increasing the duties placed upon owners towards animals and provide for better enforcement.¹⁴³

Camp One is predominantly occupied by those who oppose governmental interventions upon individuals and their property. Among the most outspoken advocates for unimpeded property interests in animals are those in agriculture, rural settings, and/or illegal animal competitions.¹⁴⁴ However, some involved in agriculture—both small individual operations and larger corporate enterprises—will argue that this stance is at least partially in response to extreme measures and policies pushed by NGOs who conflate facts in their narratives.¹⁴⁵ However, this belief is not monolithic in agriculture.¹⁴⁶

Camp Two is diametrically opposed to Camp One and seeks to reclassify

142. See Huss, *supra* note 34, at 60 (“[R]ights’ is often used as a catchword for a variety of issues related to animals (usually welfare issues) and does not necessarily mean that the proponents advocate legal rights for animals.”).

143. Richard L. Cupp, Jr., *Focusing on Human Responsibility Rather Than Legal Personhood for Nonhuman Animals*, 33 PACE ENVTL. L. REV. 517, 527 (2016).

144. Kailey Burger provides an overview of this dynamic in her discussion on puppy mills and why agricultural groups tend to oppose any further regulation in the state of Missouri. See Kailey Burger, *Solving the Problem of Puppy Mills: Why the Animal Welfare Movement’s Bark is Stronger Than Its Bite*, 43 WASH. U. J.L. & POL’Y 259, 269. See also Beau R. Morgan, *Iowa and Right to Farm: An Analysis of the Constitutionality of Right to Farm Statutes Across the United States*, 53 CREIGHTON L. REV. 623, 625 (2020); Oliver Whang, *Cockfighting Is Illegal in the U.S. Why Does It Breed so Many Fighting Birds?*, THE NEW YORK TIMES, (Jan. 18, 2023), <https://www.nytimes.com/2023/01/18/magazine/cockfighting-roosterbreeding.html#:~:text=Taking%20part%20in%20the%20practice,to%20outlaw%20cockfighting%20in%202007>.

145. See Gil Gullickson, *Why the Humane Society Says it Gets a Bad Rap from the Livestock Industry*, SUCCESSFUL FARMING (May 5, 2018), <https://www.agriculture.com/news/livestock/why-the-hsus-says-it-gets-a-bad-rap-from-the-livestock-industry>.

146. See Andrew Amelinckx, *The Human Society of the United States is Taking on Factory Farming*, MOD. FARMER (Aug 22, 2017), <https://modernfarmer.com/2017/08/humane-society-taking-factory-farming/>.

animals—either some or all—under legal personhood, granting animals certain inalienable rights. At least some argue that this designation would not make animals into “persons” except as part of a natural progression already identified within litigation and the law over time.¹⁴⁷ Others seek the recognition of animals as persons to combat “speciesism,”¹⁴⁸ protect indigenous people’s cultural beliefs and traditions, or combat environmental degradation and climate change.¹⁴⁹ Thus, Camp Two sees altering the legal status of animals to legal persons as a first step to realizing positive change.

In practice, Camps One and Two find themselves more on the fringe. The current state legal systems in the United States unanimously belong to Camp Three. Of the triad, Camp Three is the largest and contains the greatest amount of nuance and line-drawing for determining which rights should be applied to which animals.¹⁵⁰ In Camp Three, rights for animals are duties imposed on humans towards animals, and these duties are subject to modification.¹⁵¹ All members of this Camp still recognize animals as property but may differ on what this categorization entails. For example, there is growing disagreement over what the possessor of animal property should be called.¹⁵² It follows that most of the amendments or changes to modern laws concerning rights and animals will only be as effective as the ability for groups to influence members of Camp Three.

147. See Mária Zulick Nucci, *The 'Darwinian' Evolution of Animal Law*, PA. LAW., July/August 2022, at 20, 28.

The concept is, unfortunately, too often dismissed as saying “animals are people,” similar to the misrepresentation of the U.S. Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission* as saying “corporations are people,” despite the long constitutional and other legal history recognizing legal personhood, particularly for litigation purposes, for various nonhumans, such as political, business and organizational entities.

Id.

148. See PETER SINGER, *ANIMAL LIBERATION* 255 (1975) (“The core of this book is the claim that to discriminate against beings solely on account of their species is a form of prejudice, immoral and indefensible in the same way that discrimination on the basis of race is immoral and indefensible.”). One can hardly enter the arena of discussing animals and rights without running into Singer’s work or similar work he inspired. For an example of the impact Singer has made on NGOs and their leadership see Ingrid Newkirk, *What is Animal Liberation? Philosopher Peter Singer’s Work Turns 40*, PETA (2015), <https://www.peta.org/about-peta/learn-about-peta/ingrid-newkirk/animal-liberation/>.

149. See Laura Shay Lynes, *Rights of Nature and Legal Personhood to Bison in Canada*, 114 AM. SOC’Y INT’L L. PROC. 87, 87 (2020).

150. See Favre, *supra* note 19, at 1032-1042 (analogizing rights as cards to demonstrate how states handle rights and animals in different settings).

151. *Id.* at 1042-43.

152. *Id.* at 1043 (“[T]he word ‘ownership’ . . . is offensive to a number of individuals who believe the use of the word implies an attitude suggesting a superior human status with total control over the animal. Some suggest the term ‘guardian’ be used instead.”).

E. The Underlying Philosophies

As shown in Happy’s case, state courts have gone on the record and declared that an animal lacks the ability to be involved in a social contract and is, therefore, unable to be bound by the “duties and obligations” necessary to receive the benefits of rights.¹⁵³ Thus, rights associated with animals take the form of duties imposed on humans towards their animal property in alignment with Camp Three. Even so, Camp Two appears to be a growing school of thought and raises challenges to the longstanding tradition of the law that animals lack inherent rights or interests. Such arguments permeate discussions on how people see and treat animals and, thus, the laws governing those relationships. Although it has not quite been successful in shifting the Overton Window¹⁵⁴ or producing substantial policy measures in the United States, Camp Two appears to be moving the needle on the conversation.

The modern debate on rights and animals finds its three Camps undergirded by different philosophical approaches to how animals are or should be treated under the law. These three approaches are contractualism, utilitarianism, and inherent valuation.¹⁵⁵ While not fully encapsulating the three Camps, these three philosophical approaches contain general principles that help describe a ternary relationship between persons, animals, and the law.

i. Contractualism

The first philosophical approach traces its roots and influences to philosophers such as Immanuel Kant and John Rawls. Kant believed that duties to animals stemmed from the duties imposed upon finite rational

153. See *Brehey*, 197 N.E.3d at 928-29.

As these courts have aptly observed, legal personhood is often connected with the capacity, not just to benefit from the provision of legal rights, but also to assume legal duties and social responsibilities. Unlike the human species, which has the capacity to accept social responsibilities and legal duties, nonhuman animals cannot—neither individually nor collectively—be held legally accountable or required to fulfill obligations imposed by law.

Id. (internal citations omitted).

154. See Anand Giridharadas, *How America’s Elites Lost Their Grip*, TIME. (Nov 21, 2019), <https://time.com/5735384/capitalism-reckoning-elitism-in-america-2019/>; Mackinac Center for Public Policy, *The Overton Window*, <https://www.mackinac.org/OvertonWindow> (“The Overton Window is a model for understanding how ideas in society change over time and influence politics. The core concept is that politicians . . . [can] generally only pursue policies that are widely accepted throughout society as legitimate policy options.”).

155. See Huss, *supra* note 34, at 60. Huss provides a thorough and comprehensive analysis on some of the common issues addressed within the morality and animal rights debates.

beings.¹⁵⁶ This group of finite rational beings came to only include human beings.¹⁵⁷ Kant reasoned that the duties imposed upon humans correspond with rights. However, these rights and duties exist within and apply only to a defined “moral community,”¹⁵⁸ which does not include animals. Thus, following a Kantian perspective, the only way a duty would arise for the care of an animal is through indirect duties humans self-impose, with these duties tied to legal or ethical considerations. Kant argued, thus, that the only duties we owe to animals, which fall outside of our moral community, are self-imposed and depend upon our interactions with said animals in the pursuit of our own ends.

Rawls promoted the idea that those having a sense of justice were the only beings owed the duty of justice.¹⁵⁹ Within contractualism, the necessity of reciprocity¹⁶⁰ categorically limits animals from entering the human social contract.¹⁶¹ Following this line of reasoning, Rawls states it is because animals do not have the ability to sense justice-versus-injustice that no duty of justice is owed to them. Thus, their inability to participate in the social contract removes any moral obligation humans may have to refrain from harming animals who are not contributing to the rules or standards that determine what society deems as acceptable forms of behavior or existence.¹⁶²

Accordingly, under contractualism, a foundation is laid for animals to serve the ends of humankind with only self-imposed limitations we, as humans, deem necessary or ethically acceptable. Following the ideas underlying contractualism to their logical ends, the use of animals in any

156. See Nelson T. Potter, Jr., *Kant on Duties to Animals*, JARBUCH FÜR RECHT AND ETHIK (2005).

157. *Id.* at 299.

158. *Id.* at 304 (“Rather Kant’s point is that . . . only rational beings are members of the moral and legal community. The consequence is that nonhuman animals are beyond the pale of Kantian duties, and hence, . . . only the ‘with regard to’ objects of indirect duties to ourselves.”).

159. See Christie Hartley, *Two Conceptions of Justice and Reciprocity*, SOC. THEORY & PRAC. 40.3, (July 2014).

160. *Id.* at 409. Reciprocity can be summarized as all members of a group or system respecting the rules and having said rules apply equally and to all. Here, it is defined as being somewhere “between the idea of impartiality, which is altruistic (being moved by the general good), and the idea of mutual advantage understood as everyone’s being advantaged with respect to each person’s present or expected future situation as things are. . . .”). *Id.*

161. Disagreement exists on whether this is true. For more information on how animals can be considered within the social contract, see Craig Ewasiuk, *Escape Routes: The Possibility of Habeas Corpus Protection for Animals Under Modern Social Contract Theory*, 48 COLUM. HUM. RTS. L. REV. 69 (2017).

162. See Huss, *supra* note 34, at 61 (“As animals are not able to participate in the formation of this social contract (because they presumably do not possess a sense of justice and are not rational), there is no moral obligation not to harm them.”). *But see* Potter, *supra* note 156 at 305-310 (discussing Kantian theory and its implications for the indirect duties on non-relational humans, such as the severely mentally disabled and those suffering from senile dementia).

way deemed necessary to promote the desired ends of humankind allows for the development of social standards and the law that will change over time to meet society's desires. Theoretically, this could materialize in either extreme: the total depravity of animals to the will of man for any and all purposes, or conversely, near-total outcome equality of animals to humankind based upon the self-imposed duties on the human race. However, more likely, different institutional beliefs and moral systems will provide limitations in practice, though there will still be plenty of nuance and room for differences within the different belief systems operating within a contractual system.

ii. Utilitarianism

The next philosophical approach is utilitarianism. When considering this approach and the use of consequentialist theory¹⁶³ concerning the treatment of animals, the works of Jeremy Bentham and Peter Singer form the baseline. Utilitarianism's "[e]thical judgments" must be "made with a basic principle of equality, also referred to as 'the principle of equal consideration of interests.'"¹⁶⁴ Thus, equal weight is given to the interests of all those whose interests will be affected by the outcome of a decision.¹⁶⁵ A succinct summary of how Bentham and Singer implement utilitarianism is as follows:

Bentham's is a pure hedonistic Utilitarianism, asserting the supreme value of pleasure and the disvalue of pain. Peter Singer's modern version is somewhat different. He calls it "preference utilitarianism," and it holds that the consequences we should aim to produce are those that on balance "further[] the interests of those affected." Killing is wrong only when individuals killed have a preference to continue living; the killing is a wrong to those individuals.¹⁶⁶

Thus, under Bentham, a threshold consideration for an interest to be equally weighed in an ethical decision is the being's self-awareness and "capacity

163. Consequentialism has many forms, with utilitarianism as one form, and ultimately focuses on "whether an act is morally right depends only on the consequences of that act or of something related to that act" See STAN. ENCYC. OF PHIL., *Consequentialism* (May, 20, 2003), <https://plato.stanford.edu/entries/consequentialism/>.

164. See Huss, *supra* note 34, at 62-63 (citing Peter Singer, PRACTICAL ETHICS 3 (1979)).

165. *Id.* at 63.

166. Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1529 (2001).

for suffering . . . and/or the enjoyment or happiness.”¹⁶⁷ The absence of such awareness, necessary for determining interests, would enable some animals to be treated as property, as they would lack an interest in continuing to live or exist.¹⁶⁸ Under Singer’s utilitarianism, similar to Bentham’s, most animals lack self-awareness.¹⁶⁹ However, both recognize certain animals as exceptions to this rule.¹⁷⁰ Further, using the principle of equal consideration of interests, any seemingly major interests a human may have when compared to a seemingly minor interest of an animal could not be leveraged, as both interests would have equal footing.¹⁷¹

The significance of utilitarian beliefs, for our purposes, is their nod to “self-aware” animals—which would become beings rather than mere animals—and their interests. An animal is considered self-aware if they “are aware of time (past and future, existing over time) and have a sense that they are distinct from other entities.”¹⁷² Thus, a self-aware being is placed upon a higher plane of existence compared to the rest of the animal kingdom. This upward movement subsequently places said being’s interests in the same realm of consideration as that of humans—full stop.¹⁷³

iii. Inherent Valuation

The third philosophical approach is inherent valuation. This approach is largely attributed to the writings of Tom Regan and is based on the doctrine of natural rights.¹⁷⁴ As is likely apparent from the term, Regan promotes the idea that animals have moral rights because each animal, individually, has inherent value.¹⁷⁵ This belief refutes those of contractualism and utilitarianism by placing value on the individual being without any consideration of the conditional value or benefits such a being can provide. “Under this theory, all forms of discrimination based on race, gender, or

167. Huss, *supra* note 34, at 63. (Bentham’s viewpoint is often cited: ‘The question is not, Can they reason? nor Can they talk? but, Can they suffer?’) (internal citations omitted).

168. *Id.*

169. *Id.* at 64 (“Like Bentham, Singer would not view animals as being self-aware . . .”).

170. *Id.* at n.122 (“The exceptions would include various animals that tests have shown reflect self-awareness, such as chimpanzees, orangutans, and gorillas.”) (internal citations omitted).

171. *Id.* at 65.

172. *Id.* at 64.

173. Though there is plenty to say of what would happen to non-self-aware animals, the scope of this article anticipates that the implementation of utilitarianism would primarily focus selectively on the “newly recognized” interests of self-aware beings formerly void of such considerations. Because of the deep entrenchment of contractualism in modern animal rights jurisprudence, these newly recognized interests and the threshold determination would likely be the demarcation line of animals being property under current law or “beings” under the refined definitions at that time.

174. See Huss, *supra* note 34, at 65.

175. *Id.* at 66.

other social classifications are intolerable. All who possess inherent value possess it equally.”¹⁷⁶

Regan’s recognition of inherent value comes with conditions. He defines an individual as “a conscious creature having an individual welfare that has importance to us whatever our usefulness to others.”¹⁷⁷ To be considered such an individual, Regan states how consciousness is not enough. Rather, a sense of the future, perceptions, memories, beliefs, and desires must also exist.¹⁷⁸ Regan ultimately finds that this characterization applies to “normal mammalian animals, aged one or more.”¹⁷⁹

The significance of inherent valuation is the total acceptance of certain animals as individuals endowed with rights. Once classified as individuals, the imposition of these rights would be recognized in society not merely because laws would exist recognizing such rights, but rather because the rights would need to be understood as always having been present, just not yet effectuated. Moreover, with such recognition of rights, some mode of enforcement would have to be initiated to ensure the individual’s rights are protected.¹⁸⁰

II. WHERE DO WE GO FROM HERE?

Based on the trends and concepts identified herein, changes in societal beliefs held toward animals must take place in the United States for its laws and legal system to experience subsequent changes. Society must determine whether some or all animals could or should be recognized as right-holders. While a shift may come about in the future, today, it would require the abandonment of several well-established legal concepts and, thus, seems unlikely.

Today, every state in the U.S. recognizes animals as personal property, and the laws governing such property vary based on the concept of “use” alongside the development of laws over time.¹⁸¹ When looking at the history and development of laws, a notable threshold shift took place when limitations were initially imposed upon the owners of animal personal property in the form of “anti-cruelty” animal welfare statutes,¹⁸² and this

176. *Id.*

177. TOM REGAN, *The Case for Animal Rights*, in *In Defense of Animals* 13, 22 (Peter Singer ed., 1985).

178. *See* TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 8, 243 (1983).

179. *Id.* at 239.

180. Rights protection for animals would likely require an overhaul of the modern judiciary and mirror the process and style of courts in India. *See* Franceschini, *supra* note 132, at 142.

181. *See supra* Part I.b.

182. *Id.*

change was driven largely by society's views of animals at that given point in time.¹⁸³ Following this trend, the greatest protections for animals are in the form of limitations on owners with what they can or cannot do with their animal property. In contrast with the longstanding and deeply entrenched practice of owning farm animals, the current boom in pet ownership alongside the growing trend in society that questions the ownership of zoo and exotic animals—especially those showing self-recognition, memory, and complexity of trainability—presents separate developments with downstream impacts on societal views that could potentially generate opportunities to reshape the laws pertaining to such subgroups.¹⁸⁴

One way animal rights NGOs are seeking to capitalize on the apparent societal opinion changes towards zoo and exotic animals is to use the Writ of Habeas Corpus, both domestically and abroad.¹⁸⁵ Zoo and exotic animals emerge as a particularly attractive category for legal change. This follows from recent negative publicity of exotic animal owners, heightened scrutiny, and growing demand for individuals to justify their ownership of exotic animals beyond purely economic rationale. The legal concept of Habeas Corpus carries extra appeal because the court determines the application of Habeas Corpus. Thus, the legal definition of “personhood” could be changed through the ruling of one court sympathetic to the cause. Accordingly, a zoo elephant like Happy is uniquely situated to potentially enact such change.

However, no court in the United States has been willing to take the precedent-setting step of redefining legal personhood to include nonhuman animals. Such a move is unlikely because the U.S. system of property, and therefore, rights for animals, are based on contractualism. This deeply rooted theory places limits on human owners in the form of duties rather than recognizing rights as belonging to animals.¹⁸⁶ Even among pets—the animal subgroup that has seen the most marked changes towards holding rights—courts do not appear to have implemented or accepted such statutory measures which would have granted greater interest to the rights of the animal within their decisions.¹⁸⁷ Thus, in cases like that of Happy, the

183. See Favre, *supra* note 19, at 1056 (“Ultimately, what is an acceptable use of an animal, of living property, is a political decision that balances any number of factors during the legislative process.”).

184. See *supra* Part I.b.iii.

185. See *supra* Part I.c.

186. See *supra* Part I.e.i.

187. See Mickovic, *supra* note 89, at 57-60 (showing how a minority of states including Alaska, Illinois, and California permit courts to consider the well-being of companion animals in divorce proceedings).

recognition of an elephant as a legal person would not only be a leap forward in the legal rights of animals, but it would also be so for a subgroup of animals from which society is more removed—zoo and exotic animals. Such precedent would mark a significant shift from the current contractual framework of property and rights.

Even so, there is a growing possibility that legal personhood could be established for animals in the future. Specifically, various changes in the law over time indicate a greater willingness by society to recognize that pets are not just property. Although tort law treats injuries to pets as damage to chattel, a few jurisdictions now award loss of companionship or emotional distress damages to owners for pet death. Furthermore, though pets cannot inherit money directly, they can inherit money when a trust is set up for their benefit, making them legal beneficiaries with enforceable rights under the trust.

Following these trends, one possible argument for animals to garner legal personhood could derive from utilitarianism, particularly under Bentham's reasoning. For example, within Bentham's theory, a threshold consideration for an interest to be equally weighed in an ethical decision is the being's self-awareness and capacity for suffering and/or the enjoyment of happiness. This has two requirements: (1) self-awareness and (2) the capacity for suffering. If we concede for argument's sake that animals have the capacity for suffering, then weighing an animal's interest would come down to "self-awareness." Current uses of legal personhood raise the question of why "self-awareness" is required. On its face, the need for "self-awareness" is specifically tied to human consciousness. However, we attach legal personhood to corporations, which clearly are not self-aware. If utilitarianism is about the sum of pleasure over pain, then there would appear to be no need for self-awareness as long as the being experiences pleasure or pain. Separately, the justification behind laws prohibiting cruelty to animals, alongside the consideration of the pet's welfare in divorce, is partly because animals experience pain and pleasure. Thus, the utilitarian argument links (1) the consideration of the animal's welfare and (2) their rights—which are currently treated separately.

Put differently, the justification for animal welfare laws implicitly recognizes that animals are sentient beings that suffer pain and enjoy pleasure. Therefore, a utilitarian argument for animal personhood—and subsequent rights for that animal—under the law may be extended via the following steps: (1) animals are sentient beings who suffer pain (utilitarian); (2) therefore, we protect animal welfare; (3) our duty to not treat animals cruelly implicitly provides (4) a right on the part of animals to not be treated cruelly. Whether *society* will broadly accept this approach to animals and rights is one issue. But for judges (especially those similar to the dissenters

in Happy's case) who wield the ability to decide how Habeas Corpus will be applied, this line of reasoning may gain more appeal with courts in limited ways in years to come as society's views towards animals continue to change. Camps One and Two, in particular, should pay attention to the efficacy of such arguments for how to combat or promote animal personhood, respectively.

In the eyes of the law, animals will likely continue to be sub-human property for the foreseeable future. Although cases like Happy's may continue to find their way into courtrooms and X¹⁸⁸ feeds, successful legal changes are extremely unlikely absent a shift in societal views or a total departure from the contractualistic philosophy underlying legal personhood. Therefore, advocates in the short term will likely target and seek to influence Camp Three. This group and its growing number of "pet parents" are most likely to be swayed into altering the status of animal welfare in the law (though, any changes will still likely fall short of animal rights).

188. Rest in peace, Twitter.