

INTRODUCTION

LEGAL PERSONHOOD AND THE NONHUMAN RIGHTS PROJECT

By
Steven M. Wise*

The defining moment for the eighteenth century slave James Somerset was when he became legally visible.¹ He was a legal thing when he landed in England in 1769, having been captured as a boy in Africa, then sold to a merchant in Virginia, Charles Steuart, for whom he slaved for two decades.² As a legal thing, James Somerset existed in law for the sake of Charles Steuart, for legal things, living and inanimate, exist in law solely for the sakes of legal persons. They are invisible to civil judges in their own rights.³ Only legal persons count in courtrooms, or can be legally seen, for only they exist in law for their own benefits.⁴ Legal personhood is the capacity to possess at least one legal right; accordingly, one who possesses at least one legal right is a legal person.⁵ James Somerset's legal transubstantiation from thing to

* © Steven M. Wise 2010. Steven M. Wise is President of the Center for the Expansion of Fundamental Rights, Inc. and directs its Nonhuman Rights Project, of which this Article is a part. The author of numerous books and articles on animal rights jurisprudence, he currently teaches the subject at Lewis & Clark, University of Miami, St. Thomas, and Vermont Law Schools.

¹ Steven M. Wise, *Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery* IX (Da Capo Press 2005) [hereinafter Wise, *Though the Heavens May Fall*].

² *Id.* at XIII, 1–2.

³ *Id.* at IX.

⁴ *Id.*

⁵ Steven M. Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 Vt. L. Rev. 793, 795 (1998) [hereinafter Wise, *Hardly a Revolution*]. Wesley Hohfeld, whose analysis of legal rights remains the standard model, emphasized that a legal right involves two legal persons. *Id.* at 800–01; see generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Walter Wheeler Cook ed., Greenwood Press 1978). In my analysis of Hohfeld's work, I identified four types of legal rights: (1) liberties (Isaiah Berlin would famously identify two prominent concepts of liberties: negative, or “freedom from,” and

person at the hands of Lord Mansfield in 1772 marked the beginning of the end of human slavery.⁶ Persuading an American state high court to similarly transform a nonhuman animal is a primary objective of the Nonhuman Rights Project.⁷

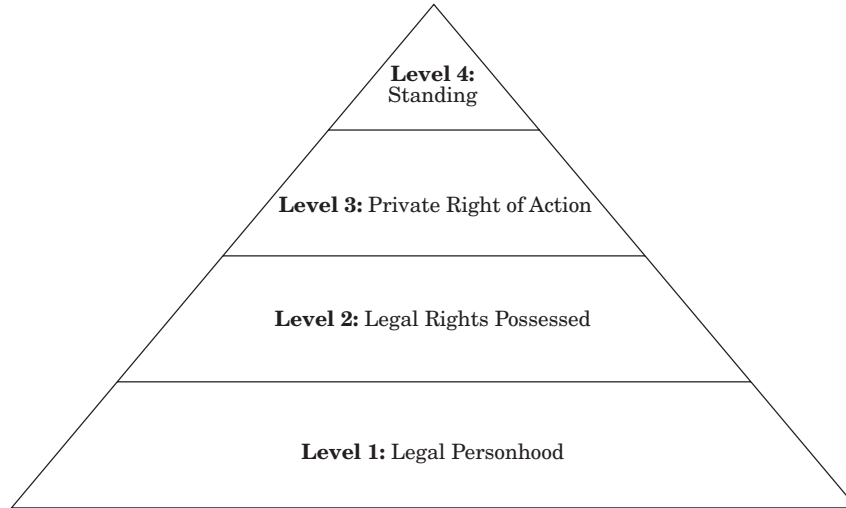


Figure 1: Animal Rights Pyramid

To help explain the importance of legal personhood in my classes on “Animal Rights Jurisprudence,” I draw an “Animal Rights Pyramid” with four horizontal bisecting lines.

At its base is Level 1, “Legal Personhood,” which emphasizes its foundational quality. Directly above legal personhood is Level 2, “Legal Rights Possessed.” A legal person may possess an infinite number of legal rights. Among these may, or may not, be the power to sue.⁸ A small coterie of theorists, for example, argues that an entity who lacks

positive, or “freedom to,” Isaiah Berlin, *Four Essays on Liberty* 118, 121–22 (Oxford U. Press 1970)); (2) claims; (3) immunities (at whose core sits a negative liberty-right); and (4) powers. Wise, *Hardly a Revolution*, *supra* n. 5, at 802, 807, 810, 815. Hohfeld also identified the correlates of these four types of legal rights: (1) no-rights; (2) duties; (3) disabilities; and (4) liabilities. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* n. 5, at 36. Until and unless a nonhuman animal attains legal personhood, he or she will continue to lack the capacity to possess any legal right. See Wise, *Hardly a Revolution*, *supra* n. 5, at 795 (explaining that only human beings and institutions that represent human rights have ever been eligible for legal personhood and therefore eligible for legal rights).

⁶ Wise, *Though the Heavens May Fall*, *supra* n. 1, at ix.

⁷ Nonhuman Rights Project, *What Rights, What Animals?*, http://www.nonhumanrights.org/what_rights/what_rights.html (accessed Oct. 20, 2010).

⁸ See generally *Moore v. Matthew’s Book Co., Inc.*, 597 F.2d 645, 647 (8th Cir. 1979) (stating that “[t]he question of capacity to sue is whether the person bringing the suit has authority to use the courts of that jurisdiction”); *Blackmar v. Lichtenstein*, 578 F.2d 1273, 1276 (8th Cir. 1978) (stating that the “[l]ack of capacity to sue is a bar to any legal action . . .”).

the exceedingly complex cognitive ability necessary to choose to understand and assert a claim or power lacks the legal capacity to possess either.⁹ Many claim these commentators are wrong.¹⁰ But, if they are right, such an entity might still possess myriad other legal rights, including the fundamental immunities with regards to bodily integrity or bodily liberty, for these rights require no ability to understand and choose anything at all. Even an entity who lacks the power to sue to vindicate the violation of an immunity may be eligible to have a third party assert her rights for her. The common law writs of habeas corpus and *de homine replegiando* are two such causes of action.¹¹

If an entity has the power to sue, or if a third party may assert that entity's immunity or claim on her behalf, we move to Level 3: Does the plaintiff possess a private right of action bestowed by statute, constitution, treaty, or common law? For example, no entity has a private right of action to remedy a violation of the federal Animal Welfare Act.¹² On the other hand, the federal Endangered Species Act permits "any person" to "commence a civil suit on his own behalf" for a violation of the Act.¹³

Finally, if a plaintiff is a Level 1 legal person, possesses Level 2 legal rights that include either the power to sue or the ability to have a third party sue on her behalf, and has a Level 3 private right of action, a court reaches Level 4, "Standing." Each American jurisdiction is free to create its own standing requirements.¹⁴ For illustrative purposes, I will only discuss standing under Article III, Section 2 of the United States Constitution. Article III, Section 2 limits the jurisdiction of federal courts to "Cases or Controversies."¹⁵ In the United States federal courts, "[s]tanding to sue or defend is an aspect of the case or controversy requirement."¹⁶ "Standing addresses the question of whether 'a party has a sufficient *stake* in an otherwise justiciable controversy to obtain judicial resolution of that controversy."¹⁷ To satisfy the standing requirement of Article III, a plaintiff must "demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the

⁹ Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* 57 (Perseus Books 2000) [hereinafter Wise, *Rattling the Cage*].

¹⁰ *Id.*

¹¹ 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, 254, 276–78 (2007) [hereinafter Wise, *The Entitlement of Chimpanzees*].

¹² See 7 U.S.C. § 2131 et seq. (2000) (demonstrating that no provision for a private right of action is included in the Animal Welfare Act).

¹³ 16 U.S.C. § 1540(g)(1) (2000); see e.g. *Cetacean Community v. Bush*, 386 F.3d 1169, 1177–78 (9th Cir. 2004) (holding that cetaceans were not "any person" within the meaning of the federal Endangered Species Act).

¹⁴ 59 Am. Jur. 2d *Parties* § 36 (2002).

¹⁵ Laurence H. Tribe, *American Constitutional Law* vol. 1, 385 (3d ed., Found. Press 2000).

¹⁶ *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

¹⁷ Tribe, *supra* n. 15, at 385 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972)) (emphasis in original).

actions of the defendant, and that the injury will likely be redressed by a favorable decision.”¹⁸

As should be plain, implied in a court’s discussion of Level 4 standing is its understanding that a plaintiff has met the requirements of Levels 1 through 3. But courts often confuse the four levels.¹⁹ For example, in *Cetacean Community v. Bush*, the Ninth Circuit Court of Appeals stated that “[a]nimals have many legal rights, protected under both federal and state laws.”²⁰ The court analyzed the relevant statutes and “conclude[d] that the Cetaceans do not have statutory standing to sue.”²¹ As cetaceans have not yet been declared to be Level 1 legal persons, they have no Level 2 legal rights, and lack the capacity to sue. Therefore, the question of the cetaceans’ Level 4 standing should never have been reached.

Citizens to End Animal Suffering and Exploitation v. The New England Aquarium, which involved a dolphin named Kama, is another example.²² Under the heading “Kama Lacks Standing,” the court noted that the Marine Mammal Protection Act (MMPA) does not authorize suits brought by animals, but only by “persons.”²³ The court analyzed Section 17(b) of the Federal Rules of Civil Procedure (FRCP), entitled “Parties,” which “discusses the capacity of an individual . . . to sue or be sued [and] provides that such capacity shall be determined by the law of the individual’s domicile.”²⁴ The court concluded that “the MMPA and the operation of [FRCP] 17(b) indicate that Kama the dolphin lack[ed] *standing* to maintain this action as a matter of law.”²⁵ However, because the dolphin, Kama, lacked Level 1 legal personhood, the question of her Level 4 standing should never have been reached.

If Level 4 standing is properly reached, the question of whether a nonhuman animal plaintiff suffered a redressable injury caused by the defendant should rarely pose an obstacle. A chimpanzee confined to a tiny cage or injected with a deadly microbe, or a dolphin enslaved in an amusement park, has a clear stake in the controversy; both are obvi-

¹⁸ *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

¹⁹ See e.g. *Bd. of Educ. of the City of Peoria v. Ill. St. Bd. of Educ.*, 810 F.2d 707, 709–10 (7th Cir. 1987) (quoting 6 Wright et al., *Federal Practice and Procedure* § 1559, at 727 (1971)) (stating that “[c]apacity has been defined as a party’s personal right to come into court, and should not be confused with the question of whether a party has an enforceable right or interest or is the real party in interest”); *Arbor Hill Concerned Citizens Neighborhood Assn. v. City of Albany*, 250 F. Supp. 2d 48, 60 n. 5 (N.D.N.Y. 2003) (quoting *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 154–55 (1994)) (asserting that “the concept of capacity is often confused with the concept of standing, but the two legal doctrines are not interchangeable. ‘Standing’ is an element of the larger question of ‘justiciability’ . . . ‘Capacity,’ in contrast, concerns a litigant’s power to appear and bring its grievance before the court.”).

²⁰ 386 F.3d 1169, 1175 (9th Cir. 2004).

²¹ *Id.* at 1179.

²² 836 F. Supp. 45 (D. Mass. 1993).

²³ *Id.* at 49.

²⁴ *Id.* (quoting Fed. R. Civ. P. 17(b)).

²⁵ *Id.* at 50 (emphasis added). Fed. R. Civ. P. 17 (b) and (c) are structured such that nonhuman animals do not have the capacity to sue or be sued.

ously suffering injuries that are fairly traceable to the defendants and are redressable by a favorable decision. The reason that federal courts will not hear their pleas is that chimpanzees and dolphins lack the capacity to possess any legal right at all. They are not Level 1 legal persons.

I have often written that a high, thick legal wall separates all humans from all nonhumans.²⁶ By this I mean that currently all humans are legal persons, while all nonhuman animals are legal things. A court confronted with a plaintiff's claim to possess any legal right need only determine the plaintiff's species. If the plaintiff is human, the answer is, "It is possible that the plaintiff has the legal right she claims." If the plaintiff is a nonhuman animal, the answer is, "Impossible."

The goal of the interdisciplinary Nonhuman Rights Project is to change this paradigm. It intends to demand that American state high courts declare that a nonhuman animal has the capacity to possess at least one legal right, to declare that she is a Level 1 legal person. This nonhuman animal need not actually possess a legal right. But she must have the capacity to possess one. Once a court recognizes her capacity, the next legal question is the Level 3 question of which legal rights she should possess, an appropriate shift from the irrational, biased, hyper-formalistic, and overly simplistic question, "What species is the plaintiff?" to the rational, nuanced, value-laden question, "Does the plaintiff possess the qualities relevant to whether she should be entitled to the legal rights she claims?"

The Nonhuman Rights Project is currently divided into seven working groups. Half its fifty researchers participate in the Legal Working Group. Their task is to identify those American state jurisdictions that may be most receptive to an array of arguments that favor Level 1 legal personhood for at least one nonhuman animal. These researchers will achieve this by exhaustively researching the law of each of the fifty states on two dozen critical substantive and procedural legal issues.²⁷

²⁶ See Wise, *Hardly a Revolution*, *supra* n. 5, at 823–24 (stating that traditional Western law excludes nonhuman animals from legal personhood).

²⁷ See Australian L. Reform Commn., *The Basic Rights of Some Non-Human Animals Under the Common Law*, Issue No. 91 11–13 (2008) (available at <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform91/R91.pdf> (accessed Nov. 3, 2010)) (finding that liberty and equality are essential to the argument for fundamental rights for nonhuman animals); Wise, *The Entitlement of Chimpanzees*, *supra* n. 11, at 228–41 (2007) (discussing the legal structure allowing chimpanzees to bring claims that challenge their legal thinghood); Steven M. Wise, *Entitling Non-Human Animals to Fundamental Legal Rights on the Basis of Practical Autonomy*, in *Animals, Ethics, and Trade: The Challenge of Animal Sentience* 87–96 (Jacky Turner & Joyce D'Silva eds., Earthscan 2006) (using practical autonomy as the basis to entitle non-human animals to fundamental legal rights); Steven M. Wise, *Animal Rights, One Step at a Time*, in *Animal Rights: Current Debates and New Directions* 19–41 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004) (discussing obstacles for advocating legal rights for nonhuman animals, overcoming the obstacles, and practical autonomy);

The Legal Working Group is addressing the substantive issue of Level 1 legal personhood for a nonhuman animal both from a non-comparative and from a comparative perspective.²⁸ A critical non-comparative question for Level 1 legal personhood is what quality, or qualities, might be sufficient (though not necessary) to generate immunity-rights that protect a being's fundamental interests. I have argued that dignity is one sufficient generator of fundamental legal rights and that autonomy is at least one sufficient generator of dignity. For humans, the four species of great apes, and cetaceans, I have identified those fundamental interests as including bodily integrity and bodily liberty.²⁹

I ask my students to imagine a human living without a working brain and only a partial brainstem. This happens. I use the example of the infant subject of the 1992 Massachusetts Supreme Judicial Court decision in *Care and Protection of Beth*.³⁰ Ten-month-old Beth lay in an irreversible coma, was not conscious, and would never be conscious.³¹ She had no interests.³² I ask the students to imagine that our

Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* 231–40 (Perseus Publ. 2003) [hereinafter Wise, *Drawing the Line*] (discussing legal rights for nonhuman animals); Wise, *Hardly a Revolution*, *supra* n. 5, at 868–84 (discussing enforceable dignity-rights of nonhuman animals); Wise, *Rattling the Cage*, *supra* n. 9, *passim* (discussing legal rights for animals); Wise, *Rattling the Cage Defended*, 43 B.C. L. Rev. 623, 689–96 (2002) (discussing legal arguments for animal rights and defending advocacy of legal rights for nonhuman animals); Steven M. Wise, *A Great Shout: Legal Rights for Great Apes*, in *Great Apes & Humans: The Ethics of Coexistence* 274, 274–90 (Benjamin B. Beck et al. eds., Smithsonian Institution Press 2001) (arguing that practical autonomy exhibited by many animals justifies giving nonhuman animals basic legal rights).

²⁸ A non-comparative right is a claim to receive a particular treatment because the claimant possesses a particular quality or status that entitles her to that treatment. Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. Rev. 387, 446–47 (1985). Liberty is a non-comparative right. *Id.* A comparative right is a claim to receive a particular treatment because another person or class receives it and the claimant is similar to that person or class in a relevant way. *Id.* at 416–46. Equality and proportionality are comparative rights. *Id.*

²⁹ Wise, *Drawing the Line*, *supra* n. 27, at 45; Wise, *Hardly a Revolution*, *supra* n. 5, at 823–88; Wise, *Rattling the Cage*, *supra* n. 9, at 81.

³⁰ *Care and Protection of Beth*, 587 N.E.2d 1377 (Mass. 1992).

³¹ *Id.* at 1378–79.

³² Beth was involved in an automobile accident when she was one month old. *Id.* at 1378. As described by the court:

That accident, in which the straps on the child's car seat wrapped around [Beth's] neck and cut off the supply of oxygen to her brain for a substantial period of time, left the child in an irreversible coma. As a result of the accident, the child cannot see, hear, or engage in any purposeful movement. Her ability to breathe on her own is extremely limited. A breathing tube has been inserted directly into her lungs through an incision in her trachea, and her rate of breathing is controlled by a machine. [Beth] is fed through a feeding tube permanently inserted in her stomach After extensive testing, Dr. Lieberman determined that 'there is nothing to indicate that [Beth] has any ability to function from her cerebral cortex. But she does function from a brain stem level where things are not under [her conscious] control.' He testified that the child is irreversibly in a state of

imaginary being is a *Homo sapiens* container that already holds her capacities to breathe, digest, and to have her heart beat, but otherwise contains no qualities that could rationally be relevant to creating fundamental interests and generating Level 1 legal personhood as a matter of autonomy or dignity. I explain that I have never encountered either a philosophical or jurisprudential argument—as opposed to a mere declaration—that rationally claims that such a *Homo sapiens*, human merely in form, is entitled to legal personhood solely because she is a member of the species *Homo sapiens*.³³ I have encountered bald assertions, but never a jurisprudential or philosophical argument.³⁴

I ask the students to fill our imaginary pitcher with qualities objective enough to be proven in court (hence such an unprovable quality as an incorporeal soul is excluded), to imagine further that they are holding this imaginary pitcher over our imaginary *Homo sapiens* container and pouring in those imaginary qualities that might be rationally sufficient to generate her legal personhood, then defend their decision, whatever it may be. We usually limit our discussion to the basic negative immunity rights of bodily liberty and bodily integrity, for a rational explanation as to why a ten-month-old human infant,

coma from which ‘she will never regain [consciousness or] be able to function in any way.’ He testified that ‘there is really no potential for this condition to be reversed’ except through the perfection of a complete brain transplant operation.’

Id. at 1378–79. Beth’s court-appointed guardian argued that Beth “has no cognitive ability and therefore will suffer no ‘indignity’ that the medical care might be supposed to produce in a conscious person.” *Id.* at 1382.

³³ See e.g. Christina Hoff, *Immoral and Moral Uses of Animals*, 302 *New Eng. J. of Med.* 115, 115 (Jan. 10, 1980) (noting, “It is sometimes asserted that ‘just being human’ is a sufficient basis for a protected moral status, that sheer membership in the species confers exclusive moral rights The principle appears evident to us because it is embodied in the attitudes and institutions of most civilized communities. Although this accounts for its intuitive appeal, it is hardly an adequate reason to accept it. Without further argument the humanistic principle is arbitrary. What must be adduced is an acceptable criterion for awarding special rights. But when we proffer a criterion based, say, on the capacity to reason or to suffer, it is clearly inadequate either because it is satisfied by some but not all members of the species *Homo sapiens*, or because it is satisfied by them all—and many other animals as well.”).

³⁴ See Charles Fried & Gregory Fried, *Because it is Wrong: Torture, Privacy and Presidential Power in the Age of Terror* 49 (W.W. Norton & Co. 2010) (arguing that the torture of humans is always wrong because it violates the sacredness of beings assembled “in the image of God,” though, for the less religiously-inclined, “the ‘image of God’ may be taken as a metaphor for the ultimate value of the human form as it is incorporated in every person”). Some courts similarly appear to declare, without argument, that the humanistic principle is sufficient. For example, concerning Beth, the Massachusetts Supreme Judicial Court stated that “[c]ognitive ability’ is not a prerequisite for enjoying basic liberties. In the law of this jurisdiction, incompetent people are entitled to the same respect, dignity and freedom of choice as competent people.” 587 N.E.2d at 1382. The Supreme Judicial Court’s statement that “cognitive ability” is not a prerequisite for rights, along with similar judicial pronouncements, is evidence that autonomy so powerfully underlies the quality of dignity, which is sufficient to generate fundamental human rights, that courts use legal fictions to find it. See Wise, *Rattling the Cage*, *supra* n. 9, at 244–46.

lying in a permanent and irreversible coma, who is and always will be unconscious, and who lacks all interests, possesses such a positive legal right as “freedom of choice” is unlikely to be forthcoming.³⁵

These are just some of the substantive legal questions that the Legal Working Group is evaluating, state jurisdiction by state jurisdiction. Other questions may be: What are sufficient and necessary conditions for Level 1 “Legal Personhood”? Is there anything inherent about legal personhood that would limit it to human beings or to particular kinds of human beings? What are the meanings and legal significance of dignity and autonomy? Is there anything inherent in either that should legally limit one or both to human beings? What are the sources and purposes of fundamental legal rights? What interests are fundamental legal rights intended to protect?³⁶

A Level 1 legal person who possesses the Level 2 power-right to sue must also be able to assert a Level 3 private cause of action. It is part of the task of the Legal Working Group to ascertain what relevant private causes of action might exist. Because constitutions and statutes may circumscribe the ability of a common law court to do what it may believe justice requires, and because constitutional or statutory ambiguities usually require analyses of legislative histories that are unlikely to have included any mention of nonhuman animals (though they may have mentioned slaves, and nonhuman animals *are* slaves), the Nonhuman Rights Project generally focuses on establishing such fundamental legal rights as bodily integrity and bodily liberty for such animals as chimpanzees and dolphins under the common law.

Among the common law causes of action the Legal Working Group believes are promising, for they were once used by human slaves, vills, and other human unfree to challenge their unfreedom, include the two ancient common law writs I have mentioned, habeas corpus and *de homine replegiando*.³⁷ The common law writ of habeas corpus—not to be confused with statutory or constitutional writs of habeas corpus—reaches private detentions, and any petitioner who demonstrates “probable cause through verified affidavit that his or her

³⁵ A holding that a being such as Beth possesses the power-right to choose supports the Nonhuman Rights Project’s alternative claim, which I discuss *infra*, that an animal such as a chimpanzee or dolphin is entitled to the fundamental immunity rights of bodily liberty and bodily integrity as a matter of equality *if* Beth is entitled to them, and powerfully so if Beth is entitled to the positive legal right of “freedom of choice.”

³⁶ The Fact Working Group, with the aid of scientists who are preeminent in their fields, is simultaneously combing the scientific literature to answer such questions as: Do known scientific facts support the proposition any nonhuman animal possesses the qualities sufficient or necessary for legal personhood? Do known scientific facts support the proposition that any nonhuman animal possesses dignity and autonomy sufficient to entitle him or her to fundamental legal rights? Do known scientific facts support the proposition that any nonhuman animal possesses fundamental interests that fundamental legal rights would protect? Do known scientific facts support the proposition that any nonhuman animal possesses fundamental interests in bodily liberty or bodily integrity?

³⁷ Wise, *The Entitlement of Chimpanzees*, *supra* n. 11, at 255, 257, 263.

detention [is] unlawful [is] entitled to [the common law] writ of habeas corpus as a matter of right.”³⁸

Though the Heavens May Fall illustrates how a legal thing—there a black slave, James Somerset—could wield the common law writ of habeas corpus to sever his slavish bonds.³⁹ Six Legal Working Group researchers are analyzing more than a dozen aspects of the common law writ of habeas corpus alone, including: the circumstances under which the writ may be used by third parties or used to transfer custody rather than as a release from custody; when the writ is superseded by constitutional or statutory writs of habeas corpus and when these writs merely supplement the common law; to what degree the law of each of the forty-nine common law American states incorporates the English common law of habeas corpus; what the content of state laws is; to what degree habeas corpus persists through legislative suspensions; in what manner and to what degree habeas corpus returns may be controverted; to what degree common law habeas corpus applies to private detentions; and under what circumstances a third party may assert another’s rights under common law habeas corpus.

The equally ancient common law writ of *de homine replegiando*, or replevin of the person, first appeared in the twelfth century Pipe Rolls and evolved into a customary common law method of trying title to villeins.⁴⁰ As with habeas corpus, *de homine replegiando* was used by the unfree, including black slaves, to challenge their legal status.⁴¹ If, for any reason, the writ of habeas corpus is not available, a writ of *de homine replegiando* should be.⁴² Moreover the writ of *de homine replegiando* differs significantly from the writ of habeas corpus: it is not a summary writ and one is entitled to trial by jury.⁴³

The Legal Working Group is also assessing the suitability of utilizing antebellum statutory causes of action that were enacted to allow human slaves to challenge their slave status. These include so-called “Freedom Act Statutes.”⁴⁴ Paradoxically, these statutes were initially passed to diminish the ability of black slaves to challenge their unfree status by invoking such common law freedom writs as habeas corpus and *de homine replegiando* and to require plaintiffs to employ strict, narrow, and often punitive, procedures instead.⁴⁵

The Legal Working group is asking other questions: Might the ancient procedure of manumission, by which a master could free his slave

³⁸ *Id.* at 263.

³⁹ Wise, *Though the Heavens May Fall*, *supra* n. 1.

⁴⁰ *Id.* at 245.

⁴¹ *Id.* at 250–51.

⁴² *Opinion on the Writ of Habeas Corpus* (1758) 97 ER 29, 31, 49 (HL) (“Answer of Mr. Justice Wilmot to the questions proposed to the Judges by the House of Lords, on the second reading of the bill, [entitled], ‘An Act for giving a more Speedy Remedy to the Subject, upon the Writ of Habeas Corpus.’”).

⁴³ Wise, *The Entitlement of Chimpanzees*, *supra* n. 11, at 248–49.

⁴⁴ *Id.* at 274–75.

⁴⁵ *Id.*

through his private action, apply to any nonhuman animal?⁴⁶ Under what circumstances might a burden of proof, perhaps due to a legal presumption of liberty, shift from a nonhuman plaintiff to a defendant accused of violating his fundamental rights to bodily liberty or bodily integrity? To what degree might a jurisdiction's common law be understood by its high court judges as their responsibility to update and expand to meet modern changes in experience? Under what circumstances are next friends or guardians *ad litem* available to a nonhuman animal plaintiff? What part do natural law and natural rights play in the personhood law of each jurisdiction? How did former legal things attain legal personhood in that jurisdiction? Is there a hierarchy of liberty-rights in the jurisdiction and, if so, how does a court determine which rights are most fundamental? May a civil cause of action be derived from duties toward nonhuman animals that are imposed by criminal statutes in that jurisdiction?

The Legal Working Group is also researching the nature of several strains of the comparative right of equality in 100 common law jurisdictions, American and foreign, focusing on the so-called "Normative Model."⁴⁷ In the Normative Model, equality is determined not just by testing the rationality of means and ends, but by identifying prohibited legislative and judicial ends within a larger social, political, and legal context.⁴⁸ Prohibited ends may include legislative or judicial classifications that burden a plaintiff in a manner that reflects deeply personal social stereotypes that are biologically "immutable or changeable only at unacceptable personal costs" or that involve morally irrelevant traits.⁴⁹

In *How Judges Think*, Judge Posner identifies nine bases on which judges decide cases: (1) attitudinal; (2) strategic; (3) sociological; (4) psychological; (5) economic; (6) organizational; (7) pragmatic; (8) phenomenological; and (9) legalist.⁵⁰ It is the job of the Legal Working Group to understand the strongest relevant legalist influences in any common law jurisdiction. Armed with the fruits of its attempts to describe the law of the American common law jurisdictions according to doctrine, the Nonhuman Rights Project is constructing a hierarchy of common law American state jurisdictions according to their perceived receptivity or hostility to certain key legal arguments in favor of nonhuman animals' legal rights. The Nonhuman Rights Project will subsequently choose the jurisdictions it deems most hospitable to arguments about nonhuman animals' legal rights.

⁴⁶ See Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America*, 42–43 (Negro U. Press 1968) (originally published 1858) (explaining the Judaic roots of manumission and manumission's implications for the rights of an enslaved person).

⁴⁷ Po-Jen Yap, *Four Models of Equality*, 27 *Loy. L.A. Intl. & Comp. L. Rev.* 63, 73–74 (2005).

⁴⁸ *Id.* at 74.

⁴⁹ *Id.* at 74, 84–86.

⁵⁰ Richard A. Posner, *How Judges Think* 19–56 (Harv. U. Press 2008).

At that point, the decision as to which of those jurisdictions might be the most favorable will be influenced by the findings of two other working groups. The first is the Supercrunchers Working Group, which is following the lead of the University of Washington School of Law's Supreme Court Forecasting Project by attempting to identify factors of intermediate generality⁵¹ and perhaps also create algorithms that possess predictive power in judicial decision-making.⁵² The second is the Sociology Working Group, which includes researchers with graduate degrees in sociology and public policy. This working group is evaluating many of the remaining influences Judge Posner describes in an attempt to correlate judicial decision-making with even more general sociological, ideological, psychological, and similar factors that the academic literature has identified as potentially relevant.⁵³

The Nonhuman Rights Project is the beneficiary of many thousands of hours of committed and intelligent volunteer work over the years. As soon as practicable, it will file the first landmark cases that demand that state high courts declare that at least one nonhuman animal possesses a legal right, that she is a legal person. Win or lose, the Nonhuman Rights Project will continue to press for Level 1 Legal Personhood and Level 2 Legal Rights for every appropriate nonhuman animal.

⁵¹ Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 Colum. L. Rev. 1150, 1193–94 (2004) (concluding that “the results . . . provide interesting additive insights into the manner in which those who follow and study the Supreme Court might conceptualize its decision[-]making. The model’s success here suggests that there is some value to assessing the Court’s behavior in accordance with factors of intermediate generality—more general than particularized doctrine, text, or facts, and more specific than simple ideological assumptions. The model has discovered a few factors of such intermediate generality that track reasonably well with Supreme Court decision[-]making, and there may be others of equal or greater significance.”).

⁵² Algorithms applicable in commercial contexts could be used to help formulate algorithms capable of predicting judicial decision-making. See generally *A Dialogue on Consciousness: Amazon’s Recommendation Algorithm*, <http://manwithoutqualities.com/2010/04/01/a-dialogue-on-consciousnessamazons-recommendation-algorithm> (Apr. 1, 2010) (accessed Oct. 22, 2010) (a book review outlining the book’s discussion of “recommendation algorithms” on websites); Rob J. Hyndman, *Business Forecasting Methods* 3, <http://robjhyndman.com/papers/businessforecasting.pdf> (Nov. 8, 2009) (accessed Oct. 22, 2010) (describing commercial data-mining algorithms used by Amazon and Netflix); Rob Walker, N.Y. Times, *The Song Decoders*, <http://www.nytimes.com/2009/10/18/magazine/18Pandora-t.html?pagewanted=all> (Oct. 14, 2009) (accessed Oct. 22, 2010) (discussing the development of the program called Pandora).

⁵³ Posner, *supra* n. 50, at 19.

