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ARTICLE

THE ENTITLEMENT OF CHIMPANZEES TO THE COMMON LAW WRITS OF *HABEAS CORPUS* AND *DE HOMINE REPLEGIANDO*

STEVEN M. WISE*

I believe that even with [the chimpanzee] “Suica’s” death the matter will continue to be discussed, especially in law school classes, as many colleagues, attorneys, students and entities have voiced their opinions, wishing to make those prevail. The topic will not die with this writ, it will certainly continue to remain controversial.¹

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¹ *In Favor of Suica*, 9th Criminal Court, No. 833085-3/2005 (Bahia, Brazil Sept. 26, 2005) (written after the untimely death of Suica, a chimpanzee, halted the attempt to have him released from a zoo by writ of *habeas corpus*) [hereinafter *In Favor of Suica*], *English translation available at* <http://animallaw.info/nonus/cases/cabrsuicaeng2005.htm> (last visited Dec. 10, 2006). Both the original Portuguese decision and the English translation are on file with the author.

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INTRODUCTION

Chimpanzees, like every other nonhuman animal, are presently regarded as legal “things.”² Classified as property, they are denied all legal rights. This allows humans to enslave them. However, the claim that chimpanzees, and perhaps other cognitively complex nonhuman animals, *should* be entitled to basic legal rights has sparked widespread scholarly discussion by highly-respected members of the legal academy.³

Some legal “things” require common law personhood for an important reason: things are invisible to the civil law and lack all rights, including the capacity to sue. Those that can suffer for their invisibility do. But social morality changes, social policy evolves, and human experience accrues. Yesterday an African slave was commonly considered a rightless thing, the day before that an English villein; today that thing may be a human fetus, tomorrow perhaps a chimpanzee.

Employing commonly accepted legal principles, I have offered extensive arguments over years as to why at least some chimpanzees, and members of certain other species, should be entitled to the substantive fundamental common law rights of bodily liberty and bodily integrity.⁴ These substantive common

² Within the designation of “chimpanzee,” I include both the common chimpanzee and the bonobo, each of whom is equally evolutionarily close to human beings.

³ See, e.g., ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass Sunstein & Martha Nussbaum, eds., 2004) (numerous essays) [hereinafter ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS]; ALAN DERSHOWITZ, RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS 139, 193-199 (Perseus Books 2005); Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1, 4 (2001); Martha C. Nussbaum, *Book Review: Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506 (2001) (review of STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (Perseus Books 2000)); Robert R. M. Verchick, *A New Species of Rights*, 89 CAL. L. REV. 207 (2001); Richard A. Posner, *Animal Rights*, 110 YALE L. J. 527 (2000).

⁴ See, e.g., Steven M. Wise, *Rattling the Cage Defended*, 43 B.C. L. REV. 623 (2002); STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS (Perseus Books 2002) [hereinafter WISE, DRAWING THE LINE]; STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (Perseus Books 2000) [hereinafter WISE, RATTLING THE CAGE]; Steven M. Wise, *Hardly a Revolution - The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793 (1998) [hereinafter Wise, *Hardly a Revolution*]; Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B. C. ENVTL. AFF. L. REV. 471 (1996) [hereinafter Wise, *Legal Thinghood*]; Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15 (1995). See also Steven M. Wise,

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law rights would qualify their holders as common law “persons,” not just “things.” I do not reiterate those arguments in this article, though I briefly summarize some of the scientific findings that underpin the substantive arguments. This article focuses on procedure.

It may turn out that courts reject the substantive arguments a legal thing proffers in support of its claim to personhood. The gap between thing and person is not easily bridged and any legal thing’s initial claim will be, as observed Professor Christopher Stone, “bound to sound odd or frightening or laughable . . . because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of ‘us’ - those who are holding rights at the time.”⁵ But whether its *substantive* claims prevail on their merits or not, the legal thing requires a *procedural* cause of action to assert its claim in the first instance that it ought no longer be considered a thing, but a person, either as a matter of fact because it meets existing definitions of personhood, or as a matter of law because the definition of legal person itself should be changed to encompass it.

In this Article, I claim that humans enslave chimpanzees and thereby deprive them of their bodily liberty and that chimpanzees should be entitled to use the common law writs of *habeas corpus* and *de homine replegiando* and to bring their common law claims to bodily liberty before courts. In Part I, I demonstrate that chimpanzees are genetically highly similar to humans and quite cognitively and socially complex.⁶ In Part II, I argue that flexibility is part of the common law’s basic structure, that legal personhood is one of the common law’s

Animal Rights, One Step at a Time, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, *supra* note 3, at 19; Steven M. Wise, *A Great Shout - Breaking the Barriers to Legal Rights for Great Apes*, in GREAT APES AND HUMANS: THE ETHICS OF COEXISTENCE (Benjamin Beck et al. eds., 2001); Steven M. Wise, *Animal Thing to Animal Person - Thoughts on Time, Place, and Theories*, 5 ANIMAL L. 61 (1999); Dr. Jane Goodall & Steven M. Wise, *Are Chimpanzees Entitled to Fundamental Legal Rights?*, Joint Presentation to Senior Lawyers Division of the American Bar Association, Aug. 2, 1996, reprinted in 3 ANIMAL L. 61 (1997); Steven M. Wise, *Legal Rights for Nonhuman Animals: The Case for Chimpanzees and Bonobos*, 2 ANIMAL L. 179 (1996). By limiting my discussion in this article to chimpanzees, I do not mean to imply here that members of other species either should, or should not, be entitled to the fundamental common law right of bodily liberty.

⁵ CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING?* 8 (Oceana Publications 1996).

⁶ See *infra* notes 11-35 and accompanying text.

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basic values, that the structure of the common law requires it to permit such a cause of action to go forward on its merits, and that the claim of chimpanzees to common law legal personhood should always be subject to common law re-evaluation.⁷ In Part III, I show that post-Conquest English villeins used writs that allowed them, under certain circumstances, to be declared free.⁸ In Part IV, I trace the history of the common law writ of *de homine replegiando* in England and America and argue that individual chimpanzees are entitled to use it to bring their claims to bodily liberty before common law courts.⁹ In Part V, I set out the history of the common law writ of *habeas corpus* in England and America and argue that individual chimpanzees are entitled to use that common law writ to bring their claims to bodily liberty before common law courts.¹⁰

I. CHIMPANZEES

A. CHIMPANZEES ARE ENSLAVED AND DEPRIVED OF THEIR BODILY LIBERTY

Chimpanzees and the other great apes are being driven into extinction.¹¹ By 2001, the number of free chimpanzees had fallen, by one estimate, to as low as 150,000, and by September 2005, according to another estimate, to 100,000.¹² In 2003, The Great Ape Project attempted the first comprehensive census of great apes enslaved in the United States.¹³ Admittedly incomplete, the census still identified more than 3,100 great apes in captivity. Nearly two-thirds were chimpanzees, and

⁷ See *infra* notes 36-95 and accompanying text.

⁸ See *infra* notes 96-113 and accompanying text.

⁹ See *infra* notes 114-156 and accompanying text.

¹⁰ See *infra* notes 157-246 and accompanying text.

¹¹ See DALE PETERSON & KARL AMMAN, *EATING APES* (Univ. of California Press 2003). I have argued that this ongoing decimation of chimpanzees constitutes genocide. WISE, *RATTLING THE CAGE*, *supra* note 4, at 265-266.

¹² Thomas M. Butynski, *Africa's Great Apes*, in GREAT APES AND HUMANS: THE ETHICS OF COEXISTENCE (Benjamin B. Beck et al. eds., 2001); Alison Jolly, *The Last Great Apes?*, 309 *Science* 1457, 1457 (Sept. 2, 2005). See also PETERSON & AMMAN, *supra* note 11, at 263 (citing Andrew J. Marshall et al., *The Plight of the Apes: A Global Survey of Great Ape Populations* (2000) (briefing for U.S. Representatives George Miller and Jim Saxton) (stating chimpanzee populations are diminishing in ninety-one percent of protected areas in Africa).

¹³ THE GREAT APE PROJECT CENSUS: RECOGNITION FOR THE UNCOUNTED (The Great Ape Project 2003).

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almost 1,300 were enslaved for use in biomedical research.¹⁴ The rest were enslaved for public entertainment in roadside zoos, zoological parks, sanctuaries of varying quality and purpose, and for private amusement in backyard menageries.

Because both chimpanzees and humans share the fundamental biological urge for bodily liberty that originates in the deepest, most ancient, reptilian part of our triune brains, both can be enslaved.¹⁵ Justinian's *Institutes* and *Digest* assumed that most wild animals live in a "natural state of freedom"¹⁶ or a "natural state of liberty."¹⁷ Seventeenth century English legal historian John Selden noted that the *Digest's* definition of liberty as

the natural *facultas* [or power] of doing what one wants, . . . can be thought of equally well among both animals and men if there is no relevant law which in any way restrains either a man's will or an animal's appetite [which can be taken to be the same kind of a thing as a will].¹⁸

Blackstone thought the personal liberty that the writ of *habeas corpus* was meant to protect was "the power of locomotion, of changing situation, or moving . . . to whatsoever

¹⁴ As of April 1, 2005, that number had dropped to 1,171. John L. VandeBerg et al., *A unique biomedical resource at risk*, 437 NATURE 30, 31 Table 1 (Sept. 1, 2005) [hereinafter VandeBerg et al.].

¹⁵ PAUL D. MACLEAN, *THE TRIUNE BRAIN IN EVOLUTION: ROLE IN PALEOCEREBRAL FUNCTIONS* (Springer 1990). Human slavery is no longer legal anywhere in the world. See Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253; Nuremburg Charter, Aug. 8, 1945, 82 U.N.T.S. 279; Universal Declaration of Human Rights, art. 4, G.A. Res. 217A, U.N. Doc. A/811 (Dec. 10, 1948); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 360 U.N.T.S. 117; The European Convention on Human Rights, art. 4(1), 15(2), Nov. 4, 1950, 87 U.N.T.S. 103; American Convention on Human Rights, art. 6(1), Nov. 22, 1969, OAS T. S. No. 36; African Charter on Human and Peoples' Rights, art. 5, June 27, 1981, 1520 U.N.T.S. 26.

¹⁶ DIG. 41.1.3 (Gaius, Common Matters or Golden Things, Book 2) ("natural state of freedom"); DIG. 41.1.55 (Proculus, Letters, Book 2) ("natural state of freedom"). Proculus was a first century jurist. DIG. 41.1.44 (Ulpian, Edict, Book 19) ("natural freedom").

¹⁷ DIG. 41.1.5 (Gaius, Common Matters or Golden Things, Book 2) ("natural state of liberty"); DIG. 41.2.3.14 (Paul, Edict, Book 54). Paul was a third century jurist and contemporary of Ulpian. The *Institutes* refer to the "natural liberty" of animals. J. INST. 2.1.12.

¹⁸ RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 90 (Cambridge Univ. Press 1979) (quoting JOHN SELDEN, 1 OPERA OMNIA, col. 105 (D. Wilkins ed., 1726)).

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place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."¹⁹ Rollin C. Hurd opened his classic 1858 treatise on personal liberty and *habeas corpus* by declaring personal liberty to be

the power of unrestrained locomotion. The right to it springs from the fundamental laws of our being. The ever-recurring wants of the body, requiring continual labor for their provision, and the necessity of exercise to the healthy action of all its vital processes, render locomotion indispensable to animal existence. Man shares these wants with inferior animals The right of personal liberty, thus inhering in man as an independent sentient being²⁰

One deprived of bodily liberty and forced to serve another is a slave. For antebellum black slavery apologist Thomas R. R. Cobb,

The slave, while possessing the power of locomotion, moves not as his own inclination may direct, but at the bidding of his master, who may, of his own will, imprison or restrain him So utterly opposite is the position of the slave from that of the freeman in respect to this right, that we could not better define his condition, than to say it is the reverse of the freeman.²¹

Professor Laurence Tribe pronounced Jerom, a teenage chimpanzee who died a decade after scientists at the Yerkes Regional Primate Research Center injected him with HIV viruses, to be "clearly . . . enslaved."²² Members of the United States National Chimpanzee Resource Committee, following its name, refer to chimpanzees as a "national resource," a "global resource," a "chimpanzee research resource," "chimpanzee resources," and even as a "renewable and robust national resource," clear affirmations that they see chimpanzees as slaves.²³ The punishment customarily imposed upon humans

¹⁹ WILLIAM BLACKSTONE, 1 COMMENTARIES *134.

²⁰ ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS 4 (Da Capo Press 1972) (1858).

²¹ THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 105 (Univ. of Georgia Press 1999).

²² Tribe, *supra* note 3, at 4. See also WISE, RATTLING THE CAGE, *supra* note 4, at 1-2.

²³ VandeBerg et al., *supra* note 14, at 30, 31, 32 (including representatives of

convicted of serious criminal offenses is the deprivation of bodily liberty. Imprisonment for crime so closely resembles slavery that the Thirteenth Amendment to the United States Constitution made an express exception for it, reading, “Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States”²⁴

B. CHIMPANZEES ARE COMPLEX BEINGS WHO ARE CLOSELY-RELATED TO AND RESEMBLE HUMANS

Over the last half century we have learned an immense amount about chimpanzees. As Professor Andrew Whiten has pointed out, “We have progressed from a position of almost complete ignorance about wild chimpanzees just decades ago, to having gathered very detailed knowledge through hundreds of field and laboratory studies.”²⁵ What we have learned is that chimpanzees resemble humans in highly significant ways. Indeed, the reason those 1,300 chimpanzees are enslaved for use in biomedical research in the United States is “due in large part to their genetic similarity to humans.”²⁶ Thus the Committee on Long-Term Care of Chimpanzees, a part of the Natural Research Council, concluded in 1997 that “[t]hese two factors—scientific use and close genetic relative—cannot be divorced; one cannot appeal to one and ignore the other.”²⁷

Just six million years ago, chimpanzees and humans shared a common ancestor. The 2005 draft sequence of the chimpanzee genome reveals that humans and chimpanzees “share more than 98% of our DNA and almost all of our genes .

each of the major centers that maintain chimpanzees enslaved for biomedical research in the United States).

²⁴ U.S. CONST. amend. XIII, § 1 (emphasis added).

²⁵ Andrew Whiten, *The second inheritance system of chimpanzees and humans*, 437 NATURE 52, 52 (Sept 1, 2005) (citations omitted).

²⁶ Committee on Long-Term Care of Chimpanzees, National Research Council, *Chimpanzees in Research - Strategies for the Ethical Care, Management, and Use* 13 (1997), available at <http://fermat.nap.edu/books/0309058910/html> (last visited Dec. 10, 2006).

²⁷ *Id.* at 8. The Committee concluded, without any explanation, that “the relevant differences between humans and chimpanzees justify the use of chimpanzees in research that would not be sanctioned if it were proposed to use human subjects,” and that “although acute terminal studies with chimpanzees have been rare, they are justified in some circumstances.” *Id.* at 26. See also *infra* note 30 (citing works that challenge these conclusory claims).

...²⁸ “Overall, human and chimpanzee genes are extremely similar”²⁹ The divergence of single-nucleotide substitutions between the human and chimpanzee genomes is only about 1.06 percent, while genomic differences due to insertions and deletions of genetic material, so-called “indels,” is about 2.7 percent.³⁰ Even this small variation may not be as significant as it might first appear. Presently it is nearly impossible to determine whether a human DNA sequence missing in chimpanzees was *added* during the course of human evolution or *lost* to chimpanzees during their evolution.³¹ All in all, “Given the short time since the human-chimpanzee split, it is likely that a few mutations of large effect are responsible for part of the current physical—phenotypic—differences that separate humans from chimpanzees and other great apes.”³²

²⁸ Chris Gunter et al., *The Chimpanzee Genome*, 437 NATURE 47, 47 (Sept. 1, 2005).

²⁹ The Chimpanzee Sequencing and Analysis Consortium, *Initial sequence of the chimpanzee genome and comparison with the human genome*, 437 NATURE 69, 76 (Sept. 1, 2005) [hereinafter Chimpanzee Sequencing and Analysis Consortium].

³⁰ See Ze Cheng et al., *A genome-wide comparison of recent chimpanzee and human segmental duplications*, 437 NATURE 88, 92 (Sept. 1, 2005); Chimpanzee Sequencing and Analysis Consortium, *supra* note 29, at 69, 71, 73. DNA is a double helix held together by weak bonds between base pairs of nucleotides, adenine (A), guanine (G), cytosine (C), and thymine (T). A and T always form a bond, as do G and C. Occasionally, an A-C base pair will substitute for a G-C pair or vice-versa. *Id.* at 69. This occurred in about 1.06 percent of the genes of chimpanzees and humans. *Id.* at 71. When considering this genetic difference, consider that “[a]ny two unrelated humans have millions of genetic differences, making them look and even behave differently.” David B. Goldstein & Gianpiero L. Cavalleri, *Understanding human diversity*, 437 NATURE 1241, 1241 (Oct. 27, 2005). See also Elizabeth Culotta & Elizabeth Pennisi, *Evolution in Action*, 310 SCIENCE 1878, 1878 (Dec. 23, 2005) (“We differ by only about 1% in the nucleotide bases that can be aligned between our two species, and the average protein differs by less than two amino acids. But a surprisingly large chunk of noncoding material is either inserted or deleted in the chimp as compared to the human, bringing the total difference in DNA between our two species to about 4%.”).

³¹ Carina Dennis, *Branching out*, 437 NATURE 17, 17 (Sept. 1, 2005). Genetic recombination, which creates new combinations of alleles on which natural selection can act, appears in “hotspots” of recombination that are rarely in the same place in humans and chimpanzees. Wendy Winckler et al., *Comparison of Fine-Scale Recombination Rates in Humans and Chimpanzees*, 308 SCIENCE 107, 107-111 (Apr. 1, 2005).

³² Wen-Hsiung Li & Matthew A. Saunders, *The chimpanzee and us*, 437 NATURE 50, 51 (Sept. 1, 2005). These would most likely occur through indels or changes in the gene regulatory regions of DNA. *Id.* at 51. See Philipp Khaitovich et al., *Parallel Patterns of Evolution in the Genomes and Transcriptomes of Humans and Chimpanzees*, 309 SCIENCE 1850, 1853 (Sept. 16, 2005) (stating that both single-nucleotide substitutions and changes in gene expression or regulation are involved).

So few differences separate chimpanzees and other primates from human beings that one working group of twenty-two scientists and philosophers, formed to discuss ethical issues that might arise from human to nonhuman primate neural stem cell grafting, wrote in 2005 that

[m]any of the most plausible and widely accepted candidates for determining moral status involve mental capacities such as the ability to feel pleasure and pain, language, rationality, and richness of relationships. To the extent that a [nonhuman primate] attains those capacities, that creature must be held in correspondingly high moral standing.³³

Chimpanzees possess these attributes. They demonstrate that they have complex minds, are self-conscious and self-aware, exhibit some or all the elements of a theory of mind (they know what other chimpanzees see or know what other chimpanzees know), understand symbols, construct complicated societies, transmit culture, use a human language or sophisticated language-like communication system, and engage in such complicated mental operations as deception, pretending, imitation, and insightful solving of difficult problems.³⁴ Humans (currently *Homo sapiens*) and chimpanzees (currently *Pan troglodytes* and *Pan paniscus*) are so genetically and evolutionarily close that prominent scientists argue that humans and common chimpanzees should be placed in the same subtribe, *Hominina*, and the same genus, *Homo*, to form *Homo sapiens*, *Homo troglodytes*, and *Homo paniscus*.³⁵

³³ Mark Greene et al., *Moral Issues of Human—Non-Human Primate Neural Grafting*, 309 SCIENCE 385 (July 1, 2005).

³⁴ See Marc Hauser, *Our chimpanzee mind*, 437 NATURE 60, 60 (Sept. 1, 2005); Whiten, *supra* note 25, at 52-55; Greg Miller, *Tool Study Supports Chimp Culture*, 309 SCIENCE 1311 (Aug. 26, 2005); Lesley J. Rogers & Gisela Kaplan, *All Animals Are Not Equal*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, *supra* note 3, at 175; WISE, DRAWING THE LINE, *supra* note 4, at 179-230; WISE, RATTLING THE CAGE, *supra* note 4, at 163-237. The Chimpanzee Sequencing and Analysis Collaborative responsible for sequencing the chimpanzee genome carefully stated that a feature specific to humans was not language, but “complex language.” Chimpanzee Sequencing and Analysis Consortium, *supra* note 29, at 69 (emphasis added).

³⁵ Derek E. Wildman & Morris Goodman, *Humankind's Place in a Phylogenetic Classification of Living Primates*, in EVOLUTIONARY THEORY AND PROCESSES: MODERN HORIZONS: PAPERS IN HONOUR OF EVIATAR NEVOI 293 (Springer 2004) (then placed in separate subgenera).

II. WHY THE STRUCTURE OF THE COMMON LAW ENTITLES CHIMPANZEES TO BRING CLAIMS THAT CHALLENGE THEIR LEGAL THINGHOOD

A. FLEXIBILITY IS INHERENT IN THE STRUCTURE OF THE COMMON LAW

Like all nonhuman animals, chimpanzees presently are considered things, not persons. In order to maintain that the common law permits them to bring claims challenging their legal status, I must first demonstrate that the common law is flexible enough to embrace these sorts of claims. I maintain here that such flexibility is inherent in the very structure of the common law.

What does the “structure” of the common law mean? “Structure,” in constitutional interpretation, refers to the way in which a constitution is organized, what it presupposes and implies, what its text implies without stating, what the logic is of its scheme and substance, and what actions assist in making its entire theme coherent and operational.³⁶ Professor Laurence Tribe points to one of United States Supreme Court Justice William Rehnquist’s dissents as a classic exposition of constitutional argument from structure.³⁷ A constitution,

³⁶ Professor Philip Bobbitt has identified six modes of constitutional interpretation: (1) “textual” interpretation looks to the meaning of the words of a constitutional provision and interprets them as they would be interpreted by the average contemporary citizen, (2) “historical” interpretation looks to the intentions of the framers and ratifiers of the constitutional provision being examined, (3) “structural” interpretation infers unwritten rules from the relationships that the Constitution as a whole mandates among the structures it sets up, (4) “doctrinal” interpretation applies rules generated by precedents of the courts, (5) “ethical” interpretation derives rules from the moral principles reflected in the Constitution, and (6) “prudential” interpretation looks to balance the costs and benefits of adopting a particular rule. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12 - 22 (Oxford Univ. Press 1991); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7-177 (Oxford Univ. Press 1982). Professor Laurence Tribe has identified six similar modes of constitutional interpretation: textual, historical, structural, precedential, moral, and an eclectic mixture of these five modes. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 30-89 (3d ed. 2000) [hereinafter TRIBE]. For other structural arguments see JOHN HART ELY, *DEMOCRACY AND DISTRUST* (Harvard Univ. Press 1980) (supporting judicial review); CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (Ox Bow Press 1969). The textual and historical modes of constitutional interpretation hold little relevance for the unwritten common law; doctrinal, ethical, moral, and prudential hold greater promise.

³⁷ TRIBE, *supra* note 36, at 41-42 (quoting *Nevada v. Hall*, 440 U.S. 410, 423, 433,

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Rehnquist wrote, is “built on certain postulates and assumptions . . . [drawing] on shared experience and common understanding.”³⁸ The Justice explained that the Supreme Court often relied

on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning . . . [whose] derogation would undermine the logic of the constitutional scheme.³⁹

The common law is not a written text the way the United States Constitution is.⁴⁰ The most respected American common law judge of the nineteenth century was Lemuel Shaw. The common law, Shaw wrote, “consists of a “few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it.”⁴¹ Like the United States Constitution, the common law has a structure that arises from what it presupposes, what its workings imply, what the logic of its scheme and substance is, and what actions assist in making its entire system coherent and operational.

The common law, however, is not deductive. Judge Richard Posner has written that “[a] set of cases can compose a pattern. But when lawyers or judges differ on what pattern it composes, their disagreement cannot be resolved either by an appeal to an intuitive sense of pattern or by the methods of scientific induction.”⁴² By personality or philosophy, judges tend to emphasize one legal vision over others, either generally, or in

439 (1979) (Rehnquist, J., dissenting)).

³⁸ *Nevada v. Hall*, 440 U.S. at 433.

³⁹ *TRIBE*, *supra* note 36, at 41-42 (quoting *Nevada v. Hall*, 440 U.S. at 439 (Rehnquist, J., dissenting)).

⁴⁰ The British constitution is unwritten.

⁴¹ *Norway Plains Co. v. Boston and Me R.R.*, 67 Mass. 263, 267 (1854). Shaw served as Chief Justice of the Massachusetts Supreme Judicial Court from 1830-1860, during the 19th century heyday of the common law.

⁴² RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 91 (Harvard Univ. Press 1990).

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specific legal areas. These visions are often incommensurable and one vision usually cannot be proven objectively superior.⁴³

Judges holding “formal visions” marinate their decisions in the past. Formal Judges believe they should decide the way other judges have decided because other judges have decided that way. They believe there must be no “jurisprudence of doubt.”⁴⁴ The most formal of these judges—I call them “Precedent (Rules) Judges”—strongly prefer legal certainty to legal correctness. They understand law to be a system of narrow yet consistent rules that they can apply more or less mechanically, and they value, or think that a legal system should value, stability, certainty, and predictability.

For example, in 1955, Precedent (Rules) Judges of the Massachusetts Supreme Judicial Court considered whether that court should continue to adhere to its long-standing rule that a plaintiff whose car was not properly registered could not sue for injuries caused by a negligent driver. The judges conceded that

[t]he doctrine has been called ‘unique.’ . . . It has been very generally criticized. As an original proposition, it could hardly find favor with us today. The rule, however, has stood for more than forty-six years without repeal by the legislature. Some of us would prefer to overrule the . . . case, but the majority of the court think that its termination should be at legislative, rather than at judicial, hands.⁴⁵

England’s Lord Halsbury, in the nineteenth century, and Lord Farwell, in the twentieth, went as far as “Precedent (Rules) Judges” can go. Halsbury denounced “the inconvenience—the disastrous inconvenience—of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions.”⁴⁶ Farwell

⁴³ TRIBE, *supra* note 36, at 31 (“By its very nature, the ongoing debate about competing modes of interpretation and their proper relationship is not one in which provably ‘correct’ answers are likely ever to emerge and vanquish all competing approaches.”). This may not be true for all areas of the law. For example, in the area of wills, certainty is arguably the supreme value. I argue that, in determining legal personhood, principle should dominate precedent and policy. WISE, RATTLING THE CAGE, *supra* note 4, at 114-118. See also *id.* at 93-100 (discussing generally the competing visions of judging).

⁴⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992) (plurality opinion).

⁴⁵ *Comeau v. Harrington*, 130 N.E. 2d 554, 555 (Mass. 1955) (citations omitted).

⁴⁶ *London Tramways Co. v. London County Council*, A.C. 375 (1898) (Halsbury,

later announced that it was “impossible for [the Law Lords] to create any new doctrine of common law,” a rule that stood until 1966.⁴⁷ To the extent certainty and stability were their supreme values, Farwell and Halsbury could scarcely be considered common law judges. They more closely resembled Continental European Civil Law judges, for whom these are the most important legal values.⁴⁸

A second category of Formal Judge is the “Precedent (Principles) Judge.” These judges also look to the past. But they honor precedents as having established broad legal principles, not narrow rules. They do not believe judges should confine themselves to the specific ways in which their predecessors formulated inflexible rules from those principles. When justice demands change, these judges wield established principles to reconstruct the law, sometimes profoundly, and in ways that might have astounded the earlier judges.

For example, in 1916, the New York Court of Appeals overturned the long-standing rule that the manufacturer of a defective product was liable only to its immediate buyer, unless the product was inherently dangerous.⁴⁹ Chief Judge Benjamin Cardozo held that the owner of a new Buick injured by the collapse of a wheel could sue the Buick Motor Company, even though Buick had purchased the defective wheel from another manufacturer. “Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle . . . does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.”⁵⁰ This is akin to what Professor Melvin Aron Eisenberg calls a “transformation”

L.J.).

⁴⁷ *Bayliss v. Bishop of London*, 1 Ch. 127, 137 (1913) (Farwell, L.J.) (emphasis added); 1 WEEKLY L.R. 1234 (1966). See W. Barton Leach, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls*, 80 HARV. L. REV. 797, 798-99 (1967).

⁴⁸ JOHN MERRYMAN, *THE CIVIL LAW TRADITION* 48-49 (2d ed. 1985). Some federal judges in the United States are edging toward the constitutional equivalent of common law Precedent (Rules) Judges. See *Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376, 376-377 (4th Cir. 2000) (“I understand the Supreme Court to have intended its decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), to be a decision of *super-stare decisis* with respect to a woman’s fundamental right to choose whether or not to proceed with a pregnancy.”) (emphasis in original). This is the only time I refer to the Civil law, as opposed to the common law. Elsewhere in this article, I use civil, as opposed to criminal, law.

⁴⁹ See generally *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

⁵⁰ *Id.* at 1053.

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of the common law, when judges, using “minimalist or result-centered approaches . . . radically reconstruct the precedents and overturn the rule the precedents announce. . . .”⁵¹ They follow precedent, but at a high level of generality.

On the other hand, “Substantive Judges” reject the past as a manacle. They agree with United States Supreme Court Justice Oliver Wendell Holmes, Jr. that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”⁵² They believe the common law should be perpetually in flux and that common law rules should change. One of the purest Substantive Judges of the twentieth century was England’s Lord Denning.⁵³ On his death, one Substantive lawyer said admiringly that Denning had “steered the law towards the administration of justice rather than the administration of the letter of the law,” while a Formal Lord Chancellor grouched, “The trouble with Tom Denning . . . is that he’s always remaking the law, and we never know where we are.”⁵⁴

Substantive Judges’ legal visions are saturated in moral, economic, and political considerations. They believe that law should express a community’s *present* sense of justice, not that of another age, and that courts should keep law abreast of public values, prevailing understandings of justice and morality, as well as new scientific discoveries. Substantive Judges want to know *why* judges once decided a case a certain way and whether those reasons still make sense. They do not want issues merely settled, but decided correctly, and they will change the law, sometimes again and again, to get it right. Their direct overturning of a legal rule, when mandated by social considerations, is just another method for adjudicating common law cases.⁵⁵ They understand these new rules not as “new law but an application of what is, and therefore had been,

⁵¹ MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 55-56, 58-61 (Harvard Univ. Press 1988).

⁵² Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897). See the classic judicial exposition by Chief Justice Vanderbilt in *Fox v. Snow*, 76 A. 2d 877, 882-884 (N.J. 1950) (Vanderbilt, C.J., dissenting).

⁵³ P.S. ATIYAH & R.S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* 287 (Oxford Univ. Press 1987) [hereinafter ATIYAH & SUMMERS].

⁵⁴ Warren Hoge, *Lord Denning, 100, a Populist Who Enlivened British Courts*, N.Y. TIMES, Mar. 6, 1999, at A11, A13.

⁵⁵ EISENBERG, *supra* note 51, at 104-145.

the true law.”⁵⁶ This is why common law judicial decisions are “presumptively retrospective.”⁵⁷ The overruling court does not “pretend to make a new law, but to vindicate the old one from misrepresentation . . . [i]t is declared not that such a sentence was *bad law*, but that it was *not law*.”⁵⁸

Professor Leonard Levy reveals Chief Justice Shaw to be the paradigm of a Substantive Judge. His

infrequent use of citation—often its total absence—was habitual. . . . Although he was duly respectful of the value of old formulas, he was more often compelled to make them serviceable. Consequently, his opinions give the impression of an imperious scorn for precedent. But it was his conception of the law as a growing science that made him impatient with mere authority for its own sake. He could not content himself with precedent, well though he could conscript it to his service when he wished. His inventive spirit would not permit him to be the prisoner of someone else’s opinions. For him the vigor of the law depended upon its keeping abreast of the changes wrought by human endeavor. Therefore he constantly searched for ways to adapt the old to the new, reconcile conflicting doctrines, and

⁵⁶ *Linkletter v. Walker*, 381 U.S. 618, 623 (1965) (quoting Shulman, *Retroactive Legislation*, 13 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 355, 356 (1934)). This is Blackstone’s theory that judges do not make, but simply declare law, as opposed to John Austin’s theory that judges make law. The newer doctrine of prospective overruling allows courts, as a matter of judicial policy, to decide whether to make a ruling prospective only, which is usually done only when rights have vested or there has been reliance. See S. R. Shapiro, Comment note, *Prospective or retroactive operation of overruling decision*, 10 A.L.R. 3d 1371 (2005).

⁵⁷ *Davis v. Moore*, 772 A.2d 204, 228 (D.C. 2001).

⁵⁸ WILLIAM BLACKSTONE, 1 COMMENTARIES *83 (emphasis in original). See *State v. Waterberry*, 804 P.2d 1000, 1003 (Kan. 1991); *County of Los Angeles v. Faus*, 312 P.2d 680, 685-686 (Cal.1957) (“It is the general rule that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation and that the effect is not that the former was bad law but that it never was the law.”); *Peerless Electric Co. v. Bowers*, 129 N.E.2d 467, 468 (Oh. 1955) (per curiam) (“The general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law.”). Forty years ago, Robert Keeton wrote that “[t]he notion that judges are engaged in merely finding law rather than making it is now thoroughly discredited. But, to paraphrase a familiar observation about another dead letter of the law, this discredited notion still rules us from its grave.” Robert E. Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 TX. L. REV. 1254, 1265 (1966) (citation omitted). As set forth *supra* in notes 51 and 52, the notion is not as discredited as Keeton thought.

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so restate the law as to make it practical and plastic.⁵⁹

Substantive Judges who try to achieve important societal goals such as economic growth, national unity, or the health or welfare of a community are known as “Policy Judges.” They value what is good. On the other hand, “Principle Judges” value what is right. They may borrow principles from religion, ethics, economics, politics, or nearly anywhere, and these principles might range from representative democracy to the maximization of wealth to liberty and equality. Regardless of whether they are primarily driven by Policy or Principle, it is clear to common law Substantive Judges that flexibility and uncertainty are both inherent in, and central to, the common law.⁶⁰

Professor Eisenberg claimed that “what the common law is cannot be determined without consideration of what the common law should be.”⁶¹ That is because there exists a “necessary connection between the content of the common law and [certain] moral norms, policies, and experiential propositions. . . .”⁶² In other words, the common law

should be, and largely is, rooted in social morality, social policy, and human experience. Therefore, the best legal rule to govern any issue is the rule that best reflects these three elements, with appropriate balancing and adjustment when they do not point in exactly the same direction. Although not every common law rule is the best rule at any given moment, over time legal rules tend toward becoming the best.⁶³

This echoes Lord Mansfield who, as Solicitor General,

⁵⁹ LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 24 (Harvard Univ. Press 1957).

⁶⁰ A Precedent (Principles) Judge would act the same way as would a Substantive Judge, except she would not adopt brand new principles, but would rely only upon accepted principles. EISENBERG, *supra* note 51, at 156-159. See Martin P. Golding, *Book Review - The Nature of the Common Law*, 43 RUTGERS L. REV. 1261, 1273 (1991).

⁶¹ EISENBERG, *supra* note 51, at 161. See *id.* at 14-42 (defining and discussing moral norms, policies, and experiential propositions). In brief, moral norms deal with right and wrong, policies concern good and bad, and experiential propositions are propositions about how the world works.

⁶² *Id.* at 161.

⁶³ Melvin Eisenberg, *What Good Teachers Say About Teaching* (1990), available at <http://teaching.berkeley.edu/goodteachers/eisenberg.html> (last visited Dec. 10, 2006).

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argued that “the common law . . . works itself pure by rules drawn from the fountain of justice.”⁶⁴ This view is held by common law judges who do not consider themselves bound by existing legal rules, a group that probably includes most American state appellate judges.⁶⁵ These judges believe that common law structure requires them to bring any legal rule that abridges social morality, public policy, or human experience into harmony with modern understandings.

B. LEGAL PERSONHOOD IS CENTRAL TO COMMON LAW

The reason personhood is central to common law is that it determines who or what counts, and whether an entity’s value is inherent, or merely instrumental. “Things” exist for persons, while “persons” exist for themselves.⁶⁶ “Personhood,” however, is a protean term. A century ago, John Chipman Gray observed that “the technical legal meaning of a ‘person’ is a subject of legal rights and duties.”⁶⁷ In 1997, the Louisiana Supreme Court, noting that the state’s legislature had characterized a fetus born dead as “never to have existed as a person, except for purposes of actions resulting from its wrongful death,” correctly stated that this “classification of ‘person’ is made solely for the purpose of facilitating determinations about the attachment of legal rights and duties. ‘Person’ is a term of art. . . .”⁶⁸

Importantly, not only is a “person” not a biological concept, it is independent of being human.⁶⁹ Human slaves were once things, a Hindu idol was once designated a person, while human fetuses,⁷⁰ corporations,⁷¹ and governmental entities may

⁶⁴ *Omychund v. Barker*, (1744) 26 Eng. Rep. 15 (Ch.). See Edmund Heward, *Lord Mansfield* 63 (Barry Rose 1979).

⁶⁵ See generally ATIYAH & SUMMERS, *supra* note 53.

⁶⁶ “The objects of dominion or property are *things*, as contradistinguished from *persons*.” WILLIAM BLACKSTONE, 2 COMMENTARIES *16 (emphasis in original).

⁶⁷ JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 27 (Columbia Univ. Press 1909).

⁶⁸ *Wartelle v. Womens’ & Children’s Hospital*, 704 So. 2d 778, 780-81 (La. 1997).

⁶⁹ See *Ex Parte Boylston*, 33 S.C.L. 41, 43 (1847); *Jarman v. Patterson*, 23 Ky. 644, 645-646 (1828) (concluding that a slaves’ civil law personhood has nothing to do with being human).

⁷⁰ *Roe v. Wade*, 410 U.S. 113, 158, 162 (1973) (holding that fetuses are not persons within the meaning of the Fourteenth Amendment to the United States Constitution); *State v. Beale*, 376 S.E.2d 1, 2-3 (N.C. 1989) (holding that fetuses are not persons within the meaning of the South Carolina homicide statute). Today every

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be persons under an array of state or federal constitutional provisions, statutes, and common law.⁷²

On the other hand, “person” is commonly understood as being synonymous with “human,” which may become critical when a court is interpreting a statute. The Supreme Judicial Court of Massachusetts invoked this synonym when it interpreted that state’s vehicular homicide statute, which prohibited the operation of a motor vehicle so as to cause “the

American jurisdiction recognizes a cause of action in tort, almost always under the common law, for a fetus born alive who suffered prenatal injury after reaching viability. See David Kader, *The Law of Tortious Prenatal Death since Roe v. Wade*, 45 Mo. L. Rev. 639, 644 n.24 (1980). Some jurisdictions permit a common law cause of action for a fetus born alive who suffered even a pre-viability injury. *Eg.*, *Sylvia v. Gobeille*, 220 A.2d 222 (R.I. 1966); *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960). Others allow either a common law or statutory cause of action in favor of the estate of stillborns for prenatal injury that caused their deaths, with courts drawing the line at injuries inflicted both before and after viability. See the cases collected in *Farley v. Sartin*, 466 S.E.2d 522, 528 n.13 (W. Va. 1995); *Amadio v. Levin*, 501 A.2d 1085, 1087 n.3. (Pa. 1985).

Courts that reject the characterization of a human fetus as a “person” may be loathe to categorize it as a thing. See Wise, *Hardly a Revolution*, *supra* note 4, at 897. In *Witty v. American Gen. Capital Distrib., Inc.*, 727 S.W.2d 504, 504-506 (Tx. 1987), the Supreme Court of Texas held that fetuses were not “persons” under the Texas Wrongful Death Act or Survival Statute. But the Court’s entire explanation for its rejection of the mother’s alternative demand for damages for the destruction of her chattel consisted of the statement that “we hold as a matter of law, that a fetus is not relegated to the status of chattel.” *Id.* at 506. If a Texas fetus is neither a person nor property, then what is it? And what is a preembryo, the term for a zygote until fourteen days after fertilization? In *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), the Tennessee Supreme Court held both that the trial court had erred in holding that preembryos were persons and that the Tennessee Court of Appeals had erred in assuming they were property. *Id.* at 596-597. The Tennessee Supreme Court, however, did not have the Texas Supreme Court’s luxury of simply dictating what an entity was not and refusing to instruct us what they were, as the fates of living Tennessee preembryos had to be decided. The Court held that preembryos “occupy an interim category that entitles them to special respect because of their potential for human life,” but that the parties had “an interest in the nature of ownership to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law.” *Id.* at 597. It is not clear how this “interest in the nature of ownership” differs from a property interest and to what “special respect” the preembryos themselves were thereby entitled. Nevertheless, the Court of Appeals of Arizona, after holding that a three-day preembryo was not a person for the purpose of the Arizona wrongful death statute, adopted the Tennessee Supreme Court’s designation of the preembryo as occupying some interim position between property and person. *Jeter v. Mayo Clinic*, 121 P.3d 1256, 1261 (2005).

⁷¹ *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394 (1886) (holding that corporations are persons within the meaning of the Fourteenth Amendment to the United States Constitution).

⁷² Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C.L. REV. 1231, 1239 (1992).

death of another person.”⁷³ The court stated, “In construing a statute, words are to be accorded their ordinary meaning and approved usage.”⁷⁴ Therefore, “In keeping with approved usage, and giving terms their ordinary meaning, the word ‘person’ is synonymous with the term ‘human being.’”⁷⁵

This Massachusetts case illustrates why the word “person” in statutes, which are ordinarily construed according to common definitions, might easily have a different meaning than it has in the common law, where it often designates an entity as the subject of legal rights and duties.⁷⁶ The long bitter struggles over the personhoods of human fetuses, black slaves, and corporations have not been contests over whether these entities are human. That is a question of biology. Instead they concern whether these entities ought to have legal rights and therefore inherent value under civil law and if so, what rights they should have.⁷⁷

Precisely because it determines who lives and who dies, who may be enslaved and who may not, who counts and who does not, legal personhood is the most important individual issue that can come before a common law court. Any common

⁷³ *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984) (construing Mass. Gen. Laws c. 90, sec. 24 (g)).

⁷⁴ *Id.* at 1325 (quoting *Hashimi v. Kalil*, 446 N.E.2d 1387, 1389 (Mass. 1983) (determining whether a viable fetus was a “person”).

⁷⁵ *Id.* See *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (No. 14,891) (confronting the novel issue whether American Indians were “persons” or “parties” within the meaning of the Federal Habeas Corpus Act). The Court pointed to Webster’s, which “describes a person as ‘a living soul; a self-conscious being; a moral agent; a man, woman, or child; an individual of the human race,’” and noted that “the first section of the Revised Statutes, declares that the word ‘person’ includes partnerships and corporations,” and found the writ was available to the Indians. *Id.*

⁷⁶ Compare *Didonato v. Wortman*, 358 S.E.2d 489, 490 (N.C. 1987) (concluding that fetuses are persons within the meaning of the state wrongful death statute) with *State v. Beale*, 376 S.E.2d 1, 4 (N.C. 1989) (concluding that fetuses are not persons within the meaning of the state homicide statute). The word “person” may also have a different meaning among different statutes, even within a single jurisdiction.

⁷⁷ See generally Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745 (2001). See also, Michael D. Rivard, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1466 (1992) (stating that in the federal constitutional arena, “[r]ather than developing a coherent, unified theory of personhood, the Supreme Court follows a result-oriented approach. If the Court determines that a corporation should be protected by the First Amendment, for example, the corporation is granted constitutional personhood under the First Amendment. Personhood is thus a conclusion, not a question.”).

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law judge who would deny a legal thing the power to argue that changes in moral norms, policy, and experiential propositions require a re-evaluation of his or her legal thinghood acts inconsistently, unjustly, and outside the structure of the common law. The judge would make the most important common law rule the only one permanently unavailable for judicial re-examination.

This is not how the common law operates in the United States. If it were, human fetuses would not be common law persons for the purpose of injuries suffered *in utero* in every American state.⁷⁸ In 1884, Oliver Wendell Holmes, Jr., sitting on the Massachusetts Supreme Judicial Court, deprived fetuses of common law personhood after finding they were merely a part of their mothers.⁷⁹ Virtually every American state high court took his lead; but twentieth century science would prove them all wrong and each court later reversed itself.⁸⁰ When its turn came, the New York Court of Appeals asked, “[S]hall we bring the common law of this state, on this question, into accord with justice? . . . [A]s New York State’s court of last resort, we should make the law conform to right.”⁸¹ Borrowing from a British court, it said “[w]hen the ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.”⁸² Those judges believed they had “not only the right, but the duty to re-examine a question where justice demands it” and to “bring the law into accordance with present day standards of wisdom and justice rather than ‘with some outworn and antiquated rule of the past.’”⁸³ Judges, they said, acted “in the finest common-law tradition” when they adapt

⁷⁸ This is how federal constitutional law, which is not common law, operates. *Doe v. Shalala*, 862 F. Supp. 1421, 1426 (D. Md. 1994); *Roe v. Casey*, 464 F. Supp. 483 (E.D. Pa. 1978), *aff’d.*, 623 F.2d 829 (3d Cir. 1980). See WISE, RATTLING THE CAGE, *supra* note 4, at 107-118 (discussing how the evolution of the common law personhood for human fetuses occurred). This evolution is entirely separate from the decision in *Roe v. Wade*, 410 U.S. 113 (1973) to deny human fetuses personhood under the Fourteenth Amendment to the United States Constitution.

⁷⁹ *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884).

⁸⁰ See WISE, RATTLING THE CAGE, *supra* note 4, at 107-114. The Holmes case is *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884).

⁸¹ *Woods v. Lancet*, 102 N.E.2d 691, 692 (N.Y. 1951).

⁸² *Id.* at 694 (quoting *United Australia, Ltd. v. Barclay Bank, Ltd.*, A.C. 1, 29 (1941)).

⁸³ *Id.* (quoting *Funk v. United States*, 290 U.S. 371, 382 (1933)).

and alter prior cases “to produce common-sense justice.”⁸⁴ Any other outcome was “harsh” and would merely “do reverence to an outmoded, timeworn fiction.”⁸⁵

C. THE LEGAL THINGHOOD OF CHIMPANZEES SHOULD ALWAYS BE SUBJECT TO COMMON LAW REEVALUATION

Chimpanzees have a colorable, even a powerful, claim to treatment as legal persons whose fundamental interests in bodily liberty should be protected by basic legal rights.⁸⁶ Accelerating shifts in social morality and social policy, coupled with accreting human experience, and especially scientific investigation, are strengthening the argument for chimpanzee legal personhood.⁸⁷ A 2001 public opinion poll revealed that most Americans (eighty-five percent) believe, and correctly so, that chimpanzees have “complex social, intellectual, and emotional lives.”⁸⁸ Most (fifty-one percent) believe chimpanzees should be “treated similar to children, with a guardian to look after their interests,” as opposed to being treated either as human adults (nine percent) or as property (twenty-three percent).⁸⁹ Accompanying the 2005 publication of the chimpanzee genome in *Nature* was a commentary that urged “special ethical responsibilities towards captive great apes”; it suggested that “the study of great apes should follow ethical principles generally similar to those currently used on human subjects who cannot give informed consent.”⁹⁰ This commentary was strongly endorsed by the Chimpanzee Sequencing and Analysis Consortium. These were the scientists who sequenced the chimpanzee genome. They

⁸⁴ *Id.*

⁸⁵ *Id.* at 695 (quoting *Woods v. Lancet*, 105 N.Y.S.2d 417, 418 (App. Div. 1951) (Heffernan, J., dissenting)).

⁸⁶ See generally ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, *supra* note 3; WISE, RATTLING THE CAGE, *supra* note 5; Nussbaum, *supra* note 3; Tribe, *supra* note 3; Verchick, *supra* note 3; WISE, DRAWING THE LINE, *supra* note 4; Wise, *Hardly a Revolution*, *supra* note 4.

⁸⁷ See *supra* notes 25-35 and accompanying text for a discussion of the scientific investigation.

⁸⁸ Zogby Poll 5, Question 3 (interviews conducted between April 24-27, 2001) [hereinafter Zogby Poll] (on file with author).

⁸⁹ *Id.* at 9, Question 15.

⁹⁰ Pascal Gigneux et al., *The ethics of research on great apes*, 437 NATURE 27, 28 (Sept. 1, 2005). See also Chimpanzee Sequencing and Analysis Consortium, *supra* note 29, at 83.

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pointedly chose to ignore an accompanying commentary by members of the United States National Chimpanzee Resource Committee that perversely interpreted the termination of chimpanzee biomedical research around the world, often on ethical grounds, as a major reason for ramping up chimpanzee research in the United States.⁹¹

Public policy is shifting. The 1985 amendments to the United States Animal Welfare Act required the Secretary of Agriculture to promulgate minimum requirements for “a physical environment adequate to promote the psychological well-being of primates,” thereby implicitly recognizing that nonhuman primates have psychologies deserving of protection.⁹² Congress enacted the Chimpanzee Health Improvement, Maintenance, and Protection Act in 2000, which allotted up to thirty million dollars a year to support a sanctuary system in the United States in which hundreds of “surplus’ chimpanzees” could retire.⁹³ Congress also enacted legislation to assist the conservation of wild chimpanzees.⁹⁴

I have sought so far to establish that there is an inherent flexibility in the structure of the common law that allows its judges to re-evaluate each and every legal rule. I also have demonstrated how the conferred legal status of “person” is a mandatory prerequisite to having an entity’s interests considered in the civil law. It is therefore my position that common law judges have a duty at least to consider the claims of a “thing” that it ought to be considered a “person.”

In the next section I shall consider what common law causes of action might be most appropriate when a chimpanzee seeks to establish its fundamental common law right to bodily

⁹¹ VandeBerg et al., *supra* note 14, at 32. *E.g.*, Supplementary Note to the Home Secretary’s Response to the Animal Procedures Committee, Interim Report on the Review of the Operation of the Animals (Scientific Procedures) Act of 1986, at 2 (1997) (on file with author) (stating that “Great apes . . . have never been used under the 1986 Act as laboratory animals. But this has not previously been banned. The Government will not allow their use in the future. This is a matter of morality. The cognitive and behavioural characteristics and qualities of these animals means it is unethical to treat them as expendable for research.”), Interim Report *available at* <http://www.apc.gov.uk/reference/ar97.pdf> (last visited Dec. 10, 2006).

⁹² 7 U.S.C.A. § 2143(a)(2)(B) (West 2006).

⁹³ 42 U.S.C.A. § 287a-3a (West 2006).

⁹⁴ 16 U.S.C.A. §§ 6301-05 (West 2006). Congress included gibbons within the statute’s definition of great apes. *See* Charles Siebert, *Planet of the retired apes*, N. Y. TIMES MAG., July 24, 2005, at 29. There are no surplus American populations of gorillas and orangutans.

liberty. I have chosen two ancient, and very powerful, common law writs, the writs of *habeas corpus* and *de homine replegiando*. Each has a long and storied history of protecting the fundamental human interest in bodily liberty. They have protected even the interests of unfree humans who were classified as legal things, such as English villeins and black slaves. I argue that these two writs should accordingly be available to chimpanzees to challenge their legal thinghood as they attempt to vindicate their fundamental interests in, and common law right to, bodily liberty.⁹⁵

III. SLAVERY AND VILLEINAGE IN ANGLO-AMERICAN LAW

William Blackstone wrote, “Under the Saxon government, there were a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they and their children and effects, to the lord of the soil, like the rest of the cattle or stock upon it.”⁹⁶ Saxon slaves, post-Conquest villeins, and black slaves, from the time of the first Queen Elizabeth, were treated as chattels personal or real estate under English, and later American, law.⁹⁷ No legal status existed between slave and free; one was either free or slave.⁹⁸ “*Civiliter mortuus*” (“civilly dead”), these slaves were “things” that lacked every personal right, including the right to institute litigation.⁹⁹ But procedures eventually evolved by which even they could challenge their legal status in a court.

No one is sure where English human slavery originated or when it appeared, but we know that English Christians were enslaving one another by early Anglo-Saxon times. Slaves

⁹⁵ Liberty is a non-comparative right. Other, perhaps lesser, requirements exist for the award of personal (or bodily) liberty as a comparative equality right.

⁹⁶ WILLIAM BLACKSTONE, 2 COMMENTARIES *92-*93.

⁹⁷ THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW 1619-1860 61-80 (Univ. of North Carolina Press 1996); A. Leon Higgenbotham, Jr. & F. Michael Higgenbotham, “*Yearning to Breathe Free*”: *Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1222-1223 (1993) (stating that at different times, Virginia treated black slaves as personal chattels or real estate). See also *Neal v. Farmer*, 9 Ga. 555, 561 (1851) (“Property in the bondsman, was as absolute as in cattle or other stock.”).

⁹⁸ A. Leon Higgenbotham, Jr. & Barbara Kopytoff, *Property First, Humanity Second: The Recognition of the Slave’s Human Nature in Virginia Civil Law*, 50 OHIO ST. L.J. 511, 534, 535, 538 (1989).

⁹⁹ *E.g.*, *Peter v. Hargrave*, 46 Va. (5 Gratt.) 12, 14-17 (1848) (emphasis in original).

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could be bought, sold, and exported and the practice was never questioned.¹⁰⁰ Under a Saxon law modeled on Roman law, those enslaved due to war, criminal conviction, or accident of birth were deemed chattels; any wrong done them was perpetrated legally against their owners. By the tenth century, Saxon law allowed human slaves a few legal privileges, while continuing generally to treat them as things. Their legal thinghood was reflected in an agreement between Saxons and Celts that set out replacement values in the event of a nonhuman animal's loss. Both a human slave and a mare were worth twenty shillings.

As late as 1086, the Domesday Book recorded that between ten percent and twenty-five percent of Anglo-Saxons were slaves. The conquering Normans had no tradition of chattel slavery and believed freemen could more efficiently develop their newly won lands and increase the rents Norman landlords received. Therefore, they set about freeing English slaves. By the beginning of the twelfth century, only a handful of slaves, owned by the Catholic Church, remained. In 1102, the Council of Westminster formally outlawed the human slave trade, declaring, "[N]o one is henceforth to presume to carry on that shameful trading whereby heretofore men used in England to be sold like brute beasts."¹⁰¹

Though Saxon chattel slavery disappeared within sixty years of the Norman Conquest, many English remained villeins: "Villeins constituted the major portion of the English population as recorded in Domesday Book."¹⁰² There were two kinds of villeins: villeins *regardant*, those attached to land, and villeins *in gross*, those attached to the persons of their lords. Disagreement exists about the extent to which villeins were chattel slaves.¹⁰³ One mid-thirteenth century judicial opinion

¹⁰⁰ I owe my brief discussion of medieval English slavery primarily to DAVID A. E. PELTERET, *SLAVERY IN EARLY MEDIAEVAL ENGLAND: FROM THE REIGN OF ALFRED UNTIL THE TWELFTH CENTURY* (London 1995) [hereinafter PELTERET].

¹⁰¹ *Id.* at 78.

¹⁰² DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 39 (Cornell Univ. Press 1966) [hereinafter DAVIS]. In the twelfth century, Evesham Abbey had "five slaves and bondswomen. Then thirty-two villeins." PELTERET, *supra* note 100, at 239.

¹⁰³ Compare JOHN HAMILTON BAKER, *THE COMMON LAW TRADITION* 325 (Hambleton Press 2000) [hereinafter BAKER] ("the villein was not a slave in the Roman sense, nor was he owned by his lord . . .") with 3 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 491, 495 (1956) [hereinafter HOLDSWORTH] ("[M]any of the rules and

reported “[e]arls, barons and free tenants may lawfully . . . sell their [villeins] like oxen or cows,” and the plea rolls contain evidence of many sales of villeins.¹⁰⁴ Lord Holt, Chief Justice of the Court of King’s Bench at the turn of the eighteenth century, disliked black chattel slavery, however, and didn’t think villeins were slaves: “one may be a villein in England, but not a slave.”¹⁰⁵ The slaveophilic Georgia Supreme Court agreed, stating that “any analogy drawn from the ville[i]nage of the feudal times, is utterly fallacious.”¹⁰⁶ Villeins might have been owned by their lord, but they still had privileges that black chattel slaves never had, such as the right to marry. At worst, they were owned outright by their lords, but had legal rights against every other person in the world.¹⁰⁷

While a Saxon slave’s hope of freedom was limited to voluntary manumission or escape, a villein might improve his legal status in ways unavailable to slaves. He could do so through his lord’s conduct, residence in certain cities or boroughs for a year and a day without the lord making a claim, or by ordination, knighthood, marriage, and other means. Blackstone noted that villeins “could not leave their lord without his permission; but if they ran away, or were purloined

maxims of the Roman conception of property were applied to them. Their lord had absolute power over their bodies and their goods. He could sell them and treat them as he pleased; for they were his chattels.”).

¹⁰⁴ PAUL R. HYAMS, *KING, LORDS AND PEASANTS IN MEDIEVAL ENGLAND: THE COMMON LAW OF VILLEINAGE IN THE TWELFTH AND THIRTEENTH CENTURIES* 2-3 (Oxford Univ. Press 1980) [hereinafter HYAMS] (quoting *THE LONDON EYRE OF 1244* (H.W. Chew & M. Weinbaum eds., 1970)).

¹⁰⁵ *Smith v. Brown and Cooper*, (1701) 91 Eng. Rep. 566 (K.B.).

¹⁰⁶ *Bryan v. Walton*, 14 Ga. 185, 199 (1853).

¹⁰⁷ DAVIS, *supra* note 102, at 38, 39; 3 HOLDSWORTH, *supra* note 103, at 491, 495; *Bryan v. Walton*, 14 Ga. 185, 199 (1853) (“[W]here his lord was not concerned, a villein was a freeman in all his dealings.”).

Some would wish to deny to the unfree villein any legal rights. Is he not rightless almost by definition? Maitland, indeed, said of the villein: “In relation to his lord, the general rule makes him rightless [while] criminal law . . . protects him in life and limb Maitland would call a slave ‘rightless’ even when his life was legally protected against his master’s violence. After all, modern English law protects domestic animals against maltreatment without giving them any legal right of redress against their masters. This view, though not beyond argument, seems sensible enough. Clearly an object, dog or villein, may be protected by the law without having the ability to initiate itself legal proceedings to enforce that protection.

HYAMS, *supra* note 104, at 125-126 n.3 (citations omitted) (noting that Glanville may also have “thought in terms of an analogy between villeins and domestic animals”).

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from him, might be claimed or recovered by Action, like beasts or other chattels.”¹⁰⁸

As the common law presumption in favor of liberty evolved, it became increasingly difficult to prove that someone was a villein. Unless one confessed to being a villein in court, it had to be proven that one had descended from villein stock, unbroken by illegitimacy, from time out of mind. Some have suggested that a villein might once have directly initiated a lawsuit to establish his status as free; others claim that this right, if it ever existed, had disappeared by 1302, perhaps by 1230.¹⁰⁹ Later, the writ of *de homine replegiando* permitted the villein to test his legal status.

Common law writs evolved for use by a lord that might lead to the adjudication of a villein’s legal status. The writ of *naifty* was used by lords as far back as the early twelfth century to commence suits to determine whether a claimed villein was, or was not, free.¹¹⁰ During the thirteenth century, a lord who claimed a villein might sue in a county court, then deliver a writ of *naifty* to the sheriff. If the alleged villein then claimed he was free, the sheriff and county court lost jurisdiction and the case went to a royal court. To continue the litigation there, the lord had to obtain a *pone de nativis* or the alleged villein had to obtain a writ *de liberate probanda*, also called a writ *monstravit*. Until 1351, when Parliament severely weakened it, the writ *monstravit* allowed the alleged villein to remain free during the pendency of a proceeding that could last several years.¹¹¹ In his celebrated argument to the Court of King’s Bench in the 1772 case of *Somerset v. Stewart*, barrister Francis Hargrave observed that the common law courts placed the burden of proof upon the lord whenever the freedom of a villein was at issue. This was the case both with the writ of *de homine replegiando*, where the villein was the

¹⁰⁸ WILLIAM BLACKSTONE, 2 COMMENTARIES *98.

¹⁰⁹ Paul R. Hyams, *The Action of Naifty in the Early Common Law*, 90 L.Q. REV. 326, 333-335 (1974); R.C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILLE 343-344 (1958-1959).

¹¹⁰ Hyams, *supra* note 109, at 326; 3 HOLDSWORTH, *supra* note 103, at 497. “Naifty” was sometimes spelled “neifty” and was also called the writ *de nativo habendo*.

¹¹¹ Hyams, *supra* note 109, at 327, 328-331. See *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.); 3 HOLDSWORTH, *supra* note 103, at 497. The villein’s ability to use this writ was taken away by parliament during the reign of Edward III. 25 Edw. 3, st. 5, ch. 18 (use of the writ *de libertate probanda* would not prevent the lord from seizing a fugitive villein).

plaintiff, and the writ *de nativo habendo*, where the villein was the defendant.¹¹²

Over hundreds of years jurors, increasingly aghast at the spectacle of Englishmen exercising despotic power over other Englishmen, began to balk at branding anyone a villein. Thus villeinage was extirpated by the end of the sixteenth century, not because it was ever formally abolished, for it never was, but because the supply of villeins dried up and none were created. The last case involving a villein was decided in 1618 with a jury verdict favoring the villein.¹¹³

IV. THE COMMON LAW WRIT OF *DE HOMINE REPLEGIANDO*

A. THE DEVELOPMENT OF THE COMMON LAW WRIT OF *DE HOMINE REPLEGIANDO* IN ENGLAND

The common law writ of *de homine replegiando* is the oldest English “freedom writ”; it appears in the Pipe Rolls by the middle of the twelfth century.¹¹⁴ The writ “was a popular and most usual remedy to obtain a release from simple custodies,” and ordered a sheriff or a private person to turn one deprived of his liberty over to another, with the prisoner having to post bail.¹¹⁵ It evolved into the customary common law method to try title to villeins seized by a lord using the writ *de nativo habendo*.¹¹⁶

¹¹² *Somerset*, (1772) 98 Eng. Rep. 499.

¹¹³ *Pigg v. Caley*, Noy 27 (K.B. 1618).

¹¹⁴ ELSA DE HAAS, *ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275* 62 (AMS Press 1966) [hereinafter DE HAAS] (“[O]ne of the first records for the purchase of a writ *de homine replegiando* is located in the Pipe Roll records for 1165-66. . . .”) (emphasis in original).

¹¹⁵ Maxwell Cohen, *Some Considerations on the Origin of Habeas Corpus*, 16 CAN. B. REV. 92, 96, 97 (1938) (citation omitted).

¹¹⁶ *In re Williamson's Case*, 26 Pa. 9, 25 (1855) (Lowrie, J., concurring). See *Somerset*, (1772) 98 Eng. Rep. 499 (K.B.); *More v. Watts*, (1700) 88 Eng. Rep. 1426, 1428 (K.B.). (“If a *homine replegiando* be brought, and the defendant claim the party as his villein, that will be a good return for the sheriff to make; and there shall be no replevin till plaintiff give security, and that in Court; and then there shall go a writ . . . to the sheriff to deliver the plaintiff”) (emphasis in original). See also BAKER, *supra* note 103, at 332; 3 HOLDSWORTH, *supra* note 103, at 497, 498; HERBERT BROOM, *CONSTITUTIONAL LAW VIEWED IN RELATION TO COMMON LAW* 76 n.x (George L. Denman ed., 2d ed. 1885); PHINEAS PEMBERTON MORRIS, *PRACTICAL TREATISE ON THE LAW OF REPLEVIN IN THE UNITED STATES* 238 (2d and rev. ed. 1869) [hereinafter MORRIS] (“It was a good return to a *homine replegiando* to say that the defendant claimed the man as villein, but upon the return of the writ to the court, if any persons

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De homine replegiando is a species of replevin. It is the right to possession that usually beats at replevin's heart.¹¹⁷ There was, Chief Justice Holt wrote, "no diversity between a *homine replegiando* and a *common replevin* for cattle."¹¹⁸ *De homine replegiando* "borrows all that belongs to a replevy of goods."¹¹⁹ Blackstone wrote "[t]he writ of *de homine replegiando* lies to replevy a man out of prison, or out of the custody of any private person (in the same manner that chattels taken in distress may be replevied . . .)."¹²⁰

The conceptual distinction between the two kinds of replevin has not been that common replevin applies to nonhumans and *de homine replegiando* applies to humans. Generally common replevin applied to legal things, while *de homine replegiando* applied to legal persons; humans occasionally fell into both categories.¹²¹ Together, common replevin and *de homine replegiando* were intended to occupy the entire field of replevin, to include all things and every

came into the court and gave security to have the plaintiff in court at a day certain, a writ issued to the sheriff to deliver the plaintiff . . .") (emphasis added).

¹¹⁷ J.E. COBBEY, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN AS ADMINISTERED BY THE COURTS OF THE UNITED STATES 7, 16 (2d ed. 1900).

¹¹⁸ *More v. Watts*, (1700) 88 Eng. Rep. at 1427 (emphasis in original).

¹¹⁹ *Huger v. Barnwell*, 39 S.C.L. (5 Rich.) 273, 275 (1852). See MORRIS, *supra* note 116, at 237 ("[T]he proceedings upon the *homine replegiando* were very much the same as in the common cases of replevin for goods.") (emphasis added). Morris devoted a chapter of his 1869 treatise on the law of replevin to *de homine replegiando* because, at one time, "replevin was the principal remedy for an illegal imprisonment" and it was being used in the United States. *Id.* at 236.

¹²⁰ WILLIAM BLACKSTONE, 3 COMMENTARIES *129. See MORRIS, *supra* note 116, at 68. See also DE HAAS, *supra* note 114, at 67-68 ("[T]he writ *de homine replegiando* was obtained 'as of course' from the Chancery for releasing on surety anyone whom a sheriff or a private person had seized and was detaining as a prisoner.") (citation omitted).

[*De homine replegiando*] was, in substance, the process of replevin, applied to the purpose of rescuing a person from imprisonment. Just as chattels unlawfully distrained could be recovered by their owner by the action of replevin, so a person unlawfully detained could recover his liberty by this writ. Since it appears in Bracton, it is at least as old as the earlier half of the thirteenth century. It was directed to the sheriff, and ordered him to replevy a man who was in prison, or who was detained in the custody of some person named in the writ.

9 HOLDSWORTH, *supra* note 103, at 105 (citations omitted).

¹²¹ *Cowperthwaite v. Jones*, 2 U.S. (2 Dall.) 55 (1790). See also Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 284 (1965) [hereinafter Oaks]. Lord Mansfield occasionally wielded the writ of *habeas corpus* in similar way. See *infra* note 197 and accompanying text.

person wrongfully detained. Admittedly, there were occasional perverse and theoretically unsupportable uses of the writ of *de homine replegiando* in cases brought by antebellum American masters seeking to reclaim wayward slaves. But judges should have required those masters to assert the claim of common replevin instead.

With a small number of irrelevant exceptions, common replevin was meant to encompass “all species of animate, inanimate, tangible, mov[e]able property.”¹²² It primarily addressed the right to possess, which was often a part of the right to own, a legal thing by a legal person, a right that was inherent in such relationships as between man and plough, man and ox, and man and slave.¹²³ On the other hand, *de homine replegiando* generally applied to self-ownership, which was a legal person’s right to demand freedom from bodily restraint. Legal historian Frederick Maitland remarked that “the . . . connection between Replevin and Liberty is obvious,” and further declared that “when a man is wrongfully deprived of his liberty he ought to be replevied.”¹²⁴ This harmonized well with John Locke’s seventeenth century claim that each human had “a *Property* in his own *Person*.”¹²⁵ Along with Thomas Hobbes, Locke trumpeted “possessive individualism,” the idea that a human could own an attribute such as individual liberty in the same way he might own property.¹²⁶

¹²² COBBEY, *supra* note 117, at 41. See also 66 AM. JUR. 2D *Replevin* §6 at 503 (2001).

¹²³ As to human slaves, see, e.g., *Gullett v. Lamberton*, 6 Ark. 109, 117 (1845). The common law writ of detinue also applied to slaves. See *Lay v. Lawson*, 23 Ala. 377 (1845); *Bethea v. McLennon*, 23 N.C. 523 (1840). Detinue and replevin could both be invoked to recover wrongfully detained chattels to which the plaintiff had a right to possession, but replevin lay when the original taking was unlawful, while detinue was appropriate when the original taking was lawful. 1 C.J. *Actions* §120 (1914).

¹²⁴ F.M. Maitland, *The History of the Register of Original Writs*, 3 HARV. L. REV. 167, 219, 217 (1889-1890).

¹²⁵ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 287, 269 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (emphasis in original). The Report on the Trial by Jury in Questions of Personal Freedom of the Massachusetts House of Representatives questioned whether the Founders had intended to “yield [trial by jury] as a *right* to every man for the investigation of his title to an ox or horse, and withhold it on a trial which involved the ownership . . . of himself?”. COMMONWEALTH OF MASS. HOUSE OF REPRESENTATIVES, REPORT ON THE TRIAL BY JURY IN QUESTIONS OF PERSONAL FREEDOM, H.R. DOC. NO. 51, 7 (Mass. 1837) [hereinafter MASS. HOUSE REPORT] (emphasis in original). See also David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L. J. 473, 481 n.29 (2000).

¹²⁶ C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM*—

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The writ of *de homine replegiando* generally allows for the immediate release of someone seeking to replevy oneself to freedom.¹²⁷ However, by the middle of Blackstone's century, numerous exceptions and lengthy procedures had attached to the writ. These made the more efficient *habeas corpus* to become the writ of choice for most of those illegally detained.¹²⁸ But the writ *de homine replegiando* continued to remain viable. In 1758, John Eardley Wilmot, a justice on the Court of King's Bench and a future Chief Justice of the Court of Common Pleas, wrote that once a proper affidavit was laid before a court, if a writ of *habeas corpus* was inappropriate, "the case is not a remediless one: by the common law, the writ of '*homine replegiando*' will clearly relieve him," as a writ of right.¹²⁹

A writ *de homine replegiando* holds one great advantage over the writ of *habeas corpus*.¹³⁰ Unlike *habeas corpus*, *de homine replegiando* allows for jury trials.¹³¹ In 1786, Chief Justice McKean of the Pennsylvania Supreme Court recommended that a freedom suit originally brought on behalf of a black slave as a writ of *habeas corpus* be changed into a writ *de homine replegiando* so that a jury could decide the question of freedom.¹³² Antebellum Northern abolitionists understood this "advantage of a jury trial to persons who were

HOBBS TO LOCKE 3 (1962). The idea of "possessive individualism" preceded both Locke and Hobbes by at least three hundred years. TUCK, *supra* note 18, at 3, 16-29.

¹²⁷ Oaks, *supra* note 121, at 281. Oaks says the writ applied neither to wards nor villeins. *Id.*

¹²⁸ WILLIAM BLACKSTONE, 3 COMMENTARIES *129. See procedures described in Oaks, *supra* note 121, at 281-282. See also Cohen, *supra* note 115, at 97 ("it was circumscribed by so many exceptions on its face that it could not be used for the most important imprisonments as in felonies, or by special command of the King, or his Chief Justiciar; and it was probably used only in cases of private detentions or breaches of the peace not amounting to felony.") (citation omitted).

¹²⁹ Opinion on the Writ of Habeas Corpus, (1758) 97 Eng Rep. 29, 31, 49 (Answer of Mr. Justice Wilmot to the questions proposed to the Judges by the House of Lords, on the second reading of the bill, [entitled], An Act for giving a More Speedy Remedy to the Subject, upon the Writ of Habeas Corpus). "That writ, which is obtained out of the Court of Chancery upon an affidavit, goes to the sheriff, and commands him to replevy the man. If he cannot replevy him, he returns it, and a process goes out instantly to seize the body of the person who is supposed to have him in custody, and he is imprisoned himself till he produces the body." *Id.* at 49.

¹³⁰ One commentator, believing *de homine replegiando* a more effective remedy than *habeas corpus*, encouraged its use. Anonymous, *Some Defects in the Law of Habeas Corpus*, 22 LAW. REV. 149 (1855).

¹³¹ 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 31 (4th ed. 1840).

¹³² *Belt v. Dalby*, 1 U.S. 167 (Pa. 1786).

at a significant disadvantage under the prevailing law but who could count on the sympathy and support of a predominant portion of the community¹³³ The enslaved might prefer a writ, such as *habeas corpus*, that promised summary release. But they would settle for one, like *de homine replegiando*, that held out the possibility of a slower but more certain release from servitude.

B. THE WRIT OF *DE HOMINE REPLEGIANDO* AND HUMAN SLAVERY IN AMERICA

The writ of *de homine replegiando* was incorporated into the law of the American Colonies and, later, the American states with the rest of English common law.¹³⁴ “The use of the

¹³³ Oaks, *supra* note 121, at 282.

Abolitionists found this antique writ useful in rescuing negros from slave catchers in the northern states. It was also technically available to slaveowners seeking to recapture their human chattels, but one procedural feature of the writ nullified its utility for southerners: issues raised by the writ were triable by jury, and few northern juries in the 1850s sympathized with slave catchers.

William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J. S. HIST. 530, 535 (1970).

¹³⁴ Many states have specifically incorporated the common law of England and/or English statutes into their state law. ALA. CODE § 1-3-1 (2005) (common law has no date); ARK. CODE ANN. § 1-2-119 (2005) (common law has no date; statutes are from Mar. 24, 1606); CAL. CIV. CODE § 22.2 (2005) (common law has no date); COLO. REV. STAT. ANN. § 2-4-211 (2005) (common law has no date; statutes are prior to the fourth year of James the First, excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth); DEL. CONST. SCHEDULE, § 18 (2005) (common law as of 1776); FLA. STAT. ANN. § 2.01 (2005) (common law and statutes prior to July 4, 1776); GA. CODE ANN. § 1-1-10 (2005) (common law as of May 14, 1776); HAW. REV. STAT. § 1-1 (2005) (common law has no date); IDAHO CODE § 73-116 (2005) (common law has no date); 5 ILL. COMP. STAT. 50/1 (2005) (common law has no date; statutes are prior to the fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth); IND. CODE ANN. § 1-1-2-1 (2005) (common law has no date; statutes are prior to the fourth year of the reign of James the First, except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth); KY. CONST. § 233 (2005) (all laws in effect in Virginia on June 1, 1792; common law has no date; statutes are from July 4, 1776); MD. CONST. DECLARATION OF RIGHTS, art. V (common law has no date; statutes are prior to July 4, 1776); MASS. CONST. pt. 2, ch. VI, art. VI (2005) (common law and statutes that modified it before the adoption of the Massachusetts constitution in 1780); *Commonwealth v. Rowe*, 153 N.E. 537 (Mass. 1926); MISS. CONST. art. VI, § 146 (2005) (common law has no date and is used as a guide); MO. REV. STAT. § 1.010 (2005) (common law has no date; statutes are prior to the fourth year of the reign of James the First); MONT. CODE ANN. § 1-1-109 (2005) (common law has no date); NEB. REV. STAT. §

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writ . . . seems to have been relatively widespread¹³⁵ in America with “most state courts deriv[ing] their power to issue the writ from the common law.”¹³⁶ In its pure common law form, the writ *de homine replegiando* was used in Colonial Massachusetts by freedom-seeking blacks; its post-Revolution statute helped streamline the writ’s archaic procedures.¹³⁷ In

49-101 (2005) (common law has no date); NEV. REV. STAT. § 1.030 (2005) (common law has no date); N.H. CONST. pt. 2, art. 90 (the common law, and English statutes in amendment of it that were in force in New Hampshire upon the organization of the provincial government); N.J. CONST. art. XI, § 1, p. 3 (1947) (common law as of 1776); N.M. STAT. § 38-1-3 (2005) (states that the common law will be in effect, but courts have interpreted this to mean English common law in effect on July 4, 1776); *Browning v. Estate of Browning*, 3 N.M. 659, 684 (1886); OR. CONST. art. XVIII, § 7 (2003); 1 PA. CONS. STAT. § 1503 (2005) (the common law and statutes of England in force on May 14, 1776); R.I. GEN. LAWS § 43-3-1 (2005) (no reference to the common law; English statutes introduced prior to the Declaration of Independence); S.C. CODE ANN. § 14-1-50 (2004) (common law has no date); TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (2005) (common law has no date); VA. CODE ANN. § 1-200 (2005) (common law has no date). Other states refer generally to “the common law” being incorporated into the law of the state. ALASKA STAT. § 01.10.010 (2005); ARIZ. REV. STAT. § 1-201 (2005); KAN. STAT. ANN. § 77-109 (2005); MICH. CONST. art. III, § 7; N.Y. CONST. art. I, § 14; N.C. GEN. STAT. § 4-1 (2005); N.D. CENT. CODE § 1-01-03 (2005); OKL. STAT. ANN. tit. 12, § 2 (2005); S.D. CODIFIED LAWS § 1-1-23 (2005); TENN. CONST. art. XI § 1; UTAH CODE ANN. § 68-3-1 (2005); VT. STAT. ANN. tit. 1, § 271 (2005); WASH. REV. CODE § 4.04.010 (2005); WIS. CONST. art. XIV, § 13 (2005); WYO. STAT. ANN. § 8-1-101 (2005). No such statute or constitutional provision exists for Connecticut, Maine, Minnesota, Ohio, or Louisiana. However, all but civil law-influenced Louisiana incorporated English common law and statutes through judicial decision. *Baldwin v. Walker*, 21 Conn 168 (1851); *Colley v. Merrill*, 6 Me. 50, 55 (1829); *Cleveland, Columbus & Cincinnati R.R. Co. v. Keary*, 3 Ohio St. 201, 205-206 (1854); *Congdon v. Congdon*, 200 N.W. 76, 82 (Minn. 1924) (not deciding whether it was the common law in effect at the time of the Revolution or at the time of the Adoption of the Northwest Ordinance of 1787).

¹³⁵ *Oaks*, *supra* note 121, at 283.

¹³⁶ THOMAS D. MORRIS, *FREE MEN ALL—THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861* 11 (Johns Hopkins Univ. Press 1974) [hereinafter MORRIS].

¹³⁷ *E.g.*, *Margaret v. Muzzy* (1768) (Middlesex Inferior Ct.) (Cambridge); 2 LEGAL PAPERS OF JOHN ADAMS, Case. No. 40, 58 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). *Cf.* *Oliver v. Sale*, Quincy’s Reports 29 (1762) (in which counsel for two blacks argued the defendant, by selling his clients into slavery, exposed himself to a writ of *de homine replegiando*). *See also* 1 Mass. Gen Laws. ch. 58 (1786). After commissioners appointed to recommend wholesale revisions of the Massachusetts General Laws wrote that *habeas corpus* “furnishes so complete and effective a remedy for all cases of unlawful imprisonment or restraint that the writ *de homine replegiando* is very seldom used” in 1834, the writ was abolished the following year. COMMONWEALTH OF MASS., REPORT OF THE COMMISSIONERS APPOINTED TO REVISE THE GENERAL STATUTES OF THE COMMONWEALTH, pt. 3, 220 (1834). It was abolished perhaps “in inadvertence, or, any rate, without adequate consideration,” perhaps as a sop to the South. MASS. HOUSE REPORT, *supra* note 125, at 7; *see also* MORRIS, *supra* note 136, at 64-65. New York retained the writ’s traditional cumbersome procedures. *See Skinner v. Fleet*, 14 Johns 263, 268-269 (N.Y. Sup. Ct. 1817); *Covenhoven v. Seaman*, 1 Johns Cas. 23, 24 (N.Y. Sup. Ct. 1799).

1837, a Massachusetts House of Representatives report stated that if “a master recaptured someone who was not his slave, “he would be liable to relinquish his custody of such person on the process of *habeas corpus* or the writ *de homine replegiando*.”¹³⁸

From the Republic’s early days, the writ *de homine replegiando* was used in at least six other states, Maine, Pennsylvania, Maryland, South Carolina, Mississippi, and Virginia. Likewise, “In Massachusetts, New York, Pennsylvania and especially in Maine, the writ was apparently very familiar to lawyers,” and “seems to have been used for virtually every purpose for which *habeas corpus* was employed,” including criminal commitment, civil arrest, military service, parent-child, child custody, and master-apprentice disputes.¹³⁹

In 1823, a South Carolina federal court, replying to the claim that the writ *de homine replegiando* “is not to be raked up from the ashes of the common law to be now first used against the state of South Carolina,” observed that it was “ingrafted by law into the jurisprudence of South Carolina; nor is it unknown in actual practice in cases to which it is applicable. In the state of New York it is familiarly used.”¹⁴⁰ In 1834, Chancellor Halworth, on the New York Court for the Correction of Errors, explained that, when the Fugitive Slave Act of 1793 was enacted,

the common law writ of *homine replegiando*, for the purpose of trying the right of the master to the services of the slave, was well known to the laws of the several states, and was in constant use for that purpose, except so far as it had been superseded by the more summary proceeding by *habeas*

¹³⁸ MASS. HOUSE REPORT, *supra* note 125, at 20 (emphasis in original).

¹³⁹ Oaks, *supra* note 121, at 283-284 n.219 (1965). “The writ [of *de homine replegiando*] existed as a part of the common law; and . . . needed no formal enactment to give it force in the colonies.” MASS HOUSE REPORT, *supra* note 125, at 6. I do not generally discuss the cases in which state writs of *de homine replegiando* were trumped by federal fugitive slave laws. See, e.g., *Jack v. Martin*, 12 Wend. 311 (N.Y. Sup. Ct. 1834); *Wright v. Deacon*, 5 Serg. & Rawle 62 (Pa. 1819).

¹⁴⁰ *Elkison v. Deliesseline*, 8 F. Cas. 493, 497 (C.C.D.S.C. 1823) (No. 4366) (internal quotations omitted). The court also said the writ of *de homine replegiando* was available even if the writ of *habeas corpus* was not. *Id.*

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corpus, or by local legislation.¹⁴¹

The following year, a New York federal court, holding the writ of *de homine replegiando* pre-empted by a federal fugitive slave law, conceded that “[t]he writ *de homine replegiando* is . . . adapted to try the question of slavery, and though nearly obsolete, this court cannot deny to the party the right of resorting to it”¹⁴²

Maine supplemented its common law of *de homine replegiando* with a statute substantially copied from Massachusetts and aimed at those “imprisoned, restrained of [l]iberty, or held in duress.”¹⁴³ A later version was held to lie “in favor of a person unlawfully deprived of his liberty, and it must be prosecuted in his own name and for his own benefit.”¹⁴⁴ Pennsylvania reports contain numerous examples of the writ’s use.¹⁴⁵ In 1817, the Pennsylvania Supreme Court refused to issue a writ of *habeas corpus* on behalf of a black who claimed to be free, since the case had been heard by another court. But paraphrasing England’s Justice Wilmot, the court noted, “[T]he party is not without remedy, as he may resort to a *homine replegiando*.”¹⁴⁶ In 1847, a Pennsylvania Supreme Court Justice issued a writ *de homine replegiando* to a sheriff holding a suspected fugitive black slave on order of the Philadelphia Court of Quarter Sessions.¹⁴⁷

Most Southern courts, however, were unenthusiastic about

¹⁴¹ Jack v. Martin, 14 Wend. 507 527 (N.Y. Ct. Err. 1835).

¹⁴² *In re Martin*, 16 F. Cas. 881, 882 (C.C.S.D.N.Y. 1835) (No. 9154) (emphasis added).

¹⁴³ 1821 Me. Laws ch. 66 (1821).

¹⁴⁴ Not only would it not have applied to a master seeking to recover his slave, it did not apply to “a party to recover one, who owes him service by contract,” including an infant and an apprentice. *Richardson v. Richardson*, 32 Me. 560, 563 (1851). See *Bridges v. Bridges*, 13 Me. 408, 411 (1836) (“It has been inquired, what shall a master do, if his apprentice is taken away by his father? It is a sufficient answer, that a writ for replevying the person, is not the proper remedy . . . [T]here is no doubt but any unlawful imprisonment or detention of a minor child, may be open to inquiry upon *habeas corpus*.”) (emphasis in original).

¹⁴⁵ *E.g.*, *Butler v. Delaplaine*, 7 Serg. & Rawle 378 (Pa. 1821); *Alexander v. Stokeley*, 7 Serg. & Rawle 299 (Pa. 1821); *Wilson v. Belinda*, 3 Serg. & Rawle 396 (Pa. 1817).

¹⁴⁶ *Ex Parte Lawrence*, 5 Binn. 304, 304 (Pa. 1817) (emphasis in original). *De homine replegiando*, however, “seems to have been available to slaves and slaveowners on the same basis.” Oaks, *supra* note 121, at 284.

¹⁴⁷ *In re Brown* (unreported), in *SLAVERY IN THE COURTROOM: AN ANNOTATED BIBLIOGRAPHY OF AMERICAN CASES* 78 (Paul Finkelman ed., 1985).

leaving a freedom writ lying in their midst for a black slave to invoke. The writ's power to restore a petitioner to immediate liberty caused both antebellum Southern judges and legislatures to disfavor, narrow, and even abolish it.¹⁴⁸ Some Southern judges claimed the writ had fallen into a fatal disuse, permanently superseded by the writ of *habeas corpus* and other causes of action.¹⁴⁹ The South Carolina Supreme Court, believing the writ was "calculated to be extremely mischievous to one who turns out to be really the master," found it had been entirely supplanted by that state's Freedom Suit Act.¹⁵⁰ The Virginia Court of Appeals noted that:

Anterior to [the Virginia Freedom Suit Act of 1795], the *habeas corpus* and *de homine replegiando* were resorted to by [black] slaves asserting a right to freedom; but as these remedies proved vexatious and unsafe [in other words, they worked], a new proceeding was prescribed by the act . . . the *homine replegiando* was repealed, and the *habeas corpus* was considered as no longer appropriate.¹⁵¹

C. A CHIMPANZEE IS ENTITLED TO USE THE COMMON LAW WRIT OF *DE HOMINE REPLEGIANDO* TO CHALLENGE HIS OR HER LEGAL THINGHOOD

We have seen that the seminal common law freedom writ of *de homine replegiando* was long available for use by villeins and black slaves to challenge the lawfulness of their detention. While some might claim that this writ is obsolete, it is not. It has merely been overshadowed by other remedies, especially the more efficient writ of *habeas corpus*. But the writ of *de homine replegiando* continues to exist, and is available if the

¹⁴⁸ *E.g.*, MASS. COMP. STATS. 1802-30, § 8, at 664; 1814 VA. ACTS § 314, at 68. Massachusetts abolished the writ in 1835, perhaps because the legislature accepted the claim of the Commissioners appointed to revise the general laws that the writ of *habeas corpus* "furnishes so complete and effectual a remedy for all cases of unlawful imprisonment or restraint, that the writ *de homine replegiando* is very seldom used," or perhaps because it was temporarily capitulating to Southern pressure to eliminate it. COMMONWEALTH OF MASS., REPORT OF THE COMMISSIONERS APPOINTED TO REVISE THE GENERAL STATUTES OF THE COMMONWEALTH, pt. 3, at 229 (1834). *See also* MORRIS, *supra* note 136, at 64-65; MASS. REV. STATS. 1836, ch. 111, § 38.

¹⁴⁹ *Huger v. Barnwell*, 39 S.C.L. (5 Rich.) 273, 274 (1852).

¹⁵⁰ *Id.* at 275.

¹⁵¹ *De Lacy v. Antoine*, 34 Va. (7 Leigh) 438, 439 (1836) (emphasis in original).

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usual remedies are not.¹⁵²

A similar argument of obsolescence was rejected by a United States District Court in 1879 when American Indians sought to use the federal statutory writ of *habeas corpus* for the first time. The Government claimed that

this is the first instance on record in which an Indian has been permitted to sue out and maintain a writ of *habeas corpus* in a federal court and therefore the court must be without jurisdiction This is a *non sequitur*. . . . It cannot [] . . . be fairly said that because no Indian ever before invoked the aid of this writ in a federal court, the rightful authority to issue does not exist. Power and authority rightfully conferred do not necessarily cease to exist in consequence of long non-user. Though much time has elapsed, and many generations have passed away, since the passage of the original *habeas corpus* act [] . . . it will not do to say that these Indians cannot avail themselves of its beneficent provisions simply because none of their ancestors ever sought relief thereunder.¹⁵³

Even if a court did determine that the writ *de homine replegiando* had become obsolete, that would be true only with respect to humans, who have an array of powerful causes of action from which to choose. But the common law is only now arriving at the point where it might be plausible—on morality, policy, and experiential grounds—for a chimpanzee petitioner successfully to invoke the writ of *de homine replegiando* by appealing to the same arguments that gave captive humans the power to use it when they had no other remedy.

The writ therefore remains available to be invoked by a chimpanzee petitioner claiming to be unlawfully detained in any jurisdiction that originally incorporated the common law of England and which has not repealed the writ either by statute or through judicial action. Even if a court determines that the chimpanzee is a thing being lawfully detained, that is no reason for prejudging that ultimate issue and denying the chimpanzee petitioner the capacity to use the writ *de homine*

¹⁵² Similarly, even though common law equality has been overshadowed by the equality mandated by the Fourteenth Amendment to the United States Constitution, it still exists. See WISE, RATTLING THE CAGE, *supra* note 4, at 295 n.116.

¹⁵³ United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879) (No. 14,891)

replegiando in the first place.

A chimpanzee, like any other petitioner who files a writ of *de homine replegiando*, would be entitled to have the merits of his case decided by a jury. Much as it once was more advantageous for a black slave seeking her freedom to file a writ of *de homine replegiando* and demand a trial by jury than it was for her to seek a writ of *habeas corpus*, it may be more prudent for one representing a chimpanzee to file a writ of *de homine replegiando* than to seek a common law writ of *habeas corpus*. Both black slave and chimpanzee were, and likely would be, at a “significant disadvantage under the prevailing law,” with both able to “count on the sympathy and support of a predominant portion of the community.”¹⁵⁴

This was true in the Northern states before the American Civil War. It would probably be true throughout the United States as we enter the twenty-first century, where the average American appears to be further evolved in her thinking about the legal status of chimpanzees than is the average judge. Recall that a 2001 public opinion poll revealed that fifty-one percent of Americans believe that chimpanzees should be “treated similar to children, with a guardian to look after their interests,” with only twenty-one percent reporting that chimpanzees should be treated as property.¹⁵⁵ Thus the writ *de homine replegiando* may turn out to be just as “extremely mischievous,” just as “vexatious and unsafe” to the masters of chimpanzee slaves, as it once was to the masters of black slaves in antebellum South Carolina and Virginia. As the September 2005 Brazilian decision demonstrates, sympathetic judges exist.¹⁵⁶

V. THE COMMON LAW WRIT OF *HABEAS CORPUS*

A. THE DEVELOPMENT OF THE WRIT OF *HABEAS CORPUS* IN ENGLAND

It is “[t]he most celebrated writ in the English law,” said Blackstone, and “[t]he most fundamental legal right” in the

¹⁵⁴ See *supra* note 133 and accompanying text.

¹⁵⁵ See Zogby Poll, *supra* note 88 and accompanying text.

¹⁵⁶ See *In Favor of Suica*, *supra* note 1.

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Anglo-American law canon.¹⁵⁷ Wide ranging, penetrating, immune to technical challenge, and available in both common law and statutory forms, the writ of *habeas corpus* remedies every illegal restraint, public or private, wherever and however it may occur. It began humbly, as a common law writ intended to secure the appearance of one who had ignored a tribunal's repeated summonses. Its antecedents can be found in the eighth century, when Anglo-Saxon tribunals required an accused to appear to pay *wergeld*, the price of a life or injury. If the accused thrice disregarded this summons, then ignored a fine for contempt, the scofflaw could be distrained of his property, possibly imprisoned, or even killed, if he resisted.¹⁵⁸ Near the end of the eleventh century, William the Conqueror introduced a writ that commanded county sheriffs to summons a party to court. A century later, Henry II's expanded writ ordered sheriffs to bring accuseds before a court.¹⁵⁹

By the mid-thirteenth century, judges were using the writ of *habeas corpus ad respondendum* ("have the body to answer") to have recalcitrant defendants brought before them.¹⁶⁰ At that time, Bracton wrote that a sheriff might be ordered to produce anyone who three times failed to obey a summons.¹⁶¹ The courts of the time also sought to compel an appearance before them by seizing lands, "*quod distringat eum per omnes terras Et quod habeat corpus* (to distrain him of all [his] lands and [in this way] have [his] body)," and eventually devised the *capias* to assist.¹⁶² Courts began to use the writ of *habeas*

¹⁵⁷ WILLIAM BLACKSTONE, 3 COMMENTARIES *129; DAVID CLARK & GERARD MCCOY, THE MOST FUNDAMENTAL LEGAL RIGHT: HABEAS CORPUS IN THE COMMONWEALTH (Oxford Univ. Press 2000) [hereinafter CLARK & MCCOY]. See also, Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 143 (1952).

¹⁵⁸ William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983, 984-85 (1978). The Perpetual Edict in Justinian's *Digest* has the praetor summoning before him the freeman unlawfully detained by means of a writ called *de homine libero exhibendo* ("produce the person"). See Albert S. Glass, *Historical Aspects of Habeas Corpus*, 9 ST. JOHN'S L. REV. 55, 56 (1934).

¹⁵⁹ Duker, *supra* note 158, at 988-989.

¹⁶⁰ Cohen, *supra* note 115, at 107-08.

¹⁶¹ 1 HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 474-77 (Travers Twiss ed., 1878).

¹⁶² Duker, *supra* note 158, at 994, 996 (emphasis added) (citation omitted). These two writs were distinct. The purpose of the writ of *habeas corpus* was simply to produce a body, while the *capias* was intended to be used to arrest and detain. See *id.* at 997-1002; Maxwell Cohen, *Habeas Corpus Cum Causa: The Emergence of the*

corpus ad respondendum in other ways, too, such as to order a sheriff to assemble a jury.¹⁶³ At this time, the writ of *habeas corpus* had nothing whatsoever to do with justifying an unlawful detention. Instead it was “aimed at persons not in custody, but at large” or at initiating a proceeding; it was “essentially a technique for getting something done which the ordinary processes of the courts apparently had been unable to do.”¹⁶⁴

Not later than the beginning of the fourteenth century, prisoners began to join the writ of *habeas corpus* to the writs of *certiorari* or *audita querela*, and later, to the evolving writ of privilege.¹⁶⁵ A writ of *certiorari* brought a prisoner’s case from an inferior to a superior tribunal, sometimes from a lower common law court to a higher court, more often from a common law court to the Chancery. The accompanying writ of *habeas corpus* brought the prisoner’s body into court. This combination evolved into the writ of *habeas corpus cum causa*, by which prisoners, whether detained by private or public persons, could have themselves brought from an inferior to a superior court in order to inquire into the lawfulness of their detention.¹⁶⁶ It would become a formidable weapon in the

Modern Writ—I, 18 CAN. B. REV. 10, 11 (1940).

¹⁶³ Duker, *supra* note 158, at 994, 1000. See, e.g., Y.B. Hill. 12 Rich. II pl. 18 (1388).

¹⁶⁴ Cohen, *supra* note 162, at 11; Cohen, *supra* note 115, at 110, 116.

¹⁶⁵ Duker, *supra* note 158, at 1012-15 (stating that the writ of privilege developed to allow those specially associated with Parliament, the King ministers, and the officers and clerks of the Royal Courts to be tried before those tribunals); Cohen, *supra* note 162, at 14. See, e.g., Y.B. Mich. 17 Edw. III fol. 37, pl. 9 (1344) (*habeas corpus* was combined with *audita querela* [the process used by a defendant for relief against an adverse verdict]); Edward Jenks, *The Story of the Habeas Corpus*, 18 L. Q. REV. 64, 69-72 (1902). A writ of privilege allowed one with some special connection to a court to have a proceeding brought against him heard by that court. Cohen, *supra* note 162, at 16-17.

¹⁶⁶ *Williamson v. Lewis*, 39 Pa. 9, 27 (1861); Y.B. Trin. 24 Edw. III, fol. 27, pl. 3 (1351). See WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS 4 (2d ed. 1893) (stating that as far back as Henry VI (1422-1461), the *cum causa* was “used as a means of relief from private restraint.”); Hurd, *supra* note 16, at 131. It has also been noted that

[B]y the end of the sixteenth century, the *Habeas Corpus ad respondendum*--the form used “when a man hath a cause of action against one who is confined by the process of some inferior court,” was distinct from the *Habeas Corpus ad subjiciendum et recipiendum*--the form used when a person was detained on a criminal charge; and a little later the form *ad fasciendum et recipiendum* became appropriated to the case where a defendant in a civil action, in an inferior court, wished to remove the action into a superior court.

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hands of courts jockeying for power against other courts, for example, the Chancery, Ecclesiastical, Requests, High Commission, and Admiralty Courts against the Courts of King's Bench, Common Pleas, and Exchequer, and by superior against inferior common law courts.¹⁶⁷

The *cum causa* form of the writ of *habeas corpus* was addressed to judges of an inferior court; its *ad subjiciendum* ("to submit to" or "to undergo") form was addressed to someone who was detaining an applicant. By combining these two writs, as early as the beginning of the sixteenth century, *habeas corpus* began to take on a more modern look and function as an independent writ. It soon began to detach from other writs and "ceased to be a mere command to deliver the body and became instead a command to have 'with cause.'"¹⁶⁸ This was partially a result of the long power struggle between the common law courts and the Sovereign with his Privy Council.¹⁶⁹ Thus, in 1587, the Court of Common Pleas could order a prisoner's release when the return to the writ of *habeas corpus cum causa* merely stated that the prisoner was being held "per mandatum Francisci Walsingham" Elizabeth's I's chief spymaster.¹⁷⁰

However, there were limits to the *habeas corpus* power of the court against the Sovereign. As late as the famous *Five Knights Case* of 1627, England's most prominent lawyers would argue unsuccessfully that certain knights ordered imprisoned by the King's Council for refusing to pay taxes should be released, or even that a cause of their detention should be specified.¹⁷¹ An aroused House of Commons responded with a

9 HOLDSWORTH, *supra* note 91, at 111 (emphasis in original) (citations omitted).

¹⁶⁷ ROBERT J. SHARPE, *THE LAW OF HABEAS CORPUS* 4-7 (2nd. ed. 1989); Duker, *supra* note 148, at 1002-25; Cohen, *supra* note 162, at 16-25.

¹⁶⁸ Maxwell Cohen, *Habeas Corpus Cum Causa: The Emergence of the Modern Writ—II*, 18 CAN. B. REV. 172, 197 (1940). See also Neil Douglas McFeeley, *The Historical Development of Habeas Corpus*, 30 SW. L. J. 585, 586-88 (1976); Cohen, *supra* note 162, at 19, 28, 32. Cohen refers to the writ as *corpus cum causa ad subjiciendum*. *Id.* at 35.

¹⁶⁹ Cohen, *supra* note 162, at 19-25.

¹⁷⁰ Hellyard's (or Hillyard's) Case, (1587) 74 Eng. Rep. 455 (C.P.). Later, when returns declared a prisoner held by special order of the Sovereign or on authority of the entire Privy Council, a prisoner he often remained. Duker, *supra* note 158, at 1026-30.

¹⁷¹ Also called Darnel's Case, 3 How. St. Tr. 1 (1627). For discussions of the case see Sharpe, *supra* note 167, at 9-13 and Church, *supra* note 166, at 4-8. Sharpe writes, "It is, perhaps, fair to say that on the strictly legal arguments, the court could have easily come down on either side, and that the political pressures and, perhaps, the

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Petition of Right, Clauses five and eight of which complained that subjects were being imprisoned without cause being shown, and that when they were brought before the court by writ of *habeas corpus* “there to undergo and receive” what the court would order (a reference to *habeas corpus ad subjiciendum et recipiendum*), “no cause was certified, but that they were detained by your Majesty’s special command”¹⁷² The Commons did “humbly pray . . . that no freeman, in any such manner . . . be imprisoned or detained”¹⁷³ The Petition of Right did receive the Royal assent.

The following year, the Privy Council, then the Star Chamber, imprisoned a London Merchant for speaking insolently to the Privy Council. Twice the Court of King’s Bench ordered his release on a writ of *habeas corpus*. *Chambers’ Case* confirmed that the writ of *habeas corpus* had assumed a role greater than the protection of the jurisdiction of common law courts. Indeed, questioning the validity of commitments, previously an incidental effect of the writ, began to become its major object. In Professor Duker’s judgment, “It was at this point . . . that the writ of *habeas corpus* embarked upon its journey as ‘the highest remedy in law, for any man that is imprisoned.’”¹⁷⁴

Parliament went on to enact the Habeas Corpus Act of 1641. This statute declared that anyone imprisoned by a court, the King, or his Privy Council could have a writ of *habeas corpus* in either the Courts of King’s Bench or Common Pleas.

political convictions of the judges, tipped the scale in the King’s favour.” Sharpe, *supra* note 167, at 13. See also Cohen, *supra* note 162, at 37-39. Cohen believed

the importance of *habeas corpus* was that it had been made the basis for the attack upon an imprisonment commanded by the King himself and had proven a quick method . . . to have one so imprisoned brought before a competent tribunal and there have himself charged and heard and the legality of the detention argued and adjudged.

Id. at 38.

¹⁷² 3 Car. I, ch. 1, § 5 (1628), available at <http://www.constitution.org/eng/petright.htm> (last visited Dec. 10, 2006).

¹⁷³ 3 Car. I, ch.1, § 8 (1628). This was not so much a statute, as a declaration of existing law. Sharpe, *supra* note 167, at 13-14.

¹⁷⁴ Duker, *supra* note 158, at 1035 (emphasis added) (quoting Proceedings in Parliament Relating to the Liberty of the Subject, (1628) 3 How. St. Tr. at 59, 154). See Cohen, *supra* note 162, at 28 (“the most significant development of the writ in the sixteenth and seventeenth centuries [was] the rise of the *habeas corpus ad subjiciendum* and the use of the writ to test the validity of every imprisonment.” *Ad subjiciendum* means “to submit to’ or ‘to undergo.’”)

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The custodian of the prisoner would be ordered to “bring . . . the body of the . . . party so committed . . . and . . . likewise certify the true cause of such . . . imprisonment, and thereupon the court . . . shall proceed to examine and determine whether the cause of such commitment . . . be just and legal”¹⁷⁵ In 1670, upon just such a writ of *habeas corpus*, Chief Justice Vaughan, of the Court of Common Pleas, ordered the release from the Tower of London of those brave jurors who had insisted upon acquitting William Penn after being expressly by the trial judge warned against doing so. Vaughn proclaimed that “[t]he Writ of *habeas corpus* is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it.”¹⁷⁶ Of course, some judges still had ways of avoiding or delaying the production of detained prisoners, ordering them onto ships bound for distant lands, refusing to entertain writs filed when courts were in their frequent vacations, and by imposing high bails.¹⁷⁷ These, and other abuses, led to the passage of The Habeas Corpus Act of 1679, England’s most renowned statute, said by Blackstone to be “another magna carta.”¹⁷⁸

This Act was intended to remedy these defects, and even to allow third persons to seek writs of *habeas corpus* on behalf of detainees. However, it was not intended to reach imprisonments ordered by the House of Commons or noncriminal detentions.¹⁷⁹ Nor was it intended to supplant the

¹⁷⁵ 16 Car. 1, ch. 10. Presumably this referred to the *habeas corpus ad subjiciendum*.

¹⁷⁶ Bushell’s Case, (1670) 124 Eng. Rep. 1006, 1007 (C.P.) (emphasis added).

¹⁷⁷ See Cohen, *supra* note 168, at 181-184; 9 HOLDSWORTH, *supra* note 103, at 120.

¹⁷⁸ WILLIAM BLACKSTONE, 3 COMMENTARIES *135.

¹⁷⁹ See Case of the Sheriff of Middlesex, (1840) 113 Eng. Rep. 419, 424 (Q.B.). Cohen, *supra* note 168, at 186 n.133 (“civil detentions’ . . . is intended to include not only those cases where there is an imprisonment under execution or like process at the suit of a party, but those cases of private detentions as well as commitments by bodies not being courts of law, yet having power to commit.”). In 1816, the statutory writ was extended to private custody, which the common law writ already covered. 56 Geo. III, ch. 100 (1816).

The United States Supreme Court has noted that “[a]s early as the 17th century, the English Habeas Corpus Act of 1679 authorized complaints to be filed by ‘any one on . . . behalf’ of detained persons, see 31 Car. II, ch. 2, and in 1704 the House of Lords resolved ‘[T]hat every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents, or friends, to apply for, and obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law.’ See *Ashby v. White*, 14 How. St. Tr. 695, 814 (Q. B. 1704).” *Whitmore v. Arkansas*, 495 U.S.

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common law, for the common law writ of *habeas corpus ad subjiciendum* “has a much broader scope than . . . the Habeas Corpus Act; for it may issue in all sorts of cases”¹⁸⁰ Yet even in circumstances not covered by the Habeas Corpus Act, “when the writ was afterwards issued at common law, [the courts] adopted in practice, so far as the same were applicable, the provisions of the [1679 Act].”¹⁸¹ Writs of *habeas corpus* now began regularly to issue to secure the release from “imprisonment by private persons, or from imprisonment on other than a charge of crime.”¹⁸²

Because many continued to perceive deficiencies in the writ of *habeas corpus*, especially naval impressments, in 1758 the House of Commons voted to amend the 1679 Act.¹⁸³ But the bill foundered on the implacable opposition of Lords Mansfield, Chief Justice of the Court of King’s Bench, and Hardwicke, Lord Chancellor. In what Horace Walpole described as “the only speech, which, in my time at least, had real effect: that is,

149, 161-62 (1990). Private detentions are not normally remedied by the federal writ of *habeas corpus* in the United States. THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1427 n.3 (Paul Bator et al. eds., 2d ed. 1973).

This Act made the writ of *Habeas Corpus ad subjiciendum* the most effective weapon yet devised for the protection of the liberty of the subject, by providing both for a speedy judicial inquiry into the justice of any imprisonment on a criminal charge, and for a speedy trial of prisoners remanded to await trial.

9 HOLDSWORTH, *supra* note 103, at 118. Justice Wilmot acknowledged that some claimed the 1679 Act permitted writs of *habeas corpus* to be issued against private detentions, but “I must say they never read the Act if they thought so.” Opinion on the Writ of Habeas Corpus, (1758) 97 Eng. Rep. 29, 40. See WILLIAM BLACKSTONE, 3 COMMENTARIES *137.

¹⁸⁰ Williamson v. Lewis, 39 Pa. 9, 29 (1861) (“Much perplexity has arisen in many minds from confounding [the common law writ] . . . with the statutory writ, and therefore it is important to distinguish them.”). This refers to the Pennsylvania Habeas Corpus Act of 1785, which was similar to the English Habeas Corpus Act of 1679.

¹⁸¹ Hurd, *supra* note 20, at 199, 208. “After the [Glorious] Revolution, the efforts of the legislature to improve the writ of *Habeas Corpus* were seconded by the judges. In fact the judges have always been ready . . . to interpret the rules of the common law and the statute law in such a way that they made for the greater efficiency of the writ.” 9 HOLDSWORTH, *supra* note 103, at 122 (emphasis in original).

¹⁸² 9 HOLDSWORTH, *supra* note 103, at 119. See Church, *supra* note 166, at 70 (stating that at common law, the writ of *habeas corpus* “extends to all cases of illegal imprisonment, whether claimed under public or private authority.”); Hurd, *supra* note 20, at 87.

¹⁸³ Sharpe, *supra* note 167, at 68; Opinion on the Writ of Habeas Corpus, (1758) 97 Eng. Rep. 29, n.(a)3.

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convinced many persons,”¹⁸⁴ Lord Mansfield argued:

that people supported it from the groundless imagination that liberty was concerned in it, whereas it had as little to do with liberty as the Navigation Laws or the act of encouraging the cultivation of madder; that ignorance on subjects of this nature was extremely pardonable, since the knowledge of particular laws required a particular study of them; that the greatest genius without such study could no more become master of them than of Japanese literature without understanding the language of the country; *that the writ of habeas corpus at common law was a sufficient remedy against all those abuses which bill was supposed to rectify.*¹⁸⁵

While the bill was pending, the House of Lords sent ten questions about the current law of *habeas corpus* to all the Royal Judges. Justice Wilmot’s lengthy response still provides the most comprehensive description of the law of *habeas corpus ad subjiciendu* in existence from near the time of the American Revolution. Wilmot maintained that the common law of *habeas corpus* reached private detentions but that the Act of 1679 applied only to criminal commitments and not to illegal pressings into military service.¹⁸⁶ *Habeas corpus* was not a civil action, he insisted, but a “remedial mandatory writ” by which a judge commanded the production of one claiming to have been

¹⁸⁴ 1 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 6 (Univ. of North Carolina Press 1992) (quoting *Legal Observer* (Dec. 1835)).

¹⁸⁵ 5 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND 900 (1809) (emphasis added).

¹⁸⁶ Opinion on the Writ of Habeas Corpus, (1758) 97 Eng. Rep. at 33-38, 42. Justice Wilmot said:

When [the writ of *habeas corpus*] was first applied to relieve against private restraints, does not appear; but whenever it was, the manner of issuing it seems to have been adopted from that of the writ of *homine replegiando*, which was the true common law remedy for the assertion of liberty against a private person: and the writ never issued of course, but was applied for by petition . . . and an affidavit made, disclosing the foundation on which it was prayed.

Id. at 37. The writ of *habeas corpus* . . . seems by practice to have been substituted in [*de homine replegiando*’s] place . . .” *Id.* at 38. “The writ of *homine replegiando* . . . was the only specific remedy provided by the common law, for the protection and defence of his liberty, against any private invasion of it.” *Id.* Blackstone wrote that a writ of *de homine replegiando* “lies to replevy a man out of prison, or out of the custody of any private person (in the same manner that chattels taken in distress may be replevied . . .) upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him.” 3 Blackstone, Commentaries *129.

unlawfully imprisoned. He further stated, "It is a writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it. It runs, at the common law, to all dominions held of the Crown. It is accommodated to all persons and places."¹⁸⁷

The writ did not issue as a matter of course, Wilmot wrote, because many imprisonments were lawful. Once these had included detentions in religious prisons and under the yoke of villeinage; now restraints could lawfully be imposed by husbands upon wives, fathers upon children, guardians on wards, and masters on apprentices. Others might be legally detained as a result of being bailed, while paupers could be lawfully confined to hospitals and workhouses and madmen could be held pursuant to properly-issued commissions of lunacy.¹⁸⁸ But any petitioner who could demonstrate probable cause through verified affidavit that his or her detention was unlawful was entitled to a writ of *habeas corpus* as a matter of right, and no court could legally deny it.¹⁸⁹

B. *SOMERSET V. STEWART*—THE PARADIGMATIC USE OF THE WRIT OF *HABEAS CORPUS* ON BEHALF OF A BLACK SLAVE

On November 28, 1771, one the world's most significant petition for a writ of *habeas corpus* arrived at the chambers of Chief Justice of King's Bench Mansfield.¹⁹⁰ In his capacity as a member of the House of Lords thirteen years before, Lord Mansfield had played an important role in blocking the House of Commons from extending the reach of the Habeas Corpus Act of 1679. How he grappled with the demand by friends of James Somerset for his freedom remains a landmark in the struggle for human and nonhuman liberty.¹⁹¹

Two hundred and thirty-three years later, in 2004, the United States Supreme Court would characterize Lord

¹⁸⁷ Opinion on the Writ of Habeas Corpus, (1758) 97 Eng. Rep. at 36.

¹⁸⁸ *Id.* at 36, 37.

¹⁸⁹ *Id.* at 32, 36, 37. See WILLIAM BLACKSTONE, 3 COMMENTARIES *132. See also *Hobhouse's Case*, 1 St. Tr. N.S. App. 1346 (1820); Hurd, *supra* note 20, at 224 n.3 (citing *In the Matter of Winder*, 2 Clifford, 89). Here, a writ of *habeas corpus* resembles the writ of *de homine replegiando*. *Id.* at 33.

¹⁹⁰ See *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.).

¹⁹¹ I tell James Somerset's story in STEVEN M. WISE, *THOUGH THE HEAVENS MAY FALL: THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY* (Da Capo Press 2005).

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Mansfield's judgment as "releasing on habeas an African slave purchased in Virginia and detained on a ship docked in England and bound for Jamaica"; the Court footnoted this characterization to the following sentence: "At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm."¹⁹² But thirty-year-old James Somerset was not your run-of-the-mill "alien." Kidnapped at age seven, sold to a Scotsman, Charles Steuart, in Virginia, Somerset was quite arguably Steuart's chattel in Britain, liable to being bought, sold, leased, mortgaged, and inherited like any other chattel. He was unquestionably Steuart's property under Virginia law.¹⁹³

Somerset's petition was probably filed by his godparents, for at that moment, the African was shackled aboard the "Ann and Mary," then preparing to weigh anchor for Jamaica, where he was to be sold into hard labor in the sugar cane fields as punishment for insulting and escaping from Steuart in London. Lord Mansfield would not have been eager to order this *habeas corpus*. Locked in a years-long, very public conflict with the determined abolitionist, Granville Sharp, over the legality of human slavery in England, Lord Mansfield had that very afternoon finally rid himself of Sharp's latest slavery case, *Lewis v. Staphylton*, which had plagued him for many months.¹⁹⁴ Lord Mansfield could easily have rid himself of Somerset's petition.

Mansfield might easily have questioned whether a proper person had sought Somerset's writ. This problem presented itself every time a master demanded the return of an apprentice or black slave pressed into military service, for the servant or slave had not sought the writ, and couldn't have if he had wanted to. As in Somerset's case, some third party had to petition for the detainee, an agent, or perhaps a friend, and the petition had to reflect what the detained person wanted. Wives and husbands could petition for each other, parents for minor children, children for aged parents, guardians for wards, brother for sister. But, except in unusual circumstances,

¹⁹² *Rasul v. Bush*, 542 U.S. 466, 482, n.11, 481 (2004).

¹⁹³ See generally Adele Hast, *The Legal Status of the Negro in Virginia, 1705-1765*, 54 J. OF NEGRO HIST. 217 (1969). Recent scholarship has demonstrated that Steuart's name, "Stewart" in the reporters, was actually spelled "Steuart." I will refer to him as "Steuart," unless I am citing to the case name.

¹⁹⁴ WISE, *supra* note 191, at 59-110.

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judges usually refused to consider petitions filed by strangers.¹⁹⁵ Had he been so inclined, Lord Mansfield could have found the godparents, if that was who filed Somerset's

¹⁹⁵ Today, "next friend" status appears fairly easy to come by under the common law of the American states. Sharpe, *supra* note 167, at 222-23. However, in United States federal courts, "next friend" status is more narrowly permitted pursuant to a writ of *habeas corpus* filed under statutory authority. 28 U.S.C.A. § 2242 (West 2006) (providing that a writ may be filed not just "by the person for whose relief it is intended" but also "by someone acting in his behalf."). See 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE*, § 8.3, at 384-401 (4th ed. 2002). In *Whitmore v. Arkansas*, the United States Supreme Court stated that "next friend" standing

is by no means granted automatically to whomever seeks to pursue an action on behalf of another. Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for "next friend" standing. First, a "next friend" must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action (citations omitted). Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate (citation omitted) and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest. *Davis v. Austin*, 492 F. Supp. 273, 275-276 (N.D. Ga. 1980) (minister and first cousin of prisoner denied "next friend" standing). The burden is on the "next friend" clearly to establish the propriety of his status and thereby justify the jurisdiction of the court . . . And in keeping with the ancient tradition of the doctrine, we conclude that one necessary condition for "next friend" standing in federal court is a showing by the proposed "next friend" that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability.

Limitations on the "next friend" doctrine are driven by the recognition that '[i]t was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends.' *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir. 1921); see also *Rosenberg v. United States*, 346 U.S. 273, 291-292 (1953) (Jackson, J., concurring with five other Justices) (discountenancing practice of granting "next friend" standing to one who was a stranger to the detained persons and their case and whose intervention was unauthorized by the prisoners' counsel).

Whitmore v. Arkansas, 495 U.S. 149, 163-64, 165 (1990). Some lower courts have interpreted this as setting forth a two-pronged test, or a three-pronged test, refusing to appoint a "next friend" who lacks a "significant relationship," while leaving open the possibility that a prisoner may have no significant relationships. Compare *Ford v. Haley*, 195 F.3d 603, 624 (11th Cir. 1999) (two-pronged test) with *Coalition of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153 (9th Cir. 2002) (refusing to appoint the Coalition as next friend). But see *Bush*, 310 F.3d at 1167 ("An institution with an established history of concern for the rights of individuals in the detainees' circumstances—such as the Red Cross or Amnesty International—would be more likely to be able to show that it is truly dedicated to the best interest of the detainees than a group without that history and with more broad ranging interests and background) (Berzon, J., concurring); *Hamdi v. Rumsfeld*, 294 F. 3d 598, 604 n.3 (4th Cir. 2002) (three-pronged test) (refusing to appoint the Public Defender, while reserving "the case of someone who possesses no significant relationships at all.").

petition, mere strangers.

Significantly, Lord Mansfield issued the writ of *habeas corpus* and eventually freed James Somerset, despite the adverse return of the ship's captain, John Knowles. Knowles stated that Somerset had been a slave in Africa, that he had been brought from Africa as a slave, that in the American Colonies and in Jamaica slaves such as Somerset were "saleable and sold as goods and chattels and upon the sale thereof have become and been and are the slaves and property of the purchasers thereof and have been and are saleable and sold by the proprietors thereof as goods and chattels," that Somerset had been duly sold to Steuart, and (four times) described Somerset as Steuart's "negro slave and property."¹⁹⁶

The manner in which Lord Mansfield had described his earlier use of *habeas corpus* to pry pressed black slaves from Royal Navy ships in the recently-dispatched *Lewis* case appeared promising, if ambiguous, yet problematic for James Somerset. In open court, Lord Mansfield had stated that, "I have granted several writs of *habeas corpus* upon affidavits of masters for their Negroes, two or three I believe, upon affidavits of masters deducing sale and property of their Negroes upon being pressed. I have granted *habeas corpus* to deliver them to their masters"¹⁹⁷

Lord Mansfield was here simultaneously repudiating one form of forcible detention, naval impressment, while reinforcing another, chattel slavery. Granville Sharp thought Lord Mansfield's use of the writ to free blacks from impressment entirely admirable, "[a] clear acknowledgment from his Lordship of the illegality of pressing . . . [and] very proper relief from that illegal oppression."¹⁹⁸ This apparently meant that Lord Mansfield believed that pressed black slaves possessed the liberty that *habeas corpus* was meant to protect and intended to grant relief against their wrongful

¹⁹⁶ This manuscript of Somerset's trial is on microfilm in the custody of the New York Historical Society. All quotes refer to that manuscript. The original Somerset *habeas corpus* petition and supporting affidavits were lost in an early twentieth century housecleaning at the British Public Records Office.

¹⁹⁷ Lord Mansfield's statement and Granville Sharp's reactions and observations about this can be found in a manuscript in the possession of the New York Historical Society, entitled *A Report of the Case of Lewis (A Negro) ag. Stapylton, with remarks by G. Sharp* [hereinafter *Sharp*].

¹⁹⁸ *Id.*

impressment.

Yet Lord Mansfield's statement was internally inconsistent. In one breath he claimed that he employed the writ to return pressed blacks from the navy to any masters who could prove their "sale and property."¹⁹⁹ But a writ of *habeas corpus* did not then, and does not today, permit a judge to order the return of property; it only allows a court to remedy a deprivation of liberty.²⁰⁰ Granville Sharp believed that this use of *habeas corpus* "to deliver up a poor wretch, against his will, into the hands of a tyrannical master, who rates him merely as a chattel, or pecuniary property, and not as a man," made the Chief Justice "guilty of a three-fold injury."²⁰¹ Such conduct would "deprive the country of a useful sailor," "cruelly injure the poor negro himself, by dragging him from the King's service [in which he was content] in order to deliver him up, against his will, into the hands of a cruel private tyrant," and injure English law "by perverting a constitutional writ to purpose entirely opposite to its original use, meaning, & intention!"²⁰² Lord Mansfield's use of the writ of *habeas corpus* to assist masters in retrieving their pressed slaves was as improper as Sharp claimed. It also presaged the occasional abuse of the writ *de homine replegiando* by masters in antebellum America to regain their slaves. Lord Mansfield should have required masters to use another writ, permits a writ of common replevin instead, rather than turn the writ of *habeas corpus* from an instrument of liberty to one of oppression.²⁰³

Lord Mansfield's return of pressed slaves to their masters was odd in another way. Writs of *habeas corpus* usually set pressed apprentices free; they were not returned to their

¹⁹⁹ WISE, *supra* note 191, at 94-95.

²⁰⁰ CLARK & MCCOY, *supra* note 157, at 47-49.

²⁰¹ Sharp, *supra* note 197.

²⁰² WISE, *supra* note 191, at 95.

²⁰³ Elvira, 57 Va. 561 (1865). See *Foster v. Alston*, 6 How. (Miss) 406, 457 (1842) (in a *habeas corpus* proceeding, "rights cannot be redressed; no damages can be assessed, no restoration of property can be decreed, except in cases of slaves, under our statute). Article I, §§ 9(3) and (4) of the Confederate Constitution stated that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it" and "[n]o bill of attainder, ex post facto law, or law denying or impairing the right of property in negro slaves shall be passed." During the Confederacy, the Supreme Court of Appeals of Virginia discharged a slave from imprisonment and delivered her to her master through a writ of *habeas corpus*.

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masters, who were left with the remedy only of suing the press gang to recover the apprentice's wages.²⁰⁴ Blackstone had equated black slaves with apprentices, slavery being "no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term."²⁰⁵ Lord Mansfield treated slaves and apprentices differently. But if a pressed black was his master's property, Lord Mansfield should never have issued the writ of *habeas corpus*. If the writ applied to a black slave's liberty, then the return of the black to his master undermined everything the writ of *habeas corpus* had come to represent.

Captain Knowles' return to the writ presented a further problem for James Somerset. Not that many years before, Justice Wilmot had claimed that, in a petition for *habeas corpus*, judges were bound by the facts set forth in the return, unless it "shall most manifestly appear . . . by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice."²⁰⁶ "Judges will construe the law as liberally as possible

²⁰⁴ When a father sought a writ of *habeas corpus* to set his son free from the custody of his aunt, Lord Mansfield ordered the boy released, but said he could go where he pleased; the father's rights would have to be decided through another action. *Rex v. Delaval*, (1763) 97 Eng. Rep. 913, 914 (K.B.) ("[T]he court is bound . . . to set the infant free from an improper restraint: but they are not bound to deliver them over to any body nor to give them any privilege.") Lord Kenyon said that a writ of *habeas corpus* was improperly issued on behalf of a master to recover an illegally impressed apprentice. *King v. Reynolds*, (1795) 101 Eng. Rep. 667 (K.B.). At most, the court has discretion to make those orders it deems just. *See, e.g., Commonwealth v. Harrison*, 11 Mass. 63 (1814) (granting a writ of *habeas corpus* granted for an apprentice at the instance of the master, with the apprentice being "set [] at large"). "The object [of the writ of *habeas corpus*] [i]s to secure personal liberty, not to decide disputes concerning property." *Commonwealth v. Robinson*, 1 Serg. & Rawle 353, 356 (Pa. 1815) (noting, however, that the court had discretion to deliver an infant to his parent or an apprentice to his master). Hurd wrote that when a master used the writ of *habeas corpus* to free his slave from illegal detention, "the slave is brought before the court under the writ, he, as well as the apprentice or infant, must, if of sufficient capacity, be allowed his liberty of choice, and if of tender years or insufficient capacity he must be disposed of under the writ, as the sound discretion of the court shall dictate." Hurd, *supra* note 20, at 552. *See also* *Fay v. Noia*, 372 U.S. 391, 423 n.32 (1963) (quoting *Cox v. Hakes*, (1890) 15 A.C. 506, 527-528 (H.L.)); *Secretary of State for Home Affairs v. O'Brien*, (1923) A.C. 603, 609 (H.L.) (Earl Birkenhead) ("habeas corpus . . . afford[s] a swift and imperative remedy in all cases of illegal restraint or confinement."); *Foster*, 7 Miss. at 459 (under the *habeas corpus* statute, damages may not be assessed, nor may property, except slaves, be restored).

²⁰⁵ WILLIAM BLACKSTONE, 1 COMMENTARIES *424-25.

²⁰⁶ Opinion on the Writ of Habeas Corpus, (1758) 97 Eng. Rep. 29, 42.

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in favour of liberty,” he explained, “but they cannot make laws.”²⁰⁷ A judge should demand that the captor “[t]ell the reason why you confine him,” and then “determine whether it is a good or bad reason; but not whether it is a true or false one.”²⁰⁸ According to Captain Knowles’ return, James Somerset was undoubtedly Charles Steuart’s slave.

Ontario Court of Appeals Justice and *habeas corpus* scholar, Robert J. Sharpe, has noted that Justice Wilmot was but one of ten sitting Royal judges who responded to the House of Lords’ 1758 request for answers about the writ of *habeas corpus*.

Of the nine other judges who delivered opinions . . . five thought that the return could be controverted. A sixth judge, unable to actually deliver his opinion, also took this more liberal view. In addition, Lord Mansfield strenuously opposed the bill because he thought the law already

²⁰⁷ *Id.* at 48. However, Justice Wilmot continued, a case involving a false return is not a remediless one: by the common law, the writ of ‘*homine replegiando*’ will clearly relieve him. That writ, which is obtained out of the Court of Chancery upon an affidavit, goes to the sheriff, and commands him to replevy the man. If he cannot replevy him, he returns it, and a process goes out instantly to seize the body of the person who is supposed to have him in custody, and he is imprisoned himself till he produces the body.

Id. at 49. Justice Wilmot also noted “[t]here is another method by which a man impressed [into the military] may get at his liberty, laying the gaoler and the return quite out of the case: and that is, by appealing to that summary jurisdiction, which the Court of King’s Bench exercises over all inferior jurisdictions, powers, and authorities whatsoever.” *Id.*

²⁰⁸ *Id.* at 43.

The writ is not framed or adapted to litigating facts: it is a summary short way of taking the opinion of the Court upon a matter of law, where the facts are disclosed and admitted . . . if the facts are controverted they must go to a jury; and when the return to a *habeas corpus* is made and filed, there is an end of the whole proceeding, and the parties have ‘no day’ in Court; and therefore it is impossible that a proceeding, by way of trial, should be grafted upon it.

Id. at 43. Justice Wilmot also said that

You have asked a question; you shall take the answer as it is given you: if it is sufficient in point of law, the Judges will give you instantaneous relief; if it is false in fact, you have received an injury; vindicate yourself against that injury by an action, and when you have proved the fact to be false, you will be entitled to a complete relief.

Id. at 44. This was to preserve the right to try disputed facts before a jury. In 1816, the Act of 1679 was amended to extend to those restrained in private custody and judges were permitted to inquire into the truth of the facts in the return. 56 Geo. III, ch. 100 (1816). See Church, *supra* note 166, 228-31, 249; Hurd, *supra* note 20, at 86.

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permitted what the Bill sought to achieve.²⁰⁹

Moreover, “Even by Wilmot’s time . . . there were several situations in which the courts did consider questions of fact on *habeas corpus*.”²¹⁰ Justices not infrequently examined the facts behind illegal naval impressments and Lord Mansfield had gone so far, in a case in which the petitioner claimed to be held illegally in a madhouse, to have her inspected by physicians and relatives.²¹¹ In 1810, abolitionists would seek a writ of *habeas corpus* from the Court of King’s Bench on behalf of the South African, Saartjie Baartman, alleging she had been imported into England to be exhibited against her will.²¹² That Court ordered her orally examined by a coroner and lawyer, in the absence of her keepers, to determine whether she was in fact consenting.²¹³

According to Justice Sharpe, the common law rule against controverting the return to a petition for habeas corpus by determining facts did not exist because of a concern for trespassing upon juries. “[T]he common law rule may be regarded as an assertion that habeas corpus was not to take the place of trial by jury for the ultimate determination of guilt or innocence. This, however, did not prevent the courts from determining certain factual issues which did arise.”²¹⁴ Judges could avoid any rule against controverting the return in a number of different ways. For one, they could examine facts consistent with the return that undercut the reasons given for the imprisonment, so-called “Confessing and Avoiding” the return.²¹⁵ Courts could also require a respondent to show cause why a prisoner should not be released after a return was filed.²¹⁶ Another option was to decide “jurisdictional facts,” such

²⁰⁹ Sharpe, *supra* note 167, at 66 n.16 (citations omitted). Justice Sharpe is “the best contemporary authority on the scope of the writ.” CLARK & MCCOY, *supra* note 157, at 5.

²¹⁰ Sharpe, *supra* note 167, at 66 (emphasis added).

²¹¹ *Id.* at 66 and nn.14, 15.

²¹² See generally *The Case of the Hottentot Venus*, (1810) 104 Eng. Rep. 344 (K.B.).

²¹³ See *id.*

²¹⁴ Sharpe, *supra* note 167, at 65.

²¹⁵ *Id.* at 67.

²¹⁶ “The significant aspect of this reasoning is that it indicates that the prohibition against controverting the return was a purely technical matter, and could be avoided so long as an actual return was not involved.” *Id.* at 68.

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as “whether or not the person or thing in question comes within the class upon which its powers may be exercised,” or facts that are “logically prior to a determination of the main issue, and such issues [which] are collateral to the issue that the tribunal is asked to decide ultimately.”²¹⁷ Courts even could order a factual dispute to be tried.²¹⁸ In short, Sharpe concludes there were “many ways around the rule which have been used since Wilmot’s time and before”²¹⁹

Viewed in this jurisprudential context, it is clear that while Lord Mansfield’s decision to free James Somerset on a writ of *habeas corpus* was courageous and innovative, it was not the radical whimsy of a maverick justice acting unilaterally. Nor did it just fall from the sky. Rather, it was a logical application of existing understandings of *habeas corpus*, rooted in the historical underpinnings of the common law, and applied in precisely the same manner that many other judges had long been granting the freedom writ in other circumstances. The common law’s structural framework and precedent pointed the way; all Lord Mansfield did was connect the dots as he believed justice demanded. The *Somerset* decision is all the more important given Lord Mansfield’s general conservatism and prior hostility to the idea of freedom for black slaves. Though acutely aware of the potentially enormous economic interests in favor of preserving human slavery in England, he could no longer deny these rightless beings the most important judicial tool necessary to question their captivity. Hence, Lord Mansfield’s famous quote in open court on the hearing day previous to that on which he rendered his decision, “Fiat justitia, ruat coelum” (Let justice be done, though the heavens may fall).²²⁰

By granting a writ of *habeas corpus* to a legal thing named James Somerset, Lord Mansfield catalyzed the fight to human slavery in Britain. At the least he made the legally invisible become visible for the first time, granted individual black

²¹⁷ *Id.* at 72.

²¹⁸ *Id.* at 78.

²¹⁹ *Id.* at 71 (citation omitted). *Accord* *Fay v. Noia*, 372 U.S. 391, 417 n.27 (1963) (“In making provision for the trial of fact on habeas . . . the Act of 1867 seems to have restored rather than extended the common-law doctrine of the habeas judge. For it appears that the common-law doctrine of the incontrovertibility of the truth of the return was subject to numerous exceptions.”) (citation omitted).

²²⁰ WISE, *supra* note 191, at 173-74.

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slaves their long-sought ability to challenge the legitimacy of their bondage, and ultimately helped to move an entire class of beings from the category of *rightless thing* to *legal person*.

C. THE WRIT OF *HABEAS CORPUS* AND BLACK SLAVERY IN AMERICA

After World War II, one scholar deemed the prohibition against the suspension of the writ of *habeas corpus* “[t]he most important human rights provision in the [United States] Constitution.”²²¹ In 2004, the United States Supreme Court even extended the reach of the writ to foreigners interned at Guantanamo Bay in Cuba, reaffirming that *habeas corpus* was “a writ antecedent to statute, . . . throwing its root deep into the genius of our common law.”²²² According to the Court, the writ appeared in English law several centuries ago, and became “an integral part of our common-law heritage’ by the time the Colonies achieved independence, and received explicit recognition in the Constitution.”²²³

With the exception of South Carolina, the 1679 Habeas Corpus Act was never explicitly extended to an American Colony, unlike the common law of *habeas corpus*, which applied in them all.²²⁴ Indeed, English common law generally applied

²²¹ Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 143 (1952). U.S. CONST. art. I, § 9 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

²²² *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (quoting *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (internal quotations omitted)).

²²³ *Rasul*, 542 U.S. at 473 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973)), and U.S. CONST. art. I, § 9, cl. 2).

²²⁴ See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 115 (Greenwood Press 1980) (“The common-law writ of *habeas corpus* was in operation in all thirteen of the British colonies that rebelled in 1776.”); Milton Cantor, *The Writ of Habeas Corpus: Early American Origins and Development*, in FREEDOM AND REFORM—ESSAYS IN HONOR OF HENRY STEELE COMMAGER 55, 66-67 (Harold M. Hyman & Leonard W. Levy eds., 1967); Albert S. Glass, *Historical Aspects of Habeas Corpus*, 9 ST. JOHN’S L. REV. 55, 63 (1934) (“The American colonies . . . always considered the writ as one of their rights, guaranteed to them by the various charters and statutes as to native-born Englishmen. . . . Generally, during colonial history, the writ was granted without question.”); A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 19-21, 26 (1903) (“In conclusion, it may be added that the rights of colonists as regards the writ of *habeas corpus* rested upon the common law with the exception of South Carolina, which reenacted the English statute.”). The December 11, 1705 diary of Massachusetts Bay Colony judge Samuel Sewell records he issued a writ of *habeas corpus* under the common law. Massachusetts Historical Society Collections,

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in every American Colony, while every royal charter but Pennsylvania's expressly protected common law rights.²²⁵ Thus,

By the 1680's [the writ of *habeas corpus*] was a familiar legal device in all the colonies . . . [and] deeply embedded in the interstices of colonial thought, much like the common law itself. . . . Habeas corpus was the only common-law process explicitly written into the Constitution, which is the most complete measure of its reception by the colonists and the high regard in which it was held. . . . Indeed, the Constitutional delegates' vote . . . had been unanimous that "the privilege of the writ of Habeas Corpus shall not be suspended."²²⁶

Northern and Southern judges disagreed on whether slaves could seek their freedom through writs of either *habeas corpus* or *de homine replegiando*. Northern courts regularly allowed blacks to challenge their enslavement through writs of *habeas corpus*.²²⁷ This was not true in the American South. On the eve of the American Civil War, Florida's Supreme Court refused the writ to a slave, saying:

There has not been an adjudication by the Courts of a Southern State cited to us, nor have we been able to find such, wherein a question of real contest as to the right of freedom on the part of the person claimed as a slave the

Ser. 5, VI, at 147. Like South Carolina, Massachusetts enacted the 1679 Habeas Corpus Act, but it was disallowed by the Privy Council. McFeeley, *supra* note 168, at 592.

²²⁵ McFeeley, *supra* note 168, at 591-92. However, statutes enacted after a royal charter was granted did not apply. *Id.*

²²⁶ Cantor, *supra* note 224, at 65, 73, 74. See Hurd, *supra* note 20, at 122. The motion to add the clause "unless in cases of rebellion or invasion the public safety may require it" was carried by a vote of seven states to three. *Id.* at 74. See also 2 Journal of the Federal Convention Kept by James Madison 560 (E.H. Scott ed., Lawbook Exchange 2003) (1893). Most state constitutions carried similar provisions. Hurd, *supra* note 20, at 127-131.

²²⁷ Lemmon v. People, 20 N.Y. 562 (1860); Commonwealth v. Aves, 35 Mass. (18 Pick.) 193 (1836); State v. Lasselle, 1 Blackf. 60 (Ind. 1820); Respublica v. Smith, 4 Yeates 204 (Pa. 1805); Respublica v. Blackmore, 2 Yeates 234 (Pa. 1797); Arabas v. Ivers, 1 Root 92 (Conn. Super. Ct. 1784). In 1855, a United States District Court committed Passmore Williamson to prison for refusing to obey a writ of habeas corpus issued at the request of a master of three slaves whom Williamson had helped escape as they passed through Pennsylvania. United States *ex rel.* Wheeler v. Williamson, 28 F. Cas. 686 (E.D. Pa. 1855) (No. 16, 726).

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remedy of *habeas corpus* has been considered the appropriate one to determine this question. . . . Whether, under the circumstances of this case, [the slave's claim to freedom] may be rightfully done through . . . the writ of *habeas corpus* [is the question for our adjudication. There being, fortunately for us, decisions made by Courts holding the same relations with ourselves to this delicate subject, assented to and having the sanction and approbation of the entire Southern judicial mind and people, has relieved us of the necessity of investigation to ascertain the entire verity of the conclusions to which they have arrived.²²⁸

In direct opposition to Lord Mansfield's implicit reasoning in *Somerset*, Southern judges routinely rejected slaves' use of the writ of *habeas corpus* on the ground it was designed to protect and restore a right of personal liberty that slaves utterly lacked,²²⁹ because the writ did not allow a jury to determine property ownership,²³⁰ or it could not be used to try title to chattel.²³¹ In a stark demonstration of the value-driven nature of law, Southern judges favored bondage no less fervently than Northern juries leaned toward freedom for slaves in freedom suits.

Southern judges, however, were not the only force preventing black slaves in Southern states from using the writs of *de homine replegiando* and *habeas corpus* to try their rights to freedom. Many Southern legislatures, before and after the American Revolution, enacted so-called Freedom Act Statutes. Now universally regarded as disgraceful acts of legislation, these statutes were intended to diminish or extirpate the power of black slaves to challenge their bondage. They were enacted to supplant the common law, destroy the ability of slaves to employ common law freedom writs, and limit freedom suits to

²²⁸ *State v. Gauthier*, 8 Fla. 360, 363-64 (1859).

²²⁹ *State v. Philpot*, Dud. 46, 52, 1 Ga. Rep. 375, 378 (Super. Ct. 1831).

²³⁰ *Field v. Walker*, 17 Ala. 80, 81 (1849); *State v. Fraser*, Dud. 43, 43-44, 1 Ga. Rep. 373, 374 (Super. Ct. 1831); *Renney v. Mayfield*, 5 Tenn. (4 Hawy.) 165, 165-167 (1817). The *Renney* court stated the plaintiff could sue for false return and, if she prevailed through a jury, would have "a *pluries habeas corpus*, founded upon the record, and shall be discharged." *Id.* (emphasis in original).

²³¹ *State v. Gauthier*, 8 Fla. 360, 363 (1859) (stating that *habeas corpus* "has been universally refused and deemed inadequate in cases . . . where the effect . . . would be to deprive the party in possession . . . of the right of trial by jury."); *Field*, 17 Ala. at 81; *Renney*, 5 Tenn. at 165.

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the strict procedures set forth in those Acts.²³² The statutes were in no way intended to facilitate the freedom of slaves; their purpose was to shield masters from other, often more fruitful, legal attempts by slaves to gain their freedom.²³³ They were usually held by Southern courts to provide the exclusive means to challenge one's slave status.²³⁴

Of the Virginia Freedom Suit Act the Supreme Court of Appeals of Virginia said:

Until this Act was passed, the remedy of a person held in slavery for the recovery of his freedom, was unregulated. The writs of *habeas corpus* and *de homine replegiando* were, among others, resorted to. They were vexatious in their character; and the latter has been accordingly repealed, while the provisions in relation to the former rendered it an objectionable and improper remedy for the trial of the right of a slave to his freedom. Therefore, by the act of 1795, ch. 11, a plain and easy remedy was provided. The preamble distinctly evinces, that it was suggested, less by an anxiety to facilitate the remedies of the slave, than by the "great and alarming mischiefs, which had arisen in other states of the Union, and were likely to arise in this, by voluntary associations of individuals" (commonly known under the appellation of emancipation societies) "who had, in many instances, been the means of depriving masters of their property in slaves, and in others occasioned them heavy expenses in tedious and unfounded law suits."²³⁵

²³² *State v. Fraser*, Dud. 43, 43-44, 1 Ga. Rep. 373, 374 (Super. Ct. 1831) ("By this act a most ample and complete remedy is given to negroes held in slavery who claim to be free."); *Thornton v. DeMoss*, 13 Miss. (1 S. & M.) 609, 616-617 (1846) ("[I]t is the only remedy which he can pursue . . . that remedy necessarily excludes every other, and must be strictly pursued.").

²³³ *Higgenbotham, Jr. & Higgenbotham*, *supra* note 97, at 1213, 1235 n.125 (addressing *habeas corpus* suits).

²³⁴ *E.g.*, *Field*, 17 Ala. at 82 (stating that the statute "provided the manner in which the presumption [that a black is a slave] may be removed."); *Cone v. Force*, 31 Ga. 328, 330 (1860) ("The General Assembly has formally and distinctly provided both the proceeding by which, and the forum in which, the status of negroes held in slavery, but claiming to be free, shall be investigated and determined."); *Knight v. Hardeman*, 17 Ga. 253, 260 (1855) (questioning whether the statutes "afford the most full and complete remedy, to enable persons of color to assert their freedom?"); *Thornton*, 13 Miss. at 616-617 (holding that the remedy set forth in the Mississippi statute "necessarily excludes every other, and must be strictly pursued.").

²³⁵ *Nicholas v. Burruss*, 31 Va. 289, 298 (1833) (Tucker, J.). *E.g.*, *De Lacy v. Antoine*, 34 Va. (7 Leigh) 438, 439 (1836) ("[U]nder our law the *habeas corpus* is not the

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Virginia freedom suits were sometimes brought as suits for trespass, assault and battery, and false imprisonment. Their object was the removal “of the claimant from the *status* of slavery to that of freedom; . . . the form is wholly fictitious.”²³⁶ According to the Virginia Supreme Court of Appeals, slaves had “no personal rights. . . . The only suit they can bring is for the recovery of freedom; and even during its pendency they still continue slaves A suit for freedom is founded upon the concession that the *status* of the claimant is that of slavery; otherwise the remedy would be inappropriate.”²³⁷

D. A CHIMPANZEE MAY USE THE COMMON LAW WRIT OF
HABEAS CORPUS TO CHALLENGE HIS OR HER LEGAL
THINGHOOD

From its beginnings as a thirteenth century writ that judges used to have stubborn parties brought before them, the common law writ of *habeas corpus* evolved by the end of the seventeenth century into the usual procedure by which a legal person, or an entity claiming to be one, could test the legality of his detention by any private or public entity, in any place, under any circumstances. Extremely broad and impervious to technicalities, the writ of *habeas corpus*, in both its statutory and common law forms continues to remain available to remedy every illegal restraint.²³⁸ It is “a remedy of right untrammelled by any requirement of discretion. The judge hearing the writ may, *ex parte*, direct immediate release. This

proper method of trying the right to freedom. The act of 1795 has prescribed the remedy which the negro must pursue Anterior to this act, the *habeas corpus* and *homine replegiando* were resorted to by slaves asserting a right to freedom; but as these remedies proved vexatious and unsafe, a new proceeding was prescribed by the act already cited, the *homine replegiando* was repealed, and the *habeas corpus* was considered no longer appropriate” (emphasis in original). The 1795 Act was codified at 1 Rev. Code ch. 124, § 4, p. 481.

²³⁶ Peter v. Hargrave, 46 Va. (5 Gratt.) 12, 14 (1848) (emphasis in original).

²³⁷ *Id.* (emphasis in original). See also Leon Higgenbotham, Jr. & Higgenbotham, *supra* note 97, at 1213, 1235-36 n.125 (1993). The 1845 Missouri Freedom Suit Act, Rev. Stat. (1845), ch. 69, p. 531, authorized a suit for trespass for false imprisonment. Neither the writ of *habeas corpus* nor the writ of *de homine replegiando* were based either on a fiction or a concession that the petitioner was a slave. *Contra*, Huger v. Barnwell, 39 S.C.L. (5 Rich.) 273, 275 (1852).

²³⁸ Church, *supra* note 166, at 137-38. The writ of *habeas corpus* is not intended to punish the respondent, grant the petitioner redress for his illegal detention, or secure a right to property, for only a jury can do that. Hurd, *supra* note 20, at 143, 147, 210, 551.

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is the nuclear weapon of public law.”²³⁹ As with the common law writ of *de homine replegiando*, the common law writ of *habeas corpus* may be invoked by any petitioner claiming to be unlawfully detained in any state that incorporated the common law of England.²⁴⁰

The common law writ of *habeas corpus* was never limited to petitioners already acknowledged to be legal persons. To the contrary, it was used by petitioners who were understood to be legal things, but who alleged that the Great Writ *ought* to shelter them. Most prominently, the writ was wielded by black slaves who were themselves legal things. As has been

²³⁹ CLARK A & MCCOY, *supra* note 157, at 214 (citation omitted).

²⁴⁰ ALA. CONST. art. I, § 17; ALA. CODE § 15-21-1 (2005); ALASKA CONST. art. I, § 13; ALASKA STAT. § 12.75.010 (2005); ARIZ. CONST. art. II, § 14; ARIZ. REV. STAT. ANN. § 13-4121 (2005); ARK. CONST. art. II, § 11; ARK. CODE ANN. § 16-112-103 (2006); CAL. CONST. art. I, § 11; CAL. PENAL. CODE § 1473 (2005); COLO. CONST. art. II, § 21; COLO. REV. STAT. ANN. § 13-45-102 (2005); CONN. CONST. art. I, § 12; CONN. GEN. STAT. § 52-466 (2004); DEL. CONST. art. I, § 13; DEL. CODE ANN. tit. 10 § 6902 (2005); FLA. CONST. art. I, § 13; FLA. STAT. § 79.01 (2005); GA. CONST. art. I, § 1, para. 15; GA. CODE ANN. § 9-14-1(2005); HAW. CONST. art. I, § 15; HAW. REV. STAT. § 660-3 (2005); IDAHO CONST. art. I, § 5; IDAHO CODE ANN. § 19-4201 (2005); ILL. CONST. art. I, § 9; ILL. COMP. STAT. 5/10-103 (2003); IND. CONST. art. I, § 27; IND. CODE ANN. § 34-25.5-1-1 (2005); IOWA CONST. art. I, § 13; IOWA CODE ANN. § 663.1 (2004); KAN. BILL OF RIGHTS, § 8; KAN. STAT. ANN. § 60-1501 (2005); KY. BILL OF RIGHTS, § 16; KY. REV. STAT. ANN. § 419.020 (2005); ME. CONST. art. I, § 10; ME. REV. STAT. ANN. tit. 14, § 5501 (2005); MD. CONST. art. III, § 55; MD. CODE ANN., CTS. & JUD. PROC. § 3-701 (2005); MASS. CONST. pt. 2, ch. 6, art. VII; MASS. GEN. LAWS ch. 248, § 1 (2005); MICH. CONST. art. I, § 12; MICH. COMP. LAWS ANN. § 600.4301 (2005); MINN. CONST. art. I, § 7; MINN. STAT. ANN. § 589.01 (2005); MISS. CONST. art. III, § 21; MISS. CODE ANN. § 11-43-1 (2005); MO. CONST. art. I, § 12; MO. ANN. STAT. § 532.010 (2006); MONT. CONST. art. II, § 19; MONT. CODE ANN. § 46-22-201 (2005); NEB. CONST. art. I, § 8; NEB. REV. STAT. § 29-2801 (2005); NEV. CONST. art. I, § 5; NEV. REV. STAT. § 34.360 (2005); N.H. CONST. pt. 2, art. 91; N.H. REV. STAT. ANN. § 534:1 (2005); N.J. CONST. art. I, § 14; N.J. STAT. ANN. § 2A:67-13 (2006); N.M. CONST. art. II, § 7; N.M. STAT. ANN. § 44-1-1 (2005); N.Y. CONST. art. I, § 4; NY C.P.L.R. § 7003 (2005); N.C. CONST. art. I, § 21; N.C. GEN. STAT. § 17-3 (2005); N.D. CONST. art. I, § 14; N.D. CENT. CODE, § 32-22-01 (2005); OHIO CONST. art. I § 8; OHIO REV. CODE ANN. § 2725.01 (2006); OKLA. CONST. art. II, § 10; OKLA. STAT. ANN. tit. 20, § 41 (2005); OR. CONST. art. I, § 23; OR. REV. STAT. § 34.310 (2003); PA. CONST. art. I, § 14; 42 PA. CONS. STAT. ANN. § 6503 (2005); R.I. CONST. art. I, § 9; R.I. GEN. LAWS § 8-8-4 (2006); S.C. CONST. art. I, § 18; S.C. CODE ANN. § 17-17-10 (2004); S.D. CONST. art. VI, § 8; S.D. CODIFIED LAWS 21-27-1 (2006); TENN. CONST. art. I, § 15; TENN. CODE ANN. § 29-21-101 (2005); TEX. CONST. art. I, § 12; TEX. GOV'T CODE ANN. § 26.047 (2005); UTAH CONST. art. I, § 5; UTAH CODE ANN. § 78-35-1 (2005) (requiring judges who wrongfully and willfully refuse to grant a writ of habeas corpus after proper application to pay \$5,000 to the wronged applicant); VT. CONST. ch. II, § 41; VT. STAT. ANN. tit. 12, § 3951 (2005); VA. CONST. art. I, § 9; VA. CODE ANN. § 8.01-654 (2005); WASH. CONST. art. I, § ; WASH. REV. CODE § 4.04.010 (2005); W. VA. CONST. art. III, § 4; W. VA. CODE § 53-4-1 (2005); WIS. CONST. art. I, § 8; WIS. STAT. § 782.01 (2005); WYO. CONST. art. 1, § 17; WYO. STAT. ANN. 1-27-101 (2005).

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discussed, the writ's most famous and effective deployment was by Lord Mansfield in 1772 on behalf of James Somerset, which permitted him to declare that Somerset was not, in law, a slave. Later, other black slaves would use the writ both in England and in America, especially in the North, to challenge the legality of their enslavement.²⁴¹ Today *Somerset* is law in nearly every state.²⁴²

Science has clearly demonstrated that chimpanzees possess the qualities that make them plausible candidates to use the common law writ of *habeas corpus* to establish that they should not be considered legal things. Genetically so similar to human beings that some scientists argue that both should be placed in the same genus, chimpanzees are extremely complex beings—cognitively, emotionally, and socially. They suffer the loss of the bodily liberty that the writ of *habeas corpus* is designed to protect in a manner similar to the way humans suffer that loss. Perhaps they suffer it even more acutely, for they cannot understand why we enslave them, the world in which we enslave them is one in which they are genetically, physically, emotionally, or culturally ill-suited, and their housing conditions are worse than any conditions of human detention that comply with international legal norms.

The merits of a writ of *habeas corpus* filed by a chimpanzee petitioner will have to be decided by a judge, not a jury, for the writ of *habeas corpus* is intended to be a more summary procedure that is the common law writ *de homine replegiando*. However, facts concerning a chimpanzee's genetics, taxonomy, anatomy, physiology, neurology, psychology, anthropology, cognitive ethology, linguistic and mathematical abilities, and other biological, anthropological, genetic, or psychological attributes may be disputed in any return to the writ. These facts will need to be settled before a judge can proceed to the ultimate legal issue of whether chimpanzees are entitled, as a matter of law, to freedom from their claimed detention. Any such facts, however, can be properly settled. Justice Sharpe's explanation of how judges might avoid the common law rule against controverting the return to a writ of *habeas corpus* helps explain how Lord Mansfield could issue his famous writ for James Somerset, and order his freedom from slavery, in the

²⁴¹ Cf. *Forbes v. Cochran*, (1824) 107 Eng. Rep. 450, 458-459 (K.B.) (Best, J.).

²⁴² See *supra* note 134 and accompanying text.

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face of Captain Knowles' return to the writ that Somerset was legally Charles Steuart's slave.²⁴³ The various methods that Judge Sharpe describes would similarly apply to any common law *habeas corpus* action brought by a chimpanzee petitioner.

As was noted at the onset of this Article, one court recently started down this path. On April 10, 2005, Environmental Department prosecutors and others sought a writ of *habeas corpus* from a court in Bahia, Brazil on behalf of a chimpanzee named Suica, who was caged at a zoo.²⁴⁴ The petitioners claimed that "in a free society, committed to ensuring freedom and equality, laws evolve according to people's thinking and behavior, and when public attitudes change, so does the law, and several authors believe that the Judiciary can be a powerful social change agent."²⁴⁵ Before the case could be finally adjudicated, Suica died. Accordingly, on September 28, 2005, the judge dismissed the case. He explained, however, that he had taken the case

[because] the theme is deserving of discussion as this is a highly complex issue, requiring an in-depth examination of "pros and cons," therefore, I did not grant the Habeas Corpus writ, preferring rather to obtain information from the co-plaintiff authority . . . within 72 hours One could, from the very topic of the petition, have enough grounds to dismiss it, from the very outset, arguing the legal impossibility of the request, or absolute inapplicability of the legal instrument sought by the petitioners, that is, a Habeas Corpus to transfer an animal from the environment in which it lives, to another. However, in order to incite debate of this issue . . . I decided to admit the argument Among the factors that influenced my accepting this matter for discussion is the fact that among the petitioners are persons with presumed broad legal knowledge, such as Prosecutors and Law professors Criminal Procedural Law is not static, rather subject to constant changes, and new decisions have to adapt to new times.²⁴⁶

²⁴³ See *supra* notes 214-219 and accompanying text.

²⁴⁴ *In Favor of Suica*, *supra* note 1.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

VI. CONCLUSION

I have offered substantive arguments elsewhere that chimpanzees should no longer be treated as common law things, but as persons, at least to the extent of being entitled to the fundamental right of bodily liberty. The structure of the common law requires judges to re-evaluate every common law rule, when appropriate. In order for judges to carry out their duty, a cause of action must be available. I have argued that at least two ancient common law writs are available, the writ *de homine replegiando* and the writ of *habeas corpus* in nearly every American state and that both writs were often used by human villeins and black slaves over the centuries in which they were considered legal things.²⁴⁷ I conclude that chimpanzees are entitled to use these two common law writs to bring their substantive arguments to the attention of courts for decision on the merits.

A court need not worry about where to draw the line on which nonhuman petitioners might invoke these causes of action to seek to establish their fundamental common law right to bodily liberty. Every imprisoned being who, in light of advances in scientific knowledge, evolution in public morality and public policy, and accretion of human experience, has a colorable substantive claim to this fundamental right is entitled to place that claim before a court, where it may fail or succeed on its merits. Chimpanzees hate to be imprisoned. A wild chimpanzee has an average daily travel range of several kilometers and a yearly travel range of about ten square kilometers.²⁴⁸ One chimpanzee named Booe, taught American Sign Language before being imprisoned in the cramped cage of a biomedical research facility for six years, made his wishes unmistakably known to a visiting representative of the facility where he had learned that language. "KEY OUT," he signed.²⁴⁹ Whatever might be the strength of the claim of any other nonhuman animal, a chimpanzee is such a petitioner.

²⁴⁷ See *supra* notes 134 and 240 for citations to those states that adopted English common law and statutes in general and the common law writ of *habeas corpus* specifically.

²⁴⁸ JANE GOODALL, THE CHIMPANZEES OF GOMBE—PATTERNS OF BEHAVIOR 207-230 (Belkap Press 1986).

²⁴⁹ ROGER FOUTS & STEPHEN TUKEL MILLS, NEXT OF KIN—WHAT CHIMPANZEES HAVE TAUGHT ME ABOUT WHO WE ARE 354-358 (William Morrow & Co. 1997).