

ANIMAL RIGHTS BEFORE LEGAL PERSONHOOD

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Growing scientific evidence shows that vast numbers of nonhuman animals are feeling, sentient beings, and ethicists have argued that this means they have moral value. However, law's integration of individual animals as subjects with greater protection has been slow, despite the terrible threats that animals face today from human drivers like anthropogenic climate change and industrial exploitation. Personhood has been heralded by some as a new legal status to protect animals, but the concept of "legal personhood" has been misunderstood. Most recently, New York's highest court decided in a case of first impression that an elephant named Happy is not a legal person and does not have a right to liberty—over two powerful dissents.

This Article offers a new synthesis of views regarding the moral status of animals, their "basic rights," and the relationship between basic rights and legal personhood. I argue that sentient animals have moral status that implies recognition of certain legal rights based on considerations of justice, which may lead to animal legal personhood over the long term. First, I argue that at least sentient animals have moral status and are subjects of justice who require greater legal protections. Then, I assess a new "bundle theory" of legal personhood that shows that personhood is a cluster concept composed of multiple "incidents." I argue that there are good reasons for American law to begin to integrate basic rights to bodily integrity, liberty, and probably life for sentient animals, while

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correcting a mistaken view that personhood is the simple ability to hold rights. However, basic rights are only one incident of legal personhood, although recognizing them may lead to personhood in time. To inform litigation, I also show how the bundle theory helps to explain the important disagreement between the judges in Happy’s case. Finally, I suggest that both legislatures and judges can work to enhance animal legal protections, and perhaps eventually legal personhood, in the United States.

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INTRODUCTION

In 2022, New York’s Court of Appeals decided in a case of first impression that a nonhuman animal is not a “person”—over two important dissents.¹ The Nonhuman Rights Project (NhRP) had argued on behalf of Happy, a female Asian elephant held in isolation for decades, that she is a legal person entitled

¹ Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 923 (N.Y. 2022). While the issue had not been decided by a state high court prior to *Breheny*, many Western jurists have assumed that animals cannot be persons because they are property, a category taken to preclude personhood. See, e.g., Gary L. Francione, *Animals—Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108, 108–15 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (discussing the classical view of animals as things and thus property, not persons, in law); STEVEN M. WISE, RATTLING THE CAGE 23–34 (2000) (same); Christine M. Korsgaard, *Kantian Ethics, Animals, and the Law*, 33 OXFORD J. LEGAL STUD. 629, 629 (2013) (same).

to the right of bodily liberty protected by common law *habeas corpus*.² A five-judge majority held that Happy is not protected by that writ: “Because the writ of habeas corpus is intended to protect the liberty right of *human beings* . . . it has no applicability to Happy, a nonhuman animal who is not a ‘person’ subjected to illegal detention.”³ However, in a first, two of the high court judges argued that an elephant—a conscious being capable of subjective experience—is a proper subject of *habeas corpus* because she has a right to liberty, regardless whether she is a legal person.⁴ The majority’s decision suggests that nonhuman animals⁵ generally are without legal recourse today when they are harmed because they cannot be *legal persons*.

Despite our ancestral kinship, Western societies have long understood animals as inferior instruments for human use, lacking moral value or dignity.⁶ Only recently have mainstream Western ethicists argued that many nonhuman animals require moral consideration, though a minority tradition that valued animals was present in ancient figures as diverse as Plutarch, Saint Francis of Assisi, Grand Rabbi Isaac Kook of Palestine, and the female Sufi mystic Rabia al-Adawiyya.⁷ Recognizing the moral value of nonhuman animals has significant implications for the many ways we harm animals.⁸ In parallel, science has plied a vast frontier of animal consciousness, showing that many animals are sentient beings capable of experiencing the world by flourishing and suffering.⁹ From

² See Brief for Petitioner-Appellant at 15, *Breheny*, 197 N.E.3d 921 (No. 2020-02581). The NhRP relied on a similar strategy in earlier litigation on behalf of a now-famous captive chimpanzee named Tommy, who lived in tragic isolation, asking the appellate court in that case to “enlarge the common-law definition of ‘person’ in order to afford legal rights to an animal.” See *People ex rel. Nonhuman Rts. Project, Inc. v. Lavery*, 124 A.D.3d 148, 150 (N.Y. App. Div. 2014).

³ *Breheny*, 197 N.E.3d at 923–24.

⁴ See *id.* at 960 (Wilson, J., dissenting); *id.* at 967–68 (Rivera, J., dissenting).

⁵ Although the word “animal” in this Article refers to nonhuman animals, humans are of course animals, which helps clarify how similarities across species can be the basis for a recognition that nonhuman animals merit legal protections like humans.

⁶ This Article uses the concepts of moral value and dignity interchangeably.

⁷ Likewise, many non-Western traditions have deeply valued animals, such as Buddhism. For a discussion of the dissenting traditions, see MATTHIEU RICARD, *A PLEA FOR THE ANIMALS* 16–30 (2014).

⁸ See generally ROBIN ATTFIELD, *ENVIRONMENTAL ETHICS* 13–28 (2018); JEFF SEBO, *SAVING ANIMALS, SAVING OURSELVES* 15–19 (2022); PETER SINGER, *ANIMAL LIBERATION* 1–23 (2009 ed.).

⁹ See, e.g., *THE CAMBRIDGE DECLARATION ON CONSCIOUSNESS* (2012), <https://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf> [<https://perma.cc/U8A9-46UV>] (declaring a scientific consensus that “[n]on-human

recent scientific research, “[w]e know . . . that all vertebrates and many invertebrates feel pain subjectively, and have, more generally, a subjectively felt view of the world: the world looks like something to them.”¹⁰ Law, however, has been slow to consider animals as subjects in their own right.¹¹ Philosopher Martha Nussbaum warns that “the world’s legal systems are in a primitive condition, where the lives of animals are concerned,”¹² and legal scholar Steven Wise has argued that animals cannot protect themselves because they can “neither fight nor write,”¹³ nor, one might add, sue.

The legal status of nonhuman animals is urgent because they face rising and terrible anthropogenic threats, in both the short and the long term. Today, in the “Anthropocene” where humans dominate the Earth, rising threats to animals include both anthropogenic extinction faced in the wild and suffering imposed by rapidly intensifying human use and exploitation.¹⁴ Nonhuman animals, like humans, face global threats like nuclear war, extreme climate change, and a raft of others.¹⁵ The so-called “Sixth Mass Extinction” is now driving both plants and animals to annihilation, resulting from anthropogenic climate change, nutrient pollution, overfishing, and deforestation, among other human impacts.¹⁶ Unlike humans, however, many *individual* animals also are constantly at risk of human-caused suffering and death at a scale that beggars belief. Every year, trillions of animals suffer in the extreme because of intensifying human uses, including industrial-scale

animals, including all mammals and birds, and many other creatures, including octopuses” possess the neurological substrates of consciousness and homologous neurophysiological structures conducive to shared evolutionary emotional capacities); KRISTIN ANDREWS, *THE ANIMAL MIND* 7–28 (2d ed. 2020) (explaining the modern development of evidence in favor of animal minds and consciousness).

¹⁰ MARTHA C. NUSSBAUM, *JUSTICE FOR ANIMALS* xiv (2022).

¹¹ See generally Steven M. Wise, *Animal Rights, One Step at a Time*, in *ANIMAL RIGHTS* 19, 19–50 (Cass Sunstein & Martha Nussbaum eds., 2004); Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 *ANIMAL L.* 15 (1995). This Article uses wild animals as the paradigmatic example of animals that are of concern, morally and legally.

¹² NUSSBAUM, *supra* note 10, at 309.

¹³ WISE, *supra* note 1, at 13.

¹⁴ See SEBO, *supra* note 8, at 40–44. For example, the rise of intensifying factory farming imposes massive suffering for farmed animals, through disease transmission, inhumane housing, practices like mutilation, and painful slaughter.

¹⁵ For a discussion of these “existential” type threats for humans, see generally TOBY ORD, *THE PRECIPICE* (2020).

¹⁶ See generally ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* (2014).

farming, commercial fishing, breeding operations, deforestation, animal abuse, and sometimes painful research.¹⁷ So how can law better protect animals?

This Article assesses key Western views arguing for the moral value of nonhuman animals,¹⁸ and the implications of that value for animal legal status in the United States. Ethicists have made important strides over the past fifty years in thinking about the value of nonhumans from non-anthropocentric perspectives, focusing on the “moral status” of animals.¹⁹ Some have argued that all living beings have some kind of moral status—a very demanding view—but others have focused on sentient animals, a view here labeled “sentientism.”²⁰ In essence, sentience is the basic capacity for good and bad subjective experience of the world, including conscious flourishing and suffering.²¹ New work by Nussbaum on a “Capabilities Approach” theory of justice argues persuasively that sentient animals are subjects of justice, like humans, and therefore must be better protected by legal systems.²² Capability is an important concept that has been used extensively in development economics, including to support the Human Development

¹⁷ Simply counting such animals is a difficult task. If we exclude insects, animals used by humans number in the trillions, with the largest share of individuals coming from commercial fisheries. See ALLISON MOOD & PHIL BROOKE, ESTIMATING THE NUMBER OF FISH CAUGHT IN GLOBAL FISHING EACH YEAR (2010) (estimating the number of fish caught, using Food and Agriculture Organization data, at 0.97–2.74 trillion individuals per year), <http://fishcount.org.uk/published/std/fishcountstudy.pdf> [<https://perma.cc/KRD2-5CTD>]. Research now indicates that fish likely are sentient, and methods of wild fish capture—including hooking, crushing by weight in massive nets, and slow asphyxiation—are likely quite painful. See generally JONATHAN BALCOMBE, WHAT A FISH KNOWS: THE INNER LIVES OF OUR UNDERWATER COUSINS (2016); *Do Fish Feel Pain? Growing Research Says Yes*, THE HUMANE LEAGUE (Dec. 15, 2020), <https://thehumaneleague.org/article/do-fish-feel-pain> [<https://perma.cc/8H6E-CKQV>]; NUSSBAUM, *supra* note 10, at 141–42.

¹⁸ The arguments presented in this Article apply primarily to *individual* animals, not to *collections* of animals such as species, genuses, or ecosystems, which is a common way of considering animals in the wild.

¹⁹ See, e.g., SINGER, *supra* note 8, at 1–23; SEBO, *supra* note 8, at 15–39; Nussbaum, *supra* note 10, at 19–39.

²⁰ For a recent and comprehensive development of this approach, see Nussbaum, *supra* note 10, at 118–53.

²¹ See, e.g., NUSSBAUM, *supra* note 10, at 126–31; SEBO, *supra* note 8, at 16–17, 146.

²² NUSSBAUM, *supra* note 10, at xxv–xxvi (explaining that her theory of justice applies to sentient animals “that have a point of view on the world” and arguing that “[l]aw can and must do better” for animals). The view that sentience is the foundation for the moral value of animals is also shared in the work of Sherry Colb and Michael Dorf. See SHERRY F. COLB & MICHAEL C. DORF, BEATING HEARTS: ABORTION AND ANIMAL RIGHTS 3 (2016).

Index.²³ This Article argues that sentientism together with the Capabilities Approach create important implications for animal legal protections, including legal “personhood.”

New protections are warranted to better ensure justice for animals. Traditionally, animals have been understood as a type of property, rather than as persons.²⁴ In recent years, some scholars have developed proposals for new forms of animal legal status that are totally different from either “person” or “property,” such as “beingness.”²⁵ Some argue that a new, intermediate status between person and property, such as “quasi-personhood,” seems easier than “full personhood” for courts to adopt in the short term.²⁶ Short-term feasibility is important, but consideration of the long-term possibilities for animals is also warranted, given the path dependencies that can arise in law. Therefore, this Article considers animal legal status with an eye to the long term—that is, the coming decades and beyond.²⁷

To evaluate the legal status of animals, we can focus on the concept of legal personhood, the most prominent candidate for a new status for animals.²⁸ Personhood has become something of a *cause célèbre* for animal advocates in recent years. Steven Wise and the NhRP have led important litigation in state courts around the country to recognize animal personhood.²⁹

²³ See, e.g., Ingrid Robeyns, *The Capability Approach in Practice*, 14 J. POL. PHIL. 351 (2006).

²⁴ See Francione, *supra* note 1 at 116–17; Wise, *supra* note 1, at 23–34.

²⁵ See, e.g., MANESHA DECKHA, ANIMALS AS LEGAL BEINGS 3–35 (2021) (arguing for the use of “beingness” rather than personhood as a new legal category for nonhuman animals); David Favre, *A New Property Status for Animals*, in ANIMAL RIGHTS, *supra* note 1, at 234–46 (proposing that animals can be understood as a form of self-owning property).

²⁶ See ANGELA FERNANDEZ, ANIMALS AS PROPERTY, QUASI-PROPERTY OR QUASI-PERSON 26, 50–61 (2022), <https://thebrooksinstitute.org/animal-law-fundamentals/animals-property-quasi-property-or-quasi-person> [<https://perma.cc/2KAM-2GK7>] (discussing the possibility of treating animals as “quasi-persons” given the challenges that recognizing full animal personhood presents today).

²⁷ Some think that the vast majority of moral value found in both humans and nonhumans may lie in the future—perhaps even the far future. See ORD, *supra* note 15, at 43–49.

²⁸ Although it is important to evaluate alternatives to animal personhood, that project is beyond the scope of this Article. See FERNANDEZ, *supra* note 26, at 50–51 (canvassing a variety of proposals made for a new animal status).

²⁹ See, e.g., Steven M. Wise, *The Struggle for the Legal Rights of Nonhuman Animals Begins—the Experience of the Nonhuman Rights Project in New York and Connecticut*, 25 ANIMAL L. 367, 368–71 (2019); Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1, 1 (2010). For others who have discussed legal personhood for animals without attempting to theorize the concept, see, for example, Macarena Montes Franceschini, *Animal Personhood: The*

Nevertheless, advocates and scholars to date have relied on a simplistic assumed meaning of legal personhood—at least a partial explanation for the lack of success in court. Scholars often assume that personhood is a simple “capacity to bear rights and duties,”³⁰ an understanding contradicted by examples like infants, who hold no duties, and corporations, who do not hold basic rights like humans. Consequently, this Article critically assesses the new “bundle theory” of legal personhood developed by legal philosopher Visa Kurki.³¹ Kurki’s theory cautions against accepting the simple interpretation of legal person.³² The bundle theory shows that legal personhood is a cluster concept that depends on different “incidents,” which may be active or passive.³³ “Passive legal persons”—including human infants—have incidents like core rights that protect their flourishing, as well as legal standing, but no duties.³⁴

Still, Kurki’s theory does not address whether animals should have rights or be legal persons. This Article fills that gap, making the new argument that legislatures and courts in

Quest for Recognition, 17 ANIMAL & NAT. RES. L. REV. 93 (2021); Sarah Schindler, *Pardoning Dogs*, 21 NEV. L.J. 117, 156–58 (2020); Carter Dillard, *Empathy with Animals: A Litmus Test for Legal Personhood?*, 19 ANIMAL L. 1 (2012); Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals As Property, and the Presumed Primacy of Humans*, 39 RUTGERS L.J. 247, 247–58 (2008); Adam Kolber, Notes, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163 (2001); but see Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369, 372–74 (2007) (describing certain core aspects of the meaning of legal personhood and discussing how personhood might apply to animals).

³⁰ See, e.g., Elizabeth Kronk Warner & Jensen Lillquist, *Laboratories of the Future: Tribes and Rights of Nature*, 111 CALIF. L. REV. 325, 335 (2023) (discussing legal personhood in the related area of personhood for features of the environment).

³¹ See VISA A.J. KURKI, A THEORY OF LEGAL PERSONHOOD 5–6 (2019).

³² See Daniel J. Hemel, *Polysemy and the Law*, 76 VAND. L. REV. 1067, 1113 (2023) (arguing that personhood is a polysemic concept with multiple meanings, which can include both legal meaning and non-legal meaning).

³³ See KURKI, *supra* note 31 at 5–6; see also Angela Fernandez, *The “Bundle” or “Cluster” Theory of Legal Personhood in Its Active and Passive “Incidents,”* 12 J. ANIMAL ETHICS 192, 201 (2022) (opining that Kurki’s book is “a signal achievement for which he should be loudly applauded and his book widely read”).

³⁴ Cf. Cass R. Sunstein, *Can Animals Sue?* in ANIMAL RIGHTS, *supra* note 1 (arguing that animals should have procedural protections like standing to sue whenever they have existing legal rights). I confine my discussion to the basic or fundamental rights of animals, recognizing that these are the most urgent priorities given the wrongs currently inflicted on animals. See NUSSBAUM, *supra* note 10, at 234 (“First, and most urgent, humans must *end human practices that directly violate wild animal life, health, and bodily integrity.*”). The argument for basic rights and passive legal personhood does not preclude the view that animals, supported by appropriate guardians or “collaborators,” may become “active” legal persons too, under certain conditions.

the United States should work to recognize “basic rights” to bodily integrity, some degree of liberty, and probably life for sentient animals, appropriately contextualized by an animal’s specific situation.³⁵ Under the bundle theory, recognition of basic rights should *precede* the recognition of animal legal personhood, which depends on an entity first having such rights.³⁶ American law should grapple with animals’ basic rights to bodily integrity, some degree of liberty, and life, and the procedural incidents of personhood, like standing, that can protect those rights.

Importantly, this analysis of legal personhood can guide litigation in practice. In particular, clarifying the relationship between rights and personhood can help explain disagreements among the judges in Happy the elephant’s case.³⁷ This Article argues that the Court of Appeals in Happy’s case erred by focusing on a simplistic understanding of personhood, at the suggestion of the NhRP, and neglecting the prior issue of Happy’s basic right to liberty. Treating personhood as a bundle concept shows why the central question in Happy’s case was whether Happy possesses one of the core *incidents* of legal personhood—the basic right to liberty—rather than whether Happy is a legal person. This argument is illuminated by a powerful dissent supporting Happy’s liberty, written by now-Chief Judge Rowan Wilson, a watershed moment in American law.³⁸ Future litigation would benefit from attention to the argument that recognizing animals’ basic rights must precede personhood.

Expanding the legal rights of animals does not mean giving them all of the rights that humans possess. The specific rights of animals on this view can vary depending on many factors,

³⁵ Reasonable minds may disagree whether animals’ core capacities to suffer and flourish require a right to life *per se*. For example, some may think that a right to bodily integrity—and against injury and suffering—is all that is needed to protect a sentient animal from serious harms. On that view, painless killing of an animal may not be wrong in all cases. *See infra* at 112–13.

³⁶ The argument presented is related to but different from the recent argument by Eva Bernet Kempers focused on the personhood of certain animals in civil law systems. *See* Eva Bernet Kempers, *Transition Rather than Revolution: The Gradual Road Towards Animal Legal Personhood Through the Legislature*, 11 *TRANSNAT’L ENV’T L.* 581, 600–01 (2022) (arguing that simple welfare rights might be strengthened through legislation in civil law systems).

³⁷ *See* Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 935–37 (N.Y. 2022) (Wilson, J dissenting).

³⁸ *See id.* at 960 (“Happy’s habeas petition should not have been summarily dismissed.”).

including the capabilities of particular species.³⁹ Yet, a limited set of basic rights seems to follow from the argument that sentient animals deserve to be treated justly.⁴⁰ Importantly, these rights are subject to constraints imposed by the rights of others—humans and animals—and the exact scope of these rights for different animals remains to be defined. A recognition of basic rights would leave open many questions: how are animals' rights different for each animal given their different capabilities and interests? Should animals be entitled to veterinary care? Do dogs have a right to be trained? Do wild animals have a right to own their habitat to protect their interests?⁴¹ Do whole species have rights not to be harmed through extinction?

This Article proceeds in four Parts. Part I evaluates and adopts arguments in favor of the moral value of sentient animals, which can be paired with the Capabilities Approach showing that animals are entitled to justice through law. Part II explores animal legal personhood to better protect animals in the United States, evaluating Kurki's bundle theory of personhood as an important new contribution that spotlights what I call "basic rights." I argue further for a novel synthesis of these views, which holds that animals probably should be awarded certain rights based on sentientism and the Capabilities Approach, subject to the characteristics of particular species. Once law recognizes an animal's basic rights, whether that animal should also be recognized as a legal person depends on whether it obtains procedural incidents of personhood like standing. In Part III, I show that the bundle theory helps explain the important disagreements in Happy's case and can guide future litigation. Part IV suggests that mechanisms for recognizing animals' basic rights, and perhaps eventually personhood, can include both legislation and judicial decision-making.

³⁹ See NUSSBAUM, *supra* note 10, at 112–13, 270–88 (explaining a basis for animal rights and the various ways in which different animals and species are protected differently); Martha C. Nussbaum, *Beyond "Compassion and Humanity": Justice for Nonhuman Animals*, in ANIMAL RIGHTS, *supra* note 1, at 309–10 (explaining that the species affects the justice due to a particular animal).

⁴⁰ These basic rights are equivalent to what Kurki calls "fundamental protections" that form a core incident of legal personhood on his theory. See KURKI, *supra* note 31, at 97–100. Other animal rights to basic supports from society ("positive rights") also seem possible, such as the right to receive veterinary care for human-caused injuries, but these are beyond scope here. This Article takes basic rights to refer only to negative rights.

⁴¹ Karen Bradshaw has proposed that wild animals, at least, might be reconceived as property owners in some circumstances. See KAREN BRADSHAW, WILDLIFE AS PROPERTY OWNERS 1–3 (2020).

I

ANIMALS, MORALITY, AND JUSTICE

A. Sentient Animals Have Moral Status

In recent decades, Western ethicists have begun to entertain seriously the view that there is moral value in the nonhuman world, in nature. In the 1970s, the environmental movement took off, with views like “deep ecology” that found important value in nature, including in plants, animals, and other organisms.⁴² Around the same time, works by Peter Singer and Tom Regan, among others, helped catalyze the rise of the animal liberation movement, which advocates, broadly speaking, for the freedom of animals from oppressive human activities that substantially harm their well-being.⁴³ Some scholars have suggested that the industrial use, confinement, and slaughter of animals today is comparable in some respects to slavery (ancient or modern).⁴⁴ Until recently, many would have responded that there are not enough similarities to justify the comparison; after the rise of industrial animal agriculture, however, the case is not so clear. The movement toward animal liberation has been accompanied by increased interest among the public in animal welfare and animal rights.⁴⁵ Importantly, many non-Western traditions have long recognized the value of nonhuman nature—Western thinking is in many respects a latecomer.⁴⁶

The movements for environmental and animal protections in the West attest to the growing number of humans concerned with harms to nonhumans. In recent years, social scientists

⁴² See ATTFIELD, *supra* note 8, at 1–12. This Article makes no attempt to define the bounds of nature.

⁴³ See, e.g., SINGER, *supra* note 8, at 1–23; Tom Regan, *The Case for Animal Rights*, in *IN DEFENSE OF ANIMALS* 13–26 (Peter Singer ed., 1985). Legal scholar Gary Francione likewise has been a notable contributor to the animal rights discourse in law, through a view he calls “abolitionism.” See GARY L. FRANCIONE, *ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION* 1–23 (2008).

⁴⁴ See, e.g., Wise, *Animal Rights*, *supra* note 11, at 19–26; Francione, *supra* note 1 at 132 (“The institution of human slavery was structurally identical to the institution of animal ownership.”).

⁴⁵ The distinction between animal welfarism and animal rights is broadly adopted from Gary Francione’s work. See FRANCIONE, *supra* note 43, at 1–24.

⁴⁶ Many indigenous peoples in North America, for example, did not think of other animals as inferior to humans. See Jessica Eisen, *Milked: Nature, Necessity, and American Law*, 34 BERKELEY J. GENDER L. & JUST. 71, 77 (2019) (explaining that indigenous worldviews gave rise to perspectives of “mutual support” between humans and animals). This simple change of perspective can be the basis for massive differences in how animals are treated. Consider for example whether, in a society where hunting requires lengthy rituals of respect for the animal, it is possible for factory farming even to exist.

have found increasing support among the public for the view that nature, and animals in particular, have value apart from their instrumental use for humans.⁴⁷ One study found a majority of Americans in every state now believe that “wildlife” (wild animals) are like humans in important ways, including in their capacities for emotional and cognitive states.⁴⁸ The evidence suggests that Americans now recognize the similarity between humans and animals that ethicists have argued supports rethinking the place of animals altogether. These changing perspectives raise a question: how should we value nonhumans, other than as mere objects for human use and exploitation?

Philosophers have identified multiple types of value that may apply to nonhuman nature, which can be understood to include organisms (individuals), species, and whole ecosystems.⁴⁹ Theories often distinguish two broad categories of value: intrinsic and instrumental value.⁵⁰ Intrinsic value is the ultimate value of something for its own sake.⁵¹ In contrast, instrumental value is the value that one thing provides for another, as a means to an end, although the same entity may have both intrinsic and instrumental value.⁵²

Intrinsic value in nature has been widely discussed in science and philosophy for decades.⁵³ For example, in conservation science, intrinsic value long has been recognized in

⁴⁷ See John A. Vucetich, Jeremy T. Bruskotter & Michael Paul Nelson, *Evaluating Whether Nature's Intrinsic Value is an Axiom of or Anathema to Conservation*, 29 CONSERVATION BIOLOGY 321 (2015) (finding that significant numbers of people value wildlife intrinsically).

⁴⁸ See Michael J. Manfredo, Esmeralda G. Urquiza-Haas, Andrew W. Don Carlos, Jeremy T. Bruskotter & Alia M. Dietsch, *How Anthropomorphism is Changing the Social Context of Modern Wildlife Conservation*, 241 BIOLOGICAL CONSERVATION 1 (2020).

⁴⁹ For an overview of the study of value in nature, see generally DALE JAMIESON, ETHICS AND THE ENVIRONMENT 68–75 (2008); ATTFIELD, *supra* note 8, at 13–28.

⁵⁰ See ATTFIELD 2018, *supra* note 8, 13–28; JAMIESON, *supra* note 49, at 68–75. Some philosophers refer to intrinsic value using a slightly different term, such as “inherent value,” but this Article treats these concepts as equivalent. See, e.g., Regan, *supra* note 43, at 21. Recent scholarship has also identified a potential third category of value, relational value, that refers to the value that arises through relationships that humans have with nature and with others through nature. See Kai M.A. Chan, Rachele K. Gould & Unai Pascual, *Editorial Overview: Relational Values: What are They, and What's the Fuss About?*, 35 CURRENT OP. IN ENV'T SUSTAINABILITY 35 A1–A7 (2018). The focus here, however, is on intrinsic value.

⁵¹ See JAMIESON, *supra* note 49, at 68–75. This Article needs not take a position regarding whether intrinsic value requires a particular person's recognition of it or is somehow mind-independent.

⁵² See, e.g., Chelsea Batavia & Michael Paul Nelson, *For Goodness Sake! What is Intrinsic Value and Why Should We Care?*, 209 BIOLOGICAL CONSERVATION 366, 370, 372 (2017).

⁵³ *Id.* at 369; JAMIESON, *supra* note 49, at 68–75.

ecological collectives like species and ecosystems. In the 20th Century, policymakers often ascribed some form of intrinsic value to nature writ large, and some attempted to integrate the intrinsic value of collectives into nature management.⁵⁴ For example, conservation biologist Michael Soulé provided the classic statement of the intrinsic value of “biodiversity” in nature but denied that individual animals have intrinsic value such that their welfare should be considered in science and policy.⁵⁵

A key implication of having intrinsic *moral* value is “moral status,” sometimes called “moral considerability” or “moral standing.”⁵⁶ Moral status means that a being has intrinsic moral value and the capacity to be wronged, such that its interests should be considered by society.⁵⁷ Philosophers have argued that moral status, in turn, gives rise to certain principles for the treatment of a moral being.⁵⁸ In particular, there is often a strong presumption against interference with (including harm to) an entity that possesses moral status.⁵⁹ Additionally, until recently, Western philosophers argued that only human beings have moral status.⁶⁰

Several recent thinkers, however, have criticized the view that only humans have moral status, labelling it “speciesism,” an anthropocentric view in some ways analogous to racism or sexism.⁶¹ There are several problems with speciesism. First, it relies on essentialist notions of species that modern biology rejects.⁶² According to modern theory, a species cannot be defined by a set of essential biological characteristics or traits that are necessary in every case.⁶³ There are always individuals of

⁵⁴ See J. Baird Callicott, *Whither Conservation Ethics?*, 4 CONSERVATION BIOLOGY 15, 17 (1990).

⁵⁵ See Michael E. Soulé, *What is Conservation Biology?*, 11 BIOSCIENCE 727, 727–34 (1985).

⁵⁶ Agnieszka Jaworska & Julie Tannenbaum, *The Grounds of Moral Status*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., Spring 2023 Edition), <https://plato.stanford.edu/archives/spr2023/entries/grounds-moral-status/> [<https://perma.cc/KQ2Q-8T8P>].

⁵⁷ See *id.*

⁵⁸ See *id.*; ATTFIELD, *supra* note 8, at 19–23; SEBO, *supra* note 8, at 16–17.

⁵⁹ Jaworska & Tannenbaum, *supra* note 56.

⁶⁰ See *id.*

⁶¹ See, e.g., SINGER, *supra* note 8, at 1–23; Lori Gruen, *The Moral Status of Animals*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2021 Edition), <https://plato.stanford.edu/archives/sum2021/entries/moral-animal/> [<https://perma.cc/6F5L-GU26>].

⁶² See KRISTIN ANDREWS ET AL., CHIMPANZEE RIGHTS: THE PHILOSOPHERS’ BRIEF 24–34 (2019).

⁶³ See *id.* at 25–27.

a species that do not possess a given trait, and there is significant genetic variation within a species. Species are not immutable “natural kinds,” ranked hierarchically as in the ancient *scala naturae* (“the Great Chain of Being”), but rather changing configurations of individuals linked by *common ancestry* and categorized into types.⁶⁴ Second, even where there is a trait like common ancestry that arguably applies to every species-member, such a trait is not morally relevant. Just as no one today would consider ancestry to be morally relevant to the rightness of harming a human, the ancestry of a chimpanzee is irrelevant to its dignity.⁶⁵ Third, some scholars have pointed out close historical parallels between racial essentialism and speciesist essentialism. Modern biology rejects biological kinds and thus the potentially racialized implications of essentialist thinking.⁶⁶ For these reasons, many ethicists have argued that some nonhumans also possess moral status, expanding the so-called “moral circle.”⁶⁷

Several broad frameworks have emerged advocating for the moral status of entities beyond humans, but this Article focuses on a framework sometimes labeled “sentientism.”⁶⁸ Sentientism takes the view that all and only sentient animals have moral status.⁶⁹ This view can be allied with consequentialism in ethics, as in the work of Peter Singer, meaning that humans should consider their actions in terms of consequences for animal welfare.⁷⁰

⁶⁴ See *id.* at 16–34.

⁶⁵ *Id.* at 27 (“There are *capacities* that might typically be shared by the members of a particular species that are morally relevant, but then it is the *capacities*—not species—doing the ethical work.”). See also NUSSBAUM, *supra* note 10, at 80–81 (explaining that her Capabilities Approach theory holds that animal “capabilities” are relevant to animals’ moral dignity and issues of justice).

⁶⁶ See ANDREWS ET AL., *supra* note 62, at 16–34. For this reason, attempts to argue that “the determination of species is almost entirely a biological endeavor” fail. See, e.g., *Nonhuman Rights Project, Inc., ex rel. Happy v. Breheny*, 136 HARV. L. REV. 1292, 1298 (2023). A species is a category that is not biologically determined under modern biological theory.

⁶⁷ See, e.g., PETER SINGER, *THE EXPANDING CIRCLE* (1981); Jacy Reese Anthis & Eze Paez, *Moral Circle Expansion*, 130 FUTURES, Apr. 2021, at 1–11.

⁶⁸ See ATTFIELD, *supra* note 8, at 10–12, 19–28; JAMIESON, *supra* note 49, at 145–153. A second framework of moral status in nature—labeled “biocentrism”—posits that all individual living organisms have moral status, thus expanding the moral circle far beyond sentientism. See JAMIESON, *supra* note 49, at 145–49. Still other thinkers have taken a position sometimes called “ecocentrism,” which holds that collectives in nature, such as ecosystems and species, may have intrinsic moral value or status. See ATTFIELD, *supra* note 8, at 12, 19–23; JAMIESON, *supra* note 49, at 149–53.

⁶⁹ See, e.g., ATTFIELD, *supra* note 8, at 26.

⁷⁰ See SINGER, *supra* note 8, at 1–23.

Other scholars like Tom Regan, Gary Francione, and Martha Nussbaum have taken a rights-based approach, arguing that animals have dignity that warrants recognition of certain rights.⁷¹

Sentience is a feature that applies to many more animals than we might initially expect. Sentience can mean at least a capacity for conscious experience that is characterized by good and bad emotional states.⁷² Scientists have posited that sentience has at least three dimensions: perception of what is good or bad (called nociception), negative and positive states of awareness, and a sense of significance attaching to some things but not others.⁷³ Scientific evidence suggests that at least all vertebrates, and many complex invertebrates like octopuses, are probably sentient, although some disagreement about particular species remains.⁷⁴ These animals likely have a subjective experience of the world, including cognitive states like pleasure, pain, joy, grief, and desire.⁷⁵

There are compelling reasons to accept at least sentientism as a minimum threshold for moral status outside of humanity. Conditioning moral status on sentience can be justified in part by reflection on our intuitions about non-conscious organisms and objects. For example, while mountaintop removal may matter to humans that care about a particular place, it is difficult to see why it would matter to the mountain. So, too, for an unconscious organism, like a tree. But sentient animals seem to have interests that *matter to them*, and that is a strong reason for recognizing their moral status.⁷⁶ By definition, sentient

⁷¹ See Regan, *supra* note 43, at 21–24; FRANCIONE, *supra* note 43, at 9–10, 23. Christine Korsgaard has argued persuasively that Kantian ethics can incorporate a concept of animals as possessing intrinsic dignity as well. See Korsgaard, *supra* note 1.

⁷² See, e.g., NUSSBAUM, *supra* note 10, at 126–31; SEBO, *supra* note 8, at 16–17, 146.

⁷³ See NUSSBAUM, *supra* note 10, at 127–31.

⁷⁴ See, e.g., Heather Browning & Jonathan Birch, *Animal Sentience*, 17(5) PHIL. COMPASS, Feb. 2022, at 1–4 (explaining that strong evidence that all vertebrates and cephalopods are sentient has emerged, although certain taxa are more controversial than others); SEBO, *supra* note 8, at 145–48 (concluding that all vertebrates and many invertebrates are probably sentient); CAMBRIDGE DECLARATION ON CONSCIOUSNESS, *supra* note 9. The view offered here is somewhat broader than Nussbaum's view, which excludes certain animals from sentience and thus moral status. See NUSSBAUM, *supra* note 10, at 141–42.

⁷⁵ See Browning & Birch, *supra* note 74, at 2–4.

⁷⁶ See, e.g., Saskia Stucki, *Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights*, 40 OXFORD J.L. STUD. 533, 542–43 (2020); Regan, *supra* note 43, at 22 (“[T]he really crucial, the basic similarity [between humans and other animals] is simply this: we are each of us the experiencing subject of a life, a conscious creature having an individual welfare that has importance to us

animals—including humans—have a perceptual experience of the world that has good and bad dimensions.⁷⁷ Moreover, sentient animals have significant core interests, such as interests in avoiding suffering, surviving, and socializing, which they act to protect.⁷⁸ These interests are part of what mark them out as beings worthy of our moral consideration, just as we consider the core interests of infants, the elderly, the marginalized, those with severe disabilities, and other vulnerable humans. In fact, today sentience is often understood among Western ethicists to be a central condition for an entity to possess moral value.⁷⁹ This simple version of sentientism raises the stakes for animals.

Sentientism also appears plausible given the growing recognition of animals' central interests in law and policy. Modern animal welfare legislation no longer prohibits abuse of animals only because such abuse demeans the humans who commit it, as was the case in early modern times.⁸⁰ Instead, welfare laws today recognize to some degree that sentient animals have intrinsic worth:

Modern animal welfare legislation cannot be intelligibly explained other than as acknowledging that the animals it protects (i) have morally and legally relevant goods and interests, notably in their welfare, life and physical or mental integrity. Moreover, it rests on an (implicit or explicit) recognition of those animals as (ii) having moral status in the sense of having intrinsic value.⁸¹

whatever our usefulness to others."); Thomas Nagel, *What is it Like to be a Bat*, 83 THE PHIL. REV. 435, 441–42 (1971) (arguing that there is a quality of how it is to be an animal like a bat, even if humans cannot directly experience it).

⁷⁷ See, e.g., Bernd Ladwig, *Do Animals Have Rights?* 13 ANIMALS, Mar. 2023, at 7 (2023) (explaining that sentience means sensations that "are not value-neutral, for they have a more or less pronounced positive or negative valence such as joy or pain").

⁷⁸ See SINGER, *supra* note 8, at 7–9 (arguing that sentience as the capacity "for suffering and/or enjoyment or happiness" is a "prerequisite" for having other interests at all); Ladwig, *supra* note 77, at 7 (arguing that all sentient animals appear to have "at least interests in the dimension of well-being, which includes pleasant sensations and pleasurable experiences as well as scope for volitional activities" in "contact with conspecifics or other—human or non-human—animals in forms that fit their social dispositions," and in "their own further life").

⁷⁹ See KURKI, *supra* note 31, at 64 ("The moral justification of this view is quite widely, though not unanimously, accepted in modern secular Western ethics: the sentience of a being is very often taken to be an important . . . condition for what may be termed . . . the possession of ultimate value.").

⁸⁰ See, e.g., FRANCIONE, *supra* note 43, at 2–3, 7 (explaining that until the 19th century, Western concern for animals was motivated by "a concern that humans who abused animals were more likely to ill-treat other humans," which changed with modern animal welfare concerns).

⁸¹ Stucki, *supra* note 76, at 543.

Many laws reflect concern for sentient animals already. The European Union explicitly recognizes the relationship between sentience and moral value under the Lisbon Treaty, which states that members “shall, since animals are sentient beings, pay full regard to the welfare requirements of animals.”⁸² Among nations, France and several other countries recently have recognized that animals are “living beings gifted [with] sentience,” suggesting concern for their intrinsic worth.⁸³

Importantly, some have argued that the line for moral status might be drawn at a more complex level of cognition—such as intelligence—but there are good reasons to focus on sentience. Steven Wise, for example, has argued that chimpanzees, bonobos, and a few others are entitled to legal rights due to “the complexities of their minds,” including capacities like self-awareness, tool use, and complex communication.⁸⁴ These capacities can indeed be amazing to encounter. But sentience is a better line because sentience effectively describes the capacity to have conscious internal experiences (like suffering) that can lead an animal to be wronged at all.⁸⁵ And requiring “cognitive complexity” as a condition for ascribing moral value inevitably raises problems about reinforcing discrimination against certain humans who may not meet such a requirement. Sentience therefore seems to be an appropriate threshold for an animal’s moral status, but that does not yet tell us how animals should be treated by governments and laws.

B. Sentient Animals Are Subjects of Justice

In her new book, *Justice for Animals*, Martha Nussbaum has detailed a framework that expressly applies the concept of justice to sentient animals based on their moral value or dignity.⁸⁶ Nussbaum’s “Capabilities Approach” (CA) framework

⁸² Consolidated Version of the Treaty on the Functioning of the European Union art. 13, 2016 O.J. (C 202) 1, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/TXT> [<https://perma.cc/G54P-H9DE>].

⁸³ Wesley J. Smith, *France Animals “Living Beings Gifted Sentience”*, NAT’L REV. (Feb. 1, 2015), <https://www.nationalreview.com/human-exceptionalism/france-animals-living-beings-gifted-sentience-wesley-j-smith/> [<https://perma.cc/3H6S-E2SA>].

⁸⁴ See WISE, *supra* note 1, at 237. Regarding whether Wise’s version of autonomy actually may tend toward something more like sentience, however, see *infra* at 108–110.

⁸⁵ See, e.g., FRANCIONE, *supra* note 43; NUSSBAUM, *supra* note 10, at 118–53; *The Relevance of Sentience*, ANIMAL ETHICS, <https://www.animal-ethics.org/relevance-of-sentience/> [<https://perma.cc/3X7Q-ZFMV>] (last visited Feb. 2, 2023).

⁸⁶ See NUSSBAUM, *supra* note 10, at 1.

of justice helps move thinking about animals from the ethical realm of individual action to the political realm of justice and law. Injustice, on Nussbaum's account, is tied to flourishing lives that are damaged or "blocked" through culpable harm: "[I]njustice centrally involves *significant striving* blocked by not just *harm* but also *wrongful thwarting*, whether negligent or deliberate."⁸⁷ Because sentient animals pursue meaningful ends, they can suffer injustice under Nussbaum's theory when we deliberately or negligently wrong them by thwarting their "central capabilities."⁸⁸

Central capabilities are "substantial freedoms" that involve a being's opportunity for choice and/or action in a dimension of its life that is valuable.⁸⁹ Preserving such opportunities means preserving the freedom of individuals to engage in activities central to their form of life, or not.⁹⁰ This freedom is how humans and other animals flourish. The form of life of an individual, in turn, is significantly influenced by its species-membership.⁹¹ For example, a highly social and wide-ranging mammal, like a human, may have central capabilities like those for play or self-organizing in large social groups. A chimpanzee may have very similar capabilities. But a less social reptile, like a lizard, may possess capabilities that do not include the ability to play, but still include, for example, an ability to be injured and suffer.

Under the CA, sentient animals are ends in themselves and therefore possess something like moral status. Nussbaum adopts a view of the value of animals from another ethicist, Christine Korsgaard, who reimagines Immanuel Kant's view of the individual human as an inviolable end-in-itself.⁹² Nussbaum and Korsgaard extend this view beyond humans to all sentient beings. Nussbaum agrees with Korsgaard that

[w]hen we pursue our ends, we treat ourselves as ends in ourselves: we resist being used as tools of other people's purposes. But that is what any animal does too, and this way of valuing our ends is just our way of being an animal

⁸⁷ *Id.* at 7–8.

⁸⁸ *Cf. id.* at 6 (noting that injustice applies to every "sentient being," not only to humans or particular species of animals).

⁸⁹ *Id.* at 80.

⁹⁰ *See id.* at 96–97 (explaining how an animal's "form of life" reflects in part its species-membership, but for all animals seems to include "survival, reproduction, and, in most cases, social interaction"), 106 (noting that capabilities may or may not be used by a person).

⁹¹ *See id.* at 86.

⁹² *See id.* at 70–71.

[T]his suffices for the conclusion that animals are ends in themselves in Kant's sense, meaning that they have, each of them, a dignity, not just a price, like property. Treating animals as nothing but means violates that dignity. Treating an animal as an end means valuing what is good for it for the sake of that creature⁹³

Consistent with sentientism, Nussbaum argues that sentient animals are the key group to be treated as ends: "[t]he world looks like something to them, and they strive for the good as they see it."⁹⁴ The concept of an end-in-itself is equivalent to dignity and implies moral status. On that basis, Nussbaum argues that a sentient animal should be considered as a fellow "citizen" in deliberations that implicate its interests.⁹⁵ Crucially, for the CA, ranking the dignity of an individual sentient animal against the value of a human or another animal is a mistake: all sentient animals should be respected, even when this can generate hard cases about competing interests.⁹⁶

The ends that animals strive for are the basis for the central capabilities that political justice must protect under the CA. These ends are often not mysterious—for all animals, they include, for example, "food," "freedom from danger," sex, and similar interests.⁹⁷ According to Nussbaum, we need experts to fill out the details of animals' central capabilities through scientific research.⁹⁸ But for all animals, these capabilities include as a starting point: *life, health, bodily integrity*—including the freedom of movement—and the use of *senses and thought*, among others.⁹⁹ Central capabilities must be guaranteed by a just society up to a minimum threshold, not to the maximum.¹⁰⁰ Consistent with principles of political liberalism, capabilities are not comprehensive mandates but cover relatively narrow, core areas of life, and preserve an individual's choice.¹⁰¹

⁹³ *Id.*

⁹⁴ *See id.* at 118–20.

⁹⁵ *See, e.g., id.* at 77 (explaining how animals are "citizens" in the sense that their needs and interests make "demands" or claims on us).

⁹⁶ *See id.* at 174–77.

⁹⁷ *See id.* at 69.

⁹⁸ *See id.* at 98–99.

⁹⁹ *See id.* at 102; *see also id.* at 88 (explaining that bodily integrity includes freedom of movement). Nussbaum also argues for "practical reason," "affiliation," and "play" as plausible central capabilities, although they are less relevant here because they do not pertain to the core protections for bodily freedom and life that may form the basis for legal personhood.

¹⁰⁰ *Id.* at 86, 106.

¹⁰¹ *See id.* at 93–95.

Under the CA, animals' capabilities are a foundation for justice, law, and judicial interpretation.¹⁰² Justice requires that society protect the exercise of central capabilities, preventing their unjust "thwarting."¹⁰³ Because animals are owed justice, due to their basic dignity or moral status, concern for them is not simply a matter of moral suasion but also can be enforced by the legal system.¹⁰⁴ So the basic laws of a nation should supply a threshold for each central capability, either through legal texts (such as a written constitution or statutes) or "through incremental judicial interpretation."¹⁰⁵ The CA thus supports the view that both legislation and judges can protect animals' central capabilities through law.

The CA shows that sentient animals' capacity for subjective flourishing means that they are a big deal morally and legally. Together with the ethical principles of sentientism, this approach to political justice shows how even pluralistic societies like the United States should better protect animals at law, as a matter of basic justice already afforded to humans (at least in theory). Moreover, Nussbaum plausibly suggests that, while an international "constitution" for capabilities might be the ideal outcome for animals (and humans), in the foreseeable future animals must rely on "nations, states, and localities" to protect their central capabilities by law.¹⁰⁶ In the United States, capabilities are, in essence, a "type of rights,"¹⁰⁷ a critical legal concept in understanding the legal status of animals, including possible personhood.

II

ANIMAL BASIC RIGHTS AND LEGAL PERSONHOOD

Sentientism provides compelling reasons for recognizing the intrinsic dignity of sentient animals, who have important subjective interests and moral status. The CA, in turn, provides a strong argument for why recognizing the moral status of animals is not merely a matter of personal ethics but also a matter of public justice. This Part addresses how justice for

¹⁰² See *id.* at 81, 90, 92.

¹⁰³ *Id.* at 7–8.

¹⁰⁴ See *id.* at 95 (noting that justice involves promoting opportunities to thrive "through the use of laws that both enable and restrain").

¹⁰⁵ *Id.* at 90. See also *id.* at 92 (explaining that just nations must secure capabilities through governments, not civil society).

¹⁰⁶ *Id.* at 100.

¹⁰⁷ See *id.* at 106.

animals can be better reflected in American law by considering the recent rise of arguments for “legal personhood” for certain animals.

A. The Meaning of Personhood in Law and the Bundle Theory

The legal status of an entity—whether a human, corporation, animal, or even an artificial intelligence—often includes recognition as subject or object. Legal subjects are typically labeled legal “persons,” and legal objects are “things” or “property.”¹⁰⁸ Animals have been considered property for thousands of years, whereas humans have been considered persons.¹⁰⁹ Many Western thinkers from the Judeo-Christian tradition to the modern period assumed that there is a “Great Chain of Being” ordering nature, with humans at the pinnacle and other animals down the ladder of moral worth due to their inferior, unchangeable natures.¹¹⁰ Science abandoned this picture with Charles Darwin’s theory of evolution, showing that humans evolved from other animals.¹¹¹ Law, however, has not adjusted its view of the inferiority of animals as quickly: “[b]ecause the common law values the past merely for having been, judges rely upon prior judicial decisions and the jurisprudential writings of those who lacked modern scientific understandings.”¹¹² This applies to the laws governing animal legal status.

In general, personhood might refer to either moral personhood—which can be understood as the meaning of a person in ordinary language—or legal personhood. Those

¹⁰⁸ Cf. Tomasz Pietrzykowski, *The Idea of Non-personal Subjects of Law*, in *LEGAL PERSONHOOD: ANIMALS, ARTIFICIAL INTELLIGENCE AND THE UNBORN* 49–67 (Visa A.J. Kurki & Tomasz Pietrzykowski eds., 2017). Some scholars, however, have argued that the categories of person and property are not always independent. For example, David Favre contends that animals can be both property and property-owners through a form of “equitable self-ownership.” See David Favre, *A New Property Status for Animals*, in *ANIMAL RIGHTS*, *supra* note 1, at 234–46.

¹⁰⁹ See, e.g., Francione, *supra* note 1, at 116–20; Pablo Lerner, *Animals are Not Objects but are Not Yet Subjects: Developments in the Proprietary Status of Animals*, 18 *ANIMAL & NAT. RES. L. REV.* 267, 274 (2022); 4 *AM. JUR. 2D Animals* § 3 (May 2024) (“Animals are generally regarded as personal property.”). Of course, many humans at different times have not been considered persons, an important fact in the history of legal progress toward justice.

¹¹⁰ See WISE, *supra* note 1, at 11–12; RICARD, *supra* note 7, at 1–16.

¹¹¹ WISE, *supra* note 1, at 19–22.

¹¹² *Id.* at 47.

with “[moral status] are often called ‘moral persons.’”¹¹³ Some philosophers define a moral person to have certain attributes, such as the ability to reason and to conform to obligations, but that is not a consensus on moral personhood.¹¹⁴ Adult human beings are often the paradigmatic example of moral personhood and are viewed by many to have “full moral status.”¹¹⁵

The concept of “legal personhood” is distinct from ordinary moral personhood and requires a careful understanding of its various applications. Some scholars have collapsed the distinction between moral and legal persons, inferring that a legal person is just any moral person. For example, Gary Francione argues that the current property status of animals is a fundamental impediment to recognizing their rights and ending their harmful treatment.¹¹⁶ He argues that the moral universe is limited to only two types of beings—persons and property—and if animals are not property they must be (moral) persons. So far, the argument may be correct. But he then seems to assume that this makes them persons *in law*.¹¹⁷

Equating legal persons with moral persons is implausible. Although the two concepts are related, a simple equivalence neglects the technical meaning of “person” in law.¹¹⁸ Jurists have long interpreted the term “person” to have special meaning, for example when applied to corporations, ships, or other entities that would not be referred to as persons in ordinary language.¹¹⁹ Likewise, law often distinguishes between “natural persons” and “juridical persons”: a natural person is a human being, whereas a juridical person is any other type of being granted legal personhood.¹²⁰ Law thus applies the meaning of “person” differently than ordinary language.

¹¹³ Jaworska & Tannenbaum, *supra* note 56.

¹¹⁴ See Bartosz Brożek, *The Troublesome ‘Person,’* in LEGAL PERSONHOOD, *supra* note 108, at 3–13 (discussing the concept of personhood in philosophy and law generally).

¹¹⁵ See generally Jaworska & Tannenbaum, *supra* note 56.

¹¹⁶ See FRANCIONE, *supra* note 43, at 1–23.

¹¹⁷ See Francione, *supra* note 1, at 131–32. This explains why he can conclude that “[i]f we extend the right not to be property to animals, then animals will become moral persons” and by implication legal persons. *Id.* at 131.

¹¹⁸ See Brożek, *supra* note 114; see also *infra* at 99–107 (discussing Kurki’s theory of legal personhood regarding different types of legal persons).

¹¹⁹ See Brożek, *supra* note 114, at 3–13; Pietrzykowski, *supra* note 108, at 49–67.

¹²⁰ Cf. Berg, *supra* note 29, at 372–74 (describing the distinction between natural and juridical persons).

Personhood is an important concept in many areas of law. In general, commencing a legal action is typically only permitted for a person. An action “requires a controversy between adverse parties,” and “every person is entitled to an opportunity to be heard in a court of law upon a question involving the person’s rights or interests.”¹²¹ The term “party” in a civil action “means all persons who have a right to control the proceedings”¹²² Likewise, specific rules, statutes, and common law often recognize only claims exercised by persons. The Federal Rules of Civil Procedure require a suit to commence only through a “real party in interest,”¹²³ but allow a guardian to sue on behalf of “a minor or an incompetent person.”¹²⁴ To take a statutory example, the Endangered Species Act allows citizens to sue to enforce its provisions that protect threatened species by authorizing “any person” to make certain claims.¹²⁵

Different doctrinal areas likewise often use the language of persons. For bodily injuries, the *Restatement (Second) of Torts* explains that someone is liable for battery if they intentionally cause “harmful contact” with the “person” of another.¹²⁶ Likewise, the *Restatement (First) of Property* defines an owner as a “person who has one or more interests” in some other “thing.”¹²⁷ Animals, as noted, have been regarded as “personal property” under property law, not as persons.¹²⁸ Of course, the specific meaning of “person” may require judicial interpretation in the relevant context in a particular lawsuit, and it may also be a matter of precedent.¹²⁹ Its meaning may vary somewhat in different statutory or common law contexts.¹³⁰ A particular

¹²¹ 59 AM. JUR. 2D *Parties* § 1 (May 2024). See also 59 AM. JUR. 2D *Parties* § 5 (May 2024) (“A party must also generally have a legal existence, and be a person—either natural or artificial.”).

¹²² 67A C.J.S. *Parties* § 1 (May 2024).

¹²³ FED. R. CIV. P. 17(a)(1).

¹²⁴ FED. R. CIV. P. 17(c)(1).

¹²⁵ 16 U.S.C. § 1540(g)(1); see also *Hawaiian Crow (‘Alala) v. Lujan*, 906 F. Supp. 549, 552 (D. Haw. 1991) (holding that the Endangered Species Act does not include an animal within the meaning of “person”).

¹²⁶ See RESTATEMENT (SECOND) OF TORTS § 13 (1965).

¹²⁷ RESTATEMENT (FIRST) OF PROPERTY § 10 (1936); see also, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24 (1971) (defining a “person” to include “a natural person, a partnership, an unincorporated association and a corporation”).

¹²⁸ See 4 AM. JUR. 2D *Animals* § 3 (May 2024).

¹²⁹ Cf. *Nonhuman Rts. Project, Inc. v. Breheny*, 197 N.E.3d 921, 935–36 (N.Y. 2022) (Wilson, J., dissenting) (noting that New York’s statute governing *habeas corpus* used the word “person” without intending any substantive content for that category, which was left to the “substantive law”).

¹³⁰ Hemel, *supra* note 32, at 1113.

context, however, does not prevent “person” from having a general legal meaning that applies broadly, with variations on the theme, as discussed in conjunction with Kurki’s theory of legal personhood below.

In recent decades, Western legal systems have granted animals protections that indicate limited moral concern but do not change animals’ legal status. For decades, laws in the United States have protected some animals from abusive, cruel, or other inhumane treatment, but courts to date have not adopted a non-property status for animals.¹³¹ In fact, commonly-cited jurisprudential texts still describe animals as *morally inferior* to humans. For example, the *Corpus Juris Secundum* asserts that animals have a lesser nature: “the word ‘animal,’ in the language of the law, is used in contra-distinction to a human being, and signifies an *inferior living creature*”¹³² This characterization is consistent with the Great Chain of Being, noted above, situating humans at the pinnacle of a hierarchy of beings—a theory discarded by modern science. That law still echoes theories abandoned by scientific inquiry indicates how slowly legal evolution has happened for nonhuman (and human) animals.

There are, however, indications that some protections for animals are becoming more robust. The protection of animals from historically normalized practices, such as painful confinement or slaughter of farm animals, is increasing, which suggests that legal systems are becoming more concerned with the dignity of sentient animals.¹³³ For example, in 2023, the Supreme Court in *National Pork Producers Council, Inc. v. Ross* upheld California’s ban on pork produced under cruel conditions for pigs, acknowledging the validity of Californians’ moral reasons in rejecting those conditions.¹³⁴ Francione has observed that “the view that animals were at least partial members of the moral community . . . found its way into the law, and remains the prevailing contemporary view.”¹³⁵ Nevertheless, that emergence has not led to widespread consideration of animals as something other than mere property in law.¹³⁶

¹³¹ See Francione, *supra* note 1, at 110–20.

¹³² 3B C.J.S. *Animals* § 1 (emphasis added); *accord*, 4 AM. JUR. 2D *Animals* § 1 (May 2024) (defining an animal as an “inferior or irrational sentient being”).

¹³³ See Francione, *supra* note 1, at 110–20; Stucki, *supra* note 76, at 543.

¹³⁴ See *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 356–362, 381–82 (2023).

¹³⁵ See FRANCIONE, *supra* note 43, at 5.

¹³⁶ *Id.* at 1–20.

In the last decade, however, personhood has become a hot topic in animal and environmental litigation and advocacy.¹³⁷ Legal scholars like Wise have promoted reconsideration of the legal status of animals, following the growing scientific evidence for animal sentience and intelligence.¹³⁸ In parallel, the NhRP, founded by Wise, has begun to argue boldly in state courts that animals should be recognized as persons and liberated from captivity under the writ of *habeas corpus*.¹³⁹ To date, courts have rejected the NhRP's arguments that animals are legal persons, however.¹⁴⁰ Most recently, in 2023, the Animal Legal Defense Fund attempted an argument that a horse is a "person" under Oregon tort law when stating a claim for negligence. The Supreme Court of Oregon denied review of the appellate decision that a horse cannot be a "person" under state common law.¹⁴¹

Despite the rise of personhood debates, few have rigorously analyzed its meaning to determine whether it might apply to animals or other features of nature.¹⁴² American legal scholarship instead typically has assumed a simple meaning

¹³⁷ See, e.g., Wise, *The Struggle*, *supra* note 29. Consider the headlines of major publications referencing animal rights and the rights of nature. See, e.g., Rachel Fobar, *A Person or a Thing? Inside the Fight for Animal Personhood*, NAT'L GEOGRAPHIC (Aug. 4, 2021), <https://www.nationalgeographic.com/animals/article/inside-the-ongoing-fight-for-happys-freedom> [<https://perma.cc/X7A4-DTRM>]; Justin E.H. Smith, *Nature Is Becoming a Person*, FOREIGN POL'Y (Nov. 24, 2021), <https://foreignpolicy.com/2021/11/24/nature-person-rights-environment-climate-philosophy-law/> [<https://perma.cc/WV97-92CD>].

¹³⁸ See Wise, *Legal Personhood*, *supra* note 29, at 1–11 (advocating for a reconsideration of animal personhood by courts); ANDREWS, *supra* note 9, at 48–72 (discussing the science of animal cognition historically through today); JAMIESON, *supra* note 49, at 102–44 (summarizing the developments in the moral theory of animal value over the past half-century).

¹³⁹ See Wise, *The Struggle*, *supra* note 29, at 372–85. See also, e.g., *Nonhuman Rts. Project, Inc. v. Breheny*, 197 N.E.3d 921, 921–23 (N.Y. 2022); *Nonhuman Rts. Project, Inc. v. Lavery*, 152 A.D.3d 73 (N.Y. App. Div. 2017); *Nonhuman Rts. Project, Inc. v. R.W. Commerford and Sons, Inc.*, 216 A.3d 839 (Conn. App. Ct. 2019).

¹⁴⁰ See Wise, *The Struggle*, *supra* note 29, at 370–82; *Nonhuman Rts. Project, Inc. v. Lavery*, 100 N.E.3d 846, 847 (N.Y. 2018) (Fahey, J., concurring); see *infra* at 121–23 (discussing the disagreement in Happy the elephant's case).

¹⁴¹ See *Justice v. Vercher*, 518 P.3d 131, 132–34 (Or. Ct. App. 2022), *review denied*, 370 Or. 789 (2023).

¹⁴² A notable exception is an article by Jessica Berg, who primarily relies on the distinction between natural and juridical persons to analyze the concept of legal personhood, explaining how it may or may not apply to animals, late-term fetuses, and other entities. See Berg, *supra* note 29, at 372–74. Kurki's work, discussed *infra* at 99–107, is more exhaustive in its analysis of legal personhood, however, for the reasons discussed below. In the international context, Ngaire Naffine has also evaluated legal personhood, but without the analytical

of personhood. Wise, for example, argued that animals require personhood in law before they can have rights, like standing to sue, but without providing an explanation of personhood.¹⁴³ Instead, he assumed that legal personhood simply attaches to any entity *capable of having rights or duties* in the law.¹⁴⁴ Put differently, (some) animals have the “capacity” to hold rights (or duties) despite their current lack of legal status, and that capacity means they must be legal persons. This assumed meaning resurfaces across a range of scholarship, for example in Elizabeth Kronk Warner and Jensen Lillquist’s excellent new article on “rights of nature.”¹⁴⁵ Warner and Lillquist characterize personhood by simply assuming the definition of other authors: “the capacity to bear rights and duties in law.”¹⁴⁶ Those other authors, however, recognize that this untheorized meaning of legal personhood has been contested recently by a new theory that offers a more complex concept that has key implications for animals.

In *A Theory of Legal Personhood*, European legal philosopher Visa Kurki develops that theory using a conceptual analysis of legal personhood.¹⁴⁷ He focuses on how Western jurists ordinarily think about human beings, animals, late-term fetuses, corporations, and artificial intelligences, among others.¹⁴⁸ Kurki develops a novel “bundle” theory of legal personhood. This descriptive theory of legal personhood is not a normative

detail of Kurki’s work. See generally NGAIRE NAFFINE, *Who are Law’s Persons? From Cheshire Cats to Responsible Subjects*, 66 MODERN L. REV. 3 (2003).

¹⁴³ See, e.g., Wise, *Legal Personhood*, *supra* note 29, at 1 (arguing that animals should have legal personhood to generate a foundation for their rights and protections).

¹⁴⁴ See *id.* at 1–11. Even in Wise’s most expansive treatment of animal rights and personhood, a 163-page article published in the *Vermont Law Review* in 1998, he does not define the nature of legal personhood. See Steven M. Wise, *Hardly A Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in A Liberal Democracy*, 22 VT. L. REV. 793, 799 (1998).

¹⁴⁵ Warner & Lillquist, *supra* note 30 at 335 (2023).

¹⁴⁶ *Id.* (quoting Erin O’Donnell, Anne Poelina, Alessandro Pelizzon & Cristy Clark, *Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature*, 9 TRANSNAT’L ENV’T L. 403, 404–05 (2020)).

¹⁴⁷ See KURKI, *supra* note 31, at 1–19. Kurki employs “conceptual analysis,” a longstanding method that identifies the meaning of words and concepts by positing a definition (composed of concepts) that can be evaluated through considering its application. See Eric Margolis & Stephen Laurence, *Concepts*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., Fall 2022 Edition), <https://plato.stanford.edu/archives/fall2022/entries/concepts/> [https://perma.cc/XLE6-22XG].

¹⁴⁸ KURKI, *supra* note 31, at 1–19.

argument about who should be a legal person.¹⁴⁹ Instead, the theory aims to explain how the concept of personhood functions in Western law today, by outlining its structure and range of application. Kurki's theory thus does not directly provide arguments for or against applying legal personhood to animals.¹⁵⁰

The bundle theory first rejects the predominant approach to legal personhood noted above, which Kurki dubs the "Orthodox View." The Orthodox View is an assumed background view in American and European scholarship dating to at least the early modern period that, in essence, equates legal personhood with rights-holding.¹⁵¹ The basic structure of the Orthodox View is that a being that holds any right also must be a legal person, although that view has several variations.¹⁵² For example, some assume that persons are entities that *actually* hold any rights, while scholars like Wise assert that personhood is the *capacity* to have a right.¹⁵³ Some have argued persons must hold both rights *and* duties, while others contend that persons hold either rights *or* duties.¹⁵⁴ Notably, the rights-and-duties variant is unpersuasive and can be discarded here, because not all entities who are persons have legal duties.¹⁵⁵ While there is a basic correlativity between someone's right and the duties of others to respect it, rights do not imply *duties for the rightsholder*, as in the case of infants who do not bear duties but do have rights.¹⁵⁶ Additionally, the Orthodox View does not require that an entity hold any particular *kind* of right to be

¹⁴⁹ See *id.* at 12, 25.

¹⁵⁰ Kurki does, however, point to some possible routes for extending legal personhood to new entities like animals, without making those arguments explicitly. See *id.* at 191–96.

¹⁵¹ See *id.* at 5, 35–42.

¹⁵² See *id.* at 55–56.

¹⁵³ Wise, *Legal Personhood*, *supra* note 29, at 1.

¹⁵⁴ See KURKI, *supra* note 31, at 55–56. See also, e.g., Richard L. Cupp, Jr., *Litigating Nonhuman Animal Legal Personhood*, 50 TEX. TECH L. REV. 573, 574 (2018) (arguing that persons must be able to hold both rights and duties).

¹⁵⁵ This view also seems not have many adherents, though it is quoted at times in assuming the meaning of personhood. See Warner & Lillquist, *supra* note 30, at 333.

¹⁵⁶ See Stucki, *supra* note 76, at 539; KURKI, *supra* note 31, at 55–56, 71; Brief for Amicus Curiae Laurence H. Tribe in Support of Petitioner-Appellant at 10–12, *Nonhuman Rts. Project, Inc. v. Breheny*, 197 N.E.3d 921 (N.Y. 2022) (No. 2020-02581). See also, e.g., 42 AM. JUR. 2D *Infants* § 120 (May 2024) (noting that a “child of very tender years” is generally not liable for even willful torts); RESTATEMENT (FIRST) OF TORTS § 283 (1934) (“A child may be so young as to be manifestly incapable of exercising any of those qualities of attention, intelligence and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character.”).

a person, such as a constitutional right, but rather any right can count.¹⁵⁷

The basic form of the Orthodox View is seductively simple: any rights-holder is a legal person, and vice-versa.¹⁵⁸ Scholars and advocates relying on this view have argued that legal personhood must apply to animals. For example, Wise argued that courts should recognize animal personhood so that animals can possess rights, such as the right to liberty protected by *habeas corpus*, because personhood is a condition for having any rights at all.¹⁵⁹ He assumes that animals have the capacity to hold rights, but do not hold them in reality—for that, they need courts to recognize their personhood first. For example, the NhRP argued in Happy the elephant's case that “[o]nce this Court recognizes Happy’s right to bodily liberty, she is necessarily a ‘person’ . . . because an entity explicitly granted a legal right is implicitly a legal person”¹⁶⁰ Under the Orthodox View, then, if an animal has any right, however simple, it is then a legal person.

Kurki's rejection of the Orthodox View centers on the observation that its simple inference from rights to persons fails to explain commonplace “extensional beliefs” about personhood in Western jurisprudence. Essentially, these beliefs are instances of applying, or not applying, the idea of a person to a particular type of being. These beliefs generally fall along the following lines: (1) adult human beings are legal persons, as are children and infants; (2) animals and fetuses are not persons, and slaves were not; and (3) women gradually became legal persons over time.¹⁶¹ We can tell whether the Orthodox

¹⁵⁷ See, e.g., KURKI, *supra* note 31, at 68–69.

¹⁵⁸ The formulations are somewhat more complex depending on the variation, but the basic equivalence of rights and personhood is the essential idea.

¹⁵⁹ See Wise, *Legal Personhood*, *supra* note 29, at 1–11. Wise's discussion of the relevance of legal personhood has caused some confusion, however, because as some have noted, he also tends to suggest that once an animal has a single actual right, it must thus be a legal person. This implies a relationship of identity between rights-holding (even a single right) and personhood, although that is not always clearly Wise's explicit proposal. See Fernandez, *supra* note 33, at 196 (“Wise tends to argue as if the recognition of any one right will automatically mean legal personhood for chimpanzees or elephants.”).

¹⁶⁰ Brief for Petitioner-Appellant at 4 n.9, *Nonhuman Rts. Project, Inc. v. Breheny*, 197 N.E.3d 921 (N.Y. 2022) (No. 2020-02581).

¹⁶¹ See KURKI, *supra* note 31, at 14, 62–66, 97–100. See also, e.g., 42 AM. JUR. 2D *Infants* § 3 (Mar. 2024) (“While a fetus is not legally considered equivalent to a ‘person,’ it is equally true that, once the fetus is actually born alive, the child becomes a person and has legal rights which may relate to events and circumstances that transpired prior to birth.”); 43 C.J.S. *Infants* § 3 (Mar. 2024) (“While

View explains these common extensional beliefs by looking at which entities have or had rights in practice. If there are entities that have or had rights but are or were not recognized as legal persons, the Orthodox View is a poor explanation for beliefs about legal personhood.¹⁶²

For Kurki, notions of rights depend on the classic Hohfeldian account of legal relations combined with the most prominent rights theory today, the "interest theory."¹⁶³ In brief, there are eight basic legal "positions" under Wesley Newcomb Hohfeld's seminal account of rights.¹⁶⁴ The "claim-right" is arguably the most basic position: it is just a right applicable to someone that is correlated with a "duty" on the part of others to respect that right.¹⁶⁵ For example, someone has a claim-right against others not to be physically harmed, whereby another person is under a duty to refrain from harming the first.

We can evaluate who can have rights by understanding the interest theory of rights.¹⁶⁶ The interest theory argues, in essence, that someone has a legal duty to treat someone else in a certain way when *important interests* of the other are served by performing the duty, thus generating a claim-right held by

it may be that a fetus is not considered a person, fetuses have been accorded rights under certain limited circumstances."); THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* at 182-200 (1996) (explaining that in the antebellum South slaves had certain limited rights, such as the right not to be intentionally killed by their owners, without also being legal persons).

¹⁶² Kurki recognizes that there would be a second option available to us in addressing this puzzle as well: persuade judges and lawyers to change their ordinary beliefs about personhood. See KURKI, *supra* note 31, at 16-18. For example, whenever an animal is recognized as having a right—even a trivial right like the right to be fed a certain diet—we could attempt to persuade judges that the animal is therefore a person. But asking judges to adopt animal legal personhood based on the Orthodox View ignores an important fact: if legal personhood is so simple, judges would have recognized animal personhood long ago because animals already have certain rights. For example, some animals clearly already have rights not to be tortured under modern animal welfare legislation. Sunstein, *supra* note 34, at 252-53; Stucki, *supra* note 76, at 549-50.

¹⁶³ See KURKI, *supra* note 31, at 57-61. See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710 (1916); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 *YALE L.J.* 16, 30-59 (1913).

¹⁶⁴ See KURKI, *supra* note 31, at 57-61.

¹⁶⁵ *Id.* at 57.

¹⁶⁶ See *id.* at 66-68. The second major theory of rights, the will theory, is not discussed in detail here, because it typically leads to the absurd conclusion that young children and the mentally incapacitated cannot be rights-holders or persons. See H.L.A. Hart, *Legal Rights*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 183, 188-89 (H.L.A. Hart ed., 1982) (explaining the core tenets of the will theory in its basic form).

the other to the performance.¹⁶⁷ But not just any entity that arguably has interests—like a plant or an ecosystem—also has rights. Instead, to be a rights-holder on the interest theory, an entity must have both interests and *intrinsic value*, and most Western thinkers do not hold that individual plants, for example, have intrinsic value.¹⁶⁸

The interest theory produces key problems for the Orthodox View in explaining the common extensional beliefs about legal personhood. Interest theory rights-holders are at least all humans (including slaves and others formerly not considered legal persons),¹⁶⁹ because all humans have interests served when others respect them. Interest theory rights-holders also may include sentient animals given their vital interests and moral status, a view supported by sentientism. Indeed, some animals already hold simple rights protecting certain aspects of their well-being under laws like the Animal Welfare Act.¹⁷⁰ For example, the Act imposes duties on animal dealers, exhibitors, and research institutions to provide for the capabilities of certain animals. These duties include issuing standards for “handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species.”¹⁷¹ Animals also have rights against, for example, being tortured in many circumstances.¹⁷² Moreover, slaves (ancient and modern) also held certain rights (and duties) in some circumstances, such as the right not to be deliberately killed or the right to own certain property.¹⁷³ The Orthodox View fails to explain why these entities are or were not considered legal persons, despite their rights.¹⁷⁴ Kurki’s analysis therefore uncovers a significant

¹⁶⁷ See KURKI, *supra* note 31, at 57–61. See also Matthew H. Kramer, *Getting Rights Right*, in RIGHTS, WRONGS AND RESPONSIBILITIES 28, 28–95 (Matthew H. Kramer ed., 2001) (discussing the interest theory of rights alongside the will theory).

¹⁶⁸ KURKI, *supra* note 31, at 63–64.

¹⁶⁹ Cf. KURKI, *supra* note 31, at 62–65.

¹⁷⁰ See *id.* at 65, 198.

¹⁷¹ See 7 U.S.C. §§ 2143(a)(2)(A), 2133, 2134, 2136 (imposing a requirement that the U.S. Department of Agriculture issue regulations promulgating such standards, with which animal dealers, exhibitors, research facilities, and others must comply).

¹⁷² Sunstein, *supra* note 34, at 253; Stucki, *supra* note 76, at 549–50.

¹⁷³ See MORRIS, *supra* note 161, at 182–200 (rights against being intentionally killed in the antebellum United States); KURKI, *supra* note 31, at 103, 106 (rights of Roman slaves to own certain property).

¹⁷⁴ See KURKI, *supra* note 31, at 65. Additionally, the interest theory suggests that a fetus may also have significant interests in life and the avoidance of suffering at some point in its development *in utero*.

weakness in the simple equivalence between rights-holding and personhood.

Instead, Kurki argues that legal personhood is better understood as a *cluster concept*. A cluster concept means that personhood is a bundle of "incidents," none of which is necessary or sufficient to determine the application of personhood in a particular case.¹⁷⁵ Legal scholars are already familiar with cluster or bundle concepts through the theory of a property right as a "bundle of rights."¹⁷⁶ For example, the right to own a car may be composed of many different rights vis-à-vis other people: the right to possess, the right to use, the right to sell, the immunity against expropriation of the car, and so on.¹⁷⁷ The concept of property thus includes different "incidents" of property, which may not be necessary or sufficient to show that something is property in a particular case.¹⁷⁸

Kurki's theory takes a similar approach to personhood. Under the bundle theory, there are both "passive" and "active" incidents of legal personhood. The passive incidents are most important for animals and are divided into two types: (1) *substantive incidents* and (2) *procedural incidents*.¹⁷⁹ According to Kurki, the substantive passive incidents include at least the following: (A) "fundamental protections" for life, liberty, and bodily autonomy; (B) the capacity to hold special rights (such as being the beneficiary of a contract); and (C) the capacity to own and not to be owned.¹⁸⁰

The fundamental protections incident is a central feature of the bundle theory. This incident occupies a "high hierarchical status," meaning it may defeat the rights of others in adjudicating claims.¹⁸¹ Fundamental protections, in essence, gather up at least three rights against harms: the rights to (1) life, (2) bodily integrity, and (3) some degree of personal liberty (or autonomy). We might also think of these rights as *basic rights*. In similar fashion, other scholars have characterized

¹⁷⁵ See *id.* at 93–95.

¹⁷⁶ See J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712–13 (1996) (describing the view of property rights that arose in the 20th century along these lines).

¹⁷⁷ *Id.* at 713.

¹⁷⁸ *Id.* at 723 (explaining that this theory of property rights holds that "property" does not have a clear definition applicable in all cases, and "no particular right or set of rights in the bundle is determinative").

¹⁷⁹ See KURKI, *supra* note 31, at 95–96 (referring to procedural incidents as remedy incidents).

¹⁸⁰ See *id.* at 95–107.

¹⁸¹ *Id.* at 98.

the fundamental protections afforded to all humans as rights to bodily integrity (including life) and bodily liberty.¹⁸² Under the bundle theory, basic rights are “trumps” that generally defeat other interests and rights in legal relations.¹⁸³ Such basic rights, in the sense used here, are paradigmatically negative rights that prevent others from seriously harming someone else.¹⁸⁴

The procedural incidents of passive personhood are important to enforce these basic rights. They include standing, the capacity to be harmed in tort, and the capacity to be a victim in criminal law.¹⁸⁵ Standing for Kurki refers primarily to so-called “invested standing,” which is the capacity for an entity to bring suit including through a guardian, as distinguished from mental competence to sue.¹⁸⁶ Together with the substantive incidents, these procedural incidents arise in different configurations to create “passive legal personhood” for an entity, like an infant.¹⁸⁷ Recall, however, that because legal personhood is a cluster concept, no incident is either necessary or sufficient for personhood to apply to a particular entity. Legal personhood is therefore something like an emergent property.¹⁸⁸

Adult humans have additional incidents that characterize “active legal personhood” under the bundle theory. These incidents can be generally divided into legal competences and legal responsibilities.¹⁸⁹ Legal competences are intentional acts performed with understanding in the law to effectuate a legal relationship, such as executing a contract or waiving a right.

¹⁸² For example, Wise has written that “[e]very human has the basic legal right to bodily integrity. We are all legally disabled from invading each other’s bodies without consent. Every human has the basic right to bodily liberty as well, so that we’re legally disabled from enslaving and kidnapping each other.” Wise, *supra* note 1, at 49.

¹⁸³ See KURKI, *supra* note 31, at 98–99 (referring to Ronald Dworkin’s view of rights as trumps). Of course, there are a narrow set of circumstances in which human beings may violate the basic rights of others—for example, in self-defense.

¹⁸⁴ For an explanation of the distinction between negative and positive rights, using Hohfeldian concepts, see Stucki, *supra* note 76, at 537–38 (explaining that negative rights, also known as “passive rights,” are rights “to non-interference” and positive rights are rights “to the provision of some good or service”).

¹⁸⁵ See KURKI, *supra* note 31, at 107–13.

¹⁸⁶ *Id.* at 107–10.

¹⁸⁷ *Id.* at 113.

¹⁸⁸ Cf. Kempers, *supra* note 36, at 590 (arguing that the bundle theory means that “an equivalent of legal personhood for animals would be reached only at the very end of the evolving status of animals rather than as a first step towards legal visibility”).

¹⁸⁹ See KURKI, *supra* note 31, at 113–18.

Legal responsibilities include both tort and criminal law duties, which require a person to have intentionality and to understand sanctions.¹⁹⁰

Kurki's bundle theory has significant benefits over the Orthodox View in its explanatory power. The theory shows why adults, children, and the mentally disabled—as well as corporations—are today considered (passive or active) legal persons. Infants, for example, possess the passive incidents of personhood, but not the active incidents, because, for example, they have basic rights but cannot execute contracts. Corporations, on the other hand, do not possess all of the incidents—they do not have basic rights, for example—but the incidents they do possess have been sufficient for judges to deem them persons.¹⁹¹ Centrally, the theory also explains why slaves, late-term fetuses, and animals have not been considered legal persons: namely, because they typically have not possessed either basic rights or the procedural incidents, unlike human infants.¹⁹²

Despite its focus on explanatory power, the bundle theory also includes important normative concepts. For example, basic rights are claim-rights that protect the flourishing and life of an entity, but only those entities that have intrinsic value can hold these rights.¹⁹³ Therefore, even the bundle theory's descriptive approach cannot fully escape "thin" normative views.¹⁹⁴ For example, we can hold views different from Kurki's regarding which entities can have intrinsic value, leading to different conclusions about the entities that can hold basic rights. Kurki posits that only sentient animals may have intrinsic value,¹⁹⁵ but someone with animist views of nature might believe that entire ecosystems have intrinsic value and can hold claim-rights.

The bundle theory compellingly disaggregates the rights, protections, and entitlements relevant to personhood as specific incidents, which do not apply in every case. As Angela Fernandez has observed, "[t]his is an *extremely* important idea and . . . the book's most important contribution to our jurisprudential understanding of legal personhood, along with the

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ See *id.* at 63–65.

¹⁹⁴ Kurki recognizes that his theory is not purely conceptual in this sense, but rather relies on thin normative claims. See *id.* at 24–27.

¹⁹⁵ See *id.* at 27.

very helpful distinction between active and passive incidents.”¹⁹⁶ The common assumption by American legal scholars that personhood is just a simple capacity to hold rights or duties is too simple. The theory is also useful in understanding why legal personhood is not a precondition for having any rights at all; some beings hold certain rights, as slaves and animals have, without being legal persons.

For animals, the bundle theory is particularly useful because it identifies the basic rights incident that attaches to “passive legal persons,” like infants, young children, and the severely mentally disabled. After all, the interests that generate basic rights for humans—susceptibility to death, suffering, and being “thwarted,” to use Nussbaum’s phrase¹⁹⁷—are important interests possessed by sentient animals as well. This returns us to the issue of whether animals should possess legal personhood, or the basic rights associated with it.

B. Animals Should Have Basic Rights in Law, Informed by Their Species Characteristics

Using the bundle theory, the question of animal legal personhood depends on what incidents of personhood should apply to animals. The theory does not address normative questions about whether to apply particular incidents to animals or other candidates for personhood. However, it calls into question the notion that advocates and judges can simply infer the answer to whether animals are legal persons from whether they think animals are *moral* persons.¹⁹⁸ That view relies on a “realist” view of the relationship between law and ethics, resembling something like natural law theory—where legal principles can be uncritically inferred from morality.¹⁹⁹ The realist approach can be contrasted with a “legalist” approach, where personhood may be applied to entities that are not understood to be persons in ordinary language.²⁰⁰

¹⁹⁶ Fernandez, *supra* note 33, at 199.

¹⁹⁷ NUSSBAUM, *supra* note 10, at 8.

¹⁹⁸ See Visa Kurki, *Legal Personhood and Animal Rights*, 11 J. ANIMAL ETHICS 1, 56–58 (2021) (describing a distinction between moral and legal personhood).

¹⁹⁹ See *id.* at 57; NGAIRE NAFFINE, *LAW’S MEANING OF LIFE: PHILOSOPHY, RELIGION, DARWIN AND THE LEGAL PERSON* 20–21 (2009).

²⁰⁰ See NAFFINE, *supra* note 199, at 20–21.

The bundle theory shows that there is a distinction between ordinary moral persons and legal persons.²⁰¹ It explains well why entities like corporations—which are not ordinarily called persons—are still legal persons.²⁰² The application of personhood to corporations, among other entities, shows that a realist interpretation of legal personhood is unsupportable. Jessica Berg has explained why a distinction should be maintained between the moral value of something and its legal status:

Legal and moral evaluations are intertwined, but not necessarily equivalent. As stated previously, moral status, or the lack of it, does not determine legal personhood status. An entity may lack moral status, but still be considered a legal person. Conversely, an entity may have moral status but not be considered a legal person.²⁰³

Although we should reject a simple inference from moral status to legal personhood, some understanding of their relationship is helpful to answer the central question: should animals be considered legal persons?

Sentientism provides strong reasons to think that individual sentient animals have moral status, with significant capabilities and interests entitled to legal protection according to the CA framework of justice. Scientists broadly accept that sentient animals can flourish or suffer physically and psychologically.²⁰⁴ Their core interests are equivalent or very similar to the core interests of humans in flourishing, which give rise to the rights that Western societies already recognize for humans.²⁰⁵

²⁰¹ Before Kurki published his theory, a group of philosophers argued in an *amicus* brief in another case that a chimpanzee was a person under New York law. In a book-length expansion of their brief, they argued that all views of personhood used by New York courts require chimpanzees to be considered persons in law, but they seem to assume that ordinary moral personhood is the same as the concept of legal personhood. See ANDREWS ET AL., *supra* note 62, at 1–10.

²⁰² This is not an endorsement of corporate legal personhood. Normative arguments still may have force against the view that corporations *should* be viewed as legal persons.

²⁰³ Berg, *supra* note 29, at 393.

²⁰⁴ See, e.g., NUSSBAUM, *supra* note 10, at 140–52 (surveying the evidence across a range of taxa); ANDREWS, *supra* note 62, at 87–93 (explaining the broad range of animals for which there is evidence for pain and suffering); CAMBRIDGE DECLARATION ON CONSCIOUSNESS, *supra* note 9. The exact scope of the category of “sentient animals” may be somewhat less settled, but it is not necessary to provide a definition here for all cases.

²⁰⁵ See NUSSBAUM, *supra* note 10, at 93–95 (explaining the importance of protecting capabilities even in liberal societies that value pluralism); *id.* at 114 (explaining that sentient animals “have a situation just like ours, thrown into the

The interest theory of rights can help us to see how animal moral status implies that animals qualify to hold certain rights protecting significant interests. Sentientism shows that animals' core interests (and capabilities) would be served in important ways if humans were generally under a duty to avoid harming them. The necessity of avoiding harm to moral beings is one of the key ethical implications of recognizing moral status.²⁰⁶ Importantly, many sentient animals (like humans) may be harmed not only through direct violence but through psychological impacts caused by captivity, isolation, harassment, violence, and other stress. Animals' central interests in life, health, and the avoidance of harm thus appear to require a duty not to harm them physically or psychologically where possible. On the interest theory, the corollary of a duty not to harm based on core interests would be a set of claim-rights protecting those core interests for animals.

In contrast to sentientism, some thinkers have argued that animals should have rights only when they demonstrate high levels of intelligence. Steven Wise argues that the dignity of an individual is founded on "autonomy." Wise explains: "Minds are critical for legal rights. It would be hard to persuade a reasonable man that a chimpanzee with the mind of Aristotle should be denied every legal right."²⁰⁷ On that basis, he argues for the "dignity-rights" of highly intelligent animals like great apes or dolphins.²⁰⁸ But he has an odd view of autonomy. He dismisses as too demanding the classic autonomy advocated by some philosophers, which Wise calls "full autonomy," characterized by complex rationality.²⁰⁹ Instead, he argues that "realistic" autonomy is what matters for legal rights, and it exists when a being has conscious states as simple as "preferences and the ability to act to satisfy them."²¹⁰ "Because dignity . . . is all or nothing, even a flickering autonomy produces the same dignity" and rights as full autonomy.²¹¹ But Wise's

world, striving to live, vulnerable to domination"); Peter Singer, *Ethics Beyond Species and Beyond Instincts*, in *ANIMAL RIGHTS*, *supra* note 1, at 80 ("We should give the same weight to the pain and distress of pigs as we would give to a similar amount of pain and distress suffered by a human being."); Korsgaard, *supra* note 1, at 629–35.

²⁰⁶ Jaworska & Tannenbaum, *supra* note 56.

²⁰⁷ WISE, *supra* note 1, at 179.

²⁰⁸ See *id.* at 243–44.

²⁰⁹ See *id.* at 246.

²¹⁰ *Id.* at 247.

²¹¹ *Id.*

version of autonomy—preferences and satisfaction, flickering consciousness—sounds much more like sentience. Arguably, then, even for Wise sentience is a justification for dignity and rights, and sentience applies across a much wider range of animals than he identifies.

The CA helps us to see why we should recognize legally enforceable basic rights for sentient animals. Under the CA, sentience supports the recognition that other animals, like humans, strive for goods and are vulnerable to wrongs, meaning that they both have dignity and are subjects of justice.²¹² Justice, in turn, “is about promoting the opportunity of each to flourish . . . through the use of laws that both enable and restrain.”²¹³ Because justice mandates that societies protect the central capabilities, animals have “rights to support” for those capabilities.²¹⁴ Nussbaum argues that the rights that support animals’ central capabilities are “*claims inherent in the dignity of each individual animal.*”²¹⁵ These claims must be correlated with duties held by others in general.²¹⁶ And critically, Nussbaum argues that the concept of a right typically requires that the right must be enacted in law: “to say that a creature has a right to something is also to say that *there should be laws protecting that entitlement.*”²¹⁷

Here, we see a critical connection between normative arguments and law supporting the view that animals should have certain legal rights. Unlike the bundle theory, the CA is a normative framework focused on making the lives of humans and animals better.²¹⁸ It provides what the bundle theory does not: a normative rationale for why laws *should* protect animals’ basic rights, even if they currently do not. The basic argument is that all capabilities are “entitlements, a type of rights”²¹⁹ and “a right is only real if it can in principle be legally enforced.”²²⁰ Put differently, a right—at least a *basic claim-right* that protects a being’s central flourishing—just is a type of moral interest

²¹² See NUSSBAUM, *supra* note 10, at 118–40.

²¹³ *Id.* at 95.

²¹⁴ *Id.* at 112.

²¹⁵ *Id.* (emphasis added).

²¹⁶ *Id.*

²¹⁷ *Id.* at 113 (emphasis added).

²¹⁸ *Id.* at 87.

²¹⁹ *Id.* at 106.

²²⁰ *Id.* at 112.

that is so important that it *must* be protected by law.²²¹ Moreover, as discussed in Part I, animals' central capabilities include both life and bodily integrity, which includes liberties like freedom of movement.²²² These capabilities should be protected by legal rights, because central capabilities in general should be supported by such rights. The interest theory of rights therefore converges to some extent with the more general CA to support the recognition of animals' basic rights.

The CA, however, moves beyond interests to a richer world of central capabilities that lead to flourishing, as discussed in Part I.²²³ Central capabilities may better capture the idea that modes of flourishing must be significant to count for legal systems—they cannot be minor interests, like tastes for certain foods, or interests beyond a certain threshold, like an interest in living on a narcotic high. These are not entitlements; they are just possible features of life. Moreover, the idea of justice promoted by the CA reflects that an animal is more than an object of compassion: the dignity of animals supports recognizing their legal rights.²²⁴

Some courts outside of the United States already have made the connection between the moral status and legal rights of animals.²²⁵ Notably, in 2008, the Superior Court of Justice in Brazil relied on something like a sentientist view of the moral status of wild parrots to conclude that they are entitled to legal rights. Kristen Stilt explains that the court reasoned from an ecocentric view of the Brazilian constitution, which enshrined a human right to a balanced environment, to a sentientist view of the rights of nonhuman animals.²²⁶ Remarkably, the court argued that dignity should be recognized as going beyond humans in “*intrinsic value conferred to non-human sensitive beings*, whose *moral status* would be recognized and would share with the human beings the same moral community.”²²⁷ The court concluded:

²²¹ See also Ladwig, *supra* note 77, at 1 (noting that rights for humans are “morally valid claims that are important enough to deserve legal protection”).

²²² See Ladwig, *supra* note 77, at 8.

²²³ NUSSBAUM, *supra* note 10, at 88–89, 102 (discussing capabilities for humans and other animals).

²²⁴ This Article has not focused on the concept of “dignity,” but it is compatible with viewing dignity as a kind of fundamental moral status or value.

²²⁵ See Kristen Stilt, Commentary, *Rights of Nature, Rights of Animals*, 134 HARV. L. REV. F. 276, 278–83 (2021).

²²⁶ See *id.* at 279–80.

²²⁷ *Id.* at 280 (internal quotation marks omitted) (emphasis added).

This view of nature as an expression of life in its entirety enables the Constitutional Law and other areas of law to recognize the environment and non-human animals as beings of their own value, therefore deserving respect and care, so that *the legal system grants them the ownership of rights and dignity*.²²⁸

While the details require elaboration, this is a clear statement of the implications of sentientism for animals' legal rights in a modern constitutional order.

Do the specific legal rights to which animals are entitled include the basic rights at the core of legal personhood? Basic rights include rights to life, bodily integrity, and personal liberty, and there are strong reasons to think that these rights apply to sentient animals, as discussed. Nussbaum does not specify the details of legal rights for animals under the CA, although she argues that current laws in the United States do not protect animals' central capabilities.²²⁹ However, she does argue that the most urgent task for animals today is ending "human practices that directly violate wild animal life, health, and bodily integrity."²³⁰

Indeed, it is hard to imagine how a sentient being's central capabilities could be supported without basic rights. A right to bodily integrity prevents the infliction of harms by others, and an animal, as an organism with its own subjective experience and ends, suffers injustice when it is harmed significantly. A basic right to some degree of liberty also seems necessary to protect an animal that needs to move (in ways relevant for its species) to exercise its physical and psychological capabilities. Perhaps the right to life is more controversial for some. The painless killing of animals might be feasible without injustice on utilitarian views, but painless killing is very far from the norm today. In the United States, ninety-nine percent of farmed animals live on industrial factory farms, confined in diseased conditions and subjected to grisly practices, including castration, tail docking, de-horning, branding, and toe amputation, almost always without anesthesia.²³¹ But even if slaughter is painless and life is good, killing

²²⁸ *Id.* (emphasis added).

²²⁹ NUSSBAUM, *supra* note 10, at 283–88.

²³⁰ *Id.* at 234.

²³¹ See *Inhumane Practices on Factory Farms*, ANIMAL WELFARE INST., <https://awionline.org/content/inhumane-practices-factory-farms> [<https://perma.cc/XZ5B-KD3S>] (last visited Oct. 13, 2024); Jacy Reese Anthis, *US Factory Farming Estimates*, SENTIENCE INST. (Apr. 11, 2019), <https://www.sentienceinstitute.org/us-factory-farming-estimates> [<https://perma.cc/52PC-8SSE>].

prematurely ends the life of a sentient being, striving for its own ends and goods.²³² This suggests that the basic rights of most animals probably should include a right to life, too.

Importantly, basic rights to life, bodily integrity, and liberty are not the same as the rights under current animal welfare legislation. Instead, rights like those to life and bodily integrity (as well as liberty) are what Saskia Stucki has called “fundamental rights,” as opposed to “simple rights.”²³³ This distinction is based on two factors: (1) the degree of fundamentality and (2) the degree of infringeability of the relevant right. High infringeability means that, even if a right protects fundamental capabilities, it is easily infringed by even the minor interests of others.²³⁴ Truly fundamental rights both protect fundamental capabilities and have low infringeability—for example, when in conflict with other fundamental rights.²³⁵ Animal welfare laws today create only simple animal rights, because they either do not protect fundamental interests—for example, when they prohibit only limited harms like tail docking or forced feeding—or are easily infringeable.²³⁶ Basic rights, in contrast, are rights that protect animals’ fundamental interests and are not easily infringeable.

Accepting sentientism and the CA therefore suggests that animals should have new basic legal rights. The rise of animal protection legislation over the last two centuries suggests that Western societies are moving in this direction in fits and starts. Still, the rising moral concern for animals, including as subjects of justice, can be viewed as a possible paradigm shift. Stucki argues that

even if fundamental animal rights may currently not be fully realisable, the very act of . . . committing to them as *normative ideals* places animals on the ‘legal map’ and will provide a powerful generative basis—a starting point rather than an endpoint—from which a dynamic process towards their more expansive realisation can unfold.²³⁷

²³² On the harm of death itself, Nussbaum argues that even painless killing can be a significant harm to animals, because it “interrupts” their lives prematurely (just as would the painless killing of a human being). See NUSSBAUM, *supra* note 10, at 164–69.

²³³ See Stucki, *supra* note 76, at 551–52 (noting that fundamental rights for animals would include “the right to life, bodily integrity, liberty and freedom from torture”).

²³⁴ See *id.* at 550.

²³⁵ *Id.* at 552.

²³⁶ See *id.* at 544–51.

²³⁷ See *id.* at 559 (emphasis added).

Of course, because the CA plausibly argues that the legal protections we owe to each animal will depend on its species-based form of life,²³⁸ the details of any animal's basic rights will depend on its biological characteristics.

We should be cautious in assessing how basic rights should apply to particular animals in specific contexts, given the enormous biological diversity within the animal kingdom. Although sentient animals share a general capacity to pursue their conscious ends, animals differ in many of their capabilities, sometimes dramatically. Different functions can lead to different capabilities for flourishing that may need to be protected by entitlements that vary in some ways from the entitlements warranted for other animals.²³⁹ Nussbaum recommends that researchers develop lists of capabilities for each species over time that can provide important modifications to the central capabilities list.²⁴⁰

We can better understand how the characteristics of particular animals can influence the nature and scope of their basic legal rights by looking at the right to liberty. The right to liberty in common law systems is protected by, among other things, the great writ of *habeas corpus*, which the NhRP pursues in litigation on behalf of great apes, elephants, and other animals in state courts in the United States.²⁴¹ Consider how it might apply to two different nonhuman animals: chimpanzees (*Pan troglodytes*), and the green anole lizards (*Anole carolinensis*) found in tropical and subtropical cities like Miami, Florida. Characterizing a liberty right for members of each species requires attention to their capabilities.

Chimpanzees are social and intelligent mammals that have evolved to live in large social groups that rely on complex hierarchies, forms of communication, and communities that cover a substantial range in the wild.²⁴² They exhibit aspects of social learning in their ape communities, including by imitating,

²³⁸ See NUSSBAUM, *supra* note 10, at 96–97. The CA also recommends attending to individual characteristics in particular cases.

²³⁹ See Nussbaum, *Beyond “Compassion and Humanity”*, *supra* note 39, at 305–13.

²⁴⁰ See NUSSBAUM, *supra* note 10, at 101–04.

²⁴¹ See, e.g., *Rights Protect Against Intolerable Wrongs—No Matter Who You Are*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/progress/> [<https://perma.cc/R3MH-P2VZ>] (last visited Feb. 3, 2023) (discussing the strategy of pursuing *habeas corpus* for captive animals).

²⁴² Cf. ANDREWS ET AL., *supra* note 62, at 85–93.

gesturing, and even teaching one another.²⁴³ Communities have territories ranging up to hundreds of square kilometers in the wild.²⁴⁴ Chimpanzees are listed as an endangered species under the Endangered Species Act. Based on their capabilities, chimpanzees clearly have the capacity to suffer both physically and psychologically, for example, through isolation and captivity.

Anoles are small lizards that congregate in high numbers in locations like Miami and the Caribbean islands. Unlike chimpanzees, the green anole is not a federally-listed threatened or endangered species. Anoles, like most reptiles, are less well-understood by scientists than large, charismatic mammals like chimpanzees, but we do know some things about their capabilities. For example, they seem to have the capacity to experience conscious states, including physical pain and suffering, like other reptiles.²⁴⁵ We know little about their social lives, but lizards often demonstrate high levels of sociability.²⁴⁶ Scientists have estimated the green anole's home territory at approximately 50 to 100 square meters.²⁴⁷

Consider the implications of these biological differences for a right to liberty. First, chimpanzees have certain important species-typical needs to associate in large social groups, whereas anoles may not need group association to the same extent. Additionally, chimpanzees need the ability to range in communities over many kilometers, whereas anoles seem to function well in a much smaller range of dozens of square meters. Both chimpanzees and anoles are wild animals, but animals of both species are commonly kept in zoos or research centers—and sometimes as “pets.” A key issue is clearly whether they are able to exercise their core capabilities in that context.

²⁴³ See, e.g., WISE, *supra* note 1, at 194–217; Victoria Gill, *Humans and Wild Apes Share Common Language*, BBC NEWS (Jan. 24, 2023), <https://www.bbc.com/news/science-environment-64387401> [<https://perma.cc/6Y5H-W382>].

²⁴⁴ See Toshisada Nishida, *Chimpanzee*, BRITANNICA <https://www.britannica.com/animal/chimpanzee> [<https://perma.cc/A4TG-UG38>] (last updated Dec. 22, 2022).

²⁴⁵ See, e.g., Helen Lambert, Gemma Carder & Neil D'Cruze, *Given the Cold Shoulder: A Review of the Scientific Literature for Evidence of Reptile Sentience*, 9 ANIMALS 821 (2019); NUSSBAUM, *supra* note 10, at 145; MICHAEL TYE, TENSE BEES AND SHELL-SHOCKED CRABS: ARE ANIMALS CONSCIOUS? 133 (2017).

²⁴⁶ See Lambert, Carder & D'Cruze, *supra* note 245, at 2.

²⁴⁷ See Chelsea Crawford, *Anolis carolinensis*, ANIMAL DIVERSITY WEB, https://animaldiversity.org/accounts/Anolis_carolinensis/ [<https://perma.cc/4NQ3-R8TS>] (last visited Jan. 25, 2023).

Chimpanzees clearly should have a right to personal liberty protected by *habeas corpus*, and holding them in zoos or small enclosures is a violation of their rights. They need a substantial amount of territory to flourish, supporting the formation of social groups and foraging. A typical zoo or research facility cannot accommodate a range of square kilometers, although larger nature reserves or sanctuaries may be suitable.²⁴⁸ Of course, a chimpanzee's right to liberty might not be immediately actionable: setting captive chimpanzees loose to run amok in Miami is no better than bringing Kong to New York.²⁴⁹ Instead, recognition of a captive chimpanzee's liberty right might require relocation to larger sanctuaries.²⁵⁰ Of course, these practical judgments, informed where necessary through expert input, are the "bread and butter" of common law courts.²⁵¹

Anoles have needs and capabilities that differ in ways that may be relevant to any right to liberty. First, anoles clearly have a need to forage and engage in other activities that require some degree of liberty, which means they have a central capability for free movement. It is not clear that anoles suffer from captivity to the degree that a chimpanzee suffers, depending on the size of an enclosure. Perhaps zoos can accommodate enclosures of many square meters for anole species, where they can socialize and roam. Can anoles be kept in terrariums? For an animal with that range, small tanks seem likely to create significant harms. Additionally, we know less about how much socialization anoles need, but they are not companion animals that have co-evolved to live closely with humans, like dogs and cats, and it seems unjust to hold them captive in tiny boxes. Both chimpanzees and anoles then have a basic liberty right, but its scope can differ somewhat in application.²⁵²

²⁴⁸ Cf. NUSSBAUM, *supra* note 10, at 237–47 (determining that for many large animals, zoos cannot accommodate their modes of life, but distinguishing zoos from nature reserves).

²⁴⁹ The 2005 film arguably provides a better version of this supersized reflection on violating the dignity of animals than the original. See KING KONG (Universal Pictures 2005).

²⁵⁰ The view that chimpanzee rights to liberty could be applied without issue in every case, transitioning captive chimpanzees to appropriate sanctuaries, is pollyannish. There may be tragic cases in which animal rights cannot be accommodated, like where an animal is ill and unable to endure relocation.

²⁵¹ See Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 963 n.12 (N.Y. 2022) (Wilson, J., dissenting) (explaining that "case-by-case determinations of competing rights and interests is . . . the bread and butter of what courts do").

²⁵² Of course, generalizations based solely on species-typical characteristics arguably may fall victim to another form of speciesism and ideally would be

For similar reasons, all sentient animals seem to have central capabilities that require protection through legally enforceable basic rights. To make the point again, the exercise of these rights is of course always limited by the rights of others. The right to life *per se* may remain somewhat controversial if killing can be accomplished painlessly, but even painless killing seems likely to wrong an animal by interrupting its pursuit of its own ends and desires. This is not to say that animals may not have other important rights, like a right to associate with others or a right to play. These other rights, however, are not connected to the concept of legal personhood and so are not *basic rights* within the meaning of the term here. Moreover, there may be some variations between species or individuals in how a basic right is applied, but these basic rights are still fundamental in Stucki's sense: they should not be infringed unless the fundamental rights of others or similar critical interests are at stake. Sentientism together with the CA provides essential support for this conclusion, and—as discussed in Part I—speciesism is not a good reason to avoid it.

C. Basic Rights for Animals Precede Legal Personhood

Recognizing the basic rights of animals returns us to legal personhood: should sentient animals with basic rights also be recognized as legal persons? Rights would precede any recognition of personhood if the bundle theory is correct; there is no clear way for animals to be recognized as legal persons without having some core incidents of personhood first. Moreover, the theory shows that the distinction between legal persons and nonpersons is not a bright line: personhood admits of degrees.²⁵³ Kurki mentions the historical example of the gradual recognition of full legal status for women in Western legal systems to illustrate how personhood can evolve over time.²⁵⁴ Likewise, slaves in Western societies, in some cases, had certain limited incidents of personhood, including certain rights against harms and criminal law responsibilities.²⁵⁵

The kind of legal personhood that applies to human infants and very young children suggests a form of personhood

supplemented by knowledge about an individual animal, once guardians become acquainted.

²⁵³ See KURKI, *supra* note 31, at 119.

²⁵⁴ See *id.* at 87 (discussing the “gradual improvement of women’s legal status”).

²⁵⁵ See *id.* at 117–18, 121 (discussing the capacity for slaves to be responsible for criminal and other legal acts in the antebellum period).

that may emerge for other animals when their basic rights are recognized. Basic rights protect an animal's flourishing, and procedural incidents of personhood like standing operate to ensure that those rights are no dead letter.²⁵⁶ Adult humans possess the most comprehensive set of incidents of personhood, including both active and passive, but infants and young children possess only passive incidents. This suggests that for individual humans there is often a progression through types or levels of personhood: basic rights and their procedural protections, which establish simple legal personhood ("passive legal personhood"), followed by legal competences and responsibilities that come with age or, in some cases, do not.²⁵⁷ This can model how animals, too, might attain simple personhood by starting with basic rights and procedural protections.

The "active" incidents of legal personhood, on the other hand, most obviously apply to humans who can initiate legal actions and are held legally responsible for their actions. Very young children and infants typically do not possess legal responsibilities or competences in American law.²⁵⁸ In ethics, infants and young children are often referred to as "moral patients," rather than "moral agents," because they are not held morally responsible for their actions.²⁵⁹ Moreover, infants and children may possess the procedural incidents of simple legal personhood—like standing—by proxy through a guardian.

Animals seem to be candidates for at least some of the procedural incidents of the bundle theory, including standing. Cass Sunstein has argued that Congress should grant animals standing to sue wherever laws, such as the Animal Welfare Act, already instantiate a right for animals.²⁶⁰ In fact, some states have recognized animals as victims through laws that empower court-appointed lawyers to advocate for an animal's interests. For example, in 2016, Connecticut enacted "Desmond's Law" to empower legal advocates to represent individual animals' interests in animal cruelty prosecutions as an

²⁵⁶ *Id.* at 192–93.

²⁵⁷ *See id.* at 119 ("[T]he proposed theory can take into account the fact that children acquire active incidents over time as they grow, until they become active legal persons . . .").

²⁵⁸ *Id.* at 81.

²⁵⁹ *See, e.g.,* Nonhuman Rts. Project, Inc. v. Lavery, 100 N.E.3d 846, 847 (2018) (Fahey, J., concurring) ("In short, being a 'moral agent' who can freely choose to act as morality requires is not a necessary condition of being a 'moral patient' who can be wronged and may have the right to redress wrongs.").

²⁶⁰ *See* Sunstein, *supra* note 34, at 251–52.

aid to the prosecution; several states have followed suit.²⁶¹ The interests of an animal in avoiding bodily harms are similar to the interests of infants, even if neither can explain those interests. If animals achieve similar procedural incidents, then their recognition as simple legal persons may be implied. For these reasons, this Article argues not for abandoning the idea of animal legal personhood, but for its decentering—including in litigation brought by organizations like the NhRP.

But why do we need the notion of personhood at all for sentient animals if they should get basic rights? Personhood, as a cluster concept, is a kind of legal shorthand that makes tracking an entity and its rights easier. Legislators and judges that accept basic rights certainly could use a new category, like “legal beings,” to capture animals’ entitlements.²⁶² But there are two problems with that, at least over the longer term. First, practically, personhood is already widely embedded in statutes and common law, as discussed. So, the NhRP is right that in practice achieving protection for animals under *existing* law, like *habeas corpus*, sometimes might require showing they are persons. Second, even if we could replace personhood across law with something special for animals, why should we? If animals deserve the basic rights and protections that are associated with legal personhood, why should they not be legal persons? Legal personhood is a technical concept with a specific meaning at law. Adopting a new category for animals signifying the same thing would be redundant. Of course, nonhuman animals are vastly different from humans in many important ways, but not with regard to basic entitlements to bodily integrity, a degree of liberty, and probably life.

Some might object by raising practical concerns about the feasibility of animal personhood or basic rights, which certainly have their place. This Article makes the argument for animal basic rights and possibly legal personhood over the longer term. But even in the shorter term, granting animals basic rights would not mean they could sue for just any claim. Many claims would not be available to animals, and biological characteristics would guide review on a case-by-case basis. For example, sentient animals would not require standing to enforce contracts or to protect constitutional entitlements, like

²⁶¹ See Jessica Rubin, Commentary, *Desmond’s Law: Early Impressions of Connecticut’s Court Advocate Program for Animal Cruelty Cases*, 134 HARV. L. REV. F. 263, 263–67 (2021).

²⁶² See DECKHA, *supra* note 25, at 8–9.

religious freedom or the right to education. Animals have no need for general property claims or labor and employment benefits.²⁶³ Instead, American law should work to reflect at least basic rights to bodily integrity, a degree of personal liberty, and probably life.²⁶⁴ These rights can and should function as “normative ideals” that guide legal developments over time.²⁶⁵ Still, we can better understand how recognition of these rights may work today by turning to the New York Court of Appeals’ recent decision regarding Happy the elephant.

III

THE BUNDLE THEORY MAKES A DIFFERENCE IN COURT: HAPPY’S CASE

Happy’s case provides an example of how the bundle theory and the notion of basic rights illuminate arguments about legal personhood in court today.²⁶⁶ The bundle theory shows that if the NhRP and the court had recognized the disaggregated nature of personhood, they could have reached a different outcome in Happy’s case—as Judges Rowan Wilson and Jenny Rivera argued in dissent. The New York Court of Appeals’ decision, *Nonhuman Rights Project, Inc., v. Breheny*, provided the first definitive examination in an American high court of basic animal rights and legal personhood.

Wild animals often live in captivity for human entertainment, research, slaughter, or breeding, and Happy is a good example. Happy is a fifty-three-year-old female Asian elephant born in the wild and held captive in the United States for more than forty-five years, primarily at New York City’s Bronx Zoo. Although Happy once had an elephant companion in her enclosure, she has been isolated in an approximately one-acre yard for about twenty years.²⁶⁷ In the wild, female Asian elephants range up to 400 square kilometers,²⁶⁸ and the zoo previously

²⁶³ However, Karen Bradshaw has recently argued that some wild animals should have certain novel types of property rights to protect their habitats. See generally BRADSHAW, *supra* note 41. Any recognition of animal property rights—another incident of personhood—would further support passive legal personhood.

²⁶⁴ Some scholars argue for reflecting a wider range of positive rights in law. See NUSSBAUM, *supra* note 10, at 98, 210.

²⁶⁵ See Stucki, *supra* note 76, at 558–59.

²⁶⁶ Before Happy, the NhRP brought other cases on behalf of chimpanzees seeking to recognize their personhood and liberty under *habeas corpus*. See Wise, *The Struggle*, *supra* note 29, *passim*.

²⁶⁷ See Fobar, *supra* note 137.

²⁶⁸ Space, *How Much Is Enough?*, GLOB. SANCTUARY FOR ELEPHANTS, <https://globelephants.org/space-much-enough/> [<https://perma.cc/E85F-PHHH>] (last visited Mar. 23, 2024).

observed that “it would be inhumane to sustain an exhibit with a single elephant.”²⁶⁹ After two decades, however, Happy remains in isolated captivity.

In 2018, the NhRP petitioned for a writ of *habeas corpus* in New York state court “on behalf of Happy,” claiming that she is unlawfully detained at the zoo in violation of her “right to bodily liberty.”²⁷⁰ As the Court of Appeals later put it, the NhRP originally argued that Happy is a complex nonhuman animal who should be “*recognized as a legal person* with the right to bodily liberty protected by the common law.”²⁷¹ The NhRP admitted that it would be unreasonable to release Happy onto the streets of New York, instead arguing that the writ of *habeas corpus* can support her transfer to a sanctuary.²⁷² The trial court found that Happy is not a person, and the appellate court affirmed, observing that the writ is “limited to human beings.”²⁷³ The NhRP appealed to the Court of Appeals.

In its briefing on appeal, the NhRP sent mixed messages about the primary issue in the case. The brief identified the primary question presented: “Does Happy, an Asian elephant imprisoned at the Bronx Zoo, have *the common law right to bodily liberty* protected by habeas corpus?”²⁷⁴ That appears to make the case straightforward: does Happy have a right to be free, or not? But the NhRP went on to suggest, as it had suggested below, that the Court of Appeals also needed to address the issue of legal personhood: “the question of ‘whether legal personality should attach’—in other words, whether an entity should have the capacity for rights—is also a ‘policy question’ requiring a ‘policy determination.’”²⁷⁵ Importantly, the NhRP’s formulation of personhood here reflects the simple, erroneous view: a legal person is just an entity with a right or the capacity for a right.

On June 14, 2022, in a 5–2 decision, the Court of Appeals concluded that Happy is “not a ‘person’” who can be liberated by the writ of *habeas corpus*.²⁷⁶ The court agreed with

²⁶⁹ Happy, NONHUMAN RTS. PROJECT, <https://www.nonhumanrights.org/client/happy/> [https://perma.cc/M983-XETR] (last visited May 28, 2024).

²⁷⁰ See Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 924 (2022).

²⁷¹ *Id.* at 925 (emphasis added).

²⁷² *Id.*

²⁷³ *Id.* at 926.

²⁷⁴ Brief for Petitioner-Appellant at 1 (emphasis added), *Breheny*, 197 N.E.3d 921 (No. 2020-02581).

²⁷⁵ *Id.* at 13–14 (citations omitted).

²⁷⁶ See *Breheny*, 197 N.E.3d at 924.

the petitioners that the writ is only available to “persons.” While the writ has been applied equitably in different human contexts throughout history—including to slaves and women, when neither were recognized as full persons—it has not been applied to nonhuman animals.²⁷⁷ Moreover, the court argued that it could not be applied to animals based on their capabilities, such as “autonomy, intelligence, and emotion,” because those capabilities are not what makes the writ available to humans.²⁷⁸ Rather, what makes the writ available is the fact of being human—*homo sapiens*.²⁷⁹

The majority made other secondary arguments. The court noted that “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.”²⁸⁰ The court thus reasoned that animals also cannot be legal persons because they cannot “bear legal duties in exchange for legal rights,”²⁸¹ a view that fails to account for commonplace rights-holders like infants who do not bear duties, as discussed in Part II. Additionally, the court objected that issuing the writ for Happy would lead to “an enormous destabilizing impact on modern society,” for example by requiring animal owners, animal breeders, and animal experimenters to answer for the treatment of animals in their care.²⁸²

Yet, in an interesting coda, the majority recognized that animals *already* have certain rights. The court noted that “the law already recognizes that [animals] are not the equivalent of ‘things’ or ‘objects,’” because legislatures have granted rights to some animals, such as rights against torture, unjustified harm, and neglect.²⁸³ These protections show that, “in many contexts, the law clearly *imposes a duty on humans* to treat nonhuman animals with dignity and respect.”²⁸⁴ Of course, the corollary of such a duty is clearly a legal claim-right, which might be recognized at common law. However, while recognizing the importance of a “continuing dialogue” about animal rights, the court admonished that such a dialogue should be

²⁷⁷ See *id.* at 926–27.

²⁷⁸ *Id.* at 927.

²⁷⁹ See *id.*

²⁸⁰ *Id.* at 928.

²⁸¹ *Id.* at 929.

²⁸² See *id.*

²⁸³ See *id.* at 931.

²⁸⁴ *Id.*

“directed to the legislature.”²⁸⁵ Nevertheless, *Breheny* recognizes, crucially, that in some cases animals already do have rights, but are not yet recognized as legal persons.

In a powerful dissent, now-Chief Judge Rowan Wilson argued that Happy made out a *prima facie* case that *habeas corpus* applies to her, because the right to personal liberty protected by the writ is not confined to *homo sapiens*. Jeremy Bentham, as Judge Wilson remarked, argued centuries ago that the relevant question in determining the rights of animals “is not, Can they *reason*? nor, Can they *talk*?, but *Can they suffer*?”²⁸⁶ Bentham had suggested that “[t]he day may come, when the rest of the animal creation may acquire those rights which never could have been withholden [sic] from them but by the hand of tyranny”²⁸⁷ Judge Wilson concluded, “They can and do, and that day is upon us.”²⁸⁸

Against the majority, Judge Wilson explained that the fundamental legal issue presented was not whether Happy is a legal person. The court did not need to reach that issue to decide whether Happy was entitled to the writ: “[W]hether an elephant is a ‘person’ or whether it can bear responsibilities are irrelevant questions that obfuscate the genuine question presented.”²⁸⁹ That question was whether the law should recognize a liberty right for Happy by allowing her to petition for the writ, given what we know about her capabilities as an elephant.²⁹⁰ Judge Wilson concluded that Happy had made a *prima facie* case that she is entitled to the writ and that she has been unjustly confined, based on her capabilities.²⁹¹ In fact, Judge Wilson understood Happy in a manner consistent with the CA: “Happy has very substantial cognitive, emotional and social *needs and abilities*, and . . . those qualities coupled with the circumstances of her particular confinement establish a *prima facie* case that *her present confinement is unjust*.”²⁹²

²⁸⁵ *Id.* at 932.

²⁸⁶ *Id.* at 933 (Wilson, J., dissenting) (citation and quotation marks omitted).

²⁸⁷ *Id.* (Wilson, J., dissenting) (citation and quotation marks omitted).

²⁸⁸ *Id.* (Wilson, J., dissenting).

²⁸⁹ *Id.* at 934 (Wilson, J., dissenting).

²⁹⁰ *See id.* at 935 (Wilson, J., dissenting) (“[G]iven what we know about the qualities an elephant has . . . should the law afford her certain rights through *habeas corpus*?”).

²⁹¹ *See id.* at 962 (Wilson, J., dissenting) (observing that Happy’s capabilities included “highly complex cognitive, social and emotional abilities,” as well as “self-awareness, social needs and empathy”).

²⁹² *Id.* at 966 (Wilson, J., dissenting) (emphasis added). The clear echo of the Capabilities Approach may be partly because Nussbaum submitted an *amicus* brief in support of Happy in the case.

Judge Wilson charted the history of the writ to support his conclusions. Among other things, he observed that the writ was used on behalf of slaves who were considered legal property at the time.²⁹³ He emphasized that slaves were treated as chattel but nevertheless were at times protected by the writ without thereby abolishing the institution of slavery.²⁹⁴ His argument thus supports the view that elephants may hold the basic right to liberty protected by *habeas corpus*, even if they are not considered legal persons.

Judge Wilson's resistance to the determination that Happy is not a legal person was embedded in a respect for the precise question presented. On multiple occasions, he remarked that the personhood question was irrelevant: "Happy is not a person. Happy is an elephant. Elephants do have an interest in liberty and have been granted rights against inhumane treatment."²⁹⁵ Likewise, he argued that elephants have their own characteristics distinct from those of other species: "Whatever rights and interests Happy may have do not tell us anything about the rights my dog has."²⁹⁶ For that reason, granting Happy one right would not terrorize the foundations of American society, whatever horrors litigants might parade before a court. Instead of analyzing personhood, then, Judge Wilson focused on a particular right to liberty, characterizing the case as a limited one. His disaggregated analysis focused on one right (the liberty right) related to one incident of legal personhood (the basic rights incident), not personhood in general. Neither did he agree with the NhRP that, once he recognized Happy's liberty right, he necessarily must have recognized her personhood.

The context and biological characteristics of Happy also bear on the analysis. If Happy has a liberty right, the correlative duty would run to her captors to free her in a manner compatible with other rights. These include both her other rights—such as the right not to be injured by residents on the streets of New York—and the rights of others—like New Yorkers' rights not to be injured by a frightened pachyderm. One settlement would be to transfer Happy to an appropriate sanctuary, just as the NhRP proposed.²⁹⁷ Happy's basic liberty right, then, could be framed here as her freedom from harmful

²⁹³ *Id.* at 933, 943–44 (Wilson, J., dissenting).

²⁹⁴ *See id.* at 942–44 (Wilson, J., dissenting).

²⁹⁵ *Id.* at 962 (Wilson, J., dissenting).

²⁹⁶ *Id.* (Wilson, J., dissenting).

²⁹⁷ *See id.* at 925.

captivity, analogous to the liberty rights of New Yorkers (who can actually navigate the streets of New York, most of the time). In Happy's case, though, her right likely cannot require returning her to her native forests in Southeast Asia either, because the injustice she has suffered probably makes it very difficult to survive a journey of thousands of miles to seek reintegration in elephant communities that may reject her.

Although Judge Wilson did not conclude that Happy is a legal person, his argument echoes the CA and suggests that Happy could become a person under the bundle theory. Judge Wilson argued that Happy, as a social animal with capabilities deeply frustrated by isolation, made "a prima facie case that her confinement at the Bronx Zoo stunts her needs in ways that cause suffering so great as to be deemed unjust."²⁹⁸ As such, Happy's central "needs" or capabilities generate, under the circumstances, her basic right to liberty. Likewise, Happy's core capability to avoid great suffering and bodily harms also would seem to ground a recognition that Happy has basic rights to bodily integrity and life, although those rights were not at issue in *Breheny*. Together with a liberty right, these would form the basic rights incident of legal personhood.²⁹⁹

Judge Wilson and his colleague Judge Jenny Rivera³⁰⁰ are now the first two high court judges in the United States to agree that a sentient animal should possess something like a basic right to personal liberty. Their arguments also imply that she should have basic rights to life and bodily integrity. And even the *Breheny* majority admits that many animals have a dignity or intrinsic value that requires respect.³⁰¹ Importantly, the emphasis by the dissenters on Happy's capabilities as an elephant, particularly her emotions, sociability, and agency, reflects something like the idea of moral status and the CA.³⁰²

²⁹⁸ *Id.* at 962 (Wilson, J., dissenting).

²⁹⁹ Even if someone were to think there is a genuine question regarding whether Happy has a basic right to life per se, given that almost any method of killing animals today imposes significant suffering and injury, this would imply a right to life in practice.

³⁰⁰ Judge Rivera, like Judge Wilson, concluded in *Breheny* that Happy is capable of holding a right like that to personal liberty, and would have required the Zoo to show cause. See *Breheny*, 197 N.E.3d at 968 (Rivera, J., dissenting) (arguing that Happy as an autonomous animal "has a right to live free of an involuntary captivity imposed by humans").

³⁰¹ *Breheny*, 197 N.E.3d at 931.

³⁰² Compare *id.* at 961 (Wilson, J., dissenting) (explaining that we know elephants possess "autonomy; empathy; self-awareness; self-determination; theory of mind (awareness that others have minds); insight; working memory; [and] an extensive long-term memory" and are "a social species who suffer immensely

In that way, Judge Wilson and Judge Rivera have stood on the precipice, part of a vanguard that shows how American law can ensure greater basic legal rights for animals.

So, if Happy gets basic rights on something like Judge Wilson's argument from her capabilities, should she then be recognized as a legal person? Happy would not be a legal person in the same way as human adults, of course. Moreover, Happy's possession of only the basic rights incident would not be enough to show simple legal personhood, because this still leaves procedural incidents like standing for Happy out of the picture.

Normatively, however, the die may be cast. The argument for animal basic rights from Judge Wilson's dissent has clear implications for the procedural incidents of personhood as well. Cass Sunstein's argument that animals ought to have legal standing to enforce any of their existing rights suggests how procedural protections could arise.³⁰³ Under laws like the Animal Welfare Act, certain animals have rights to minimum thresholds of care.³⁰⁴ These welfare rights, however, are simple rights, not basic rights.³⁰⁵ Sunstein argues that Congress should grant standing to animals to enforce these rights, for example, when the federal government is unwilling to litigate.³⁰⁶ His argument does not directly address standing as it is relevant for legal personhood. Still, at least one justification for standing is the same for basic legal rights as it is for welfare protections: if the law recognizes a right, then the rightsholder should have standing to enforce it, because public enforcement may be infeasible. Moreover, the recognition of a right

when confined in small spaces and deprived of social contact with other members of their species" (internal quotation marks omitted)), and *id.* at 973-74 (Rivera, J., dissenting) (canvassing the ways in which elephant researchers have established Happy's "complex cognitive abilities and self-determinative behavior"), with NUSSBAUM, *supra* note 10, at 102 (explaining that animals in general "strive for life . . . health . . . bodily integrity," "for the opportunity to use whatever senses, imagination, and thought are characteristic for that kind of creature," "want the opportunity to make some key choices about how their lives will go," and need to develop social lives), and *id.* at 242 (explaining that elephants cannot justly be kept in zoos "given their need for movement over large stretches of terrain" and "given their social nature").

³⁰³ See Sunstein, *supra* note 34, at 251-52.

³⁰⁴ These include, as noted, standards "for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species," 7 U.S.C. § 2143(a)(2)(A), and standards "for exercise of dogs" and for a psychologically healthy environment for primates, 7 U.S.C. § 2143(a)(2)(B).

³⁰⁵ See Stucki, *supra* note 76, at 552.

³⁰⁶ See Sunstein, *supra* note 34, at 260-61.

usually implies standing to enforce it.³⁰⁷ On that basis, something close to simple legal personhood for animals like Happy could emerge in the future from two legal acts: (1) recognition of basic animal rights, and then (2) recognition of standing, and perhaps other procedural incidents of personhood, to enforce those basic rights.

Importantly, this is not yet the approach favored by either the majority or Judge Wilson in *Breheny*. The majority rejects out of hand both the idea that Happy is a person and the view that an animal may have a basic liberty right.³⁰⁸ Judge Wilson, on the other hand, remarks that the case was “not about whether Happy is a person.”³⁰⁹ The Wilson dissent, however, does make one comment that warrants addressing: “Happy is not a person. Happy is an elephant.”³¹⁰ The suggestion that an elephant cannot be a person implies an acceptance of the view that only *homo sapiens* can be legal persons. But Judge Wilson does not need to take that position, because personhood was not the question presented, by his own analysis; in addition, this suggestion conflates a legal person with a human being.

As Judge Wilson rightly argued, animals (like humans) have central capabilities that should be protected by basic legal rights. That was the primary question presented in Happy’s case, despite the majority’s erroneous focus on personhood. Of course, if animals are awarded basic rights *and* procedural protections, then they probably should be considered at least simple legal persons; but in *Breheny*, Happy did not ask for more than a basic consideration of her interest in being free. For future courts and litigants, Happy’s case therefore may be something of a cautionary tale: putting rights before personhood matters.

IV

BOTH LEGISLATURES AND JUDGES CAN RECOGNIZE CERTAIN BASIC RIGHTS, AND PERHAPS PERSONHOOD, IN THE UNITED STATES

What are some implications of this Article’s argument for substantive law in the United States? Basic rights to life, bodily integrity, and some degree of liberty for sentient animals can be recognized through different mechanisms. Reasonable minds

³⁰⁷ See Stucki, *supra* note 76, at 553 (noting that “legal rights usually include the procedural element of having standing to sue”).

³⁰⁸ See Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 927–28 (2022).

³⁰⁹ *Id.* at 940 (Wilson, J., dissenting). Judge Rivera makes a similar argument.

³¹⁰ *Id.* at 962 (Wilson, J., dissenting).

may disagree regarding whether some sentient animals have a basic right to life *per se*.³¹¹ But even if a right to life *per se* is not required by justice for all animals, the rights to bodily integrity and liberty have major implications for both legislatures and judges in the United States. These rights are fundamental in Stucki's sense, and thus, like basic human rights, they have a high threshold for infringement.³¹² They are not like the limited rights that already exist for animals in the United States under welfare laws.

In practice, whether basic rights are applied to animals depends on whether legislatures and judges choose to act. Regarding legislation, Congress and the states could enact some basic rights for at least some animals. Arguably, there are already attempts to do so through the Animal Welfare Act (AWA). As discussed, the AWA creates simple rights that aim to protect some basic interests for certain animals.³¹³ But those rights have largely failed to protect most animals' basic interests.³¹⁴ Rights under the AWA are weak simple rights in part because they do not preclude harming animals in many cases—for example, when a lab or circus animal has outlived a research purpose or becomes a “pet.” In addition, the AWA simply does not cover nearly all animals. It covers neither farmed animals—an estimated *ninety-eight percent* of all animals that interact with humans—nor ninety percent of animals used in research or exhibition, including birds, rats, mice, fish, and reptiles.³¹⁵ Likewise, it does not protect animals in the wild.³¹⁶ Still, Congress and the states easily could expand existing animal welfare laws

³¹¹ By a right to life *per se*, I mean a right that applies to animals to protect their lives in all cases, regardless whether they are killed in a manner that involves, for example, pain and suffering.

³¹² See Stucki, *supra* note 76, at 552.

³¹³ See 7 U.S.C. § 2143(a)(1), (2).

³¹⁴ See Justin Marceau, *How the Animal Welfare Act Harms Animals*, 69 HASTINGS L.J. 925, 926–930 (2018) (explaining that the AWA covers very few animals and actively undermines broader changes that could occur for animals in the United States).

³¹⁵ See *id.* at 930 (noting that “animals raised for food comprise approximately ninety-eight percent of the animals interacting with humans in this country”); Henry Cohen, *The Animal Welfare Act*, 2 J. ANIMAL L. 13, 25 (2006) (“The Animal Welfare Act’s failure to cover the more than [nine] billion farm animals slaughtered annually in the United States, and failure to cover [ninety] or [ninety-five] percent of animals used in research, makes it an exaggeration to say that the United States has a general animal welfare act.”).

³¹⁶ The AWA only requires licensing and registration for institutions that have custody over animals, particularly animal dealers, research institutions, and exhibitors. See 7 U.S.C. §§ 2133, 2134, 2136.

or create other statutes to support a greater set of basic rights. The range of animals that merit protection is much broader than those currently protected: sentient animals likely include vertebrates—mammals, birds, fish, reptiles, amphibians—and even some invertebrates, like octopuses.

Environmental law stands out as one important area in which legislators can act to enhance the protections afforded animals, particularly wild animals. For example, the Endangered Species Act (ESA) is the only federal law in the United States that broadly protects many different species of wild animals in nature against direct harms by humans.³¹⁷ The ESA already creates duties not to harm individual wild animals: Section 9 prohibits direct harms to animals who are members of a federally listed species, including killing, harming, or “harassing” those animals.³¹⁸ Some wild animals therefore *already* possess basic claim-rights under federal law.³¹⁹ However, these basic rights do not apply to these animals in virtue of their individual dignity, but instead to protect species threatened with extinction. Nevertheless, the rights seem to be fundamental in character: they are hard to infringe and protect central capabilities.

In addition to the ESA, new state or federal environmental statutes could improve things for animals. For wild animals, Congress or a state legislature could create sanctions, for example, for cruelty, abuse toward, or intentional killing of a wild animal, where that protection does not already exist. Carveouts for permitted hunting and fishing could provide exemptions where a ban is infeasible in the near term. State legislatures or courts could initiate tort law changes, like that suggested by David Favre, to directly prevent harms to wild

³¹⁷ See, e.g., Cynthia F. Hodges, *Brief Summary of the Endangered Species Act (ESA)*, ANIMAL LEGAL & HIST. CTR. (2010), <https://www.animallaw.info/article/brief-summary-endangered-species-act> [<https://perma.cc/V6EN-GXT3>]; 16 U.S.C. §§ 1538(a)(1)(B), 1532(19). There are other environmental laws protecting specific species, most notably the Marine Mammal Protection Act (MMPA). The MMPA is an interesting case, because it protects individual marine mammals even when their species is not threatened. See 16 U.S.C. § 1371(a) (establishing a moratorium on the taking of marine mammals regardless of species). It thus provides perhaps the only federal example of a law that arguably integrates basic rights for certain wild animals due to their sentience.

³¹⁸ See 16 U.S.C. §§ 1538(a)(1)(B), 1532(19).

³¹⁹ Cf. *Nonhuman Rts. Project, Inc. v. Breheny*, 197 N.E.3d 921, 938 (N.Y. 2022) (Wilson, J., dissenting) (“The Endangered Species Act . . . gives all animals falling within its purview the right not to be captured, harassed or harmed by humans, and imposes a correlative duty on humans.”).

animals.³²⁰ Reforms like these would be required on any normative view that takes seriously the harms suffered by animals at human hands, regardless of legal personhood.

In addition, however, recognizing sentient animals' dignity and basic rights can also have substantial implications for judicial decision-making. The majority in *Breheny*, like others before it, admonished that the arguments for animal basic rights (and personhood) should be "directed to the legislature."³²¹ Passing the buck, however, glosses over the power and relevance of courts in the United States. As with any minority right, persuading a majority of the public to adopt a rule limiting its own rights to protect those with little power from harm is challenging.³²² Courts, however, can play an important role as counter-majoritarian institutions, at least in theory.

Judges make decisions based on the moral, cultural, and political principles and paradigms available to them, and the use of normative principles is unavoidable in judicial decision-making.³²³ For millennia, judges in Rome, Europe, and the Americas assumed the background of cosmologies developed by ancient and medieval philosophers, which mostly held that animal "natures" were "inferior" to human nature in the Great Chain of Being.³²⁴ But modern science has made the Great Chain of Being unsupportable, especially in a secular nation that does not allow the imposition of religious or quasi-religious views on society.³²⁵ As a result, the legal paradigms of animals' status found in judicial precedents need to be updated to better reflect modern principles and worldviews.

Steven Wise has proposed a helpful outline of different types of judicial decision-making in the United States today

³²⁰ See David S. Favre, *Judicial Recognition of the Interests of Animals—A New Tort*, 2005 MICH. ST. L. REV. 333, 352–54 (2005) (discussing a new common law tort of intentional interference with key interests of an animal, which could also be established by the legislature).

³²¹ *Breheny*, 197 N.E.3d at 932.

³²² This is in fact *quite* similar to John Hart Ely's famous argument that courts are a bulwark against majoritarian disregard for minority rights. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

³²³ See, e.g., WISE, *supra* note 1, at 89–118 (discussing the principles and methods used by judges to make decisions regarding cases that come before them).

³²⁴ See WISE, *supra* note 1, at 9–22, 40–42 (explaining that the view of animals as inferior to humans and thus property was developed by the Greeks, Romans, and Judeo-Christian tradition, and later adopted by William Blackstone, James Kent, and Oliver Wendell Holmes in England and the United States).

³²⁵ See *id.* at 46–47. Although some Americans may disagree with the characterization of the United States as a secular society, there is little disagreement that religious ideas cannot be imposed on society by public actors or governments.

that can help structure thinking about possible changes to the common law and judicial paradigms.³²⁶ Wise sets out several basic models of judges, although judges in different contexts may take on different perspectives. Some are “formal judges” that generally follow either strict precedential rules or precedential principles (e.g., free market principles).³²⁷ Others are “substantive judges,” who place primary emphasis on normative principles that ensure the law is just, for example by reflecting some key social value, like equality.³²⁸

The arguments presented in this Article will appeal to both substantive judges and formal judges who rest their decisions on principles of justice, liberty, and equality. Sentient animals—including humans—are those members of the natural world who have a “point of view.”³²⁹ They have subjective states of mind, desires, and emotions that point to the meaningful ends for which they strive. However, it would be a mistake to think that humble ends are trivial ends. Just as we would not entertain the attribution of lesser rights to a smaller human, or someone tragically born without certain key capabilities—perhaps the ability to use language—so we should not ascribe different rights to an animal based on features that are not relevant to their capabilities. Principles of justice, liberty, and equality apply to animals for reasons explained previously, and those principles can generate basic rights to life, bodily integrity, and personal liberty.

In *Breheny*, we can see that great common law judges are students of the sometimes-capricious path toward justice in the United States. Both Judge Wilson and Judge Rivera are responsive to central principles of the common law, like the principle of liberty, and neither judge is focused on hewing narrowly to ancient precedent, especially given the growing evidence about elephant minds. Judge Wilson argued that “[i]nherently, . . . to whom to grant what rights is a normative determination, one that changes (and has changed) over time” in the common law.³³⁰ This recognition of the inherent

³²⁶ See *id.* at 94–100 (discussing a rough division of judges into “Formal Judges”, who generally follow precedents construed fairly narrowly, and “substantive judges,” who often use broad principles that may or may not be found in precedents to inform their decisions).

³²⁷ See *id.* at 96–97.

³²⁸ See *id.* at 97–100.

³²⁹ See NUSSBAUM, *supra* note 10, at xxiv–xxv.

³³⁰ Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 940 (2022) (Wilson, J., dissenting) (emphasis added).

normativity of common law shows that Judge Wilson tends toward being a substantive judge, concerned with the justness of law, at least regarding basic rights. But his opinion is not a sweeping declamation: "granting a single elephant—not the whole animal kingdom—the right to a full hearing on a writ of habeas corpus is about as incremental as one can get."³³¹ Following this model, judicial decisions and the common law can gradually accommodate the basic rights of animals.

Importantly, the normative dimension in this Article's argument distinguishes it from the view that animal rights and personhood should only be accomplished through legislation. European scholar Eva Berner Kempers has argued, in the civil law context, that "[w]ho or what is a legal person or bears rights is decided by *the positive law*; it is a policy determination, independent of the actual ontological characteristics of entities."³³² Kempers rightly argues that legal rights can be applied to animals through legislation without requiring animals to be recognized as legal persons first, in contrast with the arguments made by the NhRP.³³³ But in the American common law system, animal rights also may develop through judicial decision-making, as the dissents in *Breheny* propose. This is because recognizing animals' moral value is a matter of public justice, not private morality,³³⁴ and public justice is ensured in part by the courts. Animal basic rights—and potentially, legal personhood—therefore are not merely a matter of policy, but also of considerations of right. Principles of morality and justice can guide both judicial and legislative decisions about animals. Indeed, judges at common law may even be under a duty to adapt the law to present scientific knowledge and evolving norms, "without waiting for the legislature."³³⁵

Even incremental improvements in animals' basic protections may lead to more significant changes over time. Under the bundle theory, as noted, personhood is an emergent property that clusters around several considerations.³³⁶ In the short term, intermediate legal statuses between property

³³¹ *Id.* at 962 (Wilson, J., dissenting).

³³² *See* Kempers, *supra* note 36, at 591.

³³³ *See id.* at 582.

³³⁴ *See* NUSSBAUM, *supra* note 10, at 95.

³³⁵ *See Breheny*, 197 N.E.3d at 959 (Wilson, J., dissenting).

³³⁶ *Accord, e.g.,* Kempers, *supra* note 36, at 589 (noting that on the bundle theory "there is no binary division between things and persons; non-persons can

and personhood may be more palatable for legislatures and judges to apply to animals, such as the “quasi-personhood” proposed by Angela Fernandez—which still invokes the concept of personhood as a standard.³³⁷ But over the longer term, laws probably should recognize animals as at least simple (“passive”) legal persons—or something functionally equivalent—if their basic rights and procedural protections are recognized.³³⁸ Future law on animal personhood likely will emerge organically from the accumulation of personhood incidents for animals (perhaps through both legislation and judicial decision-making), not from an *a priori* belief that animals are legal persons.

The role of the courts also mitigates some of the policy concerns with expanding animal rights. For example, many objections to animal personhood today are grounded in the practical infeasibility of recognizing that status in the near term, given our reliance on animals for food, research, and other products.³³⁹ Yet, if the bundle theory is correct, the argument for infeasibility is overblown. Legislatures can, of course, expand the rights of animals gradually, and courts are well-suited to do the same in individual cases.³⁴⁰ Likewise, courts could deal with any proliferation of claims through tools like class actions, which already exist for animals, though as property, not persons.³⁴¹ Critically, animals’ rights will have to be balanced against the rights of humans and other animals. But entirely denying justice to animals because of practical consequences is no answer at all to the increasing recognition that we owe them better.

gradually acquire personhood-related burdens and benefits, even before they are recognized as legal persons by the legal system”).

³³⁷ See FERNANDEZ *supra* note 26, at 56 (arguing that “nonhuman animals must be legal persons of some kind”).

³³⁸ Cf. Fernandez, *supra* note 33, at 199 (noting that Kurki’s concept of passive legal personhood “could apply to nonhuman animals”).

³³⁹ See, e.g., SEBO, *supra* note 8, at 67–70, 81–82 (discussing common objections about futility and demandingness of having to consider animals in public policy).

³⁴⁰ See, e.g., *Breheny*, 197 N.E.3d at 962 (Wilson, J., dissenting); see also *id.* at 964 (Wilson, J., dissenting) (explaining that issuing the writ in the case of some enslaved persons “did not produce a flood of follow-on habeas petitions” or end slavery).

³⁴¹ See Tess Vickery, *A Taxonomy of Class Actions for Animals in the United States*, 26 ANIMAL L. REV. 41, 46 (2020) (noting that “the courts have found that animals lack standing to bring cases on their own behalf because they are not legal persons”).

CONCLUSION

For nonhuman animals today, new human threats to their lives and flourishing are massive and growing. They face significant direct harms created by the likes of industrial factory farming, commercial fishing, invasive research, deforestation, animal abuse and neglect, and other exploitation by humans at massive scales. They face indirect threats that humans also face from climate change, extractive activities in nature, pollution, plastic accumulation, and many other forms of anthropogenic change. The mind recoils at the scale of the problem. Yet, many Western thinkers have joined a chorus of others to begin proposing various ways of helping animals through the law, including bold proposals to recognize them as legal persons.

This Article argues for a new synthesis of ethical views about animals with conceptions of legal rights and personhood. Because of their capacities for flourishing and suffering, at least sentient animals have dignity and moral status, and this entitles them to justice and much more legal protection than they currently possess. American law should work to recognize sentient animals' legal basic rights to bodily integrity, a degree of liberty, and probably life, contextualized by an animal's species and other characteristics. The bundle theory of legal personhood shows that if animals are awarded basic rights, they could become legal persons over time, if they also obtain certain procedural protections. Today, Happy the elephant's case illustrates the importance of clarifying the concepts of legal personhood and basic rights: if the court had recognized that the key issue was the basic right to liberty for Happy, not her personhood, things might have gone differently. What happens next depends on what rights the public, legislatures, judges, and others determine are warranted for creatures that can flourish, suffer, live, and die, and whose central capabilities merit much greater respect.