

THESIS

ANIMALS, RIGHTS, AND LEGAL PERSONHOOD

Submitted by

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## ABSTRACT

### ANIMALS, RIGHTS, AND LEGAL PERSONHOOD

This thesis serves as an intervention in debates between supporters of Animal Rights and supporters of Animal Welfare and their relationship to the law. Specifically, I consider whether nonhuman animals must be recognized as persons under the law in order to have rights. I review the most prominent accounts put forth by theorists of Animal Rights and Animal Welfare. I then draw from recent work in Animal Rights to clarify a conceptual confusion over what is meant by a right that leads theorists to speak past each other. Having clarified this confusion, I argue that animals should be granted the right to liberty, and consequently recognized as legal persons, because they have an interest in liberty. I then extrapolate on the implications my argument would have for our relationships with different animals.

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## DEDICATION

This thesis is dedicated to Sabrina S. Santos,  
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# Introduction:

Across the globe, courts are recognizing nonhuman animals as legal persons. The growing list includes courts in Argentina<sup>1</sup>, India<sup>2</sup>, Ecuador<sup>3</sup>, and Pakistan<sup>4</sup>. In the United States, however, the debate continues. There are many legal differences among these countries, such as constitutions, local laws, as well as societal and cultural differences which may influence the debate in those countries. Rather than attempt to compare the reasoning presented in these different areas, I want to investigate this debate from within the US legal structure and arguments from our own courts to understand why the US does not currently recognize animals as legal persons, and whether it may be possible for animals to be recognized as such in the future. This thesis aims to explore recent US court rulings related to the legal status of nonhuman animals, disagreements between scholars regarding existing animal rights, and conceptions of legal personhood. An analysis of a recent New York Supreme Court case brought forth by the Nonhuman Rights Project (NhRP) will be a fruitful starting point for exploring the arguments surrounding the current status of animal rights.

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<sup>1</sup> ASOCIACION DE FUNCIONARIOS Y ABOGADOS POR LOS DERECHOS DE LOS ANIMALES Y OTROS CONTRA GCBA SOBRE AMPARO (2015) <https://www.animallaw.info/case/asociacion-de-funcionarios-y-abogados-por-los-derechos-de-los-animales-y-otros-contra-gcba> and also PRESENTED BY A.F.A.D.A ABOUT THE CHIMPANZEE “CECILIA”- NON HUMAN INDIVIDUAL (2016)

<https://www.animallaw.info/case/afada-habeas-corporus-cecilia>

<sup>2</sup> Karnail Singh and others v State of Haryana (2019) [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-361239.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-361239.pdf)

<sup>3</sup> Ecuador Court Case on the Rights of Estrellita the Primate (2022)

<https://ecojurisprudence.org/initiatives/ecuador-lawsuit-primate-estrellita/>

<sup>4</sup> Islamabad Wildlife Management Board through its Chairman Versus Metropolitan Corporation Islamabad through its Mayor & 4 others (2019) <https://aldf.org/wp-content/uploads/2021/01/Islamabad-Wildlife-Management-Board-v-MCI-WP-No-1155-of-2019.pdf>

The case was initially brought forth by the Non-human Animal Rights Project (NhRP) on behalf of Happy the elephant in 2018, against the director of the Bronx Zoo, James Breheny, for Happy to be removed from the Bronx Zoo and relocated to an elephant sanctuary through a writ of habeas corpus (Nonhuman Rights Project, Inc., on behalf of Happy v. Breheny, N.Y. 2022). The initial case was unsuccessful and habeas corpus relief was denied for Happy. The NhRP appealed to the New York Supreme Court and claimed that Happy ought to be recognized as a legal person with a common law right to bodily liberty subject to the protections of the writ of habeas corpus.<sup>5</sup>

The NhRP argues that Happy should be recognized as a legal person with the right to liberty in their plea for habeas corpus on behalf of Happy. The court majority, however, determined that Happy is not a ‘legal person’ who holds any legal rights, and cannot be a legal person with rights because animals cannot bear duties. Though these animals are without legal rights, the court majority claims they have ‘protections’ through Animal Welfare Legislation (AWL).

The arguments from scholars on issues like this can be divided into two main camps: Animal Rights and Animal Welfare. Animal Rights theorists primarily argue that animals ought to be removed from their current legal status as property and recognized as legal persons with legal rights, in order for animals’ interests to be given equal consideration under the law. These theorists view the possession of legal rights as that which allows for the equal consideration of animals’ interests under the law, and claim animals cannot possess these rights while considered property. Animal Welfare theorists, on the other hand, argue that animals do not need to be

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<sup>5</sup> Habeas corpus is a legal means for challenging the legality of an individual's detention.

removed from their classification as property to have their interests given equal consideration under the law. They argue that animal anti-cruelty statutes—or Animal Welfare Legislation (AWL)—impose limitations on owners’ use of animals, thereby allowing for the equal consideration of animals’ interests under the law, without recognizing animals as legal persons. In particular, Animal Welfare theorists argue that AWL imposes duties on humans for the intended protection of animal interests, and these duties imposed in turn create a correlative claim-right for the animals in question.

Recent developments in the Animal Welfarist approach incorporate elements of Animal Rights arguments, weakening the distinction between the two camps. Animal Welfare theorists have argued that, even though animals are considered property, animals *already* possess rights, whereas Animal Rights advocates have argued that animals do not, and cannot, have rights while considered property. Given the persistence of this debate regarding animals’ possession of rights, one suspects there may be a lack of a shared understanding of the meaning of ‘rights.’

Generally, Animal Welfarists point to a problem with the conception of legal persons and property held by Animal Rights theorists, which construes right-holding and property status as mutually exclusive. Animal Rights theorists are charged with viewing legal personhood and property as dichotomous, seeming to assert that animals can only be either property without rights or a legal person with rights. In particular, Animal Rights theorists, such as Steven M. Wise and Gary L. Francione, argue for animals’ possession of the fundamental right to liberty, and claim this cannot occur while animals are legally classified as property, which is why they argue for animals to be removed from their status as property and recognized as legal persons.

This is reiterated by the Philosopher’s Brief on Tommy & Kiko<sup>6</sup>, which claims: “Under current U.S. law, every entity is either a person or a thing. Those exhaust the legal choices.” (Andrews et al., 2018, p. 5).

The supposed either/or dichotomy between legal recognition as a person or thing is claimed without including a citation of any US law. Endorsing such an either/or dichotomy between being a person or a thing could be interpreted as treating legal personhood and property status as ‘mutually exclusive,’ claiming that if you are considered a legal person, then you cannot be considered property in *any* legal contexts, and vice versa. This view may seem to be immediately challenged by quasi-status entities such as corporations and trusts. For example, there are instances in which a corporation is recognized and treated as a legal person (corporation owns its own property), and instances in which the corporation is recognized and treated as property (owned by individual or shareholders, capable of being bought and sold like other property items), depending upon the relevant matters of the case at hand. It may be the case that ‘person’ or ‘thing’ are the only two conceptual categories that any entity can ever fall under in any legal case, but this does not necessarily prevent an entity from being considered as a legal person in one particular legal case, and considered as property in another legal case. This would, however, prevent an entity from being considered as *both* a legal person and property *in the same legal case*.

My guiding questions for this thesis are whether nonhuman animals can hold legal rights associated with legal personhood, and more importantly, whether animals should hold the right

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<sup>6</sup> Tommy and Kiko, the chimpanzees, were the first nonhuman animals the Nonhuman Rights Project represented in court. The NhRP petitioned on behalf of Tommy and Kiko for a plea of habeas corpus, but the lower courts denied the plea with arguments that chimpanzees are not ‘persons’. See Nonhuman Rights Project, Inc., on behalf of Tommy v. Lavery, (N.Y. 2017) and Nonhuman Rights Project, Inc., on behalf of Kiko v. Presti, et al., Respondents (N.Y. 2018).

to liberty and be considered legal persons. My central thesis is that animals can and ought to have fundamental rights, particularly the right to liberty, codified in law in order to protect their interest in liberty, which is not currently given proper consideration under the current legal system. With conferral of the right to liberty, animals should be removed from their legal status as property and considered as legal persons. I am, therefore, endorsing an Animal Rights position against Animal Welfare theorists.

In Chapter One, I review arguments from judges in the recent New York Supreme Court case regarding Happy, the elephant, as well as the arguments between Animal Rights and Animal Welfare theorists, in order to cover the current landscape of the debates regarding animals' current legal status. I consider the court majority arguments and one of the dissenting opinions to highlight the central argument presented by the court majority for why nonhuman animals are not considered legal persons with rights. I then consider arguments from prominent Animal Rights theorists, Francione and Wise, to outline the current Animal Rights position, followed by arguments from Animal Welfare theorists, Jerrold Tannenbaum and David Favre, in order to outline the central objections and counter arguments to Francione and Wise.

In Chapter Two, I review recent arguments from Saskia Stucki and Visa J. Kurki, who provide conceptual resources for advancing the debate regarding animals' possession of rights and the possibility of their recognition as legal persons. Namely, Stucki argues for the need to distinguish between the kinds of 'rights' referenced by Animal Rights and Welfare theorists and claims the kind of right Welfare theorists focus on is not the same as the kind of right which Animal Rights theorists have argued animals should hold. Kurki advances a new view on legal personhood that considers the possession of rights as antecedent to recognition as a legal person, and helps to explain why different entities we typically associate with legal personhood have

different rights. In particular, Kurki's proposed theory accommodates dutiless legal persons, such as infants, children, and adults living with mental disabilities.

Finally, in Chapter Three, I adapt Stucki and Kurki's work to argue that all sentient animals have an interest in liberty. I highlight a central tension between protecting animals' interest in liberty, through the conferral of the right to liberty, and their continued legal status as property. I conclude by arguing that if we are to give equal consideration to animals' interest in liberty, it will require removing animals from the category of property, and seeing them as legal persons with the right to liberty.

Before continuing, I will make five preliminary points. First, I shall use the term 'animal' in place of 'nonhuman animal' for brevity. Second, when I discuss the topic of 'personhood', or reference 'persons', I am referring to *legal personhood* and *legal persons*, and not moral persons or natural persons, unless otherwise stated. Third, I will be referring to *legal* rights in my discussion of rights, and not moral rights or natural rights, unless otherwise stated. Fourth, I will be drawing from Joel Feinberg's definition of interest. For Feinberg, an individual has an interest in some outcome when she is in a position to gain or lose depending on the outcome (Feinberg, 1987, p. 38). He distinguishes two categories of interests, welfare interests and ulterior interests. The category of welfare interests, Feinberg states, includes:

the continuance for a foreseeable interval of one's life, and the interests in one's own physical health and vigor, the integrity and normal functioning of one's body, the absence of absorbing pain and suffering or grotesque disfigurement, minimal intellectual acuity, emotional stability, the absence of groundless anxieties and resentments, the capacity to engage normally in social intercourse and to enjoy and maintain friendships, at least minimal income and financial security, a tolerable social and physical environment, and a certain amount of freedom from interference and coercion (Feinberg, 1987, p. 37).

The basic welfare interests are primary and their fulfillment allows for an individual's pursuit of their ulterior interests. The category of ulterior interests, on the other hand, regards the plethora of personal ultimate goals an individual may have. While it is debatable that animals have ulterior interests, I believe it is uncontroversial to claim that animals at least have welfare, given their sentience. Animals clearly have a 'stake' in their welfare, in which things can go better or worse for them in their lives.

Fifth: I will be drawing from the widely accepted and adopted understanding of rights and legal relations elaborated by Wesley Newcomb Hohfeld (1919; see also Herstein, 2023). A Hohfeldian analysis divides rights into four distinct relations: claim-duty, power-liability, immunity-no-power, and privilege (liberty)-no-claim. At present, I will only be concerned with claims and immunities. To explain this correlative relationship, we can first review a claim-right and the correlative duty. For example, when there is a claim-right, there is a correlated duty. This means that if X has a claim, or claim-right, against me, this will necessarily correlate to duty belonging to me to perform, or refrain from performing, a certain action. In the case of immunity-rights, an immunity correlates to a disability, which is also referred to as 'no-power.' Similar to the correlative relationship of claims and duties, whenever there is an immunity, there will be a corresponding no-power held by someone else.

# Chapter 1: The *Happy* Case, Animal Rights and Animal Welfare Theories

## *The Happy Case*

### **Court Majority**

In 2018, the NhRP petitioned for a writ of habeas corpus on behalf of Happy. The initial case was unsuccessful and habeas relief was denied to Happy, but the NhRP appealed to the New York Supreme Court in 2021 and claimed that Happy ought to be recognized as a legal person with a common law right to bodily liberty subject to the protections of the writ of habeas corpus. As the petitioner in the case, NhRP representatives plead for Happy's release from the Bronx Zoo and transfer to an elephant sanctuary (*Nonhuman Rights Project Inc., on behalf of Happy v. Breheny*, No.52, N.Y. 2022, p. 6)<sup>7</sup>. To support their argument, the NhRP gathered statements from many experts on elephants who attest to Happy's sentience and autonomy (*Happy*, 2022, p. 4). The New York Supreme Court sided with the initial court ruling, thus affirming the lower court decision in denying the plea for habeas corpus. Citing the writ of habeas corpus as intended for legal persons, the court majority argues that because Happy is not a 'person', the writ is not applicable to her:

Because the writ of habeas corpus is intended to protect the liberty right of human beings to be free of unlawful confinement, it has no applicability to Happy, a nonhuman animal who is not a "person" subjected to illegal detention. Thus, while no one disputes that elephants are intelligent beings deserving of proper

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<sup>7</sup> I will be shortening future citations of this case to *Happy* (2022).

care and compassion, the courts below properly granted the motion to dismiss the petition for a writ of habeas corpus, and we therefore affirm. (*Happy*, 2022, p. 2)

The majority respondents on the New York Supreme Court highlight a primary issue with the NhRP's petition. The judges assert that animals are not persons entitled to rights and protections afforded by the writ of habeas corpus to begin with. The Court determined there is no legal precedent which would provide support for the idea that habeas corpus be available to nonhuman animals, as it has only applied to human beings 'because they are humans with certain fundamental liberty rights recognized by law' (*Happy*, 2022, p. 9). In short, the purpose of habeas corpus is to protect liberty rights, and only human beings have these certain fundamental liberty rights recognized by law. Therefore, Happy, being a nonhuman animal, cannot be afforded habeas corpus because she has no liberty rights recognized by law (*Happy*, 2022, pp. 8–9). In addition, the majority judges noted that the writ of habeas corpus is intended to release an individual from their confinement altogether, rather than to transfer the individual from one confinement to another. They conclude that even if habeas corpus were available to Happy, it would not apply in her current situation, as the request is for transferring Happy to a sanctuary, rather than releasing her from confinement altogether (*Happy*, 2022, p. 10). To summarize the central argument from the NY Supreme Court majority respondents:

- (1.) Historically, habeas relief has never been granted to nonhuman animals.
- (2.) Habeas corpus is intended to protect liberty rights (i.e., to protect legal persons from illegal detainment/confinement).
- (3.) What makes a detained person qualified to seek habeas relief is being a human with certain fundamental liberty rights recognized by law. In other words, only humans have fundamental liberty rights recognized by law which are subject to protection of the writ of habeas corpus.
- (4.) Happy is not a human with certain fundamental liberty rights recognized by law.

(5.) Happy is not subject to unlawful confinement, as her placement in the Bronx Zoo was done through a legal process.

(6.) Happy's confinement and treatment meet the standards of NY law.

(7.) Happy is not subject to habeas relief.

(8.) Even if habeas corpus were available to Happy, it would not apply in her current situation, as the request is for transferring Happy, rather than releasing her from confinement altogether.

For many, the Court decision is not a surprising one. At face value, the arguments presented in defense of the conclusion that Happy is not subject to habeas relief because she is not a 'person with fundamental liberty rights recognized by law' seems to be a rational conclusion that follows legal precedent established in our legal system, as animals have never been classified as legal persons and only as property. The court majority's conclusion, however, was not unanimous. Two judges, Judge Wilson and Judge Rivera, provide dissenting opinions. In the following section, I focus on Judge Wilson's dissenting opinion.

### **Dissenting Opinion: Judge Wilson**

Judge Wilson targets the court majority's argument that animals are not legal persons, and are incapable of holding rights because, "unlike the human species, which has the capacity to accept social responsibilities and legal duties," animals cannot (*Happy*, 2022, p. 11). Judge Wilson argues that the court majority confuses who can hold rights and who can confer rights, claiming that, while animals cannot confer rights to humans, humans have conferred numerous rights to animals (*Happy*, 2022, Wilson, dissenting, p. 12).

Judge Wilson begins addressing this confusion by noting what a right consists of, claiming that "rights and duties are correlative...But a holder of a right need not have any duty at all" (*Happy*, 2022, Wilson, dissenting, p. 13). This is already the case for animals, according to

Wilson, who claims that humans have provided animals with numerous rights without concern whether the animals are capable of holding legal duties. To support this claim, Wilson points to legal precedent: “Animals have many legal rights, protected under both federal and state laws. In some instances, criminal statutes punish those who violate statutory duties that protect animals” and cites *Cetacean Community v Bush*<sup>8</sup> (Happy, 2022, Wilson, dissenting, p. 13).

Wilson also cites specific Animal Welfare Legislation related to bald eagles and animals classified as endangered, which he views as conferring correlative rights, or claim-rights, to animals.

For example, 16 USC § 668 imposes a duty on humans not to capture or kill a bald or golden eagle, enforced by fines and imprisonment; that duty establishes a correlative right of bald and golden eagles to be free from capture by humans (except as authorized by permit). The Endangered Species Act (16 USC § 1531 et seq.) 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 (Happy, 2022, Wilson, dissenting, p. 13).

Finally, Wilson highlights the conflicting interests in Happy’s case, namely Happy’s interest in liberty and the Zoo’s interest in owning Happy as property (Happy, 2022, Wilson, dissenting, p. 11). The NhRP is arguing for the recognition of Happy’s right to liberty, or rather, arguing Happy *should* have a right to liberty. Happy’s interest in liberty, if she has one, is currently legally unprotected, and is being weighed against the Zoo’s legally protected interest in keeping Happy as property of the Zoo. Pitting unprotected interests against protected interests will almost always result in the same conclusion—the protected interest wins. This concern related to protected and unprotected interests being weighed against each other is what has led Animal Rights theorists to argue for animal personhood.

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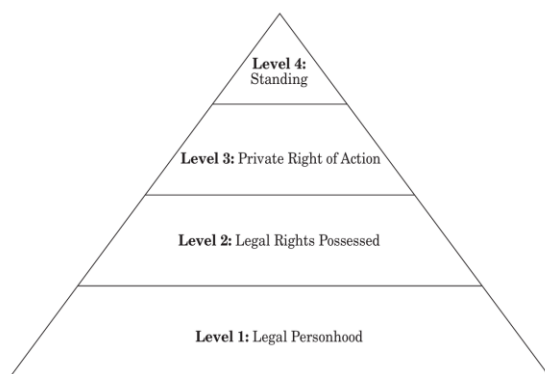
<sup>8</sup> *Cetacean Community v Bush*, 386 F 3d 1169, 1175 [9th Cir 2004].

## *Animal Rights Theorists*

Wise and Francione both challenge—from an Animal Rights perspective—animals’ legal status as property and argue for animals’ recognition as legal persons with legal rights. Much of the literature on animals and the law is in conversation with Wise and Francione. As such, I will briefly present their positions, and highlight responses by key interlocutors.

### **Steven Wise and NhRP**

For Wise, conferring liberty rights to animals is a matter of judicial equality, or providing equal treatment under the law. The NhRP, which Wise founded, argues that the possession of ‘autonomy’ is a sufficient, though not a necessary, condition for personhood and the fundamental right to bodily liberty both as a matter of liberty and equality” (Wise, 2019, p. 386). Regarding legal personhood, Wise views this as “the capacity to possess at least one legal right” (Wise, 2010, p. 1). An entity need not actually possess a right, but merely have the capacity to possess one (2010, p. 5). The aim of the NhRP, Wise states, is to “demand that American state high courts declare that a nonhuman animal has the capacity to possess at least one legal right, to declare that she is a Level 1 legal person” (2010, p. 5).



**Figure 1:** Steven Wise’s Pyramid as a visual representation of the approach to establishing animal rights, beginning with recognition of animals as legal persons (Wise, 2010, p. 2).

Elsewhere, Wise clarifies the intentions of the NhRP and how they aim to confer liberty rights to animals:

James Sommersett's legal transubstantiation from thing to person at the hands of Lord Mansfield in 1772 marked the beginning of the end of human slavery. Persuading an American state high court to similarly transform a nonhuman animal is a primary objective of the Nonhuman Rights Project (Wise, 2010, pp. 1–2).

The *Sommersett case* involved James Sommersett, a formerly enslaved Black man in the captivity of Charles Stuart. Three abolitionists sought to free Sommersett and submitted a habeas corpus petition on behalf of Sommersett. The Lord Mansfield court granted Sommersett's habeas petition, and thus liberated him (*Happy*, 2022, Wilson, dissenting, pp. 21–22). Wise believes that the legal situation nonhuman animals are currently in is analogous to the situation Sommersett was in, and that through judicial recognition of animals as legal persons, they too will enjoy the right to liberty. The courts, however, have argued that animals cannot be recognized as legal persons who hold rights because, unlike humans, animals cannot hold duties.

Wise discusses the 2014 case of Tommy the chimpanzee, which he notes as the first time the courts upheld that “the capacity to bear legal rights *and* duties was necessary for personhood” (Wise, 2019, p. 374). This ultimately led to the court's determination that chimpanzees cannot be legal persons with rights because “unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions” (Wise, 2019, p. 375). This determination was echoed in the case of Happy the elephant (*Happy*, 2022, p. 11).

Wise criticizes the courts' claims that animals must also bear duties in order to hold rights, claiming that the petition was for the Hohfeldian *immunity-right* of bodily liberty, and that

the courts mistook this for a Hohfeldian *claim-right*. The importance of this, according to Wise, is that the capacity for bearing duties is irrelevant to immunity-rights. An immunity-right correlates to a disability (no-power) rather than a duty, and Wise argues that the right to liberty is a fundamental immunity-right which does not require the entity to bear a duty. The court's claim that a legal person must have the capacity for both rights *and* duties would not apply to the immunity-right of liberty argued for. Claim-rights, on the other hand, are "comprised of a claim and a duty that correlates one with the other" and thus bearing duties *would be* relevant to holding such rights (Wise, 2019, p. 376). To clarify his point, Wise highlights two other fundamental immunity-rights enshrined in the US Constitution, the First and Thirteenth Amendments, which guarantee freedom of speech and immunity from enslavement, respectively, and refers to Supreme Court decisions that illustrate the important difference between immunity and claim-rights (2019, p. 376).

The decision of the United States Supreme Court in *Harris v. McRea* illustrates the difference between a claim-right and an immunity-right. Eight years prior to *Harris*, the United States Supreme Court in *Roe v. Wade* recognized a woman's Fourteenth Amendment immunity-right to privacy and against state interference with her decision to have an abortion in the earlier stages of her pregnancy. The *Harris* plaintiff claimed she therefore had the right to have the state pay for an abortion she was unable to afford. The Supreme Court, however, recognized that a woman's immunity-right to an abortion correlates with the state's disability to interfere in her decision to have the abortion; it does not correlate with the state's duty to fund the abortion. Therefore she had no claim against the state for payment for her abortion (Wise, 2019, p. 377)

In this example, the woman's *immunity-right* to an abortion correlates with, or has direct connection to, the state's *disability* (no-power) to interfere in her decision, but this immunity-right does not correlate with the state's *duty* to fund the abortion. The *Harris* plaintiff, then, had no *claim-right* against the state for payment of her abortion (Wise, 2019, p. 377). Again, claim-rights correlate to duties: the state had no duty to pay for the abortion, because the woman had no

claim against the state compelling them to do so. Immunity-rights correlate to disabilities, or to a ‘no-power.’ In the example, the woman’s right to decide to have an abortion in the earlier stages of her pregnancy is correlated to the state’s disability, or ‘no-power’, to interfere in her decision. Here, Wise uses the concept of immunity-rights to overcome the court’s argument that animals must bear duties in order to be legal persons with rights. By focusing on immunity-rights, which correlate with disabilities, this is intended to bypass the court’s argument that animals will need to bear duties in order to hold the right to liberty.

According to Wise, if a US high court were to recognize nonhuman animals as having the capacity to possess at least one legal right, animals would be considered legal persons. Wise can be seen as endorsing a *legalist* view of personhood, or that any entity can be considered a legal person, as ‘legal personhood’ is a legal construction. A *realist* view of personhood, on the other hand, limits the classification of personhood by arguing there are necessary attributes an entity must inherently possess to be considered a legal person. For instance, fulfilling the conditions for moral personhood may be viewed as necessary for consideration as a legal person, as being a moral person implies that the individual has interests worth our moral consideration that ought to be legally protected.<sup>9</sup> Wise views any entity considered to have the capacity to hold at least one legal right as a legal person, seeing legal personhood as merely a ‘rights container’ status which animals should be conferred. A realist like Francione, however, argues that the legal personhood of animals should be grounded in their actual capacity for moral personhood, to which I now turn to.

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<sup>9</sup> This is a very simplified discussion. For my purposes it is enough to show that some animal rights theorists may endorse either a legalist or realist view to legal personhood. For further discussion on the distinctions between legalists and realists, see Kurki, Visa. *Theory of Legal Personhood*. Oxford University Press, (2019), pp.191-195.

## Gary Francione

Francione is considered to hold a realist view in contrast to Wise's legalist view, though both argue that animals' property status should be abolished and animals should instead be recognized as legal persons with rights.<sup>10</sup> Francione can be viewed as endorsing a strong Animal Rights position, which takes sentience to be sufficient for moral personhood, when he argues animals' sentience entails moral obligations: we have moral obligations to animals *because* they are sentient, rather than some other feature commonly associated with humans, such as rationality or the ability to speak.

We have an obligation—owed directly to the dog and not merely one that concerns the dog—not to torture the dog. The sole ground for this obligation is that the dog is sentient; no other characteristic, such as humanlike rationality, reflective self consciousness, or the ability to communicate in a human language, is necessary. (Francione, 2004, p. 112-113)

Francione focuses on the problem he finds with animals' current legal status as property, which is that animals do not have rights under the law, despite the prohibitions on the infliction of 'unnecessary' pain on animals (Francione, 2005, p. 17). Though many argue anti-cruelty statutes and AWL provide rights to animals with the intention to protect animals' interests, Francione argues that these statutes do not confer rights to animals, at least not in the sense that the term is usually used (2005, pp. 17–18).<sup>11</sup>

When we say someone has a 'right,' according to Francione, "it means that the person has some value that requires our respect," (2005, p. 8) and that the central point of a 'right' is

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<sup>10</sup> To reconstruct Francione's view, I draw from (2004) and (2005).

<sup>11</sup> Later in his book, Francione similarly claims that "close examination of some features of these [anti-cruelty] statutes indicates quite clearly that they have an exclusively humanocentric focus, and the duties they impose [on humans] give rise to no corresponding rights for animals" (Francione, 2005, p. 124).

that it “cannot be abrogated even if the violation produces beneficial consequences for others” (2005, p. 21). He further notes that a legal right is distinguished from a moral right; a moral right, according to Francione, “does not have the force of law but which is often used as a reasoning for obtaining legal protection for the interest it represents” (Francione, 2005, p. 95).

Francione associates the problem of animals’ lack of legal rights, or having legally protected interests, with the current operating legal welfarism framework in the US. He defines legal welfarism as “the notion...that animals, which are the property of people, may be treated solely as a means to an end by humans so long as this exploitation does not result in the infliction of ‘unnecessary’ pain, suffering, or death” (2005, p. 18). Although current Animal Welfare Legislation prohibits the infliction of ‘unnecessary’ pain and suffering, or ‘cruelty’ towards animals, the legal framework does not confer rights to animals and does not protect animals’ fundamental interests but—Francione claims—allows for the continuation of their exploitation (2005, pp. 22–26).<sup>12</sup> Francione believes that the Animal Welfarism framework does not protect animals’ fundamental interests, and rather allows for their exploitation, because animals are considered property, rather than persons with rights.<sup>13</sup> Francione argues that animals’ property status is nearly always a crucial component to resolving human and animal conflicts, as in most of these conflicts it is a human seeking to act upon their property (2005, p. 24).

What constitutes ‘unnecessary’ or ‘necessary’ treatment within the welfarism framework, Francione argues, is based upon animals’ legal status as property (2005, p. 103). To regard

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<sup>12</sup> Francione also claims later that anti-cruelty statutes do not prohibit “any use of animals that forms a part of traditionally accepted activity” such as “hunting, fishing, target practice with live animals, scientific experiments involving live animals, particularly painful and stressful methods of agricultural husbandry and slaughter, circuses, zoos, or the uses of animals for other forms of entertainment” and refers to this as the ‘institutional’ structure of animal exploitation (Francione, 2005, pp. 129–130).

<sup>13</sup> Francione claims that “Only persons—natural or legal—can have rights” (Francione, 2005, p. 110).

animals as property means “that the animal is to be treated under the law primarily (if not exclusively) as a means to human ends, and not as an end in herself” (2005, p. 46). What is considered as ‘unnecessary’ is treatment which is counter-productive to the maximization of the animals’ instrumental value, or in other words, treatment which is considered as failing to provide a benefit to humans, such as infliction of gratuitous suffering which creates no socially recognizable benefit. What constitutes ‘necessary’ treatment within the framework, on the other hand, is treatment which is considered as providing a benefit to humans (2005, p. 26-29).

For Francione, animals’ status as property informs the way in which human/animal conflicts are resolved, and this consequently involves a problematic balancing of interests between humans as persons with legal rights, and animals as property without legal rights.

When sentient beings are regarded as property, laws that regulate the treatment of the beings are generally not effective to protect the interests that the law may recognize the beings to possess... The problem is that such rules fail to protect the supposed beneficiaries, who are without rights and legal personhood and whose interests are being balanced against those of a full person, who possesses legal rights (Francione, 2005, p. 112).

The real issue for Francione, then, is how animals’ interests are unprotected when they are legally considered property, and these unprotected interests are weighed against human interest in using animals as property, which is protected through property rights.<sup>14</sup> When animals exist under the legal category of property, according to Francione, the law does not treat animals like sentient beings with fundamental interests, but rather, treats them as it would treat inanimate objects (2004, p. 116).

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<sup>14</sup> Francione’s central thesis is “that legal welfarism requires that we balance animal interests unprotected by claims of right against human interests protected by claims of right in general, and in particular, by claims of human property rights in those animals” (Francione, 2005, p. 91).

For Francione, animals' sentience gives rise to moral consideration of their interests (2004, pp. 112–113). Animals have an interest in *not being treated like property*, and this comes into direct conflict with the interests of human owners who want to use the animal, or to treat the animal like property (2004, p. 117). The current legal system weighs animals' unprotected interests against their human owner's legally protected interests, which most often results in human interests being prioritized in these human-animal conflicts. Francione argues that if we are to provide equal consideration to animals' interests, "we have no choice but to accord animals one right: the right not to be treated as our property" (2004, p. 108). This, however, would only be possible if animals are removed from the category of property and instead recognized as legal persons under his view.

If Francione is right, then animals do not hold rights under legal welfarism and while they are regarded as property. The solution, for Francione, is to provide equal weight to animals' interests, particularly their interest in not being treated like property, which means recognizing them as legal persons with legal rights so their interests can have protections on par with the level of protections for human interests. While human-animal conflicts are bound to continue even while animals hold rights, and animals' rights will be "no more absolute than human rights" (Francione, 2005, p. 10), recognizing animals as legal persons with rights will provide a balanced weighing of interests in human-animal conflicts moving forward. Animal Welfare theorists, however, reject the conclusion that animals need to be considered legal persons and removed from their status as property. I now turn to Animal Welfarists, beginning with Jerrold Tannenbaum, who argues that animals' interests are already given equal consideration under the law, even while animals are considered property.

## *Animal Welfare & Critiques of Animal Rights Theory*

### **Jerrold Tannenbaum**

In his article “Animals and the Law: Property, Cruelty, and Rights” (1995), Tannenbaum argues that it is consistent for animals to be classified as property while simultaneously holding rights. Tannenbaum believes animals already hold rights, thus their interests are already given equal consideration, in light of duties imposed upon humans by AWL.

There are two central claims by Francione that Tannenbaum is interested in.<sup>15</sup> The first is Francione’s claim that the law is incapable of treating animals differently than inanimate objects, which have no interests of their own, while animals are regarded as property (Tannenbaum, 1995, p. 543). The second is that animal anti-cruelty statutes, or AWL, do not provide rights to animals while they are regarded as property (1995, p. 578). Tannenbaum aims to refute Francione by arguing that it is possible to provide equal consideration to animals’ interests, even while they are classified as property. If Tannenbaum is correct, it places pressure upon Francione’s argument that animals’ interests cannot be given equal consideration while they are legally regarded as property.

Conveniently, Tannenbaum formulates an outline of the Animal Activist View influenced by Francione:

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<sup>15</sup> Tannenbaum’s critiques are aimed at Francione’s 1994 article (“Animals, property and legal welfarism: “Unnecessary” suffering and the “humane treatment of animals.” *Rutgers Law Rev* 46: 737), which was incorporated into Francione’s book, “Animals, Property, and the Law,” originally published in 1995 and was later reprinted in 2005 with corrections. The arguments Tannenbaum addresses can be found in chapters one and six of Francione (2005) . Due to publication timing, Tannenbaum was not able to consider arguments from Francione’s book, and Francione was not able to consider Tannenbaum’s arguments prior to publishing in 1995.

### Tannenbaum's Interpreted Animal Activist View

- (1) The law regards animals as a form of property.
  - (2) Historically as well as conceptually, the law began with a category of "property" and placed animals in this category.
  - (3) Animals can be removed from the category of property just as they were placed in it.
  - (4) Personal property, by its very nature, involves "sole and despotic dominion" over it by its owners.
  - (5) Therefore, if animals are property their interests are not important. Animals must give way to their owners. They certainly cannot have legal "rights."
  - (6) If the law is to accord animal interests due regard, or to afford them rights, it must remove them from the category of property.
  - (7) The paradigm of personal property is an inanimate object, or to use Blackstone's other examples (other than animals) "household stuff, money, jewels, corn, garments, and everything else that can be properly put into motion and transferred from place to place."
  - (8) Inanimate things cannot have rights.
  - (9) Therefore, as property, animals cannot have legal rights.
  - (10) If the law is to accord animal interests due regard, or to afford them rights, it must remove them from the category of property.
- (Tannenbaum, 1995, p. 545)

Tannenbaum focuses on premises 4 and 5, with the aim of undermining premise 6 and showing that animals do not need to be removed from the classification of property to have their interests given equal consideration. Tannenbaum charges Francione, as well as animal activists in general, with relying upon a fundamental misunderstanding of the concept of property, which originates from William Blackstone:

In his eighteenth-century survey of English law, William Blackstone provided a classic statement of this conception of property. Blackstone also believed (incorrectly) that this conception was to be found deep in the historical foundations of English law. "There is nothing," he wrote, "which so generally strikes the imagination, and engages the affections of mankind, as *the right of property; or that sole and despotic dominion which one man claims and exercises over the external view of the world, in total exclusion of the right of any individual in the universe.*" Blackstone applied this *notion of absolute and exclusive control to the concept of "chattel" or personal property* (as distinguished from "real property," that is, land or real estate) (Tannenbaum, 1995, pp. 543–544, emphasis added).

The Blackstonian conception of property is incorrect, according to Tannenbaum, because it does not align with our legal practice regarding social limitations on the use of property (Tannenbaum, 1995, p. 555).<sup>16</sup> The social limitations on the use of property play an important role in his argument; Tannenbaum equates current AWL to limitations on the use of animals as property to argue that the law is capable of giving equal consideration to animals' interests while they are property.

Regarding premise 5, Tannenbaum argues that the current existing AWL renders it false. Tannenbaum focuses his discussion on Francione's claim that "close examination of these [anti-cruelty] statutes indicates quite clearly that they have an exclusively humanocentric focus, and the duties they impose give no corresponding rights for animals" (1995, p. 578).<sup>17</sup> Tannenbaum takes Francione to be claiming that AWL is not intended to protect animals themselves. Francione, and other animal right theorists, cannot accept that AWL protects animals' interests, "because the activist view argues that the law does not now give legal rights to animals, and must be changed in certain ways to provide rights for animals" (1995, p. 578). If Premise 5 is false, and AWL does protect animals' interests, then Premise 6 is false. As Tannenbaum explains:

For if cruelty laws do not protect animals, they would not create duties to animals. In general, duties and rights are correlative: if you have a duty to someone, typically that person has a right to whatever you have a duty to do (or not to do) to him. Therefore, if the cruelty laws protected animals and created duties to animals, they would provide rights for animals. (Tannenbaum, 1995, p. 578)

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<sup>16</sup>I find that Tannenbaum incorrectly interprets Blackstone's works. With closer inspection, we find that Blackstone did include social limitations on the use of property as a core feature in his conception of property: "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, *save only by the laws of the land*" (Blackstone, 1979, emphasis added).

<sup>17</sup> Tannenbaum is citing Francione's 1994 article ("Animals, Property and Legal Welfarism: "Unnecessary" Suffering and the "Humane Treatment of Animals." Rutgers Law Rev 46: 737), which was incorporated into Francione's book, "Animals, Property, and the Law," originally published in 1995 and was later reprinted in 2005 with corrections. This quote can be found in Francione (2005) p.124.

Tannenbaum argues that anti-cruelty laws are intended to protect animals' interests, and believes that virtually every legislator, prosecutor, judge, and employee of humane societies will claim that the primary purpose of these laws is to protect animals' interests (1995, p. 580).

Tannenbaum believes that, since AWL creates duties to animals, it also generates rights for animals which serve to protect their interests. He claims AWL serves as social limitations on the use of animals, in the form of legislation that imposes legal duties upon humans, which in turn creates correlative claim-rights for animals because rights and duties are correlative by nature (1995, p. 578). The specific duty imposed upon humans by AWL is “not to treat animals cruelly,” and the legal right this creates for animals is “the legal right not to be treated cruelly” (1995, pp. 581–582).

For Tannenbaum, AWL restricts the actions of owners to provide equal consideration of animals' interests. For example, an owner may have an interest in using an animal for their benefit that includes inflicting unnecessary pain and suffering, but this particular interest of the owner is in conflict with the animal's interest in being free from unnecessary pain and suffering. The owner's interest in this particular scenario is restricted by AWL. This demonstrates how the animal's interest—to be free from unnecessary pain and suffering—is given equal consideration even though the animal is considered property and under human ownership in this scenario.

If Tannenbaum is correct, then premise 6 is undermined by the fact animals currently hold rights (correlative rights) due to AWL imposing duties upon humans for the intended protection of animal interests. If it is the case that AWL is intended to protect animal interests, and provides correlative rights for animals by imposing duties upon owners, then there is no need to remove animals from the classification of property for the law to give equal consideration to animals' interests.

For Tannenbaum, then, there is nothing which prevents entities classified as property from holding rights, or having equal consideration provided to animals' interests. If property status does not prevent animals' interests from being equally considered, then there is no need to remove animals from this category. Some Welfarists, like David Favre, do not fully agree with Tannenbaum, and believe some changes to the current category of property are needed in order to better accommodate animals' interests.

## **David Favre**

In "Living Property: A New Status for Animals Within the Legal System" (2010), Favre argues for the creation of a new category of property: 'living property.' Like Tannenbaum, Favre argues that animals can, and already do have, legal rights. In addition, however, Favre aims to show that the new category of living property would serve to better distinguish between different forms of property; property which is living, and thus has interests of his or her or their own, and inanimate property which, by its nature, has no interests of its own.<sup>18</sup> Distinguishing between living property and traditional property can help to avoid conflating 'property' with 'inanimate objects' and explain the differences of treatment for different forms of property under the law. Put simply, Favre's new category would serve to explain why some property has rights, while other property does not.

Favre suggests the new category to provide a solution to a perceived 'disconnect' between public expectations and rule of law (Favre, 2010, pp. 1022–1023). The disconnect arises from current sentiments towards animals which have evolved over the years, where many

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<sup>18</sup> The other three categories of traditional property are: real property, private property, and intellectual property.

humans now view their pets as members of the family. Current property law, however, does not account for these evolved sentiments. For example, if someone killed my dog, the courts would generally only provide compensation for the dog's current fair market value. In other words, legal compensation would amount to how much it would cost to purchase a dog of the same kind. This type of legal response leads Francione to claim that courts do not recognize the family member status the animal has, and instead treat the animal as 'mere property,' similar to inanimate objects by limiting the owner to the fair market value of the property as compensation (Francione, 2005, p. 24).

Favre disagrees with Animal Rights theorists regarding whether it is acceptable for humans to keep, possess, and use animals, believing that "positive human communities can include animals that are owned and used by humans," (Favre, 2010, p. 1023) and aims to refute the animal right theorists' position that animals cannot hold legal rights while classified as property. Animals should remain as property under Favre's view, but they can hold legal rights with this status. Favre goes so far as to claim that at least some animals already possess legal rights, though he recognizes that these rights are "not equal to the legal rights of humans" (2010, pp. 1023–1024). What is important, however, is to distinguish between property that has interests and should be protected by legal rights, and property which does not. What makes these beings' interests worthy of our consideration, for Favre, is their interest in survival:

Moral and ethical concerns should start with all beings who have self-interests, meaning those who are driven to live a life by the encoding of their DNA. The various species-specific capacities, such as consciousness or self-awareness, of groups of animals will be important for deciding which rights an animal might deserve. However, consideration of capacities is not necessary for initial consideration of admission into the new category of living property (Favre, 2010, p. 1043).

Belonging to the Living Property category is not dependent on what capacities animals have, but rather that they are beings who have interests. For Favre, DNA serves to distinguish which entities in the world have an interest in survival, whereas species-specific capacities would serve to distinguish which rights the beings will have.<sup>19</sup> Favre outlines a non-exhaustive list of possible rights belonging to living property:

1. Not to be held for or put to prohibited uses
  2. Not to be harmed
  3. To be cared for
  4. To have living space
  5. To be properly owned
  6. To own property
  7. To enter into contracts
  8. To file tort claims
- (Favre, 2010, p. 1061).

The legal rights outlined in 1–5 “deal with the life conditions and well-being of the animal. Legal rights 6, 7, and 8 acknowledge the new legal personality that comes along with being the new category of property, living property” (2010, p. 1067). The last three are meant to acknowledge the new ‘legal personality’ that animals will have under this new property category. The fourth and fifth, respectively, allow for Favre’s view to maintain animals’ current status as property, even though there will be some acknowledged ‘legal personality’ that animals will have under the newly proposed property category.

It is debatable, however, whether this development within Animal Welfarism is enough to defend against the critiques presented by Animal Rights theorists who argue that, as long as animals remain property, equal consideration of their interests under the law is not possible. For instance, note Favre’s explicit exclusion of the right to liberty for animals, which is the right the

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<sup>19</sup> Favre notes, however, that the category would not include plants, due to current lack of understanding regarding plant interests, but their potential inclusion is a future possibility (Favre, 2010, p. 1044)

NhRP aims to have conferred to Happy, and how this exclusion highlights the relationship between the right to liberty and legal property status. In order for animals to be within the possession and control of owners, they must be property, and Favre highlights how the right to liberty conflicts with that property status. According to Favre, the right to have living space is important because “it is the substitute for the human right of personal liberty. As property, animals will be within the possession and control of owners. As such, they cannot have the personal liberty that wild animals have” (2010, p. 1065).

The central argument from Animal Welfare theorists is that Wise and Francione hold a problematic view of legal personhood which considers right-holding exclusive to legal persons. Welfare theorists push against this view by arguing that animals already hold rights even though they are considered property and not legal persons. As I have noted in my introduction, however, one wonders what each side means by a ‘right’, if one says animals do not currently possess rights and the other says they already possess rights. In the next chapter, I aim to provide conceptual clarity to this disagreement. To do so, I draw from Saskia Stucki’s work on kinds of rights, as well as Visa Kurki’s proposed alternate theory of legal personhood.

## Chapter 2: Rights and Legal Personhood

### Saskia Stucki

In her article, “Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights” (2020), Stucki seeks to develop a more systematic legal theory of animal rights (Stucki, 2020, p. 535). In doing so, Stucki argues it is conceptually possible for animals to hold rights, and explores what sorts of rights are currently conferred to animals by existing AWL (if any). Stucki argues that the currently existing AWL does not codify any explicit legal rights for animals. To try and address this, she distinguishes between simple and fundamental rights to provide conceptual clarity to what falls under the umbrella of ‘animal rights.’

While arguing for the conceptual possibility for animals to hold rights, Stucki focuses on two of the four conceptually basic rights outlined by Hohfeld, claim-rights and liberties. As Stucki explains claim-rights, “[t]o have a right in the strictest sense is ‘to have a claim to something and against someone’, the claim right necessarily corresponding with that person’s correlative duty towards the right holder to do or not to do something” (2020, p. 537). The definition of a claim-right aligns neatly with current AWL. Animal Welfare Legislation, according to Welfarists, imposes duties on humans to refrain from certain actions as well as imposing certain duties of care. In such instances, animals hold a corresponding claim-right, which amounts to “animals holding a claim to something against, for example, humans or the state who bear correlative duties to refrain from or perform certain actions” (2020, p. 537). For Stucki, the structure of claim-rights is fitting for animals, due to these rights being passive in

nature: passive rights do not need to be actively exercised by the agent, but simply enjoyed (2020, p. 538).

Animal liberties, on the other hand, are “active rights that concern the right holder’s own conduct” (2020, p. 538). Stucki defines a liberty as “one’s freedom of any contrary duty towards another to eschew or undertake that action, correlative to the no right of another” (2020, p. 538). To make it simpler: “having a liberty right amounts to being free from a specific duty to do otherwise” (2020, p. 538). This structure of liberty rights can lend itself to animal rights, which would simply mean that an animal “is free to engage in or avoid certain behaviours” in situations when they lack a specific duty to do otherwise (2020, p. 538).

Commentators, such as the court majority in the *Happy (2022)* case, have argued that animals are incapable of holding any legal rights because they cannot bear duties. Stucki recognizes that animals cannot hold legal duties in any meaningful sense, but questions whether this prevents animals having rights altogether, particularly rights against “competent humans and the state” (2020, p. 539). While the possession of claim-rights necessarily implies the presence of duties in others, Stucki argues that commentators often conflate the correlativity of rights and duties with the reciprocity of rights and duties, which results in the mistaken conclusion that animals cannot have rights. Tracking this distinction allows for animals to hold rights without themselves bearing duties. Stucki explains that *correlativity of rights and duties* is “the notion that every claim right necessarily implies a duty,” whereas *reciprocity of rights and duties* is “the notion that (the capacity for) rightholding is conditioned on (the capacity for) duty bearing” (2020, p. 539). As an example, we can understand the court majority in the *Happy (2022)* case as relying on the reciprocity of rights and duties in their argument that Happy cannot hold rights, because she cannot bear any duties. Noting that there could be normative reasons to constrain the

scope of right holders to those who themselves can also bear duties, or capable of the reciprocity of rights and duties, Stucki claims that we ought to reject this view, as it does not align with contemporary legal systems. In the case of infants and mentally incapacitated adults, contemporary legal systems have severed the strict connection between bearing rights and duties. Infants and the mentally incapacitated enjoy the benefits of rights, but cannot be made to bear duties in any meaningful sense. As such, we have already expanded the scope of potential right holders to include ‘duty-less entities,’ so it is therefore not contradictory to claim that animals can hold rights without themselves bearing duties (2020, p. 540).

However, Stucki highlights that the term ‘animal rights’ is used in a vague and inconsistent manner by opponents and proponents alike. Noting that animals do not currently have any legally recognizable and claimable rights, Stucki finds that there is a “certain inclination to talk about animal rights as if they already exist under current animal welfare legislation” (2020, p. 543). She argues that existing Animal Welfare Legislation does not codify any explicit animal rights, even if it does impose legal duties on humans with the intention to protect animals’ interests, leading others to conclude that claim-rights are conferred to animals because they benefit from these duties (2020, p. 544). While such claim-rights could be extracted from the language of AWL, these claim-rights are without unequivocal wording and thus left as a matter of legal interpretation in the courts (2020, pp. 547–548).

Stucki believes there are substantive reasons to question whether these rights extracted from Animal Welfare Legislation can be properly called rights at all (2020, p. 548). Rights for animals extracted from AWL are “unusually weak rights that do not afford the sort of strong normative protection that is ordinarily associated with legal rights” (2020, p. 548). Rights typically provide a robust sort of legal protection against individual or collective interests by

highlighting specific interests that should not be considered in the utilitarian calculus or sacrificed for the sake of social interests (2020, pp. 548–549). Current ‘rights’ extracted from AWL, however, fall short of this level of protection “because they protect interests of secondary importance or because they are easily overridden” (2020, p. 549).

To illustrate, Stucki examines two kinds of rights gathered from this extraction method. The first kind of rights—extracted from the duties imposed on humans by AWL toward animals—focus on a narrow set of interests, which Stucki calls ‘secondary interests.’ For instance, animals have the “right to be slaughtered with prior stunning...or the right of chicks to be killed by fast-acting methods,” (2020, p. 549). These extracted rights protect only certain secondary interests, since they are “premised on the permissibility of harming the more primary interests at stake” (2020, p. 549). An animal’s right to be killed in a painless manner assumes the permissibility of harming the animal’s primary interests, in this case the animal’s interest in not being killed at all (2020, p. 549).

The second kind of rights protect primary interests, “such as a right to well-being, life, dignity, not to suffer unnecessarily, or against torture and cruel treatment” (2020, pp. 549–550). These rights are fundamental. However, she argues that these rights have a problematically low threshold for permissibility of infringement; they lack the appropriate normative force which results in there being no guarantee of these rights for animals. While most rights, whether human or animal, are *prima facie* rights that allow for balancing of conflicting interests, the purpose of a right is to safeguard against certain trade-offs where important individual interests are sacrificed for other interests which are intrinsically less important. This safeguarding, Stucki argues, does not occur, as animals’ supposed protected interests are entered into the utilitarian calculus and are outweighed by human interests that are comparatively less important, such as “dietary and

fashion preferences, economic profitability, recreation or virtually any other conceivable human interest” (2020, p. 550).

Stucki argues that “if one adopts the view that animals’ existing legal protections constitute legal rights...then an important qualification needs to be made regarding the nature and limits of such ‘animal welfare rights’” (2020, p. 551): one must emphasize that these ‘animal welfare rights’ fall short of the ordinary understanding of legal rights as strong protections of important interests, as well as falling short of granting the inviolable basic animal rights, similar to human rights, that Animal Rights theorists argue for (2020, p. 551). From this, Stucki believes it is warranted to distinguish the sort of weak rights that animals are perceived to hold in light of AWL, or simple rights, from the kind of ideal and strong rights she calls fundamental rights, that animals potentially ought to hold in the future.

Simple and fundamental rights can be distinguished based on two factors. The first is substance, or whether the interest protected is fundamental or non-fundamental, and the second is its normative force, or the degree of infringeability. Simple rights are weak legal rights, their substance non-fundamental, and characterized by a high degree of infringeability. Fundamental rights, on the other hand, are strong legal rights, akin to human rights, whose substance is fundamental and difficult to override (2020, p. 552).

The rights extracted from AWL are simple rights. However, Stucki notes that simple rights that concern an animal’s primary interests could in the future become fundamental rights, if backed by the appropriate normative force. Doing so would provide two advantages. The first is a procedural advantage, which relates to animals’ standing in courts and enforceability of their rights, and the second a substantive advantage, as these rights would improve and fortify the

protection of important animal interests. Echoing Francione, Stucki concedes that the current balancing process which governs human-animal conflicts is “predisposed toward prioritization of human over animal interests” (2020, p. 554), but argues that animals’ possession of fundamental rights would create the necessary “structural preconditions for a level playing field where human and animal interests are both reinforced by equivalent rights, and can thus collide on equal terms” (2020, p. 554).

While Stucki clarifies the distinction between the correlation and reciprocity of rights and duties, as well as the distinction between simple and fundamental rights, Visa Kurki can help establish animals as capable of holding rights without bearing duties under an alternative view of legal personhood. In the following section, I review Kurki’s arguments, including his critique of Wise’s view of legal personhood and Wise’s attempt to overcome recent court arguments based on the reciprocity of rights and duties through the appeal to immunity-rights. Kurki focuses on the potential of animals holding claim-rights and how this can lead to animals not needing to bear duties to be considered legal persons.

### **Visa Kurki**

Legal personhood is not seen by Kurki as a broad, one-size-fits-all category, with everything belonging to this category as having the same rights. Rather, he argues legal personhood should be seen as a bundle of associated active and passive incidents that shape the entity's distinct legal personhood.<sup>20</sup> His proposed alternative theory provides a better framework for understanding that different legal persons, such as humans or corporations, will have

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<sup>20</sup> To reconstruct Kurki’s view on legal personhood, I draw from (2019) and (2021).

different interconnected incidents of personhood, and thus differing legal rights and duties, while still belonging to the same general category of ‘legal person.’

Kurki outlines what he refers to as the ‘orthodox view of legal personhood,’ which is typically formulated in the following three ways:

1. X is a legal person if and only if X has legal rights or duties (*rights-or-duties position*).
2. X is a legal person if and only if X has legal rights and duties (*rights-and-duties position*).
3. X is a legal person if and only if X has the capacity for rights or duties (*capacity-for-rights position*). (Kurki, 2021, p. 50)

Though each formulation is slightly different, Kurki notes that each “connects rights and legal personhood together in a black-and-white manner: One can hold rights if and only if one is a legal person. Thus, there is no ‘gray area’ in between legal persons and nonpersons” (Kurki, 2021, p. 51). Kurki views Wise as holding the capacity-for-rights position (third formulation), though he points out there are two ways to interpret this position. We can interpret the capacity to hold a right as either a conceptual capacity or a legal capacity. Kurki argues that Wise interprets it as a legal capacity for rights, which is commonly understood as a conferred status by the legal system (2021, p. 52). However, Kurki claims the capacity-for-rights view stems from 19th century German theories of private law that deal primarily with issues related to contracts and property. In the context of contracts, the capacity-for-rights view makes sense, as a “legal system can determine who has the capacity to acquire private law rights by, for instance, deciding whose agreements to enforce,” (2021, p. 52). Corporations serve as a clear example, as they receive the capacity to hold private law rights once they are registered (2021, p. 52). This view of legal personhood, however, only serves to explain the rights to enter contracts and own property, which “are not the kinds of rights the NhRP is primarily interested in” and does not

serve to effectively explain the aspects of legal personhood most relevant to animals (2021, p. 52).

Kurki proposes an alternative view, which he calls the Bundle Theory of Legal Personhood. The Bundle Theory views legal personhood as “a cluster property and consists of incidents which are separate but interconnected...[and] involve primarily the endowment of X with particular types of claim-rights, responsibilities, and/or competences” (2019, p. 5). Important to this formulation is that not all legal persons will hold the same rights and duties. Rather, different legal persons will have different clusters or bundles of incidents, those ‘incidents’ being the endowment of particular rights and/or duties. Kurki argues this incident-based understanding of legal personhood is well-suited to explain the differences between the legal personhood of humans and the legal personhood of corporations, which are both considered legal persons, but have differing rights and duties. Just as corporations do not have the exact same rights or duties as human beings, Kurki believes this could be similar for animals (2019, p. 19). Kurki states that the interconnected incidents, or endowment of particular “claim-rights, responsibilities, and/or competences” of legal personhood can be grouped into active and passive incidents (2019, p. 94).

Adult human beings serve as the paradigm example of active legal persons, and is the sort of legal personhood one may generally think of when considering the concept of legal personhood (2019, p. 145). The active incidents of legal personhood are divided by two features: legal competences and onerous legal personhood. Legal competences require “the capacity to perform acts-in-the-law” and involve acts such as engaging in contracts, filing tort claims, and other actions which require an intention to effect a legal consequence (2019, pp. 147–148). The second feature of active personhood, onerous legal personhood, is related to legal responsibilities

and “entities that can hold legal duties are the only candidates for onerous legal personhood. There is really just one class of beings who are uncontroversially endowed with onerous legal personhood: adult humans of sound mind” (2019, p. 146).

This particular form of legal personhood, active legal personhood, does not accommodate animals well. Considering legal competences, it is very unlikely that animals will be able to have a capacity-to-act-in-the-law without a representative. Considering the onerous legal personhood features, it is often aptly observed that animals cannot be thought of as holding legal responsibilities in any meaningful sense. Furthermore, active legal personhood would also rule out a great number of humans from being considered as legal persons, such as infants, children, and adults who are considered as lacking the legal competencies related to ‘adults of sound mind’.

Passive legal personhood, on the other hand, better accommodates those beings regarded as not fulfilling the requirements of active personhood. Infants serve as a paradigm example of individuals with only passive incidents of legal personhood, or purely passive legal persons, contrasted with adults of sound mind who have both active and passive incidents of personhood (2019, p. 140). Infants are endowed with the following passive incidents of legal personhood, whereas these are not currently endowed to animals:

1. their lives, liberty, and bodily integrity are protected;
2. they have standing in courts (though infants need, of course, someone else to represent them);
3. they may own property even if they cannot dispose of it independently;
4. they are not susceptible to being owned
5. they are protected by criminal law as potential victims (killing a newborn counts as a homicide, which is not the case with foetuses in most jurisdictions);
6. they can undergo legal harms (torts) which may lead to restitution or compensation, owed to the infant. (Kurki, 2019, pp. 5–6)

Passive legal personhood can be viewed through two different categories of incidents: substantive and remedy incidents. Substantive incidents relate primarily to what claim-rights or liabilities are held by, or could be held by, X. For instance, “if X’s life, liberty, and personal integrity are protected, then the number of duties owed by ‘the world’ towards X is larger than otherwise” (2019, p. 95). Another way of thinking about this is that if an infant’s life, liberty, and personal integrity are protected (by claim-right), then others in the world would have a duty to respect those rights in return. Remedy incidents, on the other hand, deal with the legal remedies available to X if those duties held by others in the world toward X are not respected (2019, p. 95). If someone were to violate an infant’s life, liberty, or personal integrity, the infant would be considered a victim in criminal law and have standing to pursue legal action (through a representative). Claim-rights are important components of passive incidents of legal personhood, as virtually all passive incidents function through claim-rights (2019, p. 141).

For Kurki, those with only passive incidents of legal personhood are considered purely passive legal persons who benefit from holding rights, yet do not hold duties. This shows that certain legal persons are capable of holding rights without duties, contrary to the court’s continued claims that personhood is reserved for entities who can hold both. While active legal personhood is “connected to the capacity to perform acts-in-the-law,” passive legal personhood functions primarily through claims (2019, p. 26). Active legal personhood, on the other hand, does not function primarily through claims, but rather focuses on the capacity to act within the law. While animals are not well-suited for being considered active legal persons, the concept of passive legal personhood can be extended to include animals.

Having reviewed Kurki’s distinction among active and legal personhood, I turn to his critique of Wise. Recall that, in response to recent court arguments that animals cannot hold

rights without bearing duties, Wise asserts that animals can hold the right to bodily liberty, because this is an immunity-right rather than a claim-right (Wise, 2019, p. 375). Kurki critiques Wise's focus on immunity-rights, claiming the emphasis of immunity-rights in Wise's arguments comes at the expense of supporting arguments for animals' possession of claim-rights. Kurki agrees that immunities are important: "many constitutional rights have a significant immunity component, as they disempower legislatures from enacting laws that infringe upon the rights protected by the constitution" (Kurki, 2021, p. 54). However, "conceding that animals cannot hold claim-rights would be extremely problematic—because at the core of virtually all meaningful animal rights is a claim-right. For instance, the right to bodily integrity is certainly correlated by the duty of others to refrain from infringing said integrity" (2021, p. 54). Aside from this, Kurki argues that the overall project of the NhRP would be compromised if claim-rights can only be held by those who can also bear duties, and insists we instead support arguments for animals' possession of claim-rights, which would allow them to be considered passive legal persons (2021, p. 54).

Claim-rights, Kurki argues, fit well with the interest theory of rights, which does not presuppose that an entity itself bears duties in order to hold rights, but rather presupposes that those who hold a claim-right have interests. Claim-rights always involve correlation of a right to a duty, but as Kurki notes, the duty is always held by *someone*, and it is most often held by *someone other than the right-holder*. From this Kurki argues that animals themselves do not need to bear duties in order to possess a claim-right, as the correlated duty would be held by someone else (2021, pp. 54–55).

Under Kurki's Bundle-Theory, only active legal personhood requires reciprocity of rights and duties, whereas passive legal personhood functions primarily through claim-rights. Kurki

and Stucki both argue that claim-rights require only a correlation between a right and duty. With these conceptual resources in hand, it is possible to consider animals as holding claim-rights similar to those held by infants while also not bearing duties, as bearing duties is only related to active legal personhood under Kurki's view. While their arguments present the conceptual possibility of animals holding rights without duties, it will be necessary to determine whether animals have an interest in liberty to be protected by the fundamental right to liberty. In the following chapter, I adapt Stucki and Kurki's work to argue that animals should be conferred the fundamental right to liberty and thus removed from their legal status as property.

## Chapter 3: Animals as Passive Legal Persons with the Fundamental Right to Liberty

The central disagreement among AR theorists and Welfarists rests upon a conceptual confusion regarding whether animals can, and do, hold legal rights. By adopting Stucki's distinction between fundamental and simple rights, as well as Kurki's Bundle-Theory of Legal Personhood, we can resolve this confusion to understand animals' current legal position. In this chapter, I argue that by keeping track of these distinctions between simple and fundamental rights, as well as between active and passive persons, we can conclude that animals should have the right to liberty. First, I outline why animals ought to be considered legal persons with a right to liberty. Second, I review competing views of autonomy and liberty in consideration of what interest animals may have in liberty. Third, I discuss my view's implications for different animals and our relationships with them. Fourth, and finally, I return to consider the *Happy* (2022) case, to argue that Happy should be conferred the right to liberty, thus consequently released from her captivity in the Bronx Zoo and relocated to an elephant sanctuary.

### **Clearing Conceptual Confusion**

#### **Animals Lack Fundamental Rights**

Let us first briefly revisit the *Happy* (2022) case: the NY Supreme Court determined that Happy, as all other animals, do not have rights. The court goes so far as to claim that animals

*cannot* hold rights because animals, unlike humans, cannot bear duties.<sup>21</sup> Recall that Welfarists assert that animals can—and in many cases already do—hold rights while they are considered property. This is a puzzling claim, in light of repeated judicial determinations that conclude the opposite. Animal Rights theorists, on the other hand, at least find agreement with the courts that animals currently *do not* hold rights, but run into disagreement on whether they can. From this, I believe it reasonable to conclude that Welfarists are concerned with a wholly different conception of a right than the conception which the courts and Animal Rights theorists appear to share. We can resolve this confusion and move forward by adopting Stucki’s claim that ‘animal welfare rights’ highlighted by Welfarists should be regarded as Simple Rights and distinguished from fundamental rights (Stucki, 2020, p. 551).

Let us suppose that the duties imposed on humans by AWL *do* generate some kind of legal rights for animals. If we are to accept the Welfarist claim that animals hold some legal rights in light of AWL, we should clarify how they differ from the rights commonly held by humans. According to Stucki, we should distinguish the rights Welfarists believe animals to hold as simple rights, which differ from fundamental rights in two ways: First, the simple right is only aimed at protecting a secondary interest, such as the interest in not being killed *painfully*, rather than a primary interest in *not being killed* (Stucki, 2020, p. 549). Second, the simple right is aimed at protecting a primary interest, but has a low level of justification for overriding, which causes these primary interests to be sacrificed for humans’ secondary interests. Fundamental Rights, on the other hand, protect primary interests *and* require a high level of justification for overriding. It is this conception of a right which I will focus on. Welfarists have concluded that

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<sup>21</sup> This is also not the first time courts have made such a ruling, as this echoes the determination made in the cases of Tommy and Kiko. See *Tommy v. Lavery* (N.Y. 2017) and *Kiko v. Presti* (N.Y. 2018).

animals currently hold rights while also being considered property, but these are only simple rights and not akin to the fundamental rights held by humans. I conclude that animals do not currently hold *fundamental* legal rights to provide protections to their *primary interests* while considered property under our current legal system. My claim is consistent with past judicial rulings, unlike arguments presented by Welfarists. However, this leaves open whether animals *could* and *should* hold fundamental rights.

### **Animals as (Passive) Legal Persons: Holding Rights Without Duties**

While the courts and Animal Rights theorists agree that animals do not currently hold fundamental legal rights, they disagree on whether animals *ought* to hold legal rights. The courts have argued that animals *cannot* hold rights because they cannot bear duties. The court, however, relies on the traditional view of legal personhood, which runs into problems better resolved by Kurki's alternative Bundle-Theory.

First, Kurki's Bundle-Theory provides a framework for understanding different entities belonging to legal personhood by viewing the category as a cluster-property consisting of different and interconnected incidents. Under this view, it is not an entity's recognition as a legal person which bestows various rights, but conversely, the various rights held by an entity shape the entity's legal personality. Consider human beings and corporations. These entities would often be considered as having more differences than commonalities, yet both are considered legal persons. Importantly, though both are considered legal persons, they do not hold the same set of legal rights. If recognition or placement in the category of legal person determined what rights an entity would hold, then humans and businesses would hold the exact same set of rights, but this is not the case. Depending on the legal context, a corporation may be considered a legal person

or property, but never as both at the same time in any given instance. For example, in legal disputes regarding the corporation's ownership of particular real estate assets, the corporation itself is considered a legal person, as it holds property and ownership rights. On the other hand, in a legal context involving a dispute over the distribution of appropriate share-holder earnings, the corporation will be considered as property owned by the individual shareholders (Velasco, 2010). The Bundle-Theory accommodates such situations of legal duality through the acknowledgement that different forms of legal personhood will have different sets of rights. Some sets contain more or fewer rights associated with legal personhood and allows us to see legal personhood on a continuum with, rather than as a binary to, property status. This helps to move away from the perceived dichotomy between legal personhood and property associated with the traditional view of personhood which past Animal Rights theorists have been critiqued for endorsing. Under the traditional view, it is often claimed that an entity can only fall into one of two categories: person or property, and at times it seems this is taken as meaning that if an entity is considered a person then it cannot ever be considered property or vice versa. The Bundle-Theory allows us to understand more easily that an entity can be regarded as a legal person in one legal context, and as property in a different legal context.

Furthermore, Kurki distinguishes between incidents related to active and passive legal personhood, which not only allows room for the protection of animals, but better accommodates the protection of humans when compared to the traditional view of legal personhood. If courts were firm on their requirement that an entity bear duties to be considered a legal person with rights, this would restrict legal personhood to only the incidents of active personhood. If active personhood was viewed as the only form of legal personhood, then a large portion of the human population would lack legal protections for their most fundamental interests, since they lack the

legal competencies necessary for active personhood. The consideration of infants and children reveals that the law already accommodates granting rights to entities who do not bear duties, or passive legal persons who lack the legal competencies, yet still enjoy protections provided by fundamental rights. In particular, Kurki considers children as the paradigmatic passive legal person whose right to life and liberty are protected, even though they cannot reciprocate in holding duties (Kurki, 2019, p. 145). One could argue, however, that children's fundamental interests are protected, because, even though they cannot bear duties *now*, they will hold duties and reciprocate *in the future*, when they become an adult of sound mind. While this is a potential reason for granting children legal protections, this would not address individual humans who live with cognitive disabilities and cannot be expected to bear duties *now* or *in the future*. For these reasons, we should favor Kurki's Bundle-Theory over the traditional view of legal personhood. Animals *could* be considered passive legal persons, if and only if they are first granted a right which serves as an incident to passive legal personhood, such as the fundamental right to liberty also enjoyed by infants, children, and adult humans living with cognitive disabilities in this category.

### **Legal Status as Property and the Compatibility with Passive Legal Personhood**

One may notice that Kurki's Bundle-Theory would allow for situations in which an animal could have incidents belonging to passive legal personhood while continuing to be regarded as property. This would make it compatible with Favre's argument for the category of living property, which suggests that animals ought to hold a right to property, while themselves remaining property.<sup>22</sup> Under Kurki's view, the right to property is an incident of passive legal

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<sup>22</sup> The right to own property was the sixth right listed by Favre belonging to living property. Favre provides examples of potential applications of this view, such as compensating animals for their labor by having

personhood, and Kurki also claims that it is possible for an entity to own property while themselves being property (Kurki, 2019, pp. 103–104). The right to property, however, is not my focus; instead, I would like to focus on animals' possession of the right to liberty.<sup>23</sup>

It may be the case that *some* incidents of passive incidents of legal personhood are compatible with property status, such as an entity holding a right to property while themselves being property. This, however, does not mean that *all* incidents of legal personhood are compatible with property status. I argue there is an irreconcilable conflict between animals' possession of the fundamental right to liberty and their legal status as property. To support this claim, consider how Favre also hints towards this irreconcilable conflict in his discussion of the rights animals would hold under his proposed living property category. In his argument for animals' right to adequate living space, Favre claims that this serves as the substitute for the right to liberty for these animals as they will need to be under ownership and control of humans (Favre, 2010, p. 1065). Under Favre's view, then, having a right to liberty and being property are not reconcilable for animals. To understand this conflict between an entity's possession of the fundamental right to liberty and legal status of property, we will need an understanding of what we mean by *liberty* and whether this is an important interest to animals that should be protected by a fundamental legal right.

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the animal's owner set aside a portion of the earnings for the animal's benefit, or how animals could be designated beneficiaries of a trust, while remaining under the property of a human. See Favre (2010) p. 1061 and pp. 1067–1068.

<sup>23</sup> I focus on the right to liberty because it is a fundamental right which corresponds with a primary interest, and this right has a higher requirement on justifications for infringement compared to the simple rights from AWL. While one could argue that we do not need to focus on animals' right to liberty and can instead focus solely on protecting their welfare interests, this would not address the current issue of animals' primary interest in liberty being given unequal consideration and consequently sacrificed for humans' secondary interests, such as entertainment or dietary preference, which results in many harms to animals and violates their interest in welfare.

## *Animals' (Intrinsic) Interest in Liberty*

To clarify: my focus is on the right to liberty because this is the specific right which the NhRP argues for in the *Happy* (2022) case, rather than for her to hold rights *in general*, or other specific rights, such as the right to property. We can work from Feinberg's interest theory of rights, which considers the purpose of a right to protect important and relevant interests. Doing so will help clarify what it means for an animal to have an interest in liberty, and what we mean by liberty in these cases. Specifically, I consider three different conceptions of liberty: positive liberty, negative liberty, and republican liberty, and whether animals can be said to have an interest in these conceptions of liberty. I argue that animals have an intrinsic interest in negative and republican liberty. To show this, I first consider Alisdair Cochrane's work on animals and liberty. Cochrane endorses a positive definition of liberty to argue that animals have only an instrumental, rather than intrinsic, interest in liberty.<sup>24</sup>

Cochrane argues that most humans have an intrinsic interest in positive liberty because humans are capable of the higher order thinking necessary for autonomy. Autonomy, according to Cochrane, is the ability to frame, revise, and pursue one's own conception of the good (Cochrane, 2009, p. 665). For Cochrane, it is questionable whether nonhuman animals possess the cognitive capabilities for higher order thinking that humans have which is considered as necessary for autonomy (2009, pp. 667–668). If humans possess the cognitive capabilities to frame, revise, and pursue their own conception of the good, and animals do not, then we should conclude that humans have an intrinsic interest in the freedom of autonomy and animals do not. However, Cochrane argues that animals may have an instrumental interest in liberty and though

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<sup>24</sup> Cochrane, Alasdair. Do Animals Have an Interest in Liberty? *Political Studies*, Vol.57 (2009), pp. 660–679.

this interest is only instrumental, there are many animals who will necessarily be harmed by restrictions to their liberty (2009, p. 674). In other words, some restrictions on animals' liberty can infringe on animals' intrinsic interest in not suffering. We should therefore, according to Cochrane, focus on attending to animals' intrinsic interest in not suffering, which liberty may be instrumental for, through Animal Welfare regulations—without concerning ourselves with animals' liberation (2009, pp. 674–675).<sup>25</sup>

I find Cochrane's analysis too strict, particularly due to the Kantian conception of autonomy and the conception of liberty he endorses. These not only make it difficult to attribute autonomy to nonhuman animals, but to a great number of humans, such as infants, children, or adults who live with cognitive disabilities. If Cochrane takes liberty to be the "freedom to frame, revise and pursue one's own ends" (2009, p. 666) and we find that there are humans who are not considered as possessing these cognitive capabilities, then they could not be considered as having an intrinsic interest in freedom of autonomy. Cochrane admits this, noting that some humans may be considered as lacking autonomy, which would imply that these humans would only have an instrumental interest in liberty just as animals do: "...while I do deny that non-autonomous humans possess an intrinsic interest in liberty, I *do not* deny their other interests" (2009, p. 676). Robert Garner argues this could lead to unfavorable conclusions regarding the status of many humans who are not viewed as satisfying the criteria (Garner, 2011). If these humans do not have an interest in liberty, then there would be no harm in placing these individuals under the ownership of those who are considered to have Kantian autonomy. Most would consider such a situation morally reprehensible and out of the question. To avoid these

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<sup>25</sup> Cochrane notes that the current regulations do not go far enough (Cochrane, p. 675) and appears to be opposed to intensive farming, experimentation, zoos, and circuses, not because keeping and using animals is itself harmful, but because they cause suffering to the animals (Cochrane, p. 674).

issues, we should consider other, less strict conceptions of autonomy and liberty which can serve to protect at least every human's interest in liberty. In particular, negative and republican conceptions of liberty can be useful here.

Jeremy Waldron (1992) helpfully elucidates the concept and importance of negative freedom, focusing on homelessness. People experiencing homelessness find themselves in a situation of unfreedom when they have no private residence to perform basic bodily functions, such as sleeping and going to the bathroom, and are constrained or punished by the general prohibition of these actions in public locations. Rather than human rationality serving as the focal point for his discussion of freedom, Waldron focuses on embodiment. Waldron recognizes the freedom to perform one's basic bodily functions may not be the kind of high-minded freedom associated with freedom of speech or other liberties commonly thought of. The freedom to engage in these actions, however, is significant, as the regular performance of these basic bodily functions is essential to maintaining a decent and healthy life, and can be essential to maintaining life itself (Waldron, 1992, p. 47). The performance of these bodily functions makes one's life go better, whereas interference makes them worse off. Humans, as embodied beings in the world, have an interest in the freedom from interference to perform their natural bodily functions. These considerations of embodiment can be extended to animals, as they too exist as embodied beings in the world.

If negative liberty requires that there be no constraints or interference to an individual's actions from others that prevent her from doing what she wants, and animals are sentient beings with the capacity for preferences, desires, and intentional action, then, according to Valéry Giroux, it may be the case that all mobile beings can be wronged when their actions are impeded in certain circumstances by an external agent. Captivity of these embodied beings, then, can

constitute a harm, as the captivity causes anxiety, fear, and pain, or at the very least frustrates the satisfaction of the animal's preferences and desires while vastly limiting their available options (Giroux, 2016, p. 33).

According to Giroux, if we accept that animals have an intrinsic interest in the absence of interference, then sentient animals also have an interest in being in situations in which this interest is not jeopardized by an inferior moral or legal status that allows for the potential of this interference. We can therefore reasonably conclude that animals will also have an interest in the absence of *potential* arbitrary interference, or an interest in republican liberty (Giroux, 2016, p. 36).

There are situations in which we can say humans' interest in negative liberty, or absence of interference, is not violated; and yet, they are unfree. Imagine a society which is ruled by an absolute monarch. This monarch may let their subjects do as they please and does not interfere in their lives. One could say that the subjects are free because their negative interest in liberty is not violated, as they do not experience interference in their lives. These subjects are nevertheless under the king's authority and mercy, as at any time the king may decide to interfere with their lives and violate their negative liberty.

While negative liberty is centered on the actual absence of interference, republican liberty is violated if there is even the *risk* of arbitrary interference (Giroux, 2016, p. 36). This liberty is dependent upon the relational structure between individuals or groups being free from the potential of arbitrary interference in their actions, sometimes expressed as freedom as non-domination (Pettit, 1996). Even if the monarch never exercises their arbitrary power over their subjects, and instead chooses to exercise benevolence, the monarch's subjects still live under his

domination. These individuals would continue to live under a position of “constant and unacceptable vulnerability” (Giroux, 2016, p. 38). To illustrate my point with regard to animals, consider the example of the benevolent owner provided by Giroux:

For instance, we can think of a dog who was born in a human environment and whom we have taught to respect traffic lights and to relieve herself in the backyard, solely with a positive reinforcement training method (i.e., with rewards and never with punishment). This dog could find herself in a situation in which she walks around as she pleases without any collar or leash, enters and exits the house by her own “dog door,” drinks and eats when she wants, and rests when she so decides, without ever being disturbed in her activities. This dog could keep her status as property without her master interfering in her activities. Her “negative” interest in liberty could be respected despite her legal status as a thing or property. (Giroux, 2016, p. 34).

Analogous to the benevolent monarch, we can similarly conclude that animals’ status as property does not *necessarily* prevent animals from enjoying negative liberty. However, such a conclusion does not rule out the *possibility* of animals undergoing arbitrary interference from owners. While Welfarists like Favre (2010) argue that positive human and animal relations can exist while animals are property, they elide the many negative human and animal relations currently possible while animals are property, placing them in a precarious and vulnerable position with respect to arbitrary interference. Though some animals may be property of a benevolent owner, animals’ property status nonetheless positions animals in an inequitable legal position and conflicts with their interest in republican freedom, or freedom from domination.

### **Humans’ Arbitrary Power Over Animals**

If animals have an intrinsic interest in republican liberty, and if humans are in a privileged legal position to exercise arbitrary power over animals, then animals are in a position of being dominated and deprived of their interest in republican liberty. We have good reason to believe that animals do have an intrinsic interest in republican liberty, but are humans in a social

position to exercise arbitrary power over animals? I believe the answer is a strong yes and this is because of the legal relationship humans and animals find themselves in.

By relegating animals to the status of property, or an entity without the right to liberty that can be appropriated by and placed under the direct control of humans, all sentient animals are at risk of potential arbitrary interference from humans. Some Welfarists will likely contend that the owner/property relationship between human and animal is not one of domination, by appealing to the fact that there are social limitations on the use of property, including the use of animals as property, and therefore owners do not have ‘absolute dominion’ over the animals (Tannenbaum, 1995). Others, such as Favre, will claim that we can provide further legal rights to animals while they are property, and can therefore improve the protection of their interests. I want to push back on this idea and argue that humans’ capacity for arbitrary interference emerges from the fact that humans are the ones who have determined that it is acceptable to keep, own, and use animals, or to consider them property for the use of human interests and ends.

The position put forth by Welfarists is simply another argument for the benevolent owner, which shares the same issues found in the example of the benevolent monarch. Regardless how benevolent the dominator is, the subject with inferior status will live under constant threat of arbitrary interference and is thus without republican liberty. Welfarist arguments amount to directing us to fulfill the ideal of the benevolent owner, requiring us to only respect certain recognized secondary interests, while animals are still property of their human owners and thus in a position of domination and unequal status. Such an approach will never give equal consideration to animals’ primary interest in republican liberty.

Giroux concludes that in order to offer animals a ‘republican type of liberty,’ we need to grant them the status of person, which comes with similar protections as those provided by fundamental human rights (Giroux, 2016, p. 38). Giroux can be interpreted as taking the traditional view of legal personhood, which views recognition as a legal person as leading to a plethora of rights. Under my reformed Animal Rights view, which incorporates Kurki’s Bundle-Theory of legal personhood, I instead argue that the recognition of animals’ intrinsic interest in republican liberty is reason enough to confer animals the fundamental right to liberty, and animals can hold this fundamental right without bearing duties when consequently recognized as passive legal persons. In my view, the endowment of the right to liberty to animals is what provides the protection for this interest, and is what leads to animals’ recognition as legal persons, rather than the traditional view of animals’ recognition as legal persons endowing them with fundamental protections.

Additionally, I propose we consider a guardianship model for animals to replace the current ownership model. Some scholars, such as Favre, argue we do not need to abandon the concept of ownership for guardianship, because the concept of ownership applied to an animal can be beneficial when the relationship is respectful (Favre, 2010, p. 1042). The example of the benevolent owner, however, shows that there are cases in which an owned animal’s negative interest in liberty is not violated, yet exists under constant threat of potential arbitrary interference by humans. If we consider animals as passive legal persons with a fundamental right to liberty, the switch to guardianship would be much more than a semantic difference to the concept of ownership, but would consist of a fundamental change in the relationship between humans and animals.

Currently, the ends for which animals are used are not to the benefit of the animals themselves, but rather to benefit humans and fulfill their desired ends. In other cases, even when animals are not made to serve our intended purposes, their interests are not given proper consideration, such as when we expand our human communities and encroach further upon spaces inhabited by animals. This would inevitably change when we opt for a guardian/ward relationship model. However, we still need to clarify how the guardian/ward relationship model would better respect the interests of animals, particularly their interest in liberty. I address this issue in the following sections.

### ***Right to Liberty & the Implications for Animals***

I have suggested that all sentient animals have an intrinsic interest in both negative and republican liberty. To ensure equality and justice in our relationship with animals, it is necessary to confer the fundamental right to liberty to animals. Such a right will need to be enacted through legislation. Legislation of this sort would likely take the form of an Animal Bill of Rights, which explicitly codifies the legal rights of animals to provide protection to their primary interest in being free from domination and establish a high bar for infringement that is necessary to amount to a fundamental right. Most importantly, if all sentient animals hold a right to liberty, then this would necessarily correlate to a duty held by others; the duty to not exercise arbitrary power over animals.<sup>26</sup>

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<sup>26</sup> This duty to not exercise arbitrary power over animals could only be held by active legal persons, such as adults of sound mind, corporations, the state, etc. Accordingly, this means that this duty would not be held by other animals, as they are considered to only meet the level of passive legal personhood; entities having interests worthy of protection through rights, but lacking the legal competences to be held responsible.

Our duty to not exercise arbitrary power over animals protects all sentient animals' interest in republican liberty. We also have further positive obligations towards a variety of animals, given the impacts of historically denying animals' interest in liberty and exercising arbitrary power over them. In order to fulfill our duties to these animals, some interference is necessary, and therefore there will be situations in which animals' interest in negative liberty, or non-interference, will be superseded. As such, this interference will not be *arbitrary*. There may be times when paternalistic interference is necessary in the care of animals, but such paternalism is only justifiable when directly aimed at serving the interests of the animal, rather than the interests humans have in using animals (Giroux, 2016, p. 39). Republican liberty is more stringent than negative liberty through its inclusion of cases related to *potential*, rather than just *actual*, interference. In some sense, however, republican liberty is less stringent than negative liberty: republican liberty permits non-arbitrary interference, whereas negative liberty does not permit *any* interference unless it is necessary to protect the liberty of others.

To clarify what conferring the right to liberty to animals, and what our obligations to them may look like, I make use of Donaldson and Kymlicka's typology, classifying animals as wild, domesticated, or liminal. Furthermore, I introduce an additional category, 'institutionalized animals,' in an attempt to hone in on the unique situation of animals in zoos and research institutions.

### **Wild Animals**

Animals classified as 'wild' are those living in their natural habitat and who are not directly dependent upon humans for the fulfillment of their basic needs and survival. Currently,

in the US, each state has ownership over the wildlife in their jurisdiction (*Happy, 2022, p. 9*).<sup>27</sup>

There are also a vast number of wild animals living outside of the US , and these wild animals are at risk of being captured and sold to US individuals and institutions with proper licensing, such as zoos and research institutions. Given these facts, the situation wild animals find themselves in serves as a prime example of humans' current capacity to exercise arbitrary power over animals. While living in the wild, these animals live under threat of being captured and appropriated as property of humans, or being killed.

To protect their interest in republican liberty, wild animals should hold the fundamental right to liberty and be regarded as passive legal persons. Providing the right to liberty in the case of wild animals seems fitting, as we commonly view wild animals as existing in a state of freedom from human interference. While wild animals are often viewed as being independent from human society, the refusal to acknowledge animals as legal persons protected by the fundamental right to liberty has led to wild animals being at risk of appropriation and domination by humans as property to serve human interests. Recognizing, and giving equal consideration to, wild animals' intrinsic interest in republican liberty requires conferring the right to liberty to wild animals. The right to liberty serves as an incident of passive legal personhood and is antithetical to property status. If wild animals held this right, then wild animals' interests in republican liberty could be protected, as they would not be under the precarious position of being subject to

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<sup>27</sup> This is a simplification of the discussion, as various differences among state constitutions regarding the management of wildlife exist as well as various federal limitations; see Favre (2003). Additionally, there are often regulations surrounding the capture and killing of wildlife, however, there are designated hunting seasons and available permits that provide exceptions. For example, limited licenses are sold in Colorado for 'big game hunting' (See Colorado Parks & Wildlife. (2025). *Hunting: Big Game*. <https://cpw.state.co.us/hunting/big-game>).

becoming property of humans. The current relationship humans have with wild animals would consequently change, in several ways.

First, there would be greater restrictions on what states can do with animals within their jurisdictions, as the state, and the humans in it, would hold a correlative duty toward the wild animals to not exercise arbitrary power over them. A guardianship model would allow us to fulfill this duty, while also recognizing we cannot take a complete ‘hands-off’ approach to our future relationship with them.

Under a ward/guardian relationship model, wild animals would not be under collective ownership, but rather collective guardianship of humans. Consequently, rather than being viewed as resources to be managed by the state, these animals will be viewed as wards who will at times require our protection. Decisions regarding the expansion of our communities will require we provide equal consideration of the impacts towards wild animals in their natural habitat. Wild animals coexist in the world with us, and we should therefore aim to have a relationship which fosters and supports their freedom alongside our own. This may require positive intervention that aims at protecting wild animals’ interest in republican liberty, such as interventions to mitigate harms to wild animals from human-caused spillover effects resulting from climate change, pollution, and infrastructure (Donaldson and Kymlicka, 2011, p. 197).<sup>28</sup>

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<sup>28</sup> Donaldson and Kymlicka’s suggestion of treating wild animals as individuals belonging to sovereign communities could be a useful conceptual resource for thinking about how our relationship to wild animals could be shaped when they hold the right to liberty. Particularly, their notion of parallel-sovereignty, which captures the relationship between sovereign groups existing alongside each other (Donaldson and Kymlicka, p. 190). The notion of sovereignty, I believe, could be in line with animals’ interest in republican liberty; if animals have an interest in freedom as non-domination, then they plausibly have an interest in sovereignty, if we understand sovereignty as being free from others making arbitrary decisions for you. I, however, am neither adopting, nor ruling out, such a view at this time and am rather focused on remaining within the legal framework of personhood and discussions of republican liberty.

Second, the purchase and keeping of wild animals from outside the US would be strictly prohibited. While we may not be responsible for the initial capture of these animals outside our country, we nonetheless have supported these efforts by purchasing these animals. The purchasing of these captured wild animals to be brought to the United States for the purposes of private ownership, display in zoos, or use in research, would be in direct violation of an animal's right to liberty, and thus their purchase or sale would be deemed illegal.

Finally, if wild animals have the right to liberty, then habeas corpus would be an applicable legal remedy to remove the animal from captivity and return them to their natural habitat. Given that animals are sentient beings with interests, we ought to allow animals the greatest possible fulfillment of their natural capacities within their natural environments without unnecessary interference.

### **Domesticated Animals**

The domesticated animals category includes companion animals like cats and dogs, as well as animals used in agriculture, such as sheep, cows, goats, chickens, pigs, etc. Domesticated animals are typically dependent on specific humans to feed and shelter them. The relationship between humans and domesticated animals is a product of historically violating animals' interests in negative and republican liberty, through generations of selective reproduction of captive animals. Conferring these animals the right to liberty would entail, for some Animal Rights theorists—particularly abolitionists—that there could be no further human interaction or relationship with these animals; we simply swing open all the doors and fences and let the

animals go. I do not think that would be a good option, and suggest we instead find a way to care for these animals outside of the owner/property paradigm.<sup>29</sup>

If animals are conferred the right to liberty and considered passive legal persons, current animals in the household could be viewed as holding a similar position as children. Recall that children serve as Kurki's paradigmatic passive legal person: children hold the right to liberty but are not thought to have the legal competences required to bear duties. Nonetheless, these children hold this fundamental legal right (and others), while under legal guardianship or wardship. Of course, parents regularly interfere with or restrict the actions of children. We can argue the interference on the part of the parent, however, is directed at serving the interests of the child who may lack the competences to know the action they are engaged in will place their life, and thus future liberty, in clear immediate danger.

Domesticated animals, while holding a fundamental right to liberty, would similarly be considered as lacking the legal competencies for bearing duties, and considered a ward under a legally appointed guardian. Just as parents sometimes place restrictions on children for their wellbeing, humans often place physical barriers around their property to prevent an animal in their care from endangering itself. This interference is again in the direct interests of the animal to protect their life, rather than intended for serving a human owner's property interests.

Domesticated animals that are captive in our current industrialized food processing system are in a different situation. These animals are most often captive in small confinements, in close quarters with many others, and raised to be slaughtered for food and the economic

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<sup>29</sup> My view does not intend to go as far as Donaldson and Kymlicka's, who emphasize domesticated animals' ability to cooperate and be interdependent with humans in society as co-citizens (Donaldson and Kymlicka, 2011, pp. 108–155).

interests of humans. The animals in industrialized agriculture are a prime example of humans' ultimately malevolent domination over animals, when animals' interest in republican liberty is violated for the satisfaction of purely human interests and preferences. Considerations of the nature of their confinement only come second to humans' economic interest in keeping them captive, until later destroying them to transform them into commodities for profit and consumption.

It is worth noting that Welfarists generally agree that most, if not all, current forms of industrialized use of animals would need to be abandoned as a consequence of respecting even the meager rights that they claim animals already have.<sup>30</sup> As a result, it is not unreasonable to argue that these practices should be abolished as part of recognizing animals' interest in liberty. The abolishment of these practices will not remedy the damages done to the animals still alive and captive, and these animals still have an interest in liberty and life. We would therefore need to care for the remaining animals as best we can with as little interference in their actions as possible. Farm sanctuaries dedicated to the ongoing care and protection of these animals' interests offer sanctuary to these animals, but they may never truly remedy the harms inflicted upon them. Nonetheless, sanctuaries would likely be the best option at this time (Emmerman, 2014).

### **Liminal Animals**

Liminal animals, under Donaldson and Kymlicka's typology, can be thought of as existing in a middle-ground between domesticated and wild animals: they are not domesticated, yet live among and partly depend on humans (Donaldson & Kymlicka, 2011, p. 210-215). This

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<sup>30</sup> For example, see Cochrane (2009) pp. 674–675, and Favre (2010) p. 1057.

dependency results in particular vulnerabilities (2011, p. 217). This dependence, however, tends to be more generalized, as their reliance is on human settlements, in contrast to the dependence that domesticated animals have toward specific human caretakers (2011, p. 218).

These animals are in some sense treated similarly to wild animals by our society, viewed as being under the collective ownership of the state they find themselves in. Given liminal animals' unique and indirect relationship with humans, however, what obligations we owe to them can be difficult to parse out. Donaldson and Kymlicka claim:

Whatever our obligations towards liminal animals, they cannot be captured by a principle of non-interference. Every time we erect a fence, build a house, or establish a park, we are interfering with the activities of liminal animals, sometimes in ways that benefit them, sometimes in ways that harm them (Donaldson & Kymlicka, p. 213).

Under my view, humans would have an obligation to not exercise arbitrary power over these animals, but again, this does not rule out cases of justified interference. If it is the case that some of our development of human communities can be viewed as a form of interference in the lives of liminal animals, and that these interferences can be viewed as either benefiting or harming these animals, then we must seek to develop communities which are mutually beneficial.<sup>31</sup>

### **Institutionalized Animals**

I use the category of institutionalized animals to highlight the unique obligations we owe to animals who have been removed from their natural habitat and have been placed in captivity at zoos and research facilities. The long-term captivity these animals experience has robbed them of their liberty through a life of confinement, limited choices, boredom, and dependency upon

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<sup>31</sup> Liminal animals and the obligations we have to them is deserving of its own dedicated research and discussion, which is beyond the scope of this project.

humans for their survival (Emmerman, 2014). Thus we can characterize institutionalized animals as animals that *would have been* wild animals, but due to deprivation and their long-term physical, emotional, and behavioral pathologies as a result of their experiences in captivity, they are no longer capable of acquiring the skills or social ties necessary to survive in their natural habitat. Consideration of what we owe to institutionalized animals will therefore differ from our considerations to wild animals. Institutionalized animals still have an interest in liberty and should be conferred the fundamental right to liberty. However, returning them to their natural habitat is rarely feasible and not in the best interests of the animal in question, and they will require ongoing care.

To understand why many institutionalized animals may not be able to return to their natural habitat and instead require ongoing care, consider the case of Keiko, a long-term captive killer whale whose release back to the wild was unsuccessful. Keiko was born in the wild among a group of killer whales around Iceland. At approximately two years old, he was captured and held in captivity with other killer whales in tanks for six years, until he was purchased by an amusement park in Mexico City. Between 1985 to 1996, Keiko lived and performed in a small pool without contact with other killer whales (Simon, et al., 2009, p. 2). After performing in the popular movie *Free Willy* (1993), there was public outcry for Keiko's release from captivity (2009, p. 11).

Keiko received training to follow his caretakers' boat and take open ocean swims during the summers between 2000 to 2002 (2009, p. 2). In an effort to reduce Keiko's human contact, crew members would hide from view when Keiko approached the tracking boat until he lost interest, and only a few close approaches were allowed each day to monitor Keiko's physical and behavioral conditions (2009, p. 4). During this time, Keiko was observed coming into proximity

with wild orca whales, but they seldom approached, and often moved away from one another. As a result, Keiko was unable to become socially integrated with his conspecifics (2009, p. 8).

Eventually, Keiko stayed in a free access bay pen and was taken for regular swims by professional caretakers, and though he would have access to open waters, he would instead swim alone outside the bay pen and return on his own. Keiko died at the age of 26 in December of 2003 from pneumonia (2009, p. 6).

While it is the case Keiko was released from his captivity, the impact of his long-term confinement ultimately prevented him from successfully integrating back into the wild. A release program for a captive animal would be considered successful if “the released animal is able to feed, maintain health and stress levels comparable to his wild conspecifics, show normal predator avoidance behavior, and ultimately reproduce” (2009, pp. 10–11). Under this criteria, Keiko’s release to the wild was unsuccessful, “since though physically unrestricted and free to leave, he kept returning to his caretakers for food and company” (2009, p. 11). There have been some successful cases of releasing captive cetaceans into the wild before, but researchers note that those who have been successfully released had been in captivity for a relatively short amount of time, their confinement was not as restrictive, and they were released alongside other conspecifics (2009, p. 1).

Institutionalized animals like Keiko have very limited options regarding nearly every aspect of their life while in captivity, including what they eat, where they may travel, who they choose to engage with, and what natural capacities they can express. Most of these animals were captured outside of the United States, sold and shipped to various zoos or research facilities, far from their home and community of conspecifics. The long-term captivity of institutionalized

animals conditions their dependence on handlers; if ever released, their ability to exercise their autonomy has been so deformed that they are left unable to safely adjust to life in their natural habitats. Such are the deep harms humans inflict upon animals while captive, so how can we go about engaging in restitution for these harms caused to institutionalized animals?

I suggest that with the conferral of the right to liberty and recognition as passive legal persons, institutionalized animals ought to be treated as wards and cared for in sanctuaries. Karen Emmerman argues that life in a sanctuary for animals necessarily involves confinement and therefore cannot provide full restitution to institutionalized animals who have been deprived of their liberty. Zoos, research facilities, and sanctuaries all involve captivity for animals and will therefore necessarily involve interference. Animal captivity in zoos and research facilities involves a large amount of arbitrary interference, as the animals experience interference in nearly every aspect of their life, which is aimed at benefiting the interests of humans and the institution. Sanctuaries, on the other hand, often aim to mitigate the harms resulting from an animal's initial captivity with a focus on providing spacious habitats to provide animals with more choices in their environment, such as who they socially engage with (Doyle, 2014, p. 50) and this allows more opportunities for animals to express their natural capabilities in these environments. The kind of interference engaged in by sanctuaries then is different from the interference taking place in zoos. Zoo captivity involves a high degree of arbitrary interference, while sanctuaries aim to reduce overall interference by providing greater space, options, and opportunities. Furthermore, even though sanctuaries cannot eliminate interference, sanctuaries aim to limit interference to actions that protect the animal's interest in life and republican liberty.

One may raise the concern that placing institutionalized animals in the care of sanctuaries would still amount to arbitrary interference on animals' liberty. This, however, would only be an

issue if animals' inequitable legal status as property persisted, and would not apply to passive legal persons with a fundamental right to liberty. In the case of human owners, the interests of humans are nearly always prioritized, and animals' interests are given consideration only when it does not frustrate the satisfaction of the human end for which the animal is being put to use. But as noted earlier, the relationship between guardian and ward, much like parent and child, involves important differences from the relationship between an owner and their property. Paternalistic interference is justified in the case of a parent who prevents their child from running into a busy street, because the interference is aimed at serving the interests of the child, and this line of thinking can be extended to nonhuman animals as wards under guardianship in sanctuaries. Without our interference, institutionalized animals released into the wild will likely experience serious harm or death, which compels us to interfere to prevent such harm from occurring. Therefore, while animals are wards under the guardianship of sanctuaries, significant interference will occur, but are justifiable when aimed at protecting the liberty interest of the animal.

### **Return to the Happy Case**

I would like to conclude this chapter by returning to the *Happy* (2022) case with a better understanding of her interest in liberty and why we should seek to confer the right to liberty. I have provided a way for us to understand *how* animals, like Happy, *could* be conferred the fundamental right to liberty, without bearing duties, and thus recognized as passive legal persons under the Bundle-Theory of legal personhood. Under the Bundle-Theory view, the possession of legal rights incidental to legal personhood comes before recognition as a legal person, not the other way around. This means that Happy will only be considered a legal person when she has

been conferred fundamental rights serving as incidents of legal personhood. I have provided a way of understanding Happy's intrinsic interest in republican liberty, which is currently routinely violated while she is without the fundamental right to liberty and held captive in the Bronx Zoo.

Happy serves as a prime example of an institutionalized animal. After living so long in human captivity, she would not be considered a wild elephant anymore. Happy was captured outside the US at the age of one, and has now been in captivity at the Bronx Zoo since 1977 (*Happy*, 2022, p. 3); at the time of the legal case, she had been in the captivity of the Bronx Zoo for 45 years and was only 48 years old (*Happy*, 2022, Wilson, dissenting, p. 59).<sup>32</sup> Her long term partner of 25 years, Grumpy, was euthanized by the Bronx Zoo, and she now lives alone in a one-acre enclosure (*Happy*, 2022, Wilson, dissenting, p. 59). She is found to engage in only five activities: “dusting, grazing on grass, standing and facing the fence or gate, swinging her trunk, and standing with one or two feet lifted off the ground, which could possibly be to ease the weight off painful, diseased feet. Of those five activities, only two—dusting and eating grass—are considered normal” (*Happy*, 2022, Wilson, dissenting, p. 60). She thus has no social opportunities and vastly limited space, which has led to physical and psychological stress while captive in the Bronx Zoo. Like many other elephants, repatriation to the wild will not be feasible given the physical and psychological harm caused by her confinement (Doyle, 2014, p. 47). Due to Happy's physical and psychological condition, as well as no longer being capable of acquiring the skills or social relations to survive in her natural habitat, she will require ongoing care, and a sanctuary may be the best option we have (Emmerman, 2014, p. 225). I argue Happy should hold

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<sup>32</sup> At the time of completing this thesis, Happy is now 53 years old and her captivity in the Bronx Zoo is still being contested. See New York City Bar Association, Animal Law Committee Report (2025).

the fundamental right to liberty, and be relocated to an elephant sanctuary that can provide better care and an environment closest in resemblance to her natural habitat than what a zoo can offer.

If we go the route I suggest and confer Happy the right to liberty, and consider her a ward, I believe habeas corpus *would* be an applicable legal remedy to remove Happy from her captivity in the Bronx Zoo and relocated to an elephant sanctuary. The NY Supreme Court majority claimed that habeas corpus relief is not available to Happy because she is not a legal person with rights, and claims that she cannot hold rights because she cannot bear duties. The court majority, however, upholds the traditional view of legal personhood, which takes legal personhood to be a prerequisite for holding rights. Under the Bundle-Theory of legal personhood, holding rights comes before recognition as a legal person. Additionally, the category of passive legal personhood under the Bundle-Theory does not require an entity to bear duties in order to enjoy fundamental rights, such as the right to liberty. We can therefore view Happy as a passive legal person, who bears no duties, and holds the right to liberty.

The majority also argues that granting habeas corpus to Happy would be inappropriate, as we cannot simply open the gates and let Happy roam free in the streets of New York, nor return her to her natural habitat and expect her to be able to survive on her own. From this, the court majority argues that *even if* habeas corpus was available to Happy, habeas corpus is not applicable to situations in which the person is transferred from one confinement to another. Considering institutionalized animals as wards allows us to bypass this confusion. For example, consider the situation of a child in divorce proceedings. In such situations the courts will consider what is in the best interests of the child and which parent can provide the most adequate care (*Happy*, 2022, Wilson, dissenting, p. 31). If one of the parents determines they will keep the child against the court's orders, habeas corpus provides the legal remedy to remove the child

from the custody of the parent and place them under the legal custody of the other. In the most drastic situations, children are removed from the legal custody of both parents, and placed under the legal custody of a state appointed guardian. The situation we find Happy in is quite similar to that of the child, as she is currently in the custody and captivity of the Bronx Zoo, but we find that when we take Happy's best interests into account, we would conclude that an elephant sanctuary will be able to provide the most adequate care compared to other options available.

While we can never make reparations for the harm we are responsible for inflicting on her, even while living in a sanctuary, we ought to do the best we can because it is us who have harmed her. Life in the sanctuary for Happy will never be identical to life in the wild, as life in a sanctuary will necessarily involve captivity. This ongoing captivity interferes with Happy's interest in negative liberty. However, it avoids placing Happy under the arbitrary power of humans and thus leaves her interest in republican liberty intact. Humans exercised arbitrary power over Happy by denying her interest and right to liberty in order to treat her as property to satisfy human ends. In a sanctuary, Happy's captivity is not intended to satisfy human interests, but rather to allow her to satisfy her own interests in a safe environment as much as possible, more closely resembling her natural habitat that can provide a greater array of options for Happy.

## Conclusion

By adopting the distinction between fundamental rights and simple rights provided by Stucki, my Animal Rights position is able to overcome the arguments from Welfarists who claim, contrary to judicial rulings, that animals already possess rights while they exist as property of humans. I have argued, consistent with judicial ruling in the *Happy (2022)* case, that animals do not currently hold fundamental rights. Additionally, the adoption of Kurki's Bundle-Theory

of legal personhood provides a way to understand the relationship between rights, duties, and legal personhood. Namely, it overcomes the criticisms directed at the traditional view of personhood held by Wise and Francione, as well as provides a route for considering animals as rights-holders without bearing duties. By distinguishing active and passive incidents of legal personhood, and basing the kind of personhood an entity has on the particular rights they are endowed with, the Bundle-Theory reverses the order of operations found in the traditional view; rights come before personhood. The reason animals do not currently hold rights, then, is because they have not yet been conferred any rights. The conferral of rights to animals should be done through legislative means, rather than judicial means, as some Animal Rights theorists believe. Only once animals hold the right to liberty would the judicial route of habeas corpus be applicable to transfer animals out of captivity in zoos or research institutions, and into sanctuaries that can provide them with more adequate care.

Furthermore, I have argued that relinquishing animals' property status does not necessitate the abolishment of all future human and animal relationships. We should consider our obligations to animals based on our history and relationships with them. Wild animals should be regarded as wards under the collective guardianship of the state, who are not susceptible to becoming property of humans—allowing them to maintain their freedom in their natural habitats—while only permitting interference which is intended to protect their freedom and their own well-being. As for domesticated animals, given their direct dependence on humans for their survival, we will need to continue to care for these animals, but under a guardianship model. While the care of these animals will necessarily involve some interference in their actions, this is acceptable so long as the interference is aimed at serving another one of the animals' primary interests. Additionally, I argued liminal animals should be considered passive legal persons and,

given their relationship of indirect dependence on humans, should be considered wards under the collective guardianship of humans and given equal consideration when we develop and expand our communities. Finally, institutionalized animals should also be considered wards, but will require more space and resources for adequate care than domesticated animals, and should therefore be cared for in a species-appropriate sanctuary.

My present argument does not address, nor limits, what other rights animals may hold as a matter of future law. My aim in this thesis was to argue that animals should hold the fundamental right to liberty to protect their interest in republican liberty, specifically. I have not argued that the interest in liberty is the *only* interest animals have that may be deserving of legal protection and leave open the possibility of other rights being conferred to animals, such as the fundamental right to life or the right to property, for example. Animals' possession of the right to liberty may in turn provide a stronger case for protecting animals' interest in life, considering how animals are currently without the right to liberty and their interest in life is routinely violated; a right to liberty may provide support for having a higher requirement for infringing on an animal's interest in living when they cannot be used to benefit human interests. The connections between the right to liberty and the right to life would be fit for future research.

Additionally, my present argument for why animals should hold the right to liberty has been limited to *sentient* animals. The criteria for sentience is often divided along the lines of vertebrate and invertebrate beings. Vertebrate beings are considered to possess characteristics necessary for sentience, particularly a central nervous system which is comparable to humans', whereas invertebrate animals lack this characteristic. Determining which animals are sentient may not be as simple as a divide along the vertebrate/invertebrate lines as it has been done, and further research into the lives and experiences of invertebrate animals will be needed.

# References

- Andrews, K., Comstock, G., Crozier, G.K.D.(2018). *Chimpanzee Rights: The Philosopher's Brief*.  
Routledge.
- Blackstone, W. (1779). *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765--1769*. University of Chicago Press, Vol.1, Ch.16, Doc.5. <https://press-pubs.uchicago.edu/founders/documents/v1ch16s5.html>
- Cochrane, A. (2009). Do Animals Have an Interest in Liberty?. *Political Studies*, Vol.57, pp. 660–679.  
doi:10.1111/j.1467-9248.2008.00742x
- Colorado Parks & Wildlife. (2025). *Hunting: Big Game*. Retrieved March 25, 2025 from  
<https://cpw.state.co.us/hunting/big-game>
- Donaldson, S., Kymlicka, W. (2011). *Zoopolis*. Oxford University Press.
- Doyle, C. (2014). Captive Elephants. In L. Gruen (Ed.), *The Ethics of Captivity* (pp. 38–56). Oxford University Press.
- Emmerman, K. (2014). Sanctuary, Not Remedy: The Problem of Captivity and the Need for Moral Repair. In L. Gruen (Ed.), *The Ethics of Captivity* (pp. 213–230). Oxford University Press.
- Favre, D. (2010). Living Property: A New Status for Animals Within the Legal System. *Marquette Law Review*, Vol.93, Iss.3, Art.3, pp. 1021–1070.  
<http://scholarship.law.marquette.edu/mulr/vol93/iss3/3>
- Favre, D. (2003). American Wildlife Law - An Introduction. *Animal Law Web Center*.  
<https://www.animallaw.info/article/american-wildlife-law-introduction>.

Francione, G. L. (2004). Animals—Property or Persons?. In Nussbaum, M., Sustain, C. R. (Eds.), *Animal Rights: Current Debates and New Directions*, (pp.108-142). Oxford University Press.

Francione, G. L. (2005). *Animals, Property, and the Law*. Temple University Press. Originally printed in 1995, reprinted 2005 with corrections.

Garner, R. (2011). In Defence of Animal Sentience: A Critique of Cochrane's Liberty Thesis. *Political Studies*, Vol. 59, pp 175–187. <https://doi.org/10.1111/j.1467-9248.2010.00848.x>

Giroux, V. (2016). Animals Do Have an Interest in Liberty. *Journal of Animal Ethics*, Vol.6, No.1 (2016), pp. 20–43.

Herstein, O. (2023). Legal Rights. *The Stanford Encyclopedia of Philosophy (Winter 2023 Edition)*, Edward N. Zalta & Uri Nodelman (eds.).  
<https://plato.stanford.edu/archives/win2023/entries/legal-rights/>.

Hohfeld, W. N. (1919). *Fundamental Legal Conceptions as Applied in Judicial Reasonings*. W.W. Cook (ed.). Yale University Press.  
<https://ia800909.us.archive.org/20/items/fundamentallegal00hohfuoft/fundamentallegal00hohfuoft.pdf>

Kurki, V. (2019). *A Theory of Legal Personhood*. Oxford University Press.

Kurki, V. (2021). Legal Personhood and Animal Rights. *Journal of Animal Ethics*, Vol.11, Iss. 1, pp. 47–62.

New York City Bar Association, Animal Law Committee. (2025). Letter to NYC officials regarding the condition of Happy the Elephant. *New York City Bar Association*.  
<https://www.nycbar.org/reports/letter-to-the-bronx-zoo-regarding-the-condition-of-happy-the-elephant/>

Nonhuman Rights Project, Inc., on behalf of Tommy v. Patrick C. Lavery, 152 A.D.3d 73, 54 N.Y.S.3d 392 (N.Y. App. Div. 2017).

Nonhuman Rights Project, Inc., on behalf of Kiko, v. Carmen Presti, et al., Respondents. 31 N.Y.3d 1054, 100 N.E.3d 846 (N.Y. 2018).

Nonhuman Rights Project, Inc., on behalf of Happy v. James Breheny, No.52, (N.Y. 2022).

<https://www.nycourts.gov/ctapps/Decisions/2022/Jun22/52opn22-Decision.pdf>

Pettit, P. (1996). Freedom as Antipower. *Ethics*, 106(3), pp.576-604.

Simon, M., Hanson, M. B., Murrey, L., Tougaard, J., Ugarte, F. (2009). From Captivity to the Wild and Back: An Attempt to Release Keiko the Killer Whale. *Publications, Agencies and Staff of the U.S. Department of Commerce*. No.33. <https://digitalcommons.unl.edu/usdeptcommercepub/33>

Stucki, S. (2020). Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights. *Oxford Journal of Legal Studies*, Vol. 40, No. 3, pp. 533–560.

Tannenbaum, J. (1995). Animals and the Law: Property, Cruelty, and Rights. *Social Research*, Vol. 62, No. 3, pp. 539–607.

Velasco, J. (2010). Shareholder Ownership and Primacy. *University of Illinois Law Review*, pp. 897–956.

Waldron, J. (1991). Homelessness and the Issue of Freedom. *U.C.L.A. Law Review*, Vol.39, pp. 295–324.

Wise, S. (2010). Legal Personhood and the Nonhuman Rights Project. *Animal Law Review*, Vol.17, Iss.1, Art.10, pp. 1–11.

Wise, S. (2019). The Struggle for the Legal Rights of Nonhuman Animals Begins – The Experience of the Nonhuman Rights Project in New York and Connecticut. *Animal Law*, Vol.25, pp. 367–393.