

Stopping the Slippery Slope: What Happy the Elephant Can Gain from Estrellita the Monkey

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Introduction

LAWS SEEKING TO MEANINGFULLY CHANGE THE STATUS QUO will often be met with pushback and calls for exemptions from enforcement. For example, the Animal Welfare Act's ("AWA") purpose is "to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment."¹ Yet the AWA's ability to accomplish that goal is limited by categorically excluding all farmed animals, invertebrates, and cold-blooded animals, like reptiles and amphibians.² Most dramatically, the AWA excludes the animals used in ninety-five percent of laboratory research: birds, rats, and mice.³ An exemption to ninety-five percent of animals used in research is enormous. One could argue that by only covering five percent of cases, the AWA is essentially useless.⁴ But at the same time, failing to limit the reach of laws like these can create political and legal issues down the road.

The failure to define and limit animal rights⁵ in court has engendered pushback from those who fear that endorsing and enforcing

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1. 7 U.S.C. § 2131(1).

2. 7 U.S.C. § 2132(g).

3. *Id.*; *Federal Law and Agencies Involved with Animal Testing*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/federal-laws-and-agencies-involved-with-animal-testing/> [https://perma.cc/2Y76-VNS6].

4. Of course, one could respond that the five percent it does cover is meaningful and should not be discounted. Either way, the AWA is not the focus of this Comment, so such nuances do not need to be resolved here.

5. In this Comment, "animal rights" is meaningfully distinguished from "animal welfare." Traditional laws, like the AWA, are examples of "animal welfare" laws, which are often more anthropocentric and narrowly focused on preventing specific types of harms. As a result, they have the benefit of clearly stating what acts violate them. By contrast, animal

animal rights will start the legal system on a slippery slope to something broadly unpopular, like upending the meat industry.⁶ Accordingly, American courts have thus far generally rejected animal rights arguments.⁷ Further, courts sometimes worry that animal rights advocates are using the judicial system to create unacceptably wide-reaching social upheaval.⁸ Given the sheer variety in the animal kingdom, judges might understandably wonder whether granting standing to one specific animal would mean that all members of that animal's species, or even all nonhuman animals, could have standing, too.⁹ Without an established legal framework for differentiating between animals and their needs, American courts are likely to continue to rule against groups advocating for animal rights. And so, as segments of the animal rights movement arguably leave behind the specificity provided by traditional animal welfare laws, courts will need another legal framework in which to analyze the demands made by these advocates.

This Comment argues that in order to secure animal rights in court, the American animal rights movement must find a workable legal standard to limit the slippery slope by specifying what rights different animals should have. Towards that goal, this Comment argues that the Ecuadorian *Estrellita Monkey*¹⁰ case provides a basic framework for such a test by aligning the rights and treatment of wild animals with their natural behaviors and needs. To support this argument, this Comment compares *Estrellita* to an American animal rights case, *Matter of Nonhuman Rights Project, Inc. v. Breheny*.¹¹

Part I introduces *Breheny* and explains that the court ruled against the animal rights advocates, in part, because there was no legal framework to limit the real-world consequences of ruling for them. Part II

rights-based laws focus on valuing animals in their own right and protecting them in ways that respect their intrinsic value. As a consequence, these laws are often broader. However, there is debate over what practical effects, if any, animal rights laws would actually have. See Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, 70 LAW & CONTEMP. PROBS. 9, 15–16 (2007); Elizabeth Kronk Warner & Jensen Lillquist, *Laboratories of the Future: Tribes and the Rights of Nature*, 111 CALIF. L. REV. 325, 328 (2023).

6. See, e.g., *Nonhuman Rts. Project, Inc. v. Breheny*, 197 N.E.3d 921, 929–30 (N.Y. 2022) (making the slippery slope argument that if the court accepts one line of animal rights argument then it takes a step onto a “slippery slope,” which will inevitably or eventually lead the court to accepting something too extreme).

7. Matthew Liebman, *Animal Plaintiffs*, 108 MINN. L. REV. 1707, 1722–27 (2024).

8. *Id.* at 1734.

9. See, e.g., *Breheny*, 197 N.E.3d at 930.

10. Corte Constitucional del Ecuador [C.C.] [Constitutional Court of Ecuador], enero 27, 2022, “Rights of Nature and Animals as Subjects of Rights, ‘Estrellita Monkey’ case,” Teresa Nuques Martinez, Sentencia [S.] No. 253-20-JH/22.

11. *Breheny*, 197 N.E.3d 921.

analyzes the *Estrellita* case and explores how the presence of a workable legal standard helped the court find a way to embrace the appellant's animal rights argument. Part III compares the reasoning of the two cases to demonstrate the important role that a limiting test played in *Estrellita*. Based on that comparison, this Comment subsequently applies the test from *Estrellita* to the facts in *Breheny* to illustrate how the test could have helped the animal rights advocates in the latter case. Finally, Part IV explains the potential benefits of this framework while acknowledging and addressing where the limiting test may still fall short.

I. The Case of Happy the Elephant

Happy is a female Asian elephant who was captured in the wild when she was still a calf.¹² After spending a few years in captivity at the Lion Country Safari, she was transferred to the Bronx Zoo in 1977.¹³ Over her decades at the zoo, two of her companion elephants were euthanized.¹⁴ Since 2006, Happy has lived alone.¹⁵

Hoping to give Happy a better life, the Nonhuman Rights Project ("NhRP") filed a lawsuit for a writ of habeas corpus on her behalf.¹⁶ The NhRP claimed Happy's confinement should be considered illegal at common law and, as such, she must be transferred to an elephant sanctuary.¹⁷ However, this legal theory was essentially untested in American courts.¹⁸ Partially as a result of the theory's novelty, a divided New York Court of Appeals ruled against the NhRP and Happy in a 5-2 decision.¹⁹ While the court rejected the NhRP's argument for multiple reasons, one key concern for the majority centered on the practical impacts of accepting the NhRP's assertion of rights for a nonhuman animal.²⁰ In other words, the court worried about creating a slippery slope by ruling in Happy's favor.

12. *Happy*, NONHUMAN RTS. PROJECT, <https://www.nonhumanrights.org/client/happy/> [<https://perma.cc/V6ZK-8X65>].

13. *Id.*

14. *Id.* (explaining that Happy's first companion was euthanized following an attack from two other elephants and that the second companion was euthanized following kidney failure).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Nonhuman Rts. Project, Inc. v. Breheny*, 197 N.E.3d 921, 927 (N.Y. 2022).

19. *Id.* at 925–26.

20. *Id.* at 929.

The majority was hesitant to rule for Happy because it worried that doing so might radically shift the relationship between humans and nonhuman animals.²¹ As far as the majority was concerned, neither the NhRP nor the dissents provided a satisfactory way to limit such a ruling's implications.²² As the majority phrased the problem, ruling for Happy would be a "sweeping pronouncement[]" of nonhuman animal personhood.²³ This "pronouncement" would then upend the "complicated and ever-evolving relationship" between humans and nonhuman animals.²⁴ Further, the court determined that this outcome would be inevitable, as there is nothing "to limit the undeniably slippery slope."²⁵ According to the majority, this slippery slope would ultimately have "significant implications" on property rights, agriculture, biomedical research, pet ownership, and service animals.²⁶ Phrased differently, granting Happy a hearing about whether she deserves habeas rights would "call into question" and "displace" the current legal framework governing nonhuman animals.²⁷ Therefore, the majority concluded that ruling for Happy would have unacceptably wide-ranging ripple effects throughout society.²⁸

Although the first of the two dissents vaguely outlined a test that could potentially limit these effects, the majority ultimately rejected it.²⁹ In his dissent, Justice Wilson wrote that the NhRP demonstrated that Happy is "extremely cognitively complex and comes from a highly social, empathetic species of wild animals."³⁰ The dissent suggests that these factors—the animal's intelligence and social complexity, humanity's ethical values and norms, and similar considerations—make for an abstract balancing test to determine whether any given nonhuman animal is "complex" enough to be granted legal rights.³¹ Using this test, Justice Wilson noted that elephants have profound mental complexity, unlike ants, earthworms, and many other animals, that distinguishes elephants from other animals and makes them more similar to humans.³² Therefore, Justice Wilson's test would likely conclude that

21. *Id.*

22. *Id.* at 930.

23. *Id.* at 930–31 (quoting *Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc.*, 216 A.3d 839, 844 (Conn. App. 2019)).

24. *Id.* at 932.

25. *Id.* at 930.

26. *Id.* at 929.

27. *Id.* at 929–31.

28. *Id.*

29. *Id.* at 930–31.

30. *Id.* at 963 (Wilson, J., dissenting).

31. *Id.*

32. *Id.*

elephants have habeas rights while ants, earthworms, and many others do not.³³ He nonetheless concluded that any animal able to make the same showing as an elephant at least has a *prima facie* case for habeas.³⁴

The majority rejected this approach; it described Justice Wilson's framework as "some form of 'functional intelligence' test," noting that it would create a "morass of confusing case-by-case inquiries" involving "some subjective, amorphous, and evolving" moral systems.³⁵ In addition to accusing the functional intelligence test of being too subjective, the majority indicated it was flatly unhelpful.³⁶ The majority agreed with Justice Wilson that his test would conclude that elephants qualify for habeas and ants do not.³⁷ However, the court also found that the functional intelligence test would fail to address any animal not on the extreme ends of how humanity measures and understands intelligence.³⁸ For example, the majority questioned how the functional intelligence test would handle dolphins, dogs, cows, pigs, and chickens.³⁹

The second dissent, from Justice Rivera, attempted to distinguish different nonhuman animal species based on whether they were domesticated,⁴⁰ but the majority rejected this distinction as well.⁴¹ According to Justice Rivera, it is "obvious that Happy is unlike . . . dogs, cats, horses, chickens, and hamsters" because Happy does not live "comfortably" among humans.⁴² Elephants, in contrast to domesticated species, were "not shaped through thousands of years of intentional selective breeding by humans."⁴³ Thus, they "exist wholly apart from human society, save for when human beings upset that natural order through their intervention."⁴⁴

The majority rejected Justice Rivera's argument, saying it was "divorced from practical reality" and "devoid of support."⁴⁵ It emphasized that many domestic animals, like chickens and pigs, are "routinely confined in conditions far more restrictive" than Happy.⁴⁶ And so, the majority reasoned that relying on an animal's "comfort" around

33. *Id.* at 963–64.

34. *Id.* at 963.

35. *Id.* at 930 (majority opinion).

36. *See id.*

37. *Id.*

38. *Id.* at 930.

39. *Id.*

40. *See id.* at 976 (Rivera, J., dissenting).

41. *Id.* at 930 (majority opinion).

42. *Id.* at 976 (Rivera, J., dissenting).

43. *Id.*

44. *Id.*

45. *Id.* at 930 (majority opinion).

46. *Id.*

humans may lead to contradictory outcomes.⁴⁷ Therefore, the majority concluded that domesticity and comfort could not be used to distinguish nonhuman animals with rights from those without.⁴⁸

Altogether, the majority in *Breheny* decided that nothing proposed in the dissents was sufficient to stop the slippery slope from leading to indeterminate rights for indeterminate species.⁴⁹ While this problem was only one of several problems with the dissent identified by the majority, the court was ultimately unwilling to endorse the NhRP's position without a tool to stop the slippery slope.⁵⁰ But that is not to say that such a tool does not exist.

II. The Case of Estrellita the Monkey

Estrellita was a woolly monkey from the Amazon Rainforest.⁵¹ Unfortunately, at only one month old, she was taken by poachers and smuggled into Ecuador.⁵² There, she was raised almost like a human baby and “learned to drink from cups, sit on chairs, and wear clothes and diapers.”⁵³ Throughout most of her life, Estrellita lived illegally in a woman's home without “administrative authorization” from the government.⁵⁴ By adulthood, she was malnourished, dangerously underweight, and had overly worn teeth.⁵⁵ In 2019, a neighbor alerted the authorities to Estrellita's illegal presence in the woman's home.⁵⁶ After the Ecuadorian government seized Estrellita and transferred her to a zoo, she died within one month.⁵⁷

47. *Id.* (explaining that livestock and companion animals are both domesticated and shaped by thousands of years of evolution, but farmed animals frequently live in poor conditions, while companion animals typically live in good conditions, thus making “domesticity” and “comfort” ineffective distinguishing factors).

48. *Id.*

49. *Id.*

50. *Id.* at 930–32.

51. Macarena Montes Franceschini & Kristen Stilt, *Estrellita the Woolly Monkey and the Ecuadorian Constitutional Court: Animal Rights Through the Rights of Nature*, REVISTA (Feb. 10, 2023), <https://revista.drclas.harvard.edu/estrellita-the-wooly-monkey-and-the-ecuadorian-constitutional-court-animal-rights-through-the-rights-of-nature/> [https://perma.cc/Q6VR-VLAY].

52. *Id.*

53. *Id.*

54. *Id.*; Corte Constitucional del Ecuador [C.C.] [Constitutional Court of Ecuador], enero 27, 2022, “Rights of Nature and Animals as Subjects of Rights, ‘Estrellita Monkey’ case,” Teresa Nuques Martinez, Sentencia [S.] No. 253-20-JH/22 p. 10.

55. C.C., enero 27, 2022, “‘Estrellita Monkey’ case,” S. No. 253-20-JH/22 p. 11.

56. Franceschini & Stilt, *supra* note 51.

57. *Id.*

Estrellita's owner⁵⁸ then filed a writ of habeas corpus to request Estrellita be returned to her, although once she found out Estrellita had died, the writ was changed to request Estrellita's body.⁵⁹ The owner and her attorney appealed to the Constitutional Court of Ecuador, which agreed to hear their arguments.⁶⁰ In taking the case, the court sought to first determine whether and how a woolly monkey, or any individual animal, could be the subject of rights.⁶¹ To answer this question, the court relied on a unique provision in the Ecuadorian Constitution that created robust rights for nature.⁶² Based on those rights, the court concluded that an individual monkey like Estrellita could receive rights in Ecuador.⁶³ However, the court ultimately denied habeas to Estrellita herself because she had already passed away.⁶⁴

The majority ruled in favor of rights for individual animals, despite ruling against Estrellita, for at least two primary reasons: (1) The country's constitution protected animals' individual rights, and (2) the court could determine the rights that animals have and, consequently, limit the downstream effects of finding that individual animals in Ecuador are constitutionally protected.⁶⁵ The court's analysis began⁶⁶ with the Ecuadorian Constitution, which reads as follows:

Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

The State shall give incentives to natural persons and legal entities and to communities to protect nature and to **promote respect for all the elements comprising an ecosystem.**⁶⁷

58. Estrellita's "owner," a 57-year-old woman, did not legally own Estrellita. The woman lacked the proper permits and administrative authorization necessary to legally own her. However, the owner described herself as Estrellita's "mother and caregiver." C.C., enero 27, 2022, "Estrellita Monkey" case," S. No. 253-20-JH/22 p. 8.

59. Franceschini & Stilt, *supra* note 51.

60. *Id.*

61. *Id.*

62. *Id.*

63. C.C., enero 27, 2022, "Estrellita Monkey" case," S. No. 253-20-JH/22 p. 27.

64. *Id.* at 17, 55.

65. *See id.* at 27–29.

66. *Id.* at 23 n.67.

67. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR 2008 [CONSTITUTION] Oct. 20, 2008, art. 71 (emphasis added).

In short, this constitutional provision grants rights to the natural environment.⁶⁸ But in another case about the rights of nature, the court found that nature is a “complex” entity comprised of many discrete parts.⁶⁹ Keeping that fact in mind, the court focused on the constitutional provision that demands “respect for all the elements that make up an ecosystem.”⁷⁰ These elements, the court reasoned, must include every constituent biotic and abiotic feature of nature.⁷¹ Therefore, each of the “components or particular expressions” that comprise nature must hold rights individually as well.⁷² An individual animal is, after all, “a basic unit of ecological organization, and . . . an element of Nature.”⁷³ Thus, individual animals deserve some level of protection under the Ecuadorian Constitution.⁷⁴

To operationalize these rights, the court employed a two-part test.⁷⁵ First, the test asks about the animal’s species in isolation.⁷⁶ Second, the test asks about that species’ relationships with other species.⁷⁷ The purpose of this test is to refine and limit the vague rights that the Ecuadorian Constitution granted to wildlife through its rights of nature provision. Consequently, the test is designed to determine the rights that an animal has, as well as the actions that violate those rights.

The court calls the first half of this test “the interspecies principle.”⁷⁸ It defines this principle as a guarantee of “the protection of animals with a concrete grounding in the characteristics, processes, life cycles, structures, functions and evolutionary processes that differentiate each species.”⁷⁹ Phrased differently, the interspecies principle looks at the unique needs of a particular species and accounts for those needs when determining the rights a species has. By way of example, this principle would mean that an “Andean condor is not protected . . . in the same

68. *Id.*

69. Corte Constitucional del Ecuador [C.C.] [Constitutional Court of Ecuador], diciembre 15, 2021, “The Aquepi River,” Ramiro Avila Santamaría, Sentencia [S.] No. 1185-20-JP/21 p. 11.

70. *Id.*; CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR 2008 [CONSTITUTION] Oct. 20, 2008, art. 71.

71. C.C., diciembre 15, 2021, “The Aquepi River,” S. No. 1185-20-JP/21 p. 11.

72. Corte Constitucional del Ecuador [C.C.] [Constitutional Court of Ecuador], enero 27, 2022, “Rights of Nature and Animals as Subjects of Rights, ‘Estrellita Monkey’ case,” Teresa Nuques Martínez, Sentencia [S.] No. 253-20-JH/22 pp. 21–22.

73. *Id.* at 24.

74. *Id.* at 27.

75. *Id.* at 30.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

way as . . . a pink Amazonian dolphin.”⁸⁰ The former is a scavenging bird, and the latter is a freshwater mammal, so the two animals have different attributes, behaviors, and needs.⁸¹ And so, the interspecies principle should be used to analyze the needs and “demands for legal protection” depending on the species of the animal at hand.⁸²

The second half of the test examines each species’ niche in its ecosystem and the relationships it has with other species.⁸³ Drawing on biology and ecology, the court highlighted “competition, amensalism, antagonism, neutralism, commensalism and mutualism” alongside “predation, herbivory [and] parasitism” as exemplary archetypes of these natural relationships.⁸⁴ Given these relationships, a predator killing prey is “in compliance with the trophic chain,” and so the prey animal’s “right to life . . . is not illegitimately violated.”⁸⁵ Further, humanity’s role in the ecosystem is not exempt from this analysis. The second part of this test uses humanity’s “historical” relationships with other species to determine which human activities impacting those species are acceptable.⁸⁶ The court subsequently concluded that wild animals have a right not to be “hunted, fished, . . . [or] captured” by humans, outside of the “legitimate interactions” that exist within the context of the ecosystem and history.⁸⁷ This right would also entail that wild animals have a right to “the free development of their animal behavior,” which means they cannot be domesticated or “forced to assimilate” with humans.⁸⁸

However, the court drew a distinction between wild animals and domesticated animals.⁸⁹ It reasoned that humans are a “heterotrophic species” without the ability to produce all of their “own nutrients.”⁹⁰ To make up for what humanity lacks, humans have domesticated animals to provide food, protection, transportation, apparel, and recreation.⁹¹ Thus, the use of animals who have already been domesticated for food, fiber, and labor would not necessarily be unconstitutional in Ecuador.⁹²

80. *Id.*

81. *Id.*

82. *Id.* at 29.

83. *Id.* at 30.

84. *Id.* at 31.

85. *Id.* at 31–32.

86. *Id.* at 34.

87. *Id.*

88. *Id.* at 34–35.

89. *Id.* at 33–34.

90. *Id.* at 34.

91. *Id.*

92. *Id.*

But the court left the door open, stating that a violation of the rights of any animal, wild or domesticated, would depend “on the particularities of each case.”⁹³ While the court drew a distinction between wild and domesticated animals, it did not expand its analysis regarding the latter, presumably because they were not at issue in this case.⁹⁴

III. The Synthesis of *Estrellita*’s Two-Part Test and *Breheny*

Both the *Estrellita* and *Breheny* cases deal with the novel issue of granting habeas rights to an individual wild animal.⁹⁵ Yet, the two cases are far from identical. As an unsurprising consequence of that fact, the Ecuadorian court and the New York court came to different conclusions based on the differences in the laws of each country and the facts of each case.⁹⁶ One notable distinction between the two cases is that Ecuador, but not New York, undeniably has rights of nature codified within its constitution.⁹⁷ Therefore, it was much easier for the Ecuadorian court to identify the source of animal rights than it was for the court in *Breheny*.

However, this Comment’s primary focus is the *Breheny* court’s slippery slope argument. As such, the most important and relevant distinguishing feature between the two cases, for the purposes of this Comment, is the two-part test in *Estrellita* that helped the appellant avoid a slippery slope argument. Without a similar test in *Breheny*, the court struggled to “limit the undeniably slippery slope.”⁹⁸ Accordingly,

93. *Id.*

94. *See id.* at 34–35.

95. *Id.* at 17; Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 924 (N.Y. 2022).

96. *See* C.C., enero 27, 2022, “‘Estrellita Monkey’ case,” S. No. 253-20-JH/22 p. 49; *Breheny*, 197 N.E.3d at 921, 931–32.

97. Obviously, the presence of a rights of nature provision in the Ecuadorian Constitution is an enormous difference between Ecuador and New York. This distinction is immensely important for lawyers seeking to ground animal rights in U.S. law. After all, it means that American lawyers cannot point to federal or state constitutions for direct, intentional, and self-apparent support of their arguments. However, this Comment is not arguing for any particular source of animal rights or any particular method of grounding animal rights in U.S. law. It is irrelevant, for the limited scope of this Comment, whether animal rights in the United States are justified in any constitution, statute, regulation, or something else entirely. Instead, this Comment argues only that having a test or standard in place to constrain the slippery slope will make judges less hesitant regarding the practical consequences of ruling for animal rights activists and that *Estrellita*’s two-part test does just that. When considering the *Estrellita* test, judges will likely be more sympathetic towards animal rights arguments, regardless of what specific law justifies those arguments. *Compare* CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR 2008 [CONSTITUTION] Oct. 20, 2008, arts. 71–75, *with* U.S. CONST. (lacking an entitlement to legal rights for animals in the U.S. Constitution).

98. *Breheny*, 197 N.E.3d at 930.

the court ruled against Happy in part because it could not restrict the effects of ruling in her favor.⁹⁹ But *Estrellita* provides a test designed to address exactly that problem and proactively prevent slippery slope arguments about which animals would have rights and what rights they would have.

To explore how *Estrellita*'s two-part test might have addressed a court's slippery slope arguments, this Part applies the test to the facts in *Breheny* without relying on any information that was not already before the New York Court of Appeals. First, this Part examines whether Happy the Elephant would merit habeas rights under the *Estrellita* test. Next, it highlights how the outcome of that analysis addresses some of the majority's concerns in *Breheny*. Finally, this Part discusses where the *Estrellita* test falls short.

A. The Application of the *Estrellita* Test to Happy

Estrellita's two-part test to determine the rights of individual animals would most likely conclude that Happy deserves habeas rights. This test first accounts for the needs of an animal's species and then accounts for that species' relationship with others.¹⁰⁰ In more detail, the first step, also called the interspecies principle, considers the animal's "characteristics, processes, life cycles, structures, functions and evolutionary processes."¹⁰¹ The second step of the two-part test accounts for the species' "main biological interactions that should be respected, valued and analyzed."¹⁰² Because the second question hinges on biological interactions between species, it takes into account humanity's "historical" and ecological relationship with the species at issue.¹⁰³ Further, it permits "legitimate" ways of causing harm and "sometimes even death," like predation and parasitism, so long as they accord with history and ecology.¹⁰⁴

1. The First Part of the Test: The Interspecies Principle

Under the interspecies principle, Happy, as an Asian elephant, has demanding and complicated needs that are unlikely to be met as a captive animal in the Bronx Zoo. Psychologically, elephants have "complex cognitive abilities," "empathy," "self-awareness," "long-term

99. *Id.*

100. C.C., enero 27, 2022, "'Estrellita Monkey' case," S. No. 253-20-JH/22 p. 30.

101. *Id.*

102. *Id.* at 31.

103. *Id.* at 34.

104. *Id.* at 31, 34.

memory,” and “social knowledge,” and they are capable of “innovative problem-solving.”¹⁰⁵ These attributes are just a few of the many similarly impressive features illustrated in the lower court decisions throughout the procedural history of *Breheny*.¹⁰⁶ Socially, a female Asian elephant in the wild would normally have an expansive social network that is “headed by matriarchs,” who are often related to other members of the herd.¹⁰⁷ Further, elephants often develop “ritualistic funeral practices” like mourning, standing guard over the dead, and attempting to revive their fallen herd members by “smelling, moving and interacting with the deceased’s bones.”¹⁰⁸ Physically, elephants wander an area of up to 125 square miles in a day.¹⁰⁹ They are “active more than [twenty] hours a day,” traveling miles to search for food, graze, and find friends.¹¹⁰

2. The Second Part of the Test: Ecological Relationships

With regards to the second question of the test, elephants have not been domesticated; therefore, they have an important ecological role independent of humans. Wild elephants interact with other species in a variety of ways. They spend nearly the entire day foraging for a wide variety of edible plant species.¹¹¹ When interacting with other animal species, wild elephants defend each other, including their dead, from predators.¹¹² Unlike domesticated animals, elephant evolution “has not been guided by human need over the millennia.”¹¹³ Instead, elephants “exist wholly apart from human society.”¹¹⁴ It simply is not “aligned with [an elephant’s] genetic dispositions” to live among humans.¹¹⁵ Therefore, elephants live around humans only when humans “upset that natural order.”¹¹⁶

105. Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 974 (N.Y. 2022) (Rivera, J., dissenting) (citing Nonhuman Rts. Project v. Breheny, No. 260441/19, 2020 WL 1670735, at *3 (N.Y. Sup. Ct. Feb. 18, 2020)).

106. *Id.*

107. *Id.* at 954 (Wilson, J., dissenting).

108. *Id.*

109. *Id.* at 967 (Rivera, J., dissenting); *Asian Elephant: Facts*, WORLD WILDLIFE FUND, <https://www.worldwildlife.org/species/asian-elephant> (last visited Feb. 7, 2025).

110. *Breheny*, 197 N.E.3d at 961 (Rivera, J., dissenting).

111. *Asian Elephant: Facts*, *supra* note 109.

112. *Breheny*, 197 N.E.3d at 973 (Rivera, J., dissenting); Appendix at A-109, Nonhuman Rts. Project v. Breheny, 134 N.Y.S.3d 118 (N.Y. Sup. Ct. 2019) (No. 260441/2019), NYSCEF No. 5 (Joint Affidavit of Lucy Bates and Richard M. Byrne).

113. *Breheny*, 197 N.E.3d at 976 (Rivera, J., dissenting).

114. *Id.*

115. *Id.* at 963 (Wilson, J., dissenting).

116. *Id.* at 976 (Rivera, J., dissenting).

In contrast to wild Asian elephants, Happy is unable to engage in many of the psychological, social, and physical practices of elephants. Psychologically, Happy has only been seen to voluntarily engage in five types of activities at the Bronx Zoo: “dusting, grazing on grass, standing and facing the fence or gate, swinging her trunk, and standing with one or two feet lifted off the ground.”¹¹⁷ Of these activities, only dusting and eating grass are considered normal behavior.¹¹⁸ The other three often indicate poor mental and physical health.¹¹⁹

Socially, Happy has been deprived of the ability to interact normally with other elephants. Instead of being with a group of female relatives, she has spent much of her life with a string of single, unrelated companions in her enclosure.¹²⁰ When her companions were subsequently euthanized, the record of this case does not indicate that Happy had the ability to mourn her friends as a wild elephant would, by standing guard and interacting with the dead elephant’s body.¹²¹ Physically, Happy has been deprived of the ability to roam. She lives in a one-acre indoor barn with “limited access” to a smaller walled-in outdoor area.¹²² Walking at a moderate pace, a human could cross her indoor enclosure in roughly thirty seconds.¹²³ Assuming generously that Happy has unrestricted access to two full acres of space, that is still only 0.0025% of the 125 square miles that a wild Asian elephant may explore in a single day.¹²⁴

117. *Id.* at 961 (Wilson, J., dissenting).

118. *Id.*

119. *See id.*

120. *Id.*

121. Despite being unable to find any evidence in the record that Happy could mourn as wild elephants would mourn, the absence of evidence is not evidence of absence. So, it cannot be certainly determined that she did not have this opportunity. However, the euthanasia of zoo animals commonly involves removing the animals from their enclosures, dismembering them, and incinerating the remains. Without evidence to the contrary, it is reasonable to assume that Happy was not given the chance to mourn as wild elephants do. Even if she did have that opportunity, mourning is only one aspect of elephant life that Happy is missing; thus, the broader point about her inability to live as wild elephants do still stands. *See* Daniel Engber, *Where Do Zoo Animals Go When They Die?*, SLATE (Jan. 27, 2006), <https://slate.com/news-and-politics/2006/01/what-happens-to-zoo-animals-when-they-die.html#> [<https://perma.cc/3WUS-SC2L>].

122. *Breheny*, 197 N.E.3d at 967 (Rivera, J., dissenting). Additionally, while this fact was not before the court, it is worth noting that Happy would be moved to a stall about twice as long as she is during colder months. Lawrence Wright, *The Elephant in the Courtroom*, NEW YORKER (Feb. 28, 2022), <https://www.newyorker.com/magazine/2022/03/07/the-elephant-in-the-courtroom> (last visited Feb. 18, 2025).

123. *Breheny*, 197 N.E.3d at 967 (Rivera, J., dissenting).

124. *See id.* (providing the 125-square-mile statistic, establishing that Happy had access to a one-acre enclosure, and indicating that she had access to a yard smaller than one acre).

Further, Happy has been deprived of the ecological interactions and relationships that wild elephants have with other elephants and non-elephant species. As discussed in the above paragraph, Happy has not had normal relationships with other elephants. For the last two decades, her contact has been limited to “sound, olfaction, and touch” with a single elephant, one with whom Happy has a “hostile relationship.”¹²⁵ Moreover, Happy’s isolation has deprived her of normal relationships, positive or negative, with other nonhuman species. First, Happy has never had relationships with many of the species that she would have known in the Asian wilderness, given that she was captured as a calf.¹²⁶ Presumably, although not specifically stated in the opinion, the social interactions throughout her life have been limited to a handful of other elephants, humans, and the birds, rodents, and insects who can enter her enclosure at will.¹²⁷ Additionally, her interactions with humans are unnatural. While at the Bronx Zoo, Happy was made to give rides and participate in “elephant extravaganzas.”¹²⁸ Asian elephants are not domesticated animals and simply would not interact with people in this way without human intervention.¹²⁹ In other words, Happy’s current relationship with humanity has “upset [the] natural order.”¹³⁰ Consequently, Happy’s confinement would likely be illegal under *Estrellita*’s two-part test.

B. Counterarguments to the *Estrellita* Test’s Application in *Breheny*

However, the majority denied Happy habeas rights despite knowing all of the above facts.¹³¹ While it is impossible to conduct a true counterfactual analysis to determine whether proposing the *Estrellita*

125. *Id.* at 924–25 (majority opinion); Appendix, *supra* note 112, at A-460 (Supplemental Affidavit of James Breheny).

126. *Breheny*, 197 N.E.3d at 967 (Rivera, J., dissenting).

127. While this claim is difficult to prove with certainty, Happy’s isolation is supported by the record, and it follows logically that her enclosure could be visited by other, smaller animals. Additionally, nothing in the record would indicate otherwise. Given that the analysis in this Section is limited to that which is available in the record, it is reasonable to make this point based only on the case’s record. However, if one disagrees, then it is most important to recognize that Happy undeniably exists outside of the normal ecological niche for her species. Asian elephants do not exist naturally in New York. As such, the exact details of which animals can sneak into her enclosure are irrelevant. Instead, one should focus on the fact that she does not have the normal relationships of an Asian elephant regardless of the exact shape her present relationships take.

128. *Id.* at 961 (Wilson, J., dissenting); Emily Hahn, *Elephant Extravaganza*, NEW YORKER, Sept. 24, 1984, at 40.

129. *Breheny*, 197 N.E.3d at 976 (Rivera, J., dissenting).

130. *Id.*

131. *Id.* at 931 (majority opinion).

court's test would have changed the outcome in Happy's case, there are at least three fact-based counterarguments that might have persuaded the majority to reject this application of the test.¹³² First, with regards to behavior, the dissents note that Happy is unable to wallow in mud as she would in the wild.¹³³ However, the court stated that she "receives daily baths" all the same.¹³⁴ Second, one could object to the conclusion that she has inadequate psychological and social experiences because the Bronx Zoo asserted that Happy receives "activities for mental and physical stimulation" and knows her zookeepers well.¹³⁵ Finally, as discussed above, Happy might not have exactly the same relationships that she would have in the wild, but she can still meaningfully interact with another elephant in the zoo.¹³⁶ Based on these facts, the majority might have ultimately concluded that Happy is treated well enough overall and, as has happened in the past, she would take poorly to being moved elsewhere.¹³⁷ As such, one could argue that the *Estrellita* court's test would not conclude that Happy and other elephants should have habeas rights.

However, such an argument misunderstands the focus of the *Estrellita* test, which emphasizes an animal's right to live as they have evolved to live, rather than the ways that humanity deems sufficient.¹³⁸ Instead, the test is fundamentally about whether the animal's current state aligns with their species' natural behavior and relationships; it is not about animal welfare *per se*.¹³⁹ Even if all the activities provided by the zoo were sufficient for Happy's mental and physical well-being, they are unlikely to be "legitimate interactions" permissible under the

132. As discussed throughout this Comment, there were still other challenges to the NhRP's argument. One of the largest gaps, unaddressed in this Comment, is that even if the court adopted the *Estrellita* test and used it to find that elephants *need* habeas rights to be in accordance with their natural state or that elephants *should have* habeas rights, this does not entail that elephants *do have* habeas rights under U.S. law. After all, there would first still need to be a source of law in which the court could ground any finding of animal rights.

133. See *Breheny*, 197 N.E.3d at 976 (Rivera, J., dissenting).

134. *Id.* at 965 (Wilson, J., dissenting).

135. *Id.*

136. See *id.* at 925 (majority opinion).

137. *Id.*

138. See Corte Constitucional del Ecuador [C.C.] [Constitutional Court of Ecuador], enero 27, 2022, "Rights of Nature and Animals as Subjects of Rights, 'Estrellita Monkey' case," Teresa Nuques Martinez, Sentencia [S.] No. 253-20-JH/22 p. 30 (explaining that "evolutionary processes" distinguish species).

139. As distinguished earlier in this Comment, animal rights and animal welfare are used differently. *Supra* note 5 and accompanying text. The two-part test in *Estrellita* is focused on animal rights, rather than animal welfare. C.C., enero 27, 2022, "'Estrellita Monkey' case," S. No. 253-20-JH/22 p. 30.

two-part test.¹⁴⁰ In other words, the two-part test is about animal rights, and these fact-based counterarguments are about animal welfare, so they miss the mark. Further, there are good reasons to doubt that these activities are sufficient for Happy's welfare. Happy has only been observed engaging in two natural behaviors, while the three non-natural behaviors may be explained by boredom and her "painful, diseased feet."¹⁴¹ After all, limited interaction with a hostile elephant and vague "activities for mental and physical stimulation" in a less-than-two-acre enclosure are unlikely to be of the same richness and quality as her would-be natural behavior and relationships.¹⁴² Consequently, Happy's present state is severely misaligned with the natural state of Asian elephants. By operationalizing the facts in this case within a predictable framework to demonstrate that misalignment, the *Estrellita* test would likely have concluded that Happy deserves habeas rights. But at a minimum, it would have determined Happy's captivity is far from the life that she has a right to live.

IV. The *Estrellita* Test's Successes

Fundamentally, the *Estrellita* test succeeds because it would likely conclude that Happy deserves habeas rights using only the facts in the record without forcing the court to issue a sweeping proclamation. It does so by providing falsifiable limitations on animal rights.

A. Provides Empirical and Intuitive Results

This test places the facts of *Breheny* within a more definite structure than the amorphous functional intelligence test proposed by Justice Wilson's dissent. First, the *Estrellita* test looks at more empirically measurable and verifiable information than the functional intelligence test. For example, the test would ask about the species' habitat, food, and lifecycle.¹⁴³ The functional intelligence test, by contrast, looks more at abstract considerations like empathy and complexity.¹⁴⁴ It is far simpler to understand the observable behaviors and needs of, for example, a dolphin than it would be to gauge a dolphin's mental complexity against that of another species. Consequently, the two-part test's focus on more straightforward scientific observations provides a superior

140. See C.C., enero 27, 2022, "'Estrellita Monkey' case," S. No. 253-20-JH/22 pp. 34–35.

141. *Breheny*, 197 N.E.3d at 961 (Wilson, J., dissenting).

142. See *id.* at 965.

143. C.C., enero 27, 2022, "'Estrellita Monkey' case," S. No. 253-20-JH/22 p. 30.

144. *Breheny*, 197 N.E.3d at 963 (Wilson, J., dissenting).

structure for analyzing the legal requests of animal rights advocates. In the words of the *Breheny* court, the relatively predictable and falsifiable nature of biology is preferable to the “confusing . . . subjective, amorphous, and evolving” nature of abstract and undefined factors like social values and mental complexity.¹⁴⁵

B. Improves upon the *Breheny* Test

Second, the *Estrellita* test improves on Justice Rivera’s “comfort” test. As the majority noted, the comfort test is somewhat counterintuitive; dogs may live in comfort with humans, but pigs rarely do.¹⁴⁶ And so, the question of domesticity alone is likely not enough to determine whether an animal deserves habeas rights.¹⁴⁷ The *Estrellita* test, by incorporating humanity’s historical relationship with the species, already accounts for a species’ domestication.¹⁴⁸ Then, as described above, it pushes that analysis further to account for whether the treatment of the domesticated animal is aligned with the historical relationship between humanity and that animal species.¹⁴⁹ By including domesticity as one factor among many, the *Estrellita* test would not reach internally contradictory conclusions as the comfort test does.

C. Limits the Slippery Slope

Further, the primary strength of the *Estrellita* test is to restrain future courts by providing more clearly defined limits that could stave off any unintended far-reaching consequences. In other words, it is a method to “limit the undeniably slippery slope” that so concerned the majority in *Breheny*.¹⁵⁰ Given that *Breheny* is “representative of how courts dismiss cases using the slippery slope . . . argument[],” ensuring that the *Estrellita* test can address that barrier in this case is uniquely important.¹⁵¹ If it does not work here, it is unlikely to work elsewhere.

The *Estrellita* test provides a better limit to slippery slopes than the functional intelligence and comfort tests for two reasons. First, having a predictable test in place creates an extra layer of certainty for parties entering litigation. By relying on stable, though still fallible,

145. *Id.* at 930 (majority opinion).

146. *See id.*

147. *See id.*

148. C.C., enero 27, 2022, “‘Estrellita Monkey’ case,” S. No. 253-20-JH/22 p. 34.

149. *Id.*

150. *Breheny*, 197 N.E.3d at 930.

151. *See* Macarena Montes Franceschini & Kristen Stilt, Naturalized Rights of Animals, Animalized Rights of Nature 37 (May 2, 2024) (unpublished paper) (SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4826699 [<https://perma.cc/RWX6-YWWF>].

sciences like biology and ecology, the potential outcome of the *Estrellita* test would be more foreseeable to parties entering a courtroom than the tests based on a judge's ability to balance more subjective factors. Second, this test accounts for humanity's historical relationships with various species.¹⁵² As a result, it would likely permit animal agriculture, hunting, and fishing to continue.¹⁵³ However, at the same time, it may restrict the industrialization of these industries because factory farming and similar technologies are not aligned with historical relationships between humans and farmed animals.¹⁵⁴ Thus, this test would likely still permit rulings with "significant implications" for certain industries while at the same time ensuring that the effects are predictable and more limited.¹⁵⁵ While many animal rights advocates might not embrace a test that includes "exemptions" like these, such exceptions may also be a necessary ingredient in avoiding the slippery slope that the *Breheny* court feared. Without them, a court could find that there is no difference between the *Estrellita* test and nothing at all.

V. The Failures of the *Estrellita* Test

However, this test may not address every concern that the court has in *Breheny*. Specifically, there are three counterarguments to the two-part test's success. First, one could argue that this test would not solve the messiness inherent to case-by-case inquiries. Second, given the majority's focus on Happy's treatment, it is possible that the facts were not conducive to an outcome in favor of rights advocates. And finally, the two-part test arguably does not apply to the facts in *Breheny* because the court does not question what rights Happy has; it questions whether she has any rights at all.

A. Habeas as a Case-by-Case Inquiry

The majority in *Breheny* stated that it does not want habeas to become a "morass of confusing case-by-case inquiries."¹⁵⁶ Under *Estrellita*'s two-part test, habeas determinations would certainly be a series of case-by-case inquiries.¹⁵⁷ Yet, under the status quo, habeas

152. C.C., enero 27, 2022, "Estrellita Monkey' case," S. No. 253-20-JH/22 p. 34.

153. *Id.* at 33–34.

154. *See id.* at 34.

155. Think, for example, of the AWA. *See supra* Introduction. Perhaps, by limiting the effects of a ruling, at least some good can come of it.

156. Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 930 (N.Y. 2022).

157. *See* C.C., enero 27, 2022, "Estrellita Monkey' case," S. No. 253-20-JH/22 p. 30.

rights are necessarily dependent on case-by-case factual analyses anyway.¹⁵⁸ And so, presumably, the court's primary concern was about avoiding unnecessary confusion. This test is well suited to achieving that goal. The *Estrellita* test provides a stable, science-based framework in which to conduct individualized, fact-specific analyses.¹⁵⁹ Therefore, this test would avoid the "confusing" "morass" created by the functional intelligence test or any other test that relies on "subjective, amorphous, and evolving" value systems.¹⁶⁰ Instead, the *Estrellita* test would look at the relative stability of a species' biological needs and relationships.¹⁶¹ The comparison between those natural needs and the animal's present condition would be the only facts necessary to make a determination in a given case under this test.¹⁶²

B. Happy's Wellbeing

Given that the majority already considered all the facts in *Breheny* and rejected the NhRP's case, one could argue that the problem was the facts of the case and not the test or lack thereof. However, that argument falls short because the *Estrellita* test would employ the facts more effectively than the functional intelligence and comfort tests. The majority, decrying its ability to limit the effects of ruling for the NhRP, seems to have searched through the dissents to find a way to avoid the slippery slope. What the majority found were the functional intelligence and comfort "tests."¹⁶³ Yet, neither was proposed as a test; as the majority points out, the dissents noted mental complexity and domestication more as factual distinctions between elephants and other animals than as actual "tests" with a more comprehensive way of analyzing the issue.¹⁶⁴ Given that distinction, it is unsurprising that they were not robust enough to satisfy the majority's demands. As such, the *Estrellita* test, which takes all of the animal's features and analyzes them through a scientific lens, would be better able to tie the facts together into a cohesive legal analysis than a balancing test of abstract and arbitrary factors like domestication. That analysis, then, would provide a more

158. *Breheny*, 197 N.E.3d at 943 (Wilson, J., dissenting).

159. C.C., enero 27, 2022, "'Estrellita Monkey' case," S. No. 253-20-JH/22 p. 30.

160. *Breheny*, 197 N.E.3d at 930 (majority opinion).

161. C.C., enero 27, 2022, "'Estrellita Monkey' case," S. No. 253-20-JH/22 p. 30.

162. *Id.*

163. *Breheny*, 197 N.E.3d at 930.

164. It is particularly telling that only the majority, not Justice Wilson's dissent, described the "functional intelligence test" as a test. However, the majority described the "comfort test" as an "[attempt] to distinguish 'domestic' animals from elephants," despite seeming to treat it as a more formal test throughout the remainder of its analysis. *See id.*

thorough and substantive narrative than either of the two approaches analyzed by the majority in *Breheny*.

Further, even if the *Estrellita* test would not change the court's mind about the outcome of the case,¹⁶⁵ the resulting analysis would be more useful for animal rights advocates than the rejection of the two tests in *Breheny*. As discussed in the above paragraph, it seems unlikely that those "tests" were meant to be treated as such. They were more akin to informal starting points. Proposing a fleshed-out test, like the one from *Estrellita*, would provide the court with a more robust framework through which it can analyze the facts in *Breheny*. Then, if the court rejects that framework, its opinion would provide greater insight into the thought processes of the judges analyzing these arguments. As such, even if the *Estrellita* test ostensibly failed, it would provide more valuable information in the process.

Additionally, the *Estrellita* test is an examination of whether an animal is living in "accordance" with their natural state.¹⁶⁶ As discussed earlier, the question is not whether Happy is cared for well or whether the Bronx Zoo is following accreditation practices for zoos, but whether Happy may be kept in captivity at all.¹⁶⁷

C. Rights Animals May Have

Lastly, one could claim that the *Estrellita* test is almost entirely inapplicable to the issues in *Breheny* because it seeks to answer a question that the court in *Breheny* does not explicitly ask. In *Estrellita*, the court had to answer two questions: (1) Do individual wild animals have rights; and (2) what rights do they have?¹⁶⁸ After answering the first question in the affirmative, the *Estrellita* court then uses its two-part test to answer only the second question.¹⁶⁹ By contrast, the court in *Breheny* answers the first question in the negative.¹⁷⁰ As a result, one might assume that it never addresses the second question, and thus there is no use for the *Estrellita* test in *Breheny*. And so, this Comment's application of the

165. After all, there were other notable issues the majority identified in *Breheny*. One significant problem, the lack of a clearcut source of animal rights law, is discussed in the following paragraph.

166. C.C., enero 27, 2022, "Estrellita Monkey' case," S. No. 253-20-JH/22 p. 36.

167. See *id.*; *Breheny*, 197 N.E.3d at 924–25.

168. C.C., enero 27, 2022, "Estrellita Monkey' case," S. No. 253-20-JH/22 pp. 29–34.

169. *Id.* at 37–47.

170. That is to say, the *Breheny* court never explicitly asks what rights different animals have. It asks only whether individual animals have rights, says no, and appears to end the inquiry there. As explained below, this understanding of the court's opinion is not entirely accurate. *Breheny*, 197 N.E.3d at 926.

two-part test to the facts in *Breheny* might seem to be out of step with the needs of the NhRP in *Breheny*. But that is not the case for two reasons.

First, the two questions answered by the court in *Estrellita* cannot be understood without each other. Fundamentally, the answer to one question affects the answer to the other. In that way, the *Breheny* court answered both questions, even if it did so implicitly. By employing slippery slope arguments, the judges in *Breheny* were implicitly saying there is no way to narrowly answer the second question; therefore, the answer to the first question should be “no.”¹⁷¹ However, the slippery slope argument really only applies to the second question because the answer to that question determines the breadth of animals’ rights, and that breadth, in turn, could become the overbreadth the court fears. Thus, by addressing fears of the slippery slope, the *Estrellita* test ensures that there is a way to clearly and narrowly answer the second question, which makes it easier for judges to say “yes” to the first question.

Second, although the *Estrellita* test does not address every hurdle to animal rights arguments, it is still relevant. At the risk of oversimplification, there must generally be favorable law and ways to distinguish unfavorable law in order to win in court. If a lawyer has no favorable law with which a judge can justify that lawyer’s preferred decision, then they will often lose. In *Estrellita*, the source of law for animal rights was fairly straightforward: the constitutional rights of nature.¹⁷² By contrast, in *Breheny*, the NhRP’s source of law grounding its argument was considerably more complex. But the lack of a New York rights of nature provision was only one issue among many: New York precedent holding that cognitive abilities do not entail moral or legal rights, slippery slope arguments, the lack of animal rights precedent across the United States, and more.¹⁷³ Therefore, the *Estrellita* test would have likely helped address the slippery slope problem, but that does not necessarily mean the NhRP would find a sufficient source of law in which to ground its claims. As such, introducing the *Estrellita* test to *Breheny* may not have changed the outcome of the case. However, it would have helped solve one critical problem facing the animal rights movement.

171. The majority in *Breheny* is concerned that ruling in favor of Happy means saying “yes” to the first question without any way of answering the second question. Without a way to answer the second question, the majority’s fears of social upheaval are exacerbated. This particular concern is apparent from the way that the majority in *Breheny* identifies pet ownership, service animals, biomedical research, and more as potentially threatened by animal rights. *Id.* at 929.

172. C.C., enero 27, 2022, “‘Estrellita Monkey’ case,” S. No. 253-20-JH/22 p. 17.

173. Wright, *supra* note 122 (discussing multiple hurdles to the animal rights movement, including those from history and those in the case at hand).

Conclusion

As American advocates test new legal theories like animal rights and the rights of nature, they often lack legal precedent to guide their arguments.¹⁷⁴ By looking to other countries that have more experience with these theories, animal rights advocates can glean some structure. Finding an initial structural foothold is particularly important now, as the NhRP and others continue to bring suits without outright victories.¹⁷⁵ While each court case brought is another useful data point, the international community has a lot to potentially offer captive wildlife in the United States.

Comparing *Breheny* and *Estrellita* reveals a key distinction between the two cases: The *Estrellita* court had a test to apply, while the majority in *Breheny* felt stranded without one.¹⁷⁶ Had the New York Court of Appeals applied *Estrellita*'s two-part test to the facts in *Breheny*, this Comment's analysis finds that the test likely would have concluded that Happy is entitled to habeas rights without making a sweeping pronouncement of nonhuman personhood, as the court wanted to avoid. However, the *Estrellita* test would still be unlikely to provide a constitutional, statutory, or regulatory source for habeas rights.

Still, at a minimum, the test would identify the incongruency between Happy's life and her natural behaviors as legally significant. That finding would not only be useful for future animal advocacy, but it would be a tremendous step in the direction of addressing slippery slope arguments facing the nonhuman legal personhood movement. While the *Estrellita* test does not solve every problem that the animal rights movement faces, it is a starting point. From there, more common law can be built, ultimately ensuring elephants can live as they evolved to live, without the suffering they undergo in captivity.

174. *Id.*

175. *Our Clients*, NONHUMAN RTS. PROJECT, <https://www.nonhumanrights.org/our-clients/> [<https://perma.cc/MK7A-B7CQ>]; Justice *ex rel.* Mosiman v. Vercher, 518 P.3d 131, 132 (Or. Ct. App. 2022).

176. C.C., enero 27, 2022, "'Estrellita Monkey' case," S. No. 253-20-JH/22 p. 30; *Breheny*, 197 N.E.3d at 930-31.