# APPLYING THE RIGHTS OF NATURE TO THE RIGHTS OF ANIMALS: COMPARING THE LAKE ERIE BILL OF RIGHTS TO HAPPY THE ELEPHANT

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## INTRODUCTION

In the field of environmental law, the northern spotted owl is a famously endangered species.[1] In addition to human-caused habitat destruction, the species faces severe competition from the barred owl. The latter species is aggressive, invasive, and outcompeting the northern spotted owl. As a result, northern spotted owl population numbers have fallen dramatically and continue to do so today.[2] Hoping to prevent the northern spotted owl's extinction, the U.S. Fish and Wildlife Service has killed thousands of barred owls.[3]

This is the point at which two otherwise similar advocacy movements, environmentalism and animal rights, sometimes come apart.[4] An environmental activist is more likely to prioritize the ecosystem and conservation of native species.[5] As such, they are more likely to advocate for killing members of an invasive species to protect a native species.[6] By contrast, an animal activist is more likely to prioritize the lives of the individual animals.[7] Therefore, animal activists are generally more inclined to oppose killing thousands of animals, even if it results in the native species' decline and eventual extinction.

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[1] *See* FOREST AND RANGELAND ECOSYSTEM SCI. CTR., *Threat of Invasive Barred Owls to Northern Owls and their Habitats*, U.S. GEOLOGICAL SURVEY (Nov. 14, 2017), https://www.usgs.gov/centers/forest-and-rangeland-ecosystem-science-center/science/threat-invasive-barred-owls-northern#overview and Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687 (1995).

[2] Kyla Mandel, *Despite Massive Effort, Spotted Owl Populations at an All-time Low*, Nat'l Geographic (June 24, 2021), https://www.nationalgeographic.com/animals/article/northern-spotted-owl-populations-at-all-time-low.

[3] Allison Frost, *Saving Endangered Spotted Owls Means Killing Some Barred Owls*, Or. Pub. Broad. (July 30, 2021), https://www.opb.org/article/2021/07/30/saving-endangered-spotted-owls-means-killing-some-barred-owls/.

[4] *See* Karin Brulliard, *The Battle over Wild Horses*, WASH. POST (Sept. 18, 2019), https://www.washingtonpost.com/science/2019/09/18/wild-horses-have-long-kicked-up-controversy-now-foes-say-they-have-solution.

[5] Sarah Deweerdt, *Killing Barred Owls to Keep Spotted Owls Breathing*, NEWSWEEK (May 17, 2015), https://www.newsweek.com/killing-barred-owls-keep-spotted-owls-breathing-332540.

[6] *Id.*

[7] *Id.* Of course, this very rough division between animal rights activists and environmental rights activists is not representative of everyone in the movements. For one example of the nuance at play, some animal rights activists provide environmentalist rationales to justify allowing the northern spotted owl's extinction. Specifically, they argue that environmental stability is important and best achieved by minimizing human interference with the environment. Therefore, hunting competitor species only makes the problems caused by human-caused habitat destruction worse. The substantial overlap in membership and ethics between the two groups of activists is one possible reason for these subtleties and potential contradictions within the movements. *Id.*

While the two movements can and do disagree, they also have tremendous overlap in their membership, goals, and, most importantly for this Note, roadblocks.[8] Advocates for the environment and for animals have struggled to accomplish their most ambitious goals and fully protect their respective entities in court. While traditional environmental protections face substantial hurdles already, advocates for animals and nature to have legal *rights* (collectively "rights activists"), rather than *protections*, have an even steeper uphill climb. But because of the similarities in rights-based litigation for animals and rights-based litigation for nature, each one can study the successes and failures of the other to shape its own path forward. Yet because of the movements' differences, each one has unique challenges too.

In this Note, I will argue that both movements should, for the time being, pursue incrementalistic strategies in court and that the framework of an animal rights approach is more amenable to this strategy. Because individual animals fit into the current legal system better than abstract entities like ecosystems and species, they are better suited for the current jurisprudence than the rights of nature more broadly. To support this argument, this Note will compare two recent court decisions ruling against the rights activists. First, it will discuss why a court struck down the Lake Erie Bill of Rights ("LEBOR"), which was an effort by the City of Toledo, Ohio to instantiate certain rights for Lake Erie in its city charter. Second, this Note will discuss why a court denied a hearing on habeas corpus rights for Happy the Elephant, who has been kept in captivity by the Bronx Zoo for decades. Then, this Note will analyze the role that vagueness and uncertainty played in both cases. Finally, this Note will discuss why a focused conception of animal rights that deliberately avoids as much uncertainty as possible is more likely to provide an effective path that avoids such issues for rights activists' litigation in the near future.

[8] *See* Kirsten Stilt, *Rights of Nature, Rights of Animals*, 134 HARV. L. REV. 276 (discussing many of the similarities and differences between the animal rights movement and the rights of nature movement).

# I. BACKGROUND

## *A. The Rights of Nature*

The term "rights of nature" can have different definitions depending on context. To some people, "nature" may include entire ecosystems, general geographic features like mountains, a particular species of plant, or one specific animal.[9] Reasonable people may also differ over whether a diverted river or pet dog counts as "nature." Further, the entire phrase "rights of nature" can also take on different meanings. In moral philosophy, it might mean that there is an ethical duty to either perform or not perform certain acts on the behalf of or against nature.[10] In environmental activism, it often refers to the movement of environmentalists who subscribe to the idea that nature possesses those aforementioned philosophical, moral rights.[11] For this Note, however, the most important conception of "rights of nature" is that of a legal theory. Specifically, the phrase refers to the legal theory that nature is not a mere "thing" and has or should have inherent legal rights like humans.[12] The specific rights championed by these activists do, of course, depend on the person.

There are a number of reasons why advocates may embrace the rights of nature. Some of these reasons focus on the positive consequences of giving legal rights to nature. In *Should Trees Have Standing?*, the seminal paper on the topic, Professor Christopher Stone suggests it would help prevent nature from being commercialized, ignored, or "sold out" by private litigants.[13] From a more utilitarian perspective, other proponents argue that the long-term stability of the

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[9] GLOB. ALL. FOR THE RTS. OF NATURE, *What are the Rights of Nature?,* https://www.garn.org/rights-of-nature/ (last visited Jan. 5, 2024).
[10] Leif Wenar, *Rights*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://plato.stanford.edu/entries/rights/ (Feb. 24, 2020).
[11] Tiffany Challe, *The Rights of Nature – Can an Ecosystem Bear Legal Rights?*, COLUMBIA CLIMATE SCH. (Apr. 22, 2021), https://news.climate.columbia.edu/2021/04/22/rights-of-nature-lawsuits/.
[12] United Nations of Nature, *Rights of Nature*, https://unitednationsofnature.com/what-is-rights-of-nature/ (last visited Jan. 5, 2024).
[13] CHRISTOPHER D. STONE, *Should Trees Have Standing? —Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450, 480 (1972).

planet is a necessary component of achieving the greatest good for humanity or for all life.[14] Some of these advocates maintain that the best way to protect the environment and achieve that stability is through the legal and political systems and, therefore, granting legal rights to nature.[15] Other philosophical justifications focus more on the inherent value of nature. For example, land ethicists make an eco-centric argument that incorporates soil, water, plants, animals, and the ecosystems they form as inherently morally valuable.[16] This ethical framework inspired a modern legal framework known as Earth jurisprudence, which essentially seeks to codify land ethics into law.[17]

Despite the various rationales for embracing the rights of nature movement, many people, including environmentalists, have concerns about rights-based protections. For example, although their reasons vary, some critics claim that legal rights are insufficient to address the twin crises of climate change and biodiversity loss. One branch of criticism, alluded to earlier in this Note, is that the term "nature" itself is hazy. As such, providing rights to "nature" does not clearly identify what is actually being given rights.[18] Further, the rights that "nature" receives are often "vague and incoherent" and fail to provide meaningful guidance on human action.[19] Then, because the rights of nature are so often unclear, they are more difficult to enforce.[20] Consequently, rights of nature legislation is often perceived to be largely symbolic, rather than

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[14] LESLIE P. THIELE, INDRA'S NET AND THE MIDAS TOUCH: LIVING SUSTAINABLY IN A CONNECTED WORLD 235 (2011).
[15] *Id.* at 201-03.
[16] *The Land Ethic*, ALDO LEOPOLD FOUND., https://www.aldoleopold.org/about/the-land-ethic/ (last visited Jan. 5, 2024).
[17] Cormac Cullinan, *Earth Jurisprudence*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 233 (Lavanya Rajamani & Jacqueline Peel eds., 2nd ed. 2021).
[18] *See* Noah Sachs, *A Wrong Turn with the Rights of Nature Movement*, 35 GEORGETOWN ENV'T L. REV. (forthcoming 2023).
[19] *See id.*
[20] *See* Julien Bétaille, *Rights of Nature: Why it Might Not Save the Entire World*, 16 J. FOR EUR. ENV'T & PLANNING L. 35 (Mar. 27, 2019).

being meaningful law.[21] Other critics worry that if the rights of nature are codified strongly and in detail, they may restrict human activity beyond what the public would accept.[22] Rather than being a revolution, it is possible that the problems that the rights of nature are intended to solve would simply reemerge in a different form.[23]

Regardless, the rights of nature have been marching forward. In 2008, Ecuador amended its constitution to recognize and protect these rights.[24] Specifically, Ecuador's constitution now protects nature's right to exist, maintain, and regenerate.[25] Following a lawsuit in 2011, Ecuador enforced these rights for the first time against a local government in order to protect the Vilcabamba River.[26] The plaintiffs, on behalf of the river, received an injunction against a construction project that expanded the river and dumped excavation materials into it without a permit.[27] In 2017, Colombia protected the Rio Altrato in a similar way.[28] In that same year, New Zealand granted rights to the Whangunui River, and India granted rights to both the Ganga and Yamuna Rivers.[29] Then, in 2019, the rights of Lake Erie were codified in Toledo, Ohio's city charter in the form of LEBOR, which is discussed in great detail throughout the rest of this Note.[30] Efforts to use the rights of nature to protect ecosystems and species continue around the world today, to widely varying levels of success in both passage and enforcement.

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[21] *See* Mauricio Guim & Michael A. Livermore, *Where Nature's Rights Go Wrong*, 107 VA. L. REV. 1347, 1412-16 (2021).
[22] *See* Sachs, *supra* note 18 at *and* Bétaille, *supra* note 20.
[23] *See* Bétaille, *supra* note 20.
[24] Constitucion de República del Ecuador Oct. 20, 2008 Title II, Chapter 7; Challe *supra* note 11.
[25] Constitucion de República del Ecuador Oct. 20, 2008 Title II, Chapter 7.
[26] Natalia Greene, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, GLOB. ALL. FOR THE RTS. OF NATURE (May 21, 2011), https://www.garn.org/first-ron-case-ecuador/.
[27] *Id.*
[28] Challe *supra* note 11
[29] *Id.*
[30] Charter of the City of Toledo, Ohio, Chapter XVII.

*B. Animal Rights*

Unlike the rights of nature, "animal rights" has one relatively consistent definition: humans owe some level of moral consideration to the interests of nonhuman animals[31] when making decisions.[32] While this definition is broadly agreed upon, the amount and kind of moral consideration animal activists believe that animals are due varies greatly depending on the person being asked. Regardless, the notion of "animal rights" in this form has been around since at least the time of Pythagoras, in roughly the fifth century BCE.[33] In the modern day, the animal rights movement began in the 1970s and has evolved since then.[34] Lawyers quickly began to play a role in this modern movement. For example, the Animal Legal Defense Fund was founded in 1979 in order to strengthen and enforce anti-cruelty laws, and it continues to be a force today.[35] The goal of animal rights lawyering is, essentially, to guarantee nonhuman animals some level of care and consideration when people make legal decisions that affect nonhuman animals.[36]

Generally, proponents of animal rights have one of two (broadly described) philosophical ideologies: utilitarianism or deontology.[37] In the current era, the former is greatly informed by

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[31] "Nonhuman animals" is something of a term of art that is used in conversations about animal rights. Because humans are animals, the term "nonhuman animals" is used by some to refer to all animals except humans. I will be using this term throughout the Note to denote the same.
[32] Steven M. Wise, *Animal Rights*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/animal-rights (Dec. 19, 2023).
[33] *Id.*
[34] *Id.*
[35] Linton Weeks, *Championing Life and Liberty for Animals*, NAT'L PUB. RADIO (Oct. 25, 2012), https://www.npr.org/2012/10/25/158296711/championing-life-and-liberty-for-animals; ANIMAL LEGAL DEF. FUND, *About Us*, https://aldf.org/about-us/ (last visited Jan. 5, 2024).
[36] Wise, *supra* note 32.
[37] "Deontology" refers to ethics based on duties from one to another. These duties and responsibilities are typically described as "rights." Deontology is often compared to utilitarianism, which is an ethical system that eschews formal rights and duties in favor of, essentially, doing the greatest good for the greatest number of beneficiaries. Unsurprisingly, utilitarian animal rights activists believe that animals deserve to be among those beneficiaries, but not all utilitarians agree on that issue. *See* Editors of Encyclopeadia Britannica, *Deontological Ethics*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/deontological-ethics (Dec. 4, 2023) *and* Henry R.

Peter Singer's *Animal Liberation*, which argues that the interests of all sentient creatures, including humans and nonhuman animals, are due equal consideration when making moral decisions.[38] It is premised on the idea that humans and nonhuman animals alike are capable of suffering and, therefore, the suffering experienced by members of either group should not be discounted.[39] Some consider *Animal Liberation* to be the "bible" of the modern animal rights movement, having been published in 1975.[40] By contrast, deontological activists usually refer to Tom Regan's *The Case for Animal Rights*.[41] In it, he argues against Singer to say that nonhuman animals have the same moral rights as humans because of their complex cognitive abilities.[42] Other deontologists follow similar reasoning to that of many rights of nature activists: nonhuman animals have inherent moral value and deserve not to have that fact ignored.[43]

At the same time, the animal rights movement is not without criticism. Some criticize the movement for *how* animal rights are advocated. For example, *Animal Liberation,* the movement's foundational text, directly analogizes advocating for animals to advocating for People of Color as well as lesbian, gay, bisexual, transgender, and queer people.[44] The author's intended point is that humans and animals are morally important for the same reasons and the

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West & Brian Duignan, *Utilitarianism*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/utilitarianism-philosophy (Jan. 5, 2024) (defining and explaining the two terms in greater detail).

[38] Janet M. Davis, *The History of Animal Protection in the United States*, ORG. OF AM. HISTORIANS https://www.oah.org/tah/november-2/the-history-of-animal-protection-in-the-united-states/ (last visited Jan. 5, 2024)

[39] Wise, *supra* note 32.

[40] Davis, *supra* note 38.

[41] *Id.*

[42] Wise, *supra* note 32.

[43] *The Land Ethic*, *supra* note 16.

[44] PETER SINGER, ANIMAL LIBERATION 117 (40th anniversary ed. 2015), https://grupojovenfl.files.wordpress.com/2019/10/peter-singer-animal-liberation-1.pdf.

choice to discount the moral interest of animals is akin to discounting the moral interests of those marginalized groups of people.[45] However, this comparison has drawn considerable backlash.[46]

By contrast, others criticize the movement for *what* it advocates. Some social contract theorists, for example, argue that rights are duties owed from one to another and thus the protection granted by rights can only be given to those who can respect the rights of others.[47] In other words, rights are a necessarily reciprocal relationship. According to these arguments, because nonhuman animals do not understand or respect the concept of "rights," they are not a part of the social contract and cannot have rights themselves.[48] From another perspective, animal rights advocates themselves frequently take issue with other parts of the movement. For example, some argue that only emphasizing "sentience" is unnecessarily restrictive.[49] From this standpoint, the focus on highly intelligent nonhuman animals, like elephants and great apes, is insufficient.

Like the rights of nature, countries across the globe have codified animal rights in law, even if not to a great extent. In 2005, Austria forbade experimentation on great apes, including chimpanzees, orangutans, and gorillas.[50] Austria reasoned that great apes are closely related to humans and, therefore, deserve a comparable level of protection.[51] The European Union banned experimentation on great apes in all but life-threatening situations for the same reason.[52] In the

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[45]Peter Singer describes this discrimination against nonhuman animals as "speciesism." Speciesism is, essentially, the idea that humans discount harms to nonhuman animals because of the latter's species, which is a morally irrelevant characteristic. For Singer and many utilitarian animal rights activists, the only morally relevant characteristic is sentience. Therefore, because humans ignore the interests of sentient animal species in favor of those of own species, we engage in speciesism. *See id.*

[46] Davis, *supra* note 38.

[47] Editors of Encyclopaedia Britannica, *Social Contract*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/social-contract (Jan. 1, 2024).

[48] Roger Scruton, *Animal Rights*, CITY JOURNAL, Summer 2000, https://www.city-journal.org/article/animal-rights.

[49]Robert Garner, *The Politics of Animal Rights*, 3 BRITISH POLITICS 110, 112 (2008).

[50] *Austria Bans Experiments on Great Apes*, PROJECT R&R (Dec. 21, 2005), https://www.releasechimps.org/resources/article/austria-bans-experiments-on-great-apes.

[51] *Id.*

[52] 2010 O.J. (L 276) 35.

last few years, several cities and counties in the Pacific Northwest of the United States have embraced legal rights for Southern Resident Orcas, a distinct population of orcas facing extinction.[53] Demonstrating the overlap between the animal rights and rights of nature movements, LEBOR, which broadly protected the rights of Lake Erie and its watershed, specifies that its provisions also protect the "organisms" living inside that ecosystem.[54] Consequently, LEBOR is a de facto animal rights document in addition to being a rights of nature document. And so, while the two movements share a great deal, their philosophical groundings and criticisms do not perfectly overlap. These practical differences are explored throughout the rest of this Note.

## II. CASE ANALYSES

This section analyzes the background, reasoning, and outcome of two cases separately. The first case involves LEBOR and the rights of nature. The second case involves Happy the Elephant and the rights of animals. In both instances, the moral foundations and criticisms explored in the previous section guide the courts' reasoning and outcome. The analysis in this section will then guide the rest of this Note.

### *A. The Lake Erie Bill of Rights*

[53] Stephanie McGeary, *Arcata City Council Preview: Proclamation Supporting Orcas, Hearing for Delinquent Garbage Bills and More!*, LOST COAST OUTPOST: AGENDIZER (July 17, 2023, 3:23 PM), https://lostcoastoutpost.com/agendizer/arcata-city-council/200/.
[54] Charter of the City of Toledo, Ohio, Chapter XVII.

In the summer of 2014, a bloom of toxic algae took over Lake Erie caused by excess agricultural runoff and other pollutants.[55] Toledo was forced to declare a state of emergency and turn off its municipal water, which left half a million residents without tap water for three days.[56] In response, grassroots groups organized in favor of an amendment to the city charter: LEBOR. According to its proponents, LEBOR had to draw on the rights of nature framework because traditional environmental policy that had been in place demonstrably failed Toledo's residents.[57] After years of advocacy, LEBOR passed with sixty-one percent of the vote in 2019.[58]

Broadly, LEBOR included three types of rights: rights for the Lake Erie ecosystem, rights for humans to have a clean and healthy environment, and rights for humans to have local self-governance.[59] While important, the second and third rights are human rights, and therefore not this Note's focus. Rather, this Note focuses on the first set of rights: those for Lake Erie itself. Lake Erie's rights, as laid out by LEBOR, are an expansive view of the rights of nature, essentially limited only in its geographic reach. In full, it reads: "Lake Erie, and the Lake Erie watershed, possess the right to exist, flourish, and naturally evolve. The Lake Erie Ecosystem shall include all natural water features, communities of organisms, soil as well as terrestrial and aquatic sub ecosystems that are part of Lake Erie and its watershed."[60] LEBOR further declared that all three sets of rights, the two for humans and the one for Lake Erie, are "inherent, fundamental, and unalienable . . . and self-executing and enforceable."[61] These rights could be enforced by any private or public actor against "any corporation or government" that violates

[55] Jason Daley, *Toledo, Ohio, Just Granted Lake Erie the Same Legal Rights as People*, SMITHSONIAN (Mar. 1, 2019), https://www.smithsonianmag.com/smart-news/toledo-ohio-just-granted-lake-erie-same-legal-rights-people-180971603/.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Charter of the City of Toledo, Ohio, Chapter XVII, § 254.
[60] *Id.* at § 254(a).
[61] *Id.* at § 254(d).

them.[62] But only a single day after the referendum, Drewes Farms Partnership sued the City of Toledo for fear that LEBOR's strong provisions would empower the government to severely penalize the partnership's agricultural runoff.[63]

Ultimately, the District Court of Ohio struck down LEBOR only one year after it was passed. In that case, *Drewes Farms*, the ruling court primarily cited the LEBOR's violations of the Fourteenth Amendment right to due process.[64] Due process, it reasoned, requires "clarity of the laws," and LEBOR simply was not clear.[65] Put differently, LEBOR was vague enough to "invite[] arbitrary enforcement" from the government and, therefore, did not provide fair warning.[66] The court found that LEBOR's rights for the lake itself were "even less clear" than other rights that had been struck down in U.S. Supreme Court precedent.[67] Because the right of a watershed to exist is somewhat abstract, it is difficult to impartially determine what actions infringe upon it.[68] The court noted that catching fish or pulling weeds, even to remove invasive species, could violate Lake Erie's rights when those rights are phrased as expansively and unclearly as they are in LEBOR.[69]

Further, the court concluded that LEBOR was Toledo's attempt to control a lake that borders dozens of cities, multiple states, and two countries.[70] Drawing on the principles of federalism, the court ruled that Toledo is not permitted to pass a law that encompasses the whole of Lake Erie, which is a Great Lake and "not a pond" within the bounds of the city.[71] Because it

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[62] *Id.*
[63] Daley, *supra* note 56.
[64] Drewes Farms P'ship v. City of Toledo, 441 F. Supp. 3d 551, 555-56 (N.D. Ohio 2020).
[65] *Id.* at 555.
[66] *Id.* at 556.
[67] *Id.*
[68] *See id.*
[69] *Id.*
[70] *Id.* at 557.
[71] *Id.*

expanded Toledo's area of control so much, the court stated that LEBOR is a "textbook example" of what city governments are not permitted to do.[72] Without any limitations to what qualifies as "Lake Erie and its watershed" or the rights that LEBOR granted Lake Erie, these rights of nature could not realistically be understood or enforced. Despite LEBOR's "well-intentioned goal," the court found that its decision was "not a close call" and LEBOR must be "invalid in its entirety."[73]

The court further determined that LEBOR's vagueness created practical problems for public policy. The court found that LEBOR's challenger, which was within the Lake Erie watershed, "reasonably fears that spreading even small amounts of fertilizer violates LEBOR."[74] Other similar acts, like "planting corn" and "irrigating a field" could be at risk too.[75] Fundamentally, the court concluded that LEBOR's authors did not make "hard choices" about balancing environmental protection with economy activity.[76] Instead, its drafters employed "powerful" language with "no practical meaning."[77]

In dicta, the court implied that vagueness is likely to remain an issue for rights of nature legislation like LEBOR. Instead of an approach centered around legal rights for nature, the court indicated that more traditional environmental protections might generally be preferable.[78] In fact, the court directly and unfavorably compared LEBOR to an ordinance from Madison, Wisconsin that forbade the use of any phosphorus-based fertilizers within city limits.[79] Madison reasoned that fertilizers with phosphorus can cause algae blooms that reduce water quality, so it banned

[72] *Id.*
[73] *Id.* at 557-58.
[74] *Id.* at 556.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *See id.* at 557.
[79] *Id.*

their sale and application within city limits, as cities are permitted to do.[80] Madison's ordinance is not a "rights of nature" document. After all, it does not couch any of its reasoning in terms of "rights." Instead, the ordinance is a traditional environmental protection that states only that the Madison lakes "are natural assets" with great utility to the public.[81] But the court in *Drewes Farms* found that Madison's ordinance was "carefully drafted," or at least more carefully drafted than LEBOR, to prevent the same issues with algae blooms that were the impetus for passing LEBOR in the first place.[82] Madison's ordinance, which was narrower in its effect than LEBOR, succeeded specifically because of its smaller scope, which fit more neatly within with the history of environmental regulations.

The issues with LEBOR that the court identified in *Drewes Farms* should come as no surprise given the general criticisms of the rights of nature movement. In this case, vagueness is the most salient and explicit issue.[83] Vagueness manifested itself in the court's worries that any use of fertilizer or catching fish may violate LEBOR.[84] Additionally, vagueness appeared in the fears that LEBOR unreasonably restricted human activity; the court concluded that LEBOR was not a good balance of environmental protection and economic growth.[85] And yet, vagueness was not the only issue. The court found that LEBOR's rights were powerful language, but ultimately meaningless.[86] In other words, the court determined that LEBOR's rights were merely symbolic rather than practicable protections. Although the court may have understood what the words literally meant, their practical and legal impact was too vague to be enforceable. And so, the

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[80] Madison General Ordinances §§ 7.48(1), (3), (6).
[81] *Id.* at § 7.48(1)
[82] Drewes Farms, 441 F. Supp. 3d at 557.
[83]*See* Sachs, *supra* note 18 (this source was mentioned as an example of criticisms of the rights of nature movement and academically explores academic vagueness in the movement).
[84] Drewes Farms, 441 F. Supp. 3d at 556.
[85]*Compare id., with* Bétaille, *supra* note 20 (the former shows a practical application of fears that economic activity would be limited while the latter shows an abstract, academic concern of the same).
[86] Drewes Farms, 441 F. Supp. 3d at 556.

court struck down this amendment to the city charter. All of LEBOR's biggest problems reflect general criticisms of the rights of nature movement previously discussed in this Note.

### *B. Happy the Elephant*

Happy is a female Asian elephant who was born in the wild in 1971.[87] But only one or two years after she was born, she was captured.[88] While still a calf, she was sold to the Lion Country Safari in California.[89] There, like the Safari's other elephants, she was named after one of the seven dwarves from *Snow White and the Seven Dwarves*.[90] At the Safari, she became close friends with another elephant: Grumpy.[91] After being transferred to the Bronx Zoo in 1977, Happy and Grumpy were put on display, compelled to give rides, and made to perform for audiences.[92] After several decades in captivity, Grumpy was attacked by two other elephants and had to be euthanized in 2002 .[93] Because elephants are highly social animals, an elephant named Sammie was brought in to be Happy's companion.[94] But, only four years later, Sammie died of kidney failure.[95] Since 2006, Happy has lived in solitary captivity.[96]

In October 2018, the Nonhuman Rights Project ("NhRP") filed a petition in the New York Supreme Court, on behalf of Happy, for a common law writ of habeas corpus.[97] That writ allows people to challenge illegal imprisonment.[98] As such, the NhRP used the writ to ask that

[87] *Happy*, NONHUMAN RIGHTS PROJECT: OUR CLIENTS, https://www.nonhumanrights.org/client/happy/ (last visited Jan. 6, 2024).
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Habeas Corpus*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/habeas%20corpus (last visited Mar. 17, 2024).

Happy be released from the Bronx Zoo and transferred to an elephant sanctuary in Tennessee.[99] However, the New York state constitution specifies that the writ of habeas is available to "persons."[100] The NhRP and dissents argued that Happy should be considered a "legal person" because she is an "extraordinarily cognitively complex and autonomous nonhuman" animal.[101] Therefore, Happy should be entitled to a "right to bodily liberty as an autonomous being, regardless of the care she was receiving."[102] While the trial court sympathized with the argument from the NhRP, it held that there was no binding precedent for nonhuman animals to assert a right like habeas.[103] Without it, the trial court felt compelled to reject the NhRP's claim.[104] The NhRP lost again on appeal in a December 2020 decision.[105] Soon after, the New York Court of Appeals, the state's highest court, granted certiorari to the NhRP in May 2021. Ultimately, the NhRP lost at the Court of Appeals for one stated reason: "[h]abeas corpus is a procedural vehicle intended to secure the liberty rights of human beings who are unlawfully restrained, not nonhuman animals."[106]

The court's reasoning to this conclusion included three concerns, both legal and practical. First, the Court of Appeals' primary legal argument was that the writ is intended for illegal detainment of humans alone.[107] This legal argument is grounded in social contract theory, which

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[99] *Happy*, *supra* note 88.
[100] Matter of Nonhuman Rights Project, Inc. v. Breheny, 38 N.Y.3d 555, 569 (N.Y. 2022).
[101] *Id.* at 567. Being a "legal person" does not mean that Happy would be able to vote, drive a car, or join the military. Instead, the NhRP often compares legal personhood for nonhuman animals to legal personhood granted to corporations. There are specific contexts in which corporations are legally deemed "persons," as *Citizens United v. Federal Election Commission* made famous. Similarly, the NhRP is requesting that Happy be given only a right to the writ of habeas corpus and freed from her involuntary captivity in the Bronx Zoo. However, the comparison between corporations and nonhuman animals was not received well by the majority. Matter of Nonhuman Rights Project, Inc, 38 N.Y.3d at 572-73.
[102] Matter of Nonhuman Rights Project, 38 N.Y.3d at 637 (Rivera, J., dissenting).
[103] Matter of Nonhuman Rights Project, Inc. v. Breheny, No. 260441, 2020 N.Y. Misc. LEXIS 22283, at *26 (N.Y. Sup. Feb. 18, 2020).
[104] Nonhuman Rights Project, 38 N.Y.3d at 568 (majority opinion).
[105] *Id.*
[106] *Id.*
[107] *Id.* at 570-71.

was discussed in the Background section. The court determined that there must be a reciprocal relationship between the ability to "assume legal duties and social responsibilities" and the receipt of legal rights.[108] The court determined that elephants and other "nonhuman animals cannot—neither individually nor collectively—be held legally accountable."[109] As such, there was no reciprocal relationship. In applying this philosophical argument, the Court of Appeals first looked to the state constitution. The New York constitution says that "[n]o person shall be deprived of life, liberty or property without due process of law."[110] Accordingly, the state's case law holds that the writ protects "[t]he right of persons, deprived of liberty, to challenge in the courts the legality of their detention."[111] But because Happy is a nonhuman animal, her confinement is unquestionably statutorily and constitutionally legal.[112] The NhRP, then, could only realistically argue that Happy's captivity should be illegal at common law. But the Court of Appeals, like the state Supreme Court earlier, found no precedent in New York or "any other state or federal court" to support a common law expansion of the writ to nonhuman animals.[113] In the absence of precedent, the Court of Appeals reasoned that the writ "protects the right to liberty of humans *because* they are humans with certain fundamental liberty rights recognized at law."[114] Without the ability to assume those duties, the court concluded that nonhuman animals like Happy cannot have legal rights.[115]

Second, the majority of the court declined to expand the writ to nonhuman animals because doing so would denigrate past expansions of the writ, in which it had been expanded to

[108] *Id.* at 573.
[109] *Id.* at 572.
[110] *Id.* at 569.
[111] *Id.*
[112] *Id.* at 571-72.
[113] *Id.* at 571.
[114] *Id.*
[115] *Id.* at 572.

groups like people who were enslaved, women, and children.[116] Contrastingly, the dissents cited the writ's previous expansions as evidence that the court has always flexibly applied habeas.[117] The dissents reasoned that even humans whose personhood was not historically recognized by statutory or constitutional law could receive protection from the writ.[118] Therefore, the dissents concluded that habeas rights did not require previously recognized legal personhood. The majority agreed with the dissents that Happy, like the aforementioned groups of people and the humans formerly kept in captivity by the Bronx Zoo, has "suffered greatly from confinement."[119] Despite that fact, the majority concluded that there is no "logical progression" from those groups of humans to elephants.[120] Regardless of the undisputed "impressive capabilities of elephants," the majority found that drawing such a throughline invites "an odious comparison with concerning implications."[121] This line strongly implies that the history of racist animalization was on the majority's mind when writing its opinion.

Third, the court worried that endorsing any nonhuman animal personhood would have substantial real-world effects. Because those potentially significant changes in the "complicated and ever-evolving relationship" between humans and nonhuman animals might substantially disrupt the status quo, the court found that it is an issue better suited for the legislature than the

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[116] *Id.* at 571.
[117] *Id.* at 632-33 (Rivera, J., dissenting).
[118] *Id.*
[119] *Id.* at 580 (Wilson, J., dissenting). The Bronx Zoo kept a Mbuti man named Ota Benga in captivity. Mr. Benga was twelve or thirteen when he was kidnapped by slavers in what was then the Belgian Congo. In 1906, Mr. Benga was put on display in the Bronx Zoo's primate exhibit alongside an orangutan. The Bronx Zoo was not the only zoo to engage in such extremely racist acts. After over a century of stonewalling, the Bronx Zoo officially apologized for exhibiting Mr. Benga in 2020. Pamela Newkirk, *Caged Congolese Teen: Why a Zoo Took 114 Years to Apologize*, BBC (Aug. 26, 2020), https://www.bbc.com/news/world-africa-53917733. *See* Walter Johnson, *The Largest Human Zoo in World History: Visiting the 1904 World's Fair in St. Louis*, LAPHAM'S QUARTERLY (Apr. 14, 2020), https://www.laphamsquarterly.org/roundtable/largest-human-zoo-world-history. Mary Dixon, *A Statement from the Wildlife Conservation Society*, WILDLIFE CONSERVATION SOC'Y (July 29, 2020), https://newsroom.wcs.org/News-Releases/articleType/ArticleView/articleId/14648/A-Statement-from-the-Wildlife-Conservation-Society.aspx.
[120] Matter of Nonhuman Rights Project, Inc, 38 N.Y.3d at 571 (majority opinion).
[121] *Id.*

courts.[122] While the dissents and the NhRP insist that this appeal would only grant "a single elephant . . . the right to a full hearing on a writ of habeas corpus," the majority states that ruling for the NhRP and Happy would be a "'sweeping pronouncement[]' of nonhuman animal personhood."[123] The majority feared that granting Happy habeas rights, or even a hearing on the issue, would create a slippery slope that may radically change humanity's relationship with "cows or pigs or chickens."[124] Relying in part on this slippery slope argument, the court concluded that it cannot be the one to take the first step.

Among the reasons that the NhRP lost this case are many of the same criticisms of animal rights more generally. As discussed earlier in this section, the court relied heavily on social contract theory.[125] But notably, the "odious comparison" discussed by the majority strongly implies the majority considered the animalization of People of Color that has historically justified slavery, genocide, and other despicable acts.[126] For this reason, one dissent noted animal rights activists must exercise "great caution" to avoid even the appearance of racist messaging.[127] The dialogue about human-animal comparisons between the majority and the dissents demonstrates that this is an ongoing and fraught issue for animal rights lawyers. However, those comparisons also represent a path forward for the movement. The legally relevant similarities between humans and nonhuman animals enable the latter group to more neatly fit into extant legal structures. And so, despite ruling against Happy and finding that habeas is exclusively a right for humans, the majority's reasoning in its conclusion may be good news for animal rights activists.

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[122] *Id.* at 577.
[123] *Id.* at 575 (citing People *ex rel.* Keitt v. McMann, 18 N.Y.2d 257, 263 (N.Y. 1966)).
[124] *Id.*
[125] *Id.* at 573.
[126] *Id.* at 611-12 (Wilson, J., dissenting).
[127] *Id.* at 612.

## III. COMPARING THE TWO CASES

The cases above imply that animal rights framework is more likely to succeed in incrementally building case law than a rights of nature framework. Despite the differences between LEBOR and Happy's cases, the reasons that the rights activists lost in their respective cases were mostly the same. Broadly, there was one key issue for the rights activists in both cases: vagueness. With so much uncertainty, courts were concerned about what ruling in favor of the rights activists might mean. Yet, as demonstrated by the following comparison of *Drewes Farms* and *Happy*, the rights of nature framework has higher levels of built-in vagueness than the animal rights framework. LEBOR, by definition, protected a body of water in constant flux. The NhRP, by defending Happy, had the inherent advantage of seeking to protect a more clearly defined subject. While the NhRP still lost for many of the same reasons as Toledo, its animal rights approach retained that one advantage.

As such, this section begins by examining the legally relevant differences between animals and nature through the lens of Happy and the Lake Erie watershed. After concluding that these differences make an animal rights framework more likely to succeed in court than a rights of nature framework, this section discusses the practical consequences of failing to reduce vagueness in rights-based litigation efforts like those examined in this note. Specifically, this section looks at how uncertainty exacerbates the ever-present challenges of separation of powers, federalism, and slippery slope arguments. While animal rights litigation is not immune to those same issues, litigation about animals is better positioned to avoid them than litigation about nature. This fact can be used advantageously by rights activists in both movements because individual animals are a part of nature and can be used to advance the rights of nature alongside the rights of animals.

*A. Rights for Dynamic and Abstract Entities*

One of the most significant differences between the two cases is what type of being the rights activists sought to protect. Lake Erie and its watershed are enormous, dynamic entities comprised of innumerable parts. That fact added an element of vagueness that the *Happy* case lacked, because Happy the Elephant is a specific creature with definite and known limits. As such, this particular type of vagueness was only a detriment to LEBOR. The benefits of the relative certainty provided by Happy the Elephant rather than the Lake Erie watershed is apparent in the reasoning of the two courts.

The court in *Drewes Farms* found that it could not apply the law in practice, so it was unconstitutionally vague.[128] As described elsewhere, the court in that case listed a long series of activities and wondered if they violated LEBOR's rights for Lake Erie and its watershed.[129] For example, the court was unsure whether catching a single fish would violate the watershed's rights.[130] After all, even one fish is a part of the "communities of organisms" that comprise the lake and its ecosystem.[131] This line of reasoning indicates that the court was not certain what "Lake Erie and its watershed" actually is and, equally importantly, what it is not. Consequently, the court explicitly and repeatedly stated its confusion on this issue. It first asked "[w]hat conduct infringes the right of Lake Erie" to exist, flourish, and naturally evolve.[132] Then, the court stated that "the nature of those . . . rights is anybody's guess."[133] And in practice, the court concluded "LEBOR offers no guidance [on how a prosecutor, judge or jury would decide a

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[128] *See* Drewes Farms P'ship, 441 F. Supp. 3d at 556.
[129] *See id.*
[130] *See id.*
[131] Charter of the City of Toledo, Ohio, Chapter XVII, § 254(a) (defines the "Lake Erie Ecosystem" to include "communities of organisms" among other features).
[132] Drewes Farms, 441 F. Supp. 3d at 556.
[133] *Id.* at 557.

case].”[134] There are other similarly negative quotes about how, on some fundamental level, the court was not sure *what* had rights and *how* those rights protected the amorphous entity that received them.

As discussed in the Background section, the court in *Drewes Farms* is not alone in its confusion over what the rights of “nature” protects. LEBOR provides a case study in how that uncertainty plays out in court. “Lake Erie and its watershed” is not clearly defined in LEBOR, despite being the exact entity it sought to protect. Instead of providing a definition, LEBOR declared that it protected “Lake Erie and its watershed” and the “Lake Erie Ecosystem,” which includes its “natural water features, communities of organisms, soil [sic] as well as terrestrial and aquatic sub ecosystems.”[135] But traditional definitions of “watershed,” like that of Merriam-Webster,[136] fail to capture the breadth suggested by LEBOR’s limited guidance. Similar to the haziness when defining “nature,” the concept of a “lake” and its “watershed” is more abstract than other, concrete objects. While watersheds and lakes certainly exist and have formal academic, geological definitions, individual watersheds are dynamic and harder to precisely define.[137] What exactly constitutes “Lake Erie and its watershed” varies day to day and is uncertain at the margins. Then, because of anthropogenic climate change and rapid land use alteration, watersheds are changing quickly.[138] Moreover, LEBOR’s explicit inclusion of soils,

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[134] *Id.* at 556.
[135] Charter of the City of Toledo, Ohio, Chapter XVII, § 254(a).
[136] While several definitions exist, Merriam-Webster defines a “watershed” as a “region or area bounded peripherally by a divide and draining ultimately to a particular watercourse or body of water.” Notably, unlike LEBOR, this definition does not include organisms. *Watershed*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/watershed (last visited Jan. 7, 2024).
[137] WATERSHED DYNAMICS AND EVOLUTION, *Why Study Watersheds?*, U.S. DEP’T OF ENERGY https://wade.ornl.gov/about/ (last visited Jan. 7, 2024); WATERSHED ACAD. WEB, *The Concept of Change*, U.S. ENV’T PROTECTION AGENCY, https://cfpub.epa.gov/watertrain/moduleFrame.cfm?parent_object_id=682#:~:text=Change%20is%20an%20integral%20component,human%20activity%20and%20other%20factors (Jan. 7, 2024).
[138] WATERSHED DYNAMICS, *supra* note 138.

organisms, ecosystems, and other entities that are not typically included in the formal definition of a "watershed" only exaggerates the uncertainty surrounding "Lake Erie and its watershed" by entirely defying those traditional definitions Finally, Lake Erie is immense. The surface area of the lake alone is nearly 10,000 square miles and, including the entire watershed, it covers just above 30,000 square miles.[139] Not only might the watershed's size make it psychologically harder to conceive of it as one cohesive entity, but its size means any marginal uncertainty of what comprises "Lake Erie and its watershed" is magnified by the sheer size of those margins. And so, the court did not know how to apply LEBOR in practice.

By contrast, the court in *Happy* could have applied the law in practice, but simply decided against it. At no point in the nearly eighty-page opinion did the court indicate uncertainty about what "Happy the Elephant" is or what actions might affect her. Further, the court understandably had no questions about what a writ of habeas corpus is. Altogether, the court knows that Happy the Elephant is an elephant, that the NhRP wanted to transfer her to an elephant sanctuary, and what it would mean for Happy the Elephant to be granted a writ of habeas corpus. While Happy may change over time, like a watershed, there cannot be any reasonable question about what entity is and what entity is not Happy.[140] There is neither marginal uncertainty over what Happy is nor does the NhRP provide any non-traditional definitions of "Happy the Elephant." Even though the court denied her the hearing, it understood *what* could be protected and *how* it could be protected.

While this analysis might appear somewhat tongue-in-cheek or self-apparent, it demonstrates an important lesson for rights activists: in many cases, individual animals fit better

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[139] Editors of Encyclopaedia Britannica, *Lake Erie*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/place/Lake-Erie (Jan. 7, 2024).
[140] At least, there can be no reasonable question that is not asked by someone studying the philosophy of self.

within the framework of law than dynamic and abstract entities. Consider, as an extreme example, the Colorado definition of murder in the first degree: "a person commits the crime of murder in the first degree if: (a) [a]fter deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person . . . ."[141] Given this text, reasonable people can plausibly disagree about whether killing an elephant constitutes murder. And given the fraught morality of the example, people could certainly disagree about whether killing an elephant *should* constitute murder. But either way, the concept of "murdering an elephant" makes sense in a way that "murdering a lake" or even "murdering a species" does not. As a more germane example, consider the "right to exist" provided in LEBOR. The point at which one specific elephant ceases to exist more readily apparent than the point at which a lake and a watershed cease to exist.[142] This right's vagueness, identified by the court in *Drewes Farms*, is reduced simply by granting the right to an individual animal rather than a geographical feature. As such, rights activists seeking to apply extant law in novel ways in court are more likely to have success by focusing litigation on a single, clearly defined entity. After all, many laws are written to protect a single, clearly defined entity: individual humans. By relying on beings that fit this framework more cleanly, rights activists lessen any additional and unnecessary complications about defying precedent, real-world consequences, and bedrock democratic principles.

Of course, this conclusion is not to devalue or dismiss work being done through other avenues. Traditional environmental protections, like limitations on the quantity of specific

[141] C.R.S. § 18-3-102(1)(a).

[142] When does the lake cease to exist? When it is reduced to multiple smaller lakes, when it becomes a pond, or when all the water is gone? If the water in the lake has completely disappeared, does the watershed still legally exist so long as the water in one area all flows to the same basin? These questions can likely be answered both in science and in law, but doing so would require a greater deal of work and invite more argumentation along the way than would be the case for nonhuman animals. As such, it would be less efficient than a similar approach that relies on individual animals instead.

pollutants, are regularly designed to protect entities like bodies of water rather than humans. Other laws, like the Endangered Species Act, are designed to protect entire species in addition to the individual animals that comprise them. Further, laws like LEBOR can create new paradigms where the law is designed to protect abstract and dynamic entities like "nature." This Note is not intended to guide every form of advocacy. Instead, it is primarily directed towards those rights activists who want to use the courts to create legal precedent from extant common and statutory law to protect the rights of nature and the rights of nonhuman animals.

### *B. Vagueness in Practice*

The uncertainty created by LEBOR's protection of the Lake Erie watershed only worsens procedural and practical hurdles that exist in every case. The procedural problems that are exaggerated by defending dynamic and abstract entities like Lake Erie include the violation of the principles of federalism and separation of powers. The practical concerns center on fears about immediate consequences as well as slippery slope arguments about potential future consequences.

#### *1. Federalism and the Separation of Powers*

In *Drewes Farms* and *Happy*, the courts noted that the requests the rights activists made violate the principles of federalism and separation of powers, respectively. First, in *Drewes Farms*, the court stated that Toledo lacks the jurisdiction to pass a law as expansive as LEBOR.[143] Then, in *Happy*, the court determined that the separation of powers indicates that expanding the writ of habeas corpus is a job for the legislature.[144]

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[143] *See* Drewes Farms, 441 F. Supp. 3d at 557.
[144] Nonhuman Rights Project, 38 N.Y.3d at 576-77.

The court in *Drewes Farms* stated that "LEBOR's attempt to invalidate Ohio [state] law in the name of environmental protection is a textbook example of what municipal government cannot do."[145] Because Lake Erie is simply so large, its wellbeing "falls well outside the City's" right to self-governance.[146] This line of reasoning demonstrates that the rights activists' initial demands were focused at least on the wrong level of government. As such, the court suggested imposing restrictions "within city limits."[147]

Meanwhile, in *Happy*, the majority and the dissent repeatedly fought over whether the court could expand the use of habeas corpus. The majority stated that expanding the writ to nonhuman animals would endorse values "regarding the treatment of nonhuman animals to which [its] own legislature has not subscribed."[148] And in doing so, the court would be overstepping its bounds. The majority then concluded that arguments over the protection and welfare of nonhuman animals "should be directed to the legislature."[149] Much like the court in *Drewes Farms*, the New York Court of Appeals in *Happy* hesitated to take action that it thought was better suited for another branch of government. By contrast, Justice Wilson's dissent in *Happy* argued that the opinions of the court's former Chief Judge, Benjamin Cardozo, have long-since demonstrated that the court can modify common law in accordance with justice "without waiting for a legislature to act."[150] Justice Wilson, then, concluded that the judiciary is empowered to make decisions about the scope of habeas even in the absence of legislative direction.

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[145] Drewes Farms, 441 F. Supp. 3d at 557.
[146] *Id.*
[147] *Id.*
[148] Nonhuman Rights Project, 38 N.Y.3d at 574.
[149] *Id.* at 577.
[150] *Id.* at 613-14 (Wilson, J., dissenting).

Rights activists should narrowly and clearly frame the scope of the issue and their proposed solutions in order to anticipate and avoid problems with separation of powers and federalism. By failing to limit the scope of their demands, rights activists open themselves up to straightforward procedural issues like jurisdiction and federalism, as raised in *Drewes Farms*. This failure in *Drewes Farms* further demonstrates that a narrow, incrementalistic approach would find more success in courts than a broader approach. After all, the court stated that rights for a "pond" inside Toledo might survive this challenge but not rights for Lake Erie, which were a "textbook" violation of federalism.[151] Similarly, in *Happy*, the court worried that ruling in the elephant's favor would result in such an immense societal change that the court would upend its role as a judicial body. Thus, the court said the question of habeas rights for a nonhuman animal was not for the judicial branch. The court's fears of real-world consequences are discussed in greater detail in the next section, but the lesson is the same from both *Happy* and *Drewes Farms*. Scaling down what rights activists seek to protect and the types of protections they seek to give will better avoid these procedural challenges. But given that the rights of nature and animals are relatively new to U.S. law, there are already sufficient difficulties with expanding the case law. As such, it is even more important to avoid having cases thrown out for failing to clear well-known procedural hurdles like standing, separation of powers, and others. But asking courts to create case law that they perceive to violate these principles will only slow the advancement of rights of nature and animals.

However, by narrowing the scope of the demands being made, the breadth of any rights won for nature or animals will likely be restricted in at least the near future. An incremental approach would limit rights activists in the short term. But at the same time, it is likely that

[151] Drewes Farms, 441 F. Supp. 3d at 557.

incrementalism would ultimately be more productive in the long term. Once there have been unambiguous judicial endorsements of these rights, even if they are limited in scope, it will be easier to build precedent for larger changes in the future. After all, U.S. courts are prone to incrementalism over perceived radical change.[152] Regardless, without incrementalism and narrowed focus in litigation, rights activists risk falling into procedural traps that will slow their progress.

*2. Real-world Consequences and the Slippery Slope*

Judicial worries about potential ripple effects caused by granting rights to nonhuman animals and nature appeared multiple times in both cases. More specifically, the courts wondered whether ruling in favor of the rights activists would substantially disrupt human activity, economic and otherwise.

In *Drewes Farms*, the court feared that any human activity in the Lake Erie watershed could potentially violate LEBOR. Consequently, the court noted LEBOR may have a chilling effect on commerce and recreation. As mentioned elsewhere, the court listed the following issues as possible violations of LEBOR: "spreading even small amounts of fertilizer . . ., catching fish, dredging a riverbed, removing invasive species, driving a gas-fueled vehicle, pulling up weeds, planting corn, irrigating a field" and so on.[153] According to the court, LEBOR's drafters "failed to make hard choices" regarding the balance of environmental protection and economic activity.[154] Phrased differently, the court found that LEBOR did not include any limiting factors. Without them, its potential for societal disruption was unacceptable.

[152] Martin M. Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or* Stare Decisis, 2 L. IN TRANSITION QUARTERLY 134, 155 (1965).
[153] Drewes Farms, 441 F. Supp. 3d at 556.
[154] *Id.*

In *Happy*, the court feared that even granting a hearing to Happy would embrace animal personhood of all kinds. The majority stated that there is no practicable way "to limit the undeniably slippery slope" of granting Happy a hearing.[155] The majority then asked whether ants, dogs, and dolphins may all be granted standing to sue if it ruled in favor of Happy.[156] In an attempt to impose limitations on the consequences of a ruling in favor of Happy, the dissent suggested an amorphous test based on whether the animal is "cognitively complex," "social," and "empathetic."[157] But the majority rejected this approach.[158] It suggested that the test only works at the extremes.[159] So, the majority says that the test might deny legal personhood to ants and grant it to elephants, but it would be entirely unhelpful for dogs, cows, pigs, chickens, and any nonhuman animal not in the outer bounds of how humanity understands and measures intelligence.[160] Without these limitations on rights for nonhuman animals, the court stated that there would be "significant implications . . . in all facets of life."[161] It specifically identified property rights, the agriculture industry, medical research, pet ownership, and service animals as being "call[ed] into question" by granting legal personhood to nonhuman animals.[162] Consequently, the majority concluded that granting legal personhood to an elephant would not constitute an "incremental step in 'the slow process of decisional accretion.' "[163] Instead, it would "displace" the framework of law "carefully" established by the legislature to protect

[155] Nonhuman Rights Project, 38 N.Y.3d at 574-75.
[156] *Id.* at 575.
[157] *See id.* at 574-75 (majority opinion), 621-22 (Wilson, J., dissenting).
[158] *Id.* at 574-75 (majority opinion).
[159] *Id.* at 575.
[160] *Id.*
[161] *Id.* at 573.
[162] *Id.* at 573-74.
[163] *Id.* at 575 (citing Keitt, 18 N.Y.2d at 263).

nonhuman animals.[164] Essentially, the court worried not just about a slippery slope for future cases but also about the immediate consequences of this case.

In practice, the court in *Drewes Farms* and the majority in *Happy* framed the fundamental issue differently than the dissents in *Happy*. For the majority in *Happy*, the issue was the "undeniably slippery slope," "significant implications," and problems for enormous economic industries like agriculture and medical research. The court in *Drewes Farms* identified potential disruption to economic industries like agriculture as its primary concern too. Both courts also stated that ruling for the rights activists would implicitly threaten property rights.

By contrast, Justice Wilson's dissent in *Happy* frames the problem another way. Instead of a trial about animal personhood, it was a trial about "granting a single elephant – not the whole animal kingdom – the right to a full hearing on a writ of habeas corpus."[165] At the same time, Justice Rivera's dissent in *Happy* understood the issue to be whether Happy had "forfeited her right to liberty" despite having "committed no crime."[166] Making that limited scope as clear as possible from the beginning of the case might assuage worries about ripple effects and seismic shifts in the legal system. Then, sacrificing the scope of their ask enables rights activists to get Happy or another nonhuman animal a habeas hearing. That success alone would be an enormous accomplishment, even without a sweeping pronouncement like the majority feared. Although a habeas hearing for a single animal is unlikely to be everything that many rights activists want, that one hearing would serve an important purpose.

Just as the New York Court of Appeals looked for precedent across the country, other courts are likely to do the same.[167] Having a full hearing on a nonhuman animal's right to habeas

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[164] *Id.*
[165] *Id.* at 620-21 (Wilson, J., dissenting).
[166] *Id.* at 634 (Rivera, J., dissenting).
[167] *See id.* at 570-71 (majority opinion).

would only be directly and immediately significant for that particular animal. Far from irreparably disrupting all human-animal relationships, it would only implicate the specific facts of its own case. By intentionally framing an argument in this way, rights advocates can first address judicial worries about slippery slopes. But such a case could also provide a framework for future fact-specific analyses in comparable cases. This approach can create a path for future litigation without opening the door wide enough for unexpected consequences. Put succinctly, rights activists can narrow their scope without sacrificing their ability to accomplish meaningful goals.

One approach to narrow the requests made by rights activists is to use an animal rights framework with a single concrete entity over a rights of nature framework with a dynamic and abstract entity. Both animal rights and rights of nature are vulnerable to judicial concerns of social consequences and slippery slope arguments, but so are all arguments seeking to change the status quo. If rights activists are upfront, emphatic, and restrained about the intended immediate consequences of granting these rights, judges will be less likely to perceive ruling for the rights activists as creating these seismic changes. Because precedent on these issues is limited in the United States, this approach will create a permission structure for judges to make perceived incremental changes.

Through careful framing, both frameworks can reduce their vagueness. But animal rights, which protects entities that more cleanly fit inside current legal systems, has an inherent advantage simply given the entities that it seeks to protect.

# IV. PROBLEMS WITH THE ANIMAL RIGHTS FRAMEWORK

## *A. The Costs of Relying on Animals*

As explored through much of the above, the similarities between nonhuman animals and humans are useful for fitting the former into legal frameworks designed for the latter. But those same comparisons are potentially dangerous. In *Happy*, the NhRP and the dissents draw comparisons between humans and nonhuman animals. For example, one dissent discussed how habeas corpus had been used historically to transfer custody of people who had been enslaved.[168] The dissent's intended point was that the writ of habeas corpus has never required the total freedom of the writ's recipient. Therefore, the dissent concluded that habeas can be used to transfer Happy to an elephant sanctuary rather than letting her free entirely. But as a result of this comparison, the majority admonished the NhRP and the dissents. In *Drewes Farms*, the rights activists never make such comparisons. Consequently, the court did not address the issue.

Because it is likely to continue influencing litigation, there are important takeaways from acknowledging this challenge. As noted above, these human-and-animal comparisons are essentially foundational to the modern animal rights movement. Additionally, as I argue in the *Rights for Dynamic and Abstract Entities* section, individual animals fit into existing legal frameworks more easily than nature does precisely because humans and nonhuman animals have more in common than humans and "nature," however the latter is defined. That fact gives an advantage to animal rights litigation over rights of nature litigation. But for these reasons, animal rights activists may struggle to avoid comparing humans and nonhuman animals. Therefore, those activists who seek to explicitly make these comparisons must do so carefully and delicately. To do otherwise risks accusations of an "odious comparison" or outright racism.[169]

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[168] Nonhuman Rights Project, 38 N.Y.3d at 600 (Wilson, J., dissenting).
[169] *Id.* at 571 (majority opinion).

### *B. Incrementalism*

Fundamentally, incrementalism should, for the time being, guide litigators seeking to secure legal rights for nature and animals given the reasons discussed above. But an incrementalistic approach may not appeal to many rights activists. Many of these activists want to dramatically and immediately upset the economic and political systems that they believe unjustly exploit animals, the environment, and others. And it may be true that rapid and pervasive change is for the best. To take one example, animal agriculture is the leading cause of deforestation and a major contributor to biodiversity loss and methane pollution.[170] Yet the amount of time that remains to reduce emissions and avoid climate change's worst effects is on the order of years, not decades.[171] Perhaps immediately dismantling animal agriculture is morally necessary in its own right or it is at least a necessary step to slow or prevent the worst effects of climate change. Even if both claims are assumed to be true, that pressing timeline does not align with the speed of the courts. The appeals process alone for a single case in Colorado state courts, for example, regularly takes at least a year.[172] Other state-level appeals alone can be up to three years.[173] Even at its fastest, the court system is slow.

Further, courts are generally wary of making large changes they believe are better suited to the legislative branch.[174] As the New York Court of Appeals made explicit in *Happy*, it could not rule in favor of Happy and the NhRP because it predicted social upheaval if it did so.[175] As such,

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[170] Coni Arévalo et al., *Animal Agriculture is the Missing Piece in Climate Change Media Coverage*, FAUNALYTICS (May 31, 2023).
[171] Justine Calma, *Time is Running Out on the Climate Clock,* THE VERGE (July 22, 2023), https://www.theverge.com/2023/7/22/23803197/climate-change-clock-deadline-new-york.
[172] *Court of Appeals FAQ*, COLO. JUD. BRANCH, https://www.courts.state.co.us/Self_Help/courtofappeals/FAQs/index.cfm#:~:text=How%20long%20does%20an%20appeal,Can%20I%20submit%20new%20evidence%3F (last visited Jan. 8, 2024).
[173] *Id.*
[174] For better or worse, this mindset is epitomized in the major questions doctrine.
[175] Nonhuman Rights Project, 38 N.Y.3d at 575-77.

the court suggested that the NhRP should take its argument to the political realm.[176] There, the democratic process could account for potential blowback. Courts will likely give the same treatment to any substantial enough change without a sufficient precedential foundation to ground it. Together, these facts simply justify taking more meaningful action taken in the legislative and executive branches. After all, judicial norms like stare decisis explicitly encourage courts to avoid making those types of changes by themselves.[177] As such, achieving political ends through legal strategies that rely on building incremental precedent often takes decades of robust effort to come to fruition.[178]

Outside of the courtroom, a deliberate and narrow approach to animal rights and rights of nature does not necessarily mean an incrementalistic one. Rights activists can pursue legislation and executive action as radically or incrementally as they want and the political environmental allows. For example, LEBOR was a part of the city charter and, thus, not bound by stare decisis. Instead, it was bound by state and federal law. Of course, any legislation should certainly be sufficiently narrow as to avoid any technical issues like federalism and others encountered by LEBOR. As the court seemed to imply in *Drewes Farms*, Toledo could grant rights to a pond within its city limits but a lake the size of Lake Erie is beyond the city's control.[179]

## CONCLUSION

In this Note, I compared two movements, rights of nature and animal rights, through the lens of two cases that emerged from those movements: *Drewes Farms* and *Happy*. While the analysis in this Note is limited to just two cases, these cases suffer from many of the problems

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[176] *Id.* at 577.
[177] *Stare Decisis*, CORNELL L. SCH.LEGAL INFO. INST., https://www.law.cornell.edu/wex/stare_decisis (Dec. 2024).
[178] *See* Michael Scherer et al., *A 49-Year Crusade: Inside the Movement to Overturn* Roe v. Wade, WASH. POST (May 7, 2022).
[179] *See* Drewes Farms P'ship,, 441 F. Supp. 3d at 557.

seen in their respective philosophical backings and activist movements. The way that the requests made by the rights activists were received by the courts indicate that rights activists litigating in court can avoid these persistent problems, like vagueness, and their consequences by narrowly focusing on one definite entity, most likely an animal, and stating that intention clearly. Individual animals, then, are likely the best path forward for animal rights activists and rights of nature activists because they fit into the jurisprudence more neatly than dynamic and abstract entities do. Therefore, rights of nature activists may want to use individual animals as vehicles for rights of nature more broadly.[180] However, rights activists should consider and avoid the dangers of comparing nonhuman animals to humans, despite the important role that such comparisons have played in the history of the modern animal rights movement.

All of these insights have one common thread: rights activists should take great care to consciously and cautiously frame their arguments. Whether it is ensuring that a law does not overreach the legislature's authority, that a brief explicitly narrows what is being requested, or that the entity being granted rights has clearly defined boundaries, the framing of the issue requires detailed thought. Without such an approach, these arguments will continue to be misunderstood and ineffective.

[180] One example of the reverse approach working comes from Guatemala's rights of nature case that protected Estrellita the Woolly Monkey. In that case, the Constitutional Court of Ecuador found that the country's constitutional rights of nature protected nature's component parts. Thus, they protected individual animals. *See* Corte Constitucional. Sentencia No. 253-20-JH (also known as "the 'Estrellita Monkey' case" or "el caso 'Mona Estrellita' ").