

THE WRIT *DE HOMINE REPLEGIANDO*:
A COMMON LAW PATH TO NONHUMAN ANIMAL RIGHTS

*Blake M. Mills and Steven M. Wise**

INTRODUCTION

Blackfish, a 2013 documentary, examines the plight of orcas forced to perform at SeaWorld theme parks through the lenses of the deaths and near-deaths of their trainers.¹ An orca named Tilikum is the focus of the film.² In documenting his life and the lives of other orcas imprisoned at SeaWorld, the film raises significant questions as to whether such creatures should ever be held in captivity.³ For Tilikum, this is not a new question. Even before *Blackfish*, Tilikum attained notoriety as one of five named orca plaintiffs in a 2011 lawsuit that claimed the orcas possessed a Thirteenth Amendment right to not be enslaved.⁴ Unfortunately, United States District Judge Jeffrey T. Miller rejected this claim, calling the goal “laudable,” but stating there was “simply no basis” for it.⁵

The problem was that the claim’s reliance on the Thirteenth Amendment required Judge Miller to look to historical context and prior judicial interpretation of that Amendment’s terms “slavery” and “involuntary servitude.” He found they both represented “uniquely

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¹ *BLACKFISH* (CNN Films 2013).

² *See id.*

³ *See id.*

⁴ *See* *Tilikum v. Sea World Parks & Entm’t, Inc.*, 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012).

⁵ *See id.* at 1264-65.

human activities,” and therefore could provide no relief to the orcas.⁶ This finding exposed a major difficulty with attempting to forge non-human animal rights on existing statutory or constitutional grounds: it will inevitably lead to a consideration of legislative intent, at which point the claim will likely be rejected.

Fortunately, the common law provides other legal paths to non-human animal rights. One is the ancient common law writ of *habeas corpus*.⁷ In December 2013, the Nonhuman Rights Project requested that three New York Supreme Court judges issue common law writs of *habeas corpus* on behalf of four chimpanzees.⁸ Another is the equally ancient common law writ of *de homine replegiando*.⁹ Both writs have played significant roles in the development of civil liberties. Although the writ of *habeas corpus* is famed, the writ *de homine replegiando* is unknown even to most legal professionals. Though unknown to modern practice, the writ *de homine replegiando* is no legal relic—it remains a viable cause of action that may be used on behalf of a nonhuman animal.¹⁰

This article argues that the writ *de homine replegiando* offers legal “things” the opportunity to challenge their legal “thinghood” and establish their rights to bodily liberty.¹¹ The possibilities afforded by this writ (and likewise by the writ of *habeas corpus*), have become

⁶ See *id.* at 1264.

⁷ See generally Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and De Homine Replegiando*, 37 GOLDEN GATE U.L. REV. 219 (2007) (discussing how “humans enslave chimpanzees and thereby deprive them of their bodily liberty[.] [A]nd [] chimpanzees should be entitled to use the common law writs of *habeas corpus* and *de homine replegiando* [] to bring [] common law claims to bodily liberty before courts.”).

⁸ Petition for Writ of Habeas Corpus, Nonhuman Rights Project, Inc. v. Stanley, (N.Y. Sup. Ct. Dec. 3, 2013) (Index No. 13-32098); Petition for Writ of Habeas Corpus, Nonhuman Rights Project, Inc. v. Lavery, (N.Y. Sup. Ct. Dec. 3, 2013) (Index No. 02051); Petition for Writ of Habeas Corpus, Nonhuman Rights Project, Inc. v. Presti, (N.Y. Sup. Ct. Dec. 2, 2013) (Index No. 151725). All judges refused to issue the writs of habeas corpus. Transcript of Hearing at 15–16, Nonhuman Rights Project, Inc. v. Presti, (N.Y. Sup. Ct. Dec. 9, 2013) (Index No. 151725); Order to Show Cause & Writ of Habeas Corpus, Nonhuman Rights Project, Inc. v. Stanley, Index No. 13-32098 (N.Y. Sup. Ct. Dec. 5, 2013) (Index No. 13-32098); Transcript of Hearing at 27, Nonhuman Rights Project, Inc. v. Lavery, (N.Y. Sup. Ct. Dec. 3, 2013) (Index No. 02051). All three refusals are currently under appeal. Notice of Appeal, Nonhuman Rights Project, Inc. v. Lavery, (N.Y. Sup. Ct. Jan. 9, 2014) (Index Notice 02051); Notice of Appeal, Nonhuman Rights Project, Inc. v. Presti, Index No. 151725 (N.Y. Sup. Ct. Jan. 9, 2014) (Index No. 151725); Notice of Appeal, Nonhuman Rights Project, Inc. v. Stanley, (N.Y. Sup. Ct. Jan. 9, 2014) (Index No. 13-32098).

⁹ See Wise, *supra* note 7, at 245.

¹⁰ See *id.* at 254-55.

¹¹ See *id.* at 253-55.

particularly significant in light of the *Tilikum* decision, as a common law writ will dispense with the need to persuade a court that a legislature intended to include a nonhuman animal within its meaning.¹² However, the writ *de homine replegiando* has neither been sought on behalf of a nonhuman animal nor used in an American court for more than 150 years.¹³

This article seeks to reintroduce the writ. Part I of this article reveals the writ's origins in English common law and how it operated. Part II discusses the writ's use in the United States by a variety of "legal things" to challenge their detentions, including human slaves, prisoners, and children, and the implications these decisions have on the potential modern use of the writ by nonhuman animals. Finally, Part III, explores the current viability of the writ in United States jurisdictions, analyzes the writ's status in each state, and considers challenges to the writ based on the principle of *desuetude*. This article concludes that there is no legal justification for limiting the writ's use to human beings, and that it remains available to challenge an unlawful confinement in many states.

I. THE ORIGINS OF THE WRIT *DE HOMINE REPLEGIANDO* AND ITS PROCEDURE

The writ *de homine replegiando*—literally “personal replevin”—was a common law procedure utilized in England to protect the fundamental right to bodily liberty, that is, the freedom from unlawful detention by a private party and, occasionally, by the state.¹⁴ It is the

¹² The common law is not formulated by any one body, but rather consists of “broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it.” See *Norway Plains Co. v. Boston & Maine R.R.*, 67 Mass. 263, 267 (1854) (Lemuel Shaw, C.J.).

¹³ The most recent reported case of the writ being used was a decision by the Supreme Judicial Court of Maine in 1861. *Nason v. Staples*, 48 Me. 123, 127 (1861). It was also used successfully in New York in the famous, if unreported, 1871 case of *Mary Ellen Wilson*. See Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1, 9 (2005) (citing Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293 (1972)).

¹⁴ See 1 REEVES' HISTORY OF THE ENGLISH LAW 483 (W.F. Finlason ed., 1869) (the writ is “resorted to, not only where a private person imprisoned or put restraint upon another, without any show of authority, but also where officers of justice, under colour of process, caused persons to be put in confinement. It was from this latter cause that the writ *de homine replegiando* took its name . . .”); 2 SIR MATHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 148 n.6 (1847) (“The writ of *homine replegiando* was the only specific

oldest of the English freedom writs,¹⁵ appearing as early as the twelfth century,¹⁶ predating the evolution of the writ of *habeas corpus* into a challenge to unlawful detention by as much as a century.¹⁷ It is listed in the Register of Original Writs,¹⁸ one of the earliest known “[]books of . . . law” and the “very skeleton of Corpus Juris.”¹⁹ Blackstone explained:

The writ *de homine replegiando* lies to replevy a man out of prison, or out of the custody of any private person (in the same manner as chattels taken in distress may be replevied . . .) upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him.²⁰

A. De Homine Replegiando Procedure

The writ *de homine replegiando* is an original writ, meaning it must be sought or petitioned for to commence an action.²¹ Upon filing of the writ, the sheriff is ordered to cause the detained petitioner to be produced in court, unless the petitioner was taken under act of law.²² In exchange for paying a surety or bond to the sheriff,²³ the

remedy provided by the common law for the protection and defence of ‘liberty against any private invasion of it . . .’).

¹⁵ 2 STATHAM’S ABRIDGMENT OF THE LAW 1115 (Margaret Center Klingel Smith trans. 1915) (writ *de homine replegiando* is described as “the forerunner of the *habeas corpus*”). The other writs are *de odio et atia*, *habeas corpus* and mainprize. 3 WILLIAM BLACKSTONE, COMMENTARIES *129.

¹⁶ ELSA DE HAAS, ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275, 62 (1966).

¹⁷ See Wise, *supra* note 7, at 256–57; see also Maxwell Cohen, *Some Considerations on the Origin of Habeas Corpus*, 16 CAN. B. REV. 92, 110, 116 (1938).

¹⁸ ANTHONY FITZ-HERBERT, THE NEW NATURA BREVIVM 147-51 (6th ed., 1718) (“De homine replegiando [When a man is unlawfully in custody, he may be restored to his liberty by writ *de homine replegiando*, upon giving bail; or by a writ to his liberty by writ *de homine replegiando*, upon giving bail; or by a writ of *habeas corpus*, which is the more usual remedy]”).

¹⁹ F.W. MAITLAND, *The History of the Register of Original Writs*, in 2 COLLECTED PAPERS OF F.W. MAITLAND 97 (1911).

²⁰ BLACKSTONE, *supra* note 15, at *129.

²¹ See 1 HENRY MADDOCK, A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE HIGH COURT OF CHANCERY 20 (1820) (“The writ *de homine replegiando* is an original, suable of right, on petition or motion, and returnable in a court of law.”); *Treblecock’s Case*, (1737) 26 Eng. Rep. 397 (Ch.) (“The writ of *de homine replegiando* is an original writ, and the party may suit it of right . . .”).

²² See P. PEMBERTON MORRIS, PRACTICAL TREATISE OF THE LAW OF REPLEVIN IN THE UNITED STATES WITH AN APPENDIX OF FORMS AND A DIGEST OF STATUTES 176-77 (1849). Morris provides a complete example of a writ filed in Pennsylvania:

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petitioner is entitled to freedom from the outset of the action, so long

The Commonwealth of Pennsylvania to the sheriff of Philadelphia county, greeting: We command you that justly and without delay you cause to be replevied William Wright, otherwise called Ben. Hall, whom Israel Deacon, late of your county, took and taken doth hold as it is said, unless the aforesaid William Wright, otherwise called Ben. Hall, was taken by our special precept, or of our Chief Justice, or of the death of any man, or of any other right whereof, according to the laws and usages of this Commonwealth, he is not repleviable that no more clamour thereof we may have for defect of justice, and how you shall execute this our writ you make appear to our justices of our Supreme Court at our Supreme Court to be holden at Philadelphia, in and for our Eastern District, on the second Monday of December next, and have you then there this writ. Witness the Hon. William Tilghman, Esquire, Doctor of Laws, Chief Justice of our said Supreme Court at Philadelphia, the twenty-seventh of July, in the year of our Lord 1818.

Id. at 226–27. Another example can be found in *Gurney v. Tufts*, 37 Me. 130 (1853):

We command you, that justly and without delay you cause to be replevied John Gurney, who, (as it is said) is taken and detained in a place called Alfred, within our said county of York, by the duress of Thomas P. Tufts, of Saco, in the county of York, and is there unlawfully imprisoned and restrained of his liberty, by the said Thomas P. Tufts; that he, the said John Gurney, may appear at our District Court, for the Western District, next to be holden at Alfred, within and for our said county of York, upon the third Monday of October, A. D. 1851, then and there in our said Court, to demand right and justice against the said Tufts, for the duress and imprisonment aforesaid, and to prosecute his replevin as the law directs; provided that the said John Gurney shall, before his deliverance, give bond to the defendant, in such sum as you shall judge reasonable, and with two sufficient sureties, with condition to appear at said Court to prosecute his replevin against the defendant, and to have his body there, to be redelivered, if thereto ordered by the Court, and to pay all such damages and costs as may be awarded against him; and if this plaintiff is delivered by you at a day before the sitting of said Court, you are to summon the defendant to appear at said Court.

Id. at 130–31.

²³ An example of the form for the bond is found in the 6 *ENCYCLOPEDIA OF FORMS AND PRECEDENTS FOR PLEADING AND PRACTICE, AT COMMON LAW, IN EQUITY, AND UNDER THE VARIOUS CODES AND PRACTICE ACTS* 284 (William Mack & Howard P. Nash eds., 1898), and reads as follows:

Know all men by these presents, that we, *Richard Roe*, of *Chelsea*, in the county of *Suffolk*, as principal, and *Samuel Short* and *William West*, both of said *Chelsea*, as sureties, are holden and stand firmly bound unto *John Doe* of *Boston* in said county of *Suffolk* in the sum of *five hundred* dollars, to the payment of which to the said *John Doe*, or his executors, administrators, or assigns, we hereby jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such, that whereas the above bounden *Richard Roe*, on the *twentieth* day of *May current*, sued out a writ of personal replevin returnable before the *Superior* Court to be holden at *Boston*, within and for the county of *Suffolk*, on the *first* Monday of *October next*:

Now if the above bounden *Richard Roe* shall well and truly appear at said *Superior* Court and prosecute his said action of replevin against *John Doe* and have his body there ready to be redelivered if thereto ordered by the court and to pay all such damages and costs as shall be then and there awarded against him, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

In witness whereof we hereunto set our hands and seals this *twenty-first* day of *May*, A. D. *1898*.

Id.

as he or she continues to appear in court as required.²⁴ If the sheriff determines that the petitioner has been eloigned, or carried to a place where he or she cannot be found, the sheriff is directed to take *in withernam* or, in substitute, the person who detained the petitioner until that person produces the detained petitioner in court.²⁵ Upon appearing at court, the respondent has the burden to show why the detention is valid and, if the respondent meets this burden, the burden shifts to the petitioner to prove her right to liberty.²⁶ If judgment is in the petitioner's favor, he or she remains free. If not, the petitioner is remanded into the custody of the respondent.²⁷

B. De Homine Replegiando *Versus* Habeas Corpus

On its face, *de homine replegiando* differs only slightly from the writ of *habeas corpus*, and Blackstone placed them both in the category of procedures to rectify a false imprisonment.²⁸ Over time, numerous exceptions and procedures attached to the *de homine* writ, leading the writ of *habeas corpus* to become the more popular English method for challenging an illegal detention.²⁹ Nonetheless, the writ *de homine replegiando* remained viable under English common law, making its way into the common law of the American Colonies and, from there, expanding to the rest of the country.³⁰ Though it has lain dormant in many states, the writ *de homine replegiando* saw periods of revival in others, most often in cases involving slaves challenging their legal status.³¹

In addition to having similar purposes, the two writs were closely related in practice; where one writ was not available to challenge a detention, the other might be.³² In 1758, John Eardley Wilmot, Justice of the Court of King's Bench, wrote that if a writ of *habeas corpus* was unavailable, "the case is not a remediless one: by the common law, the

²⁴ See MORRIS, *supra* note 22, at 178; see also *Huger v. Barnwell*, 39 S.C.L. (5 Rich) 273, 276 (1852) ("claimant would enjoy his freedom *pendente lite*").

²⁵ See MORRIS, *supra* note 22, at 177.

²⁶ See *Treblecock's Case*, (1737) 26 Eng. Rep. 397 (Ch.); MORRIS, *supra* note 22, at 178.

²⁷ See MORRIS, *supra* note 22, at 180.

²⁸ See BLACKSTONE, *supra* note 15 at *128-30.

²⁹ See *id.* at *130.

³⁰ See WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, *THE CYCLOPEDIA OF LAW* 278 (2d ed. 1922) (noting that despite nearly falling out of use, the writ was revived in some of the United States).

³¹ See, e.g., *Jack v. Martin*, 14 Wend. 507, 527 (N.Y. 1835).

³² See, e.g., *Ex parte Lawrence*, 5 Binn. 304, 304 (Pa. 1812).

writ of ‘*homine replegiando*’ will clearly relieve him.”³³ Courts have held that the writ *de homine replegiando* can even be sought where a previous *habeas* action was unsuccessful³⁴ or has been filed but has not been heard.³⁵

Both writs can also be brought on behalf of the detainee by a third-party.³⁶ In many instances, the detainee will not have the ability to seek the writ *de homine replegiando* on her own, due to the very fact of her detention.³⁷ As this article is concerned with the use of the writ *de homine replegiando* by a nonhuman animal, the ability for this writ to be brought by a third-party on the detainee’s behalf is indispensable. Finally, the writ *de homine replegiando* allows for release of the detainee on bond pending trial, which is also often available upon a writ of *habeas corpus*.³⁸

However, while the purpose of each writ is the same, they differ in substance and procedure.³⁹ First, the writ *de homine replegiando* is

³³ Opinion on the Writ of Habeas Corpus, (1758) 97 Eng. Rep. 29, 31, 49 (K.B.) (Answer of Mr. Justice Wilmot to the questions proposed to the Judges by the House of Lords, on the second reading of the bill, [entitled], an Act for giving a More Speedy Remedy to the Subject, upon the Writ of Habeas Corpus). Similarly, the Supreme Court of Pennsylvania explained that, although the court refused to issue a *habeas corpus*, the petitioner was “not without remedy, as he may resort to a *homine replegiando*.” *Ex parte Lawrence*, 5 Binn. at 304.

³⁴ See *Ex parte Lawrence*, 5 Binn. at 304 (“We do not think that the act of assembly obliges this Court to grant a *habeas corpus*, where the case has been already heard upon the same evidence by another court; and we do not think it expedient in this case, because it has been already heard upon the same evidence, and the party is not without remedy, as he may resort to a *homine replegiando*.”).

³⁵ See *Floyd v. Recorder of City of New York*, 11 Wend. 180, 180 (N.Y. Sup. Ct. 1834) (“The recorder did not lose jurisdiction by the suing out of the writ of *homine replegiando*; the only effect of it in this respect was to suspend the proceedings upon the *habeas corpus*, until final judgment upon the writ of *homine replegiando*.”).

³⁶ See, e.g., *In re Jones*, 2 Del. Cas. 622, 622 (1821) (although the opinion is unclear, writs were filed by third party to challenge detention of three free black men, who had been kidnapped); *In re King*, 161 Mass. 46, 46 (1894) (“It is often necessary that the court or magistrate should receive a petition [for *habeas corpus*] signed by some other person in behalf of the person imprisoned, because the person imprisoned may be prevented, by his imprisonment, from signing such an application.”); *Richardson v. Richardson*, 32 Me. 560, 563 (1851) (writ “may be sued out by any person in behalf of a plaintiff”).

³⁷ See, e.g., *In re King*, 161 Mass. at 47.

³⁸ See MORRIS, *supra* note 22, at 178; see also *Rose v. Nickeson*, 271 A.2d 855, 856 (Conn. Super. Ct. 1970) (“On the return to the writ of *habeas corpus*, the original restraint is deemed to be suspended during the pendency of the proceedings and the safekeeping of the petitioner is entirely under the authority and discretion of the court which issued the writ and to which the return is made”); *Huger v. Barnwell*, 39 S.C.L. (5 Rich) 273, 273 (1852) (*de homine replegiando* “claimant would enjoy his freedom *pendente lite*”).

³⁹ Some courts have determined that the writ *de homine replegiando* is the appropriate remedy for a person being unlawfully restrained by a private actor, while *habeas corpus* should

a writ of right—*habeas corpus* is not.⁴⁰ This distinction is significant. As a writ of right, *de homine replegiando* is initially issued without the petitioner having to show cause, and the initial burden is placed on the respondent to appear and show cause why he or she should not be compelled to comply with the writ and release the petitioner from detention.⁴¹ Second, the *habeas* writ applies only to persons detained within a court's jurisdiction, while the writ *de homine replegiando* provides a remedy in cases in which the detained party has been removed from the jurisdiction, so long as the wrongdoer remains in the jurisdiction.⁴² Third, and perhaps most importantly, a valid writ *de homine replegiando* entitles the petitioner to a jury trial on the merits.⁴³ A *habeas corpus* action only entitles the petitioner to a judge's ruling on the petitioner's freedom.⁴⁴ Finally, a successful writ *de homine replegiando* may permit an award of damages.⁴⁵

be used when the detention was made under law. See, e.g., *Elkison v. Deliesseline*, 8 F. Cas. 493, 496-97 (C.C.D.S.C. 1823); *Nason v. Staples*, 48 Me. 123, 128 (1861).

⁴⁰ *Treblecock's Case*, (1737) 26 Eng. Rep. 397, 397 (Ch.).

⁴¹ *Id.*; see also *MADDOCK*, *supra* note 21, at 20.

⁴² See, e.g., *In re Jackson*, 15 Mich. 417, 432 (1867) (holding that writ of habeas corpus must be quashed because party was not detained within the state). The *Jackson* court contrasted the situation it faced with an English decision known as "*Designy's Case*," in which a boy had been eloigned to Jamaica. *Id.* at 431-32. There, the court directed the father of the boy to bring a writ *de homine replegiando*, and as the return was that the boy had been eloigned, the court held that the defendant could be released on bail, subject to a requirement that the child be returned within six months. See *id.* (citing *Designy's Case*, (1682) 83 Eng. Rep. 247-48 (K.B.)); see also *Jurisdiction in Habeas Corpus Proceedings*, 14 HARV. L. REV. 612, 613 (1900-1901) (explaining the writ *de homine replegiando*, not *habeas corpus*, is the proper remedy where the party is secreted out of the state).

⁴³ See, e.g., *Jack v. Martin*, 14 Wend. 507, 532 (N.Y. 1835) ("[a] writ *de homine replegiando*, authorized by the laws of this state, [] gives the person seized a trial by jury"); 2 JOHN REED, PENNSYLVANIA BLACKSTONE 528 (1831) (the writ "is the only one in which the right to personal services of any one, can be tried before a court and jury"); Stephen M. Kohn & Frederick L. Brown, *Human Rights and Freedom of Conscience in Administrative Law: A Critique of the Fugitive Slave Act and the Selective Service Act Through Use of the Liberty-Fact Doctrine*, 61 U. DET. J. URB. L. 177, 185 (1983-1984) ("The writ *de homine replegiando* carried with it a right to a trial by jury.").

⁴⁴ See 1 FRANCIS HARGRAVE, JURISCONSULT EXERCITATIONS 22 (1811) (reporting argument from the 1771 case of *Somerset v. Stewart*, in which the right to jury trial was described as the "great advantage" of the writ *de homine replegiando* over the writ *habeas corpus*); 2 JAMES KENT, COMMENTARIES OF AMERICAN LAW *32 n.h (Charles M. Barnes, 13th ed. 1884).

⁴⁵ See *Elson v. M'Colloch*, 4 Yeates 115, 115 (Pa. 1804); *Urie v. Johnston*, 3 Pen. & W. 212, 216-17 (Pa. 1831). The *Urie* court distinguished this remedy from the available remedies under a *habeas* action as follows:

If *Johnston* had brought a *homine replegeando*, instead of a *habeas corpus*, there can be no question, but that he would have recovered a judgment, which would have restored

On its face, the writ *de homine replegiando* appears to be the best procedure for a nonhuman animal to challenge its detention. It is a writ of right so, at least initially, it should not be denied.⁴⁶ It can be brought by a third-party on behalf of the nonhuman animal, which is a practical necessity.⁴⁷ It allows for the immediate freedom of the nonhuman animal upon provision of a bond, which helps prevent any further damage due to confinement.⁴⁸ If the writ is properly brought and supported, the propriety of the nonhuman animal's confinement will be ruled upon by a jury, which may be more inclined to grant a nonhuman animal rights than would a judge.⁴⁹

However, two important questions remain. First, can the writ be properly brought on behalf of a nonhuman animal? And, second, is the writ still viable?

II. A HISTORY OF THE WRIT *DE HOMINE REPLEGIANDO* IN AMERICA

This Part supplements the theoretical foundation laid out in *The Entitlement Of Chimpanzees To The Common Law Writs Of Habeas Corpus And De Homine Replegiando* regarding the availability of this writ to nonhuman animals,⁵⁰ with a number of specific examples in the United States of the writ being used by legal things to challenge their alleged illegal confinement. These cases provide the best guidance on how the writ would be viewed in a modern court if brought on behalf of a nonhuman animal.

A brief restatement of the theoretical foundation laid out in that article is worthwhile. The common law is inherently flexible and intended to adapt to the circumstances of new situations.⁵¹ At different times, human beings have been both legal things and legal persons,⁵² as have inanimate objects,⁵³ and legal constructs.⁵⁴ The writ *de*

him to liberty: but he would have recovered damages for his detention, and the standard of these damages would have been measured by his services.

Id.

⁴⁶ See *Treblecock's Case*, (1737) 26 Eng. Rep. 397, 397 (Ch.).

⁴⁷ See, e.g., *Richardson v. Richardson*, 32 Me. 560, 563-64 (1851).

⁴⁸ See *MORRIS*, *supra* note 22, at 178.

⁴⁹ See, e.g., *Jack v. Martin*, 14 Wend. 507, 532 (N.Y. 1835).

⁵⁰ See *Wise*, *supra* note 7, at 253-55.

⁵¹ See *id.* at 228-29.

⁵² *Id.* at 235 n.69 (citing *Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828) (concluding that slaves' civil law personhood had nothing to do with being human)); see also *Atwood's Heirs v.*

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homine replegiando—along with the writ of *habeas corpus*—has been used to “protect [] . . . the interest of unfree humans who were classified as legal things,” and there is no reason it should not be similarly available to a nonhuman animal classified as a legal thing, like a chimpanzee.⁵⁵

A. *Incorporation Into American Common Law*

Although most commentators agree that the writ fell into disuse in England,⁵⁶ they acknowledge that it continued to be used, even if rarely, in English cases during the American Colonial period.⁵⁷ As an English common law writ, *de homine replegiando* was “ingrafted”, meaning incorporated, into the common law of the United States in every state except Louisiana.⁵⁸ Most states accomplished this through statutes, or state constitutions, stating specifically that English common law shall be incorporated into their state law.⁵⁹ Others passed

Beck, 21 Ala. 590, 608 (1852) (“slaves are now regarded by our law as chattels, and their owners have an absolute, unqualified property in them”).

⁵³ In *Tucker v. Alexandroff*, 183 U.S. 424 (1902), the Supreme Court reasoned that a ship at sea was a legal person, imbued with several rights:

A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics’ liens created by state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name.

Id. at 438.

⁵⁴ Corporations, which are legal constructs, are nonetheless considered legal persons under the U.S. Constitution. *Charlotte C. & A.R., Co. v. Gibbes*, 142 U.S. 386, 391 (1892).

⁵⁵ Wise, *supra* note 7, at 241.

⁵⁶ See, e.g., BLACKSTONE, *supra* note 15, at *129.

⁵⁷ 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 242, 242 n.4 (1883) (noting “modern” uses of the writ, including a case in 1682).

⁵⁸ This is not true only of the United States. The writ was also incorporated into the common law of British colonies such as Jamaica. See ALEXANDER BARCLAY, A PRACTICAL VIEW OF THE PRESENT STATE OF SLAVERY IN THE WEST INDIES 276–78 (2d ed. 1827) (reporting the successful use of the writ by a former slave to obtain a jury trial of her freedom).

⁵⁹ ALA. CODE § 1-3-1 (2014); ARK. CODE ANN. § 1-2-119 (2014); CAL. CIV. CODE § 22.2 (West 2014); COLO. REV. STAT. § 2-4-211 (2014); FLA. STAT. § 2.01 (2014); GA. CODE ANN. § 1-1-10 (2014); HAW. REV. STAT. § 1-1 (2014); IDAHO CODE § 73-116 (2014); 5 ILL. COMP. STAT. 50/1 (2014); IND. CODE § 1-1-2-1 (2014); MD. CONST. DECLARATION OF RIGHTS, art. 5; MO. REV. STAT. § 1.010 (2013); MONT. CODE ANN. § 1-1-109 (2013); NEB. REV. STAT. § 49-101 (2014); NEV. REV. STAT. § 1.030 (2014); 1 PA. CONS. STAT. § 1503(a); R.I. GEN. LAWS § 43-3-1 (2014); S.C. CODE ANN. § 14-1-50 (2013); TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (West 2013);

statutes that referred only generally to “the common law” being incorporated into the law of the state.⁶⁰ Connecticut, Maine, Minnesota, Ohio, and Louisiana do not have such statutes or constitutional provisions. But courts in all of these states, other than Louisiana, have incorporated English common law through judicial precedent.⁶¹

In the majority of states, the writ has lain dormant.⁶² But, in some states, the writ has seen periods of revival and, in a few, there is a robust history of its usage.⁶³ These states—Maine, Massachusetts, New York, and Pennsylvania—provide the best source for understanding how the writ has been used in this country, and suggest how the writ will be treated if used today.⁶⁴

B. *Cases In Which The Writ Has Been Employed*

In United States courts, there are three basic categories of petitioners that have used *de homine replegiando* to seek freedom from allegedly unlawful detention: (1) slaves; (2) prisoners; and (3) children.

UTAH CODE ANN. § 68-3-1 (LexisNexis 2014); VT. STAT. ANN. tit.1, § 271 (2013); VA. CODE ANN. § 1-200 (2014); WYO. STAT. ANN. § 8-1-101 (2014).

⁶⁰ ALASKA STAT. § 01.10.010 (2014); ARIZ. REV. STAT. § 1-201 (2014); DEL. CONST. Schedule § 18; KAN. STAT. ANN. § 77-109 (2014); KY. CONST. § 233; MASS. CONST. pt. II, ch. VI, art. VI; MICH. CONST. art. III, § 7; MISS. CONST. art. VI, § 146; N.H. CONST. pt. 2, art. 90; N.J. CONST. art. XI, § 1, para. 3; N.Y. CONST. art. I, § 14; OR. CONST. art. XVIII, § 7; TENN. CONST. art. XI § 1; WIS. CONST. art. XIV, § 13; N.C. GEN. STAT. § 4-1 (2014); N.M. STAT. § 38-1-3 (2014); N.D. CENT. CODE § 1-01-03 (2013); OKL. STAT. ANN. tit. 12, § 2 (2014); S.D. CODIFIED LAWS § 1-1-23 (2014); WASH. REV. CODE § 4.04.010 (2014) .

⁶¹ *Baldwin v. Walker*, 21 Conn. 168, 181 (1851); *Colley v. Merrill*, 6 Me. 50, 55 (1829); *Congdon v. Congdon*, 200 N.W. 76, 82 (Minn. 1924); *Cleveland, Columbus & Cincinnati R.R. Co. v. Keary*, 3 Ohio St. 201, 205–206 (1854).

⁶² *See infra* Part III.B.

⁶³ The following discussion is almost entirely limited to state court actions and does not analyze the history of the writ’s usage in United States federal courts, or its current viability at the federal level.

⁶⁴ A handful of other states—Delaware, Kentucky, Maryland, New Hampshire, North Carolina, South Carolina, and Virginia—also have reported cases discussing the writ, some applying it, others rejecting it, that supplement the knowledge gleaned from the four main states. *See, e.g.,* *Elkison v. Deliesseline*, 8 F. Cas. 493, 497-98 (C.C.D.S.C. 1823); *State v. Hudson*, 2 Del. Cas. 28, 28 (1797); *Leah v. Young*, 25 Ky. (2 J.J. Marsh) 18, 18-19 (1829); *In re Cain*, 60 N.C. (Win.) 525, 528, 533–34 (1864); *Thorne v. Fordham*, 25 S.C. Eq. (4 Rich. Eq.) 222, 226-27 (1852); *Nicholas v. Burruss*, 31 Va. (4 Leigh) 289, 293-95 (1833).

1. Slaves

The most prevalent use of the writ in the United States has been by freedom-seeking individuals being held as slaves, alleging they had been unlawfully detained.⁶⁵ As New York's highest court explained, the writ, "for the purpose of trying the right of the master to the services of the slave, was well known to the laws of the several states, and was in constant use for that purpose"⁶⁶ One of the earliest reported United States cases involving the writ *de homine replegiando*, a Supreme Court of Pennsylvania case regarding the son of a Maryland slave, illustrates why the writ was uniquely suited for this purpose.⁶⁷ The suit began in the lower court as a *habeas corpus* action but was transformed into a writ *de homine replegiando*, because the court recognized it could then be heard by a jury, after the parties raised several factual disputes.⁶⁸

Pennsylvanians recognized the benefits of the writ more often than citizens of any other state, and indeed, the Pennsylvania Abolition Society "often employed the [writ *de homine replegiando*] to secure freedom to those blacks lawfully entitled to it."⁶⁹ One 1804 Pennsylvania case discusses an underlying decision in which a black slave successfully used the writ to prove himself a free man.⁷⁰ In a similar 1810 case, the writ was successfully used by a woman held as a slave, though the jury's grant of her freedom was eventually overturned by the state's Supreme Court.⁷¹

Pennsylvania's Abolition Act provided additional grounds for challenging slave status, as it required registration of slaves and established circumstances under which children of slaves could become

⁶⁵ One commentator has suggested that the writ, though it had fallen into disuse in England, survived in the United States specifically because of our "recognition of a legitimate property interest in men," i.e., slavery. THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861*, 11 (2001).

⁶⁶ *Jack v. Martin*, 14 Wend. 507, 527 (N.Y. 1835).

⁶⁷ *See Pirate v. Dalby*, 1 Dall. 167, 168-69 (Pa. 1786).

⁶⁸ *See id.* at 167.

⁶⁹ *See MORRIS, supra* note 65, at 24.

⁷⁰ *Jones v. Conoway*, 4 Yeates 109, 111 (Pa. 1804); *see also* *Wood v. Stephen*, 1 Serg. & Rawle 175, 175-76 (Pa. 1814) (affirming lower court decision granting freedom to alleged slave upon writ *de homine replegiando*); *John v. Dawson*, 2 Yeates 449, 449 (Pa. 1799) (successful use of writ by slave to obtain freedom).

⁷¹ *See Jack v. Eales*, 3 Binn. 101, 102 (Pa. 1810).

free.⁷² *De homine replegiando* cases arising out of this Act were numerous. One 1804 case involved a successful use of the writ by a petitioner who was able to show that the defendant who attempted to register the petitioner as his slave under the Abolition Act was not in fact the petitioner's owner.⁷³ In a similar 1817 case, a woman held as a slave successfully used the writ to obtain a judgment that she had not been properly registered pursuant to the Act, and was therefore free.⁷⁴

In another case from 1826, the child of a former slave successfully used the writ to obtain a trial on his freedom, which was allegedly based on his mother's status.⁷⁵ The lower court found for his owner, but the Supreme Court of Pennsylvania reversed, finding that the facts had shown that the petitioner was born after his mother had been converted from slave to a "servant for years," and therefore was born free.⁷⁶ In another case, a mother and her two children, all held as slaves in Maryland, brought an action by the writ against their owner, arguing that they had been rendered free under Pennsylvania's abolition act because the mother resided in that state for an extended period of time with the consent of her owner.⁷⁷ After filing the writ, the petitioners were provided with a jury trial regarding their status, though the verdict was in favor of the defendant.⁷⁸

Similar uses of the writ can be found in the other states. In New Hampshire, an alleged slave brought an action upon a writ *de homine replegiando* against her supposed owners and her case was tried to a

⁷² Some courts normally receptive to use of the writ by slaves found themselves prevented from enforcing the writ because of its conflict with federal Fugitive Slave Acts. *See, e.g., In re Martin*, 16 F. Cas. 881, 882-84 (C.C.S.D.N.Y. 1835) (No. 9154); *Wright v. Deacon*, 5 Serg. & Rawle 62, 64 (Pa. 1819) (court denies the writ because it conflicts with the federal fugitive slave law). There are also some atypical instances of slave owners attempting to use the writ to recover possession of alleged slaves. *See, e.g., Alexander v. Stokely*, 7 Serg. & Rawle 299 (Pa. 1821) (slave owner unsuccessfully brought writ in attempt to recover the daughter of her former slave, who herself had been determined free after filing a writ *de homine replegiando*). These however are unique and isolated decisions, with little precedential value for the issue examined by this article.

⁷³ *See Elson v. M'Colloch*, 4 Yeates 115, 115 (Pa. 1804).

⁷⁴ *See Wilson v. Belinda*, 3 Serg. & Rawle 396, 399 (Pa. 1817).

⁷⁵ *See Scott v. Waugh*, 15 Serg. & Rawle 17, 20-21 (Pa. 1826).

⁷⁶ *See id.* at 18-19; *see also Miller v. Dwilling*, 14 Serg. & Rawle 442 (Pa. 1826) (successful use of the writ by the child of a slave to receive jury trial of whether he was free pursuant to Abolition Act).

⁷⁷ *See Butler v. Delaplaine*, 7 Serg. & Rawle 378, 379-80 (Pa. 1821).

⁷⁸ *Id.* at 381; *see also Stiles v. Nelly*, 10 Serg. & Rawle 366, 372 (Pa. 1823) (rejecting argument that slave had not been properly registered).

jury, which found that she was a free woman.⁷⁹ In New York, a slave successfully utilized the writ to argue that his owner's agreement to lease him to the defendant was effectively a sale, which under a state act, rendered the petitioner free.⁸⁰ Moreover, successful uses were not limited to northern states, as at least one South Carolina woman was able to establish her freedom through use of the writ.⁸¹

Slaves challenging their captivity were not the only type of legal "things" able to use the writ to challenge their legal "thinghood." As discussed below, prisoners and children have also employed the writ.⁸²

2. Prisoners

A lawfully imprisoned person who is denied his right to liberty and autonomy becomes, as one court has described, a "slave of the State."⁸³ Some courts have found the writ *de homine replegiando* to be an avenue for challenging that imprisonment. In 1853, the Supreme Judicial Court of Maine found in favor of a petitioner who sought release through the writ, claiming that he was being held by the sheriff upon a warrant that was issued without jurisdiction.⁸⁴ Another

⁷⁹ Eric M. Freedman, *Habeas Corpus in Three Dimensions, Dimension I: Habeas Corpus as a Common Law Writ*, 46 HARV. C.R.-C.L. L. REV. 591, 602-03 (2011) (citing Provincial Case File No. 22138, New Hampshire State Archives).

⁸⁰ See *Fish v. Fisher*, 2 Johns. Cas. 89, 90-91 (N.Y. 1800). *But see Sable v. Hitchcock*, 2 Johns. Cas. 79, 83-84 (N.Y. 1800) (rejecting argument that transaction by executor was a sale that rendered slave free under state statute).

⁸¹ See *Thorne v. Fordham*, 25 S.C. Eq. (4 Rich. Eq.) 222, 223 (1852) (appellate decision mentions that one of the parties had six years earlier established her freedom in the Court of Law).

⁸² In England, the writ was also used by villeins, persons attached to either the land or their lords, to test their legal status. See *Wise*, *supra* note 7, at 242-44; see also 19 CHARLES KNIGHT, THE PENNY CYCLOPAEDIA OF THE SOCIETY FOR THE DIFFUSION OF USEFUL KNOWLEDGE 400 (1841) ("The great mass of the cases of homine replegiando in the old law book arose upon the seizure and detention of persons whom the parties seizing claims as their fugitive villeins . . .").

⁸³ See *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871) (stating further that, "[f]or the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him.").

⁸⁴ See *Gurney v. Tufts*, 37 Me. 130, 132-33, 136 (1853). The case was brought under Maine's personal replevin statute, ME. REV. STAT. ANN. tit. 14, § 7351 (2014). This statute appears to still be current, however, some question is raised by the Advisory Committee's 2000 notes to Maine Rule of Civil Procedure 81, in which the Committee explained that a reference in a subdivision to an action to replevy the person was removed, because "there is no longer an action to replevy the person." M.R. Civ. P. 81; *Maine Rules of Civil Procedure Complete with Advisory Notes*, STATE OF MAINE, http://www.courts.maine.gov/rules_adminorders/rules/text/MRCivP-Plus/mr_civ_p_81_plus_2014-9-1.pdf (last visited Oct. 2, 2014).

example is a case in the United States District Court for South Carolina, in which the prisoner was a free black native of Great Britain who had arrived in South Carolina while working aboard a ship and was detained under a state act.⁸⁵ The action was brought on a writ of *habeas corpus* or, in the alternative that the *habeas* action was unsuccessful, a writ *de homine replegiando*.⁸⁶ The court held the South Carolina statute unconstitutional, but found it lacked the authority to provide a *habeas corpus* remedy.⁸⁷ Conversely, the court ruled it had “no right to refuse” the writ *de homine replegiando*, and rejected arguments that the writ was obsolete, affirming that it had been “ingrafted by law into the jurisprudence of South Carolina.”⁸⁸ A prisoner in Maine made another, ultimately unsuccessful, use of the writ in 1860.⁸⁹ The prisoner, having been arrested and freed on bond, reported to court at the appointed time to voluntarily surrender before his examination by the court.⁹⁰ After what the petitioner urged were errors in the conduct of that examination and his subsequent imprisonment, he brought an action for the writ against his jailor.⁹¹ The Supreme Court of Maine, explaining that the writ only lies in favor of persons unlawfully imprisoned, rejected the writ, as the petitioner was in jail by his voluntary surrender.⁹²

3. Children

Children, sometimes seen as property, have also employed the writ or have been the subject thereof.⁹³ In a particularly renowned

⁸⁵ See *Elkison v. Deliesseline*, 8 F. Cas. 493, 493 (C.C.D.S.C. 1823).

⁸⁶ *Id.* at 493.

⁸⁷ See *id.* at 496-97.

⁸⁸ *Id.* at 497-98. However, the court noted its skepticism that the writ would avail the petitioner if brought against the sheriff himself, rather than to a vendee under the sheriff. *Id.* at 498.

⁸⁹ See *Garland v. Williams*, 49 Me. 16, 18-19 (1860).

⁹⁰ See *id.* at 18.

⁹¹ See *id.*

⁹² See *id.* In the dissent, Judge May argued that the petitioner’s voluntary surrender should not justify his continued imprisonment after he became entitled to discharge. See *id.* at 20 (May, J., dissenting); see also *Nason v. Staples*, 48 Me. 123, 128 (1861) (rejecting use of writ by person held upon lawful criminal process); *Hutchings v. Van Bokkelen*, 34 Me. 126, 130, 133 (1852) (unsuccessful use of writ by imprisoned army deserter).

⁹³ See *Ventrell*, *supra* note 13, at 4-9. As of the nineteenth century, commentators have found it “hard to say that children had moved out of property status.” *Id.* at 8. See generally *Ex parte Hales*, (1729) 25 Eng. Rep. 378 (Ch.) (an English case where the court ordered a *homine replegiando* on behalf of a child allegedly sent out of the country).

instance, the plight of a young girl named Mary Ellen Wilson was noticed by a church worker who then approached the American Society for Prevention of Cruelty to Animals for help.⁹⁴ This woman recognized the similarity of this mistreated child to a mistreated animal.⁹⁵ The ASPCA agreed to help, sending an investigator and initiating a lawsuit upon a writ *de homine replegiando*.⁹⁶ And it worked—Mary Ellen was taken from her home on warrant from the court.⁹⁷ The judge permanently removed her from the custody of her former caretaker, appointed a guardian for her, and placed her in the care of the woman who had noticed her plight.⁹⁸ This was not the first time the writ had been used in connection with a child in a New York court. In an earlier case, the writ's availability was recognized, but was found to have been procedurally defective because a next friend needed to be appointed to act on the child's behalf before the child could bring the writ.⁹⁹

In another case, the writ was used regarding children who had been contracted out as apprentices.¹⁰⁰ Although the apprentices were successful in proving their freedom at an initial trial, the petitioner appealed and was granted a new trial after the court found that the apprenticeship contract executed by the children's father was valid.¹⁰¹ The Maine case of *Richardson v. Richardson* provides an additional example.¹⁰² There, an infant was assigned to its grandmother by the child's father.¹⁰³ The grandmother, seeking to regain custody after the father took the child back, brought the writ on behalf of the child.¹⁰⁴ A jury honored the original assignment to the child's grandmother, but the Supreme Judicial Court of Maine overturned the verdict, holding that the writ could not be used to enforce contractual rights, and

⁹⁴ See Ventrell, *supra* note 13, at 9.

⁹⁵ See Sallie A. Watkins, *The Mary Ellen Myth: Correcting Child Welfare History*, 35 SOC. WORK. 500, 501 (1990).

⁹⁶ See Ventrell, *supra* note 13, at 9; see also Watkins, *supra* note 95, at 501–02.

⁹⁷ Watkins, *supra* note 95, at 502.

⁹⁸ See *id.*

⁹⁹ See *Wilder v. Ember*, 12 Wend. 191, 191 (N.Y. Sup. Ct. 1834).

¹⁰⁰ See *Fowler v. Hollenbeck*, 9 Barb. 309, 312–13 (N.Y. Gen. Term. 1850).

¹⁰¹ See *id.* at 314–15.

¹⁰² *Richardson v. Richardson*, 32 Me. 560, 563 (1851).

¹⁰³ *Id.* at 564.

¹⁰⁴ *Id.* at 561.

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that the father's refusal to abide by the contract did not convert his lawful custody of his child to an unlawful detention.¹⁰⁵

C. *What Does This Mean For Nonhuman Animals?*

In the cases discussed above, the petitioners were not considered legal persons prior to bringing the writ or, at minimum, legal personhood was in question. The writ provided each petitioner with a method to test his or her legal status and demonstrate legal personhood. Some attempts were successful, some were not, but the writ of *de homine replegiando* provided the opportunity to try.

Nothing in these cases suggests any basis for a nonhuman animal to be denied the same opportunity. A human slave was a legal thing.¹⁰⁶ Being a member of the same species as her owner had no impact on whether the slave had legal rights and the same has been true for prisoners and children.¹⁰⁷ Moreover, legal personhood has not been restricted to human beings. The common law recognizes the legal personhood of legal constructs such as corporations and inanimate objects such as vessels.¹⁰⁸ As membership in the human species is neither a necessary nor a sufficient condition for legal personhood, it is not an appropriate basis for denying a nonhuman animal, or a person acting on its behalf, the use of the writ *de homine replegiando* to challenge her confinement. Nothing in the history of the writ's usage in United States courts suggests otherwise.

III. THE VIABILITY OF THE WRIT *DE HOMINE REPLEGIANDO*

As detailed above, as of the mid-nineteenth century, the writ *de homine replegiando* was alive and well in a number of American states.¹⁰⁹ However, the most recent case dates back to 1871.¹¹⁰ As 141 years have passed since, it is reasonable to question whether the writ retains any vitality.

¹⁰⁵ See *id.* at 564-65.

¹⁰⁶ See, e.g., *Atwood's Heirs v. Beck*, 21 Ala. 590, 608 (1852) ("slaves are now regarded by our law as chattels, and their owners have an absolute, unqualified property in them").

¹⁰⁷ See, e.g., *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (Va. 1871); Ventrell, *supra* note 13, at 3.

¹⁰⁸ See, e.g., *Tucker v. Alexandroff*, 183 U.S. 424, 438 (1901); *Cnty. of Santa Clara, v. Southern Pac. R.R. Co.*, 118, 118 U.S. 394 (1886).

¹⁰⁹ See *supra* Part II.B.

¹¹⁰ See Ventrell, *supra* note 13, at 9.

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For purposes of this analysis, states can be split into three categories of “viability”: (1) states in which the writ has been used, or where the writ has been mentioned as being appropriate; (2) states in which the writ has never been used; and (3) states in which the writ has been abolished. The third category is discussed first, as there is little to be said about the status of the writ in these states, though the decisions provide support for the viability of the writ in states that fall in the first two categories.

A. *States that have abolished the writ*

Three states, West Virginia, Virginia, and Mississippi, have abolished the writ *de homine replegiando* directly by statute.¹¹¹ The West Virginia statute simply states that “the writ *de homine replegiando* . . . [is] abolished and shall not hereafter be issued.”¹¹² Virginia’s version states, “the writ *de homine replegiando* is abolished.”¹¹³ Mississippi’s 1838 repeal statute is comparable.¹¹⁴ Accordingly, the writ is no longer available in these jurisdictions.

Michigan’s statute abolishing the writ came into existence in an unusual and indirect way. The Michigan Supreme Court explained:

The revised statutes of [Massachusetts], which we followed in our revision of 1838, contained, at the end of the *habeas corpus* act, a clause expressly abolishing the writ *de homine replegiando*, which was a writ

¹¹¹ VA. CODE ANN. § 8.01-668 (2014); W. VA. CODE § 56-3-2 (2014); *An Act, to Reduce into one, the several Acts concerning the Writ of Habeas Corpus, and to Annul the Remedy by Writ de Homine Replegiando-June 11, 1822*, in A. HUTCHISON, CODE OF MISSISSIPPI: BEING AN ANALYTICAL COMPILATION OF THE PUBLIC AND GENERAL STATUTES OF THE TERRITORY AND STATE WITH TABULAR REFERENCES TO THE LOCAL AND PRIVATE ACTS, FROM 1798 TO 1848, 999, 1002 (1848).

¹¹² W. VA. CODE § 56-3-2 (2014).

¹¹³ VA. CODE ANN. § 8.01-668 (2014); *see also* De Lacy v. Antoine, 34 Va. (7 Leigh) 438, 443 (1836) (writ “proved vexatious and unsafe” because it was “resorted to by slaves asserting a right to freedom”). Although the writ was repealed, the Virginia legislature clearly recognized that prior to repeal it could be resorted to by legal “things” to challenge their status, and indeed, was specifically attempting to prevent third parties (emancipation societies), from using them to challenge slaves’ freedom. *See id.*; *see also* Nicholas v. Burruss, 31 Va. (4 Leigh) 289, 298 (1833).

¹¹⁴ *An Act, to Reduce into one, the several Acts concerning the Writ of Habeas Corpus, and to Annul the Remedy by Writ de Homine Replegiando-June 11, 1822*, in A. HUTCHISON, CODE OF MISSISSIPPI: BEING AN ANALYTICAL COMPILATION OF THE PUBLIC AND GENERAL STATUTES OF THE TERRITORY AND STATE WITH TABULAR REFERENCES TO THE LOCAL AND PRIVATE ACTS, FROM 1798 TO 1848, 999, 1002 (1848) (“The remedy by writ *de homine replegiando*, shall be, and the same is hereby annulled.”).

peculiarly adapted to do justice in cases where the prisoner had been eloigned. But it was found necessary in Massachusetts, in the year 1837 . . . to restore the abrogated remedy under the name of *personal replevin*, and to enact, by a new statute the substance of the common law incidents of the old writ. In Michigan that writ has not been restored¹¹⁵

The existence of these statutes in West Virginia, Virginia, Mississippi, and Michigan, though they abolished the writ in those specific states, helps to support the argument for viability of the writ in the states that lack such statutes. One commentator noted that, prior to 1795 in Virginia, the writ had been “allowed to blacks who claimed to be free.”¹¹⁶ Had the Virginia statute not been passed, the common law remedy would arguably remain available to this day.¹¹⁷

Other courts have judicially abolished the writ without relying on a statute. In 1864, the North Carolina Supreme Court held that the writ “is now superseded by the judicial writ of *habeas corpus*, as a more speedy and summary remedy, called for by the nature of the case, which the Courts issued under their common law jurisdiction.”¹¹⁸ The Maryland Supreme Court similarly held that “a writ *de homine replegiando* cannot legally issue from any of the courts of law of the state.”¹¹⁹

B. *States with a history of writ being used*

There are five states in which the writ has been used in reported decisions¹²⁰ and has not since been abolished: Delaware,¹²¹ Massachu-

¹¹⁵ *In re Jackson*, 15 Mich. 417, 424 (1867).

¹¹⁶ MORRIS, *supra* note 65, at 12.

¹¹⁷ However, Virginia courts do not appear to have considered the application of *desuetude* to common law writs. See *infra* Part III.D.2 and note 177.

¹¹⁸ *Walton v. Gatlin*, 60 N.C. (Win.) 318, 321 (1864).

¹¹⁹ *Johnson v. Medtart*, 4 H. & J. 24, 24 (Md. 1815). It is unclear whether this decision leaves open the possibility that the writ might legally issue from a Maryland High Court of Chancery.

¹²⁰ Maine has a history of a number of reported cases involving the writ; however, there is some question as to whether it remains available. Compare ME. REV. STAT. tit 14, § 7351 (“If any person is imprisoned, restrained of his liberty or held in duress, unless by a lawful writ, warrant or other process, civil or criminal, he may have the writ for replevying the person, on complaint filed by himself or anyone in his behalf in the Superior Court, at the discretion of the court and not otherwise.”) with M.R. Civ. P. 81 advisory committee’s note to 2000 amend., Me. Judicial Branch website/Rules (last visited Oct. 2, 2014) (stating that a reference to an action to replevy the person was removed, because “there is no longer an action to replevy the person”).

setts,¹²² New Hampshire,¹²³ New York,¹²⁴ and Pennsylvania.¹²⁵ The question in these states is not whether the writ was in fact adopted from English common law—that much is clear.¹²⁶ What remains questionable is whether the writ remains available after 141 years of disuse, that is, has the writ has fallen into *desuetude*?

C. *States with no history of writ being used*

The following states have no reported judicial or legislative history of granting the writ: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.¹²⁷ Given that (1) the writ *de homine replegiando* was part of the English common law,¹²⁸ (2) each of these states adopted the English common

The writ is also arguably still available, at least to animals and humans other than slaves, in South Carolina, which recognized the availability of the writ, but later held that it specifically could not be used by slaves. *Compare* Thorne v. Fordham, 25 S.C. Eq. (4 Rich.) 222, 223 (1852) with Huger v. Barnwell, 39 S.C.L. (5 Rich.) 273, 273, 275, 277 (1852).

¹²¹ See, e.g., *In re Jones*, 2 Del. Cas. 622, 622 (1821); *State v. Hudson*, 2 Del. Cas. 28, 28 (1797) (“the writ [*de homine replegiando*] was not (as it had been argued) obsolete, it is being used through the state”).

¹²² See, e.g., *Wood v. Ross*, 11 Mass. 271, 271 (1814); *Wright v. Wright*, 2 Mass. 109, 109 (1806).

¹²³ See, e.g., Freedman, *supra* note 79, at 602-03.

¹²⁴ See, e.g., *In re Martin*, 16 F. Cas. 881, 882 (C.C.S.D.N.Y. 1835) (No. 9154); *Floyd v. Recorder of New York*, 11 Wend. 180, 180 (N.Y. Sup. Ct. 1834); *Skinner v. Fleet*, 14 Johns. 263, (N.Y. Sup. Ct. 1817); *Aza v. Eitlinger*, Ant. N.P. Cas. 73 (N.Y. Sup. Ct. 1808); *Sable v. Hitchcock*, 2 Johns. Cas. 79 (N.Y. Sup. Ct. 1800); *Fish v. Fisher*, 2 Johns. Cas. 89 (N.Y. Sup. Ct. 1800).

¹²⁵ See, e.g., *Commonwealth v. Hasson*, 3 Pen. & W. 237, 237 (Pa. 1831); *Scott v. Waugh*, 15 Serg. & Rawle 17, 17 (Pa. 1826); *Witherow v. Keller*, 11 Serg. & Rawle 271, 274 (Pa. 1824); *Stiles v. Nelly*, 10 Serg. & Rawle 366, 366 (Pa. 1823); *Butler v. Delaplaine*, 7 Serg. & Rawle 378, 378-79 (Pa. 1821); *Alexander v. Stokely*, 7 Serg. & Rawle 299, 299 (Pa. 1821); *Wilson v. Belinda*, 3 Serg. & Rawle 396, 396 (Pa. 1817); *Marchand v. Peggy*, 2 Serg. & Rawle 18, 18 (Pa. 1815); *Ex parte Lawrence*, 5 Binn. 304, 304 (Pa. 1812) (per curiam); *Jack v. Eales*, 3 Binn. 101, 101 (Pa. 1810); *Elson v. M'Colloch*, 4 Yeates 115, 115 (Pa. 1804); *Jones v. Conoway*, 4 Yeates 109, 109 (Pa. 1804); *John v. Dawson*, 2 Yeates 449, 449 (Pa. 1799); *Pirate v. Dalby*, 1 Dall. 167, 167 (Pa. 1786); *Cowperthwaite v. Jones*, 2 Dall. 55, 57-58 (Pa. 1790).

¹²⁶ See *supra* note 59.

¹²⁷ No reported cases were located during research using LexisNexis, Westlaw, and other sources.

¹²⁸ See BLACKSTONE, *supra* note 15, at *128.

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law,¹²⁹ and (3) none of these states have repealed the writ, the writ still exists as part of these states' common law. As with states where the writ has been used, the only question is whether the writ remains available or if it has fallen into *desuetude*.

D. Desuetude

Rooted in European civil law, the principle of *desuetude* says that a statute can become obsolete and invalid if it is not enforced or fails to be utilized; that is, it “falls into *desuetude*.”¹³⁰ Though generally thought to be a civil law concept, *desuetude* has been applied to the common law, including common law writs.¹³¹ In many instances, the writs were adopted from English common law, but had little or no history of use in the state, much like the writ *de homine replegiando*. Thus, an analysis of the present viability of the writ must acknowledge the various state courts' application of the principle of *desuetude* to the common law, and to common law writs in particular.

States can be split into three categories based on how they treat arguments of *desuetude*: (1) states taking the minority view that common law writs remain viable despite *desuetude*, unless specifically repealed by statute; (2) states taking the majority view that *desuetude* may render a common law writ or practice invalid; and (3) states that have not applied *desuetude* to common law writs or practices.

¹²⁹ See *supra* note 59.

¹³⁰ West Virginia in particular recognizes the application of *desuetude* to statutes, especially criminal statutes. See *State v. Blake*, 584 S.E.2d 512, 516 (W. Va. 2003) (doctrine is “founded on the constitutional concept of fairness embodied in federal and state constitutional due process and equal protection clauses”) (quoting *State v. Linares*, 630 A.2d 1340, 1346 n. 11 (Conn. 1993)), *overruled on other grounds by* *State v. Linares*, 655 A.2d 737 (Conn. 1995)). Most other U.S. states specifically reject this principle, as does the United States Supreme Court. See *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113–14 (1953) (“The failure of the executive branch to enforce a law does not result in its modification or repeal.”); see also *infra* notes 143–148.

¹³¹ See, e.g., *Carrillo v. Rostro*, 845 P.2d 130, 140–41 (N.M. 1992) (considering the effect of *desuetude* on the viability of the writ of *error coram nobis*).

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1. The Minority View: Common law writs remain viable despite *desuetude*, unless specifically repealed by statute

Courts that subscribe to this view hold that common law writs remain viable unless the legislature has repealed them.¹³² The Superior Court of Delaware has most strongly rejected the application of *desuetude* to the common law, explaining that:

[u]nlike the statute law the ancient common law never expires from non-use or desuetude, never becomes obsolete; but when the occasion occurs for a resort to it, it arises from a slumber however long, as vigorous and efficient, with all its remedies at hand for the enforcement of it, as if it were in daily use¹³³

The Supreme Court of Florida echoed that holding, stating that “[t]he common law has not become petrified; it does not stand still. It continues in a state of flux. And, its ever present fluidity enables it to meet and adjust itself to shifting conditions and new demands.”¹³⁴ Further, once a principle of common law is established, “the courts of this country must enforce it until repealed by the legislature . . . although the reason . . . which induced its original establishment may have ceased to exist.”¹³⁵

The Supreme Courts of Missouri and North Carolina, examining the writ of *coram nobis* each stated that “when not specially abrogated by statute, [a writ] still remains a factor in modern practice.”¹³⁶ The Court of Appeals of Kentucky likewise found that the writ of *coram nobis* remained available, again because it had not been repealed by statute.¹³⁷

¹³² See, e.g., *State v. Stewart*, 11 Del. (6 Houst.) 359, 372 (1881) (affirming the continued viability of the writ of *quo warranto*).

¹³³ *Id.*

¹³⁴ *State v. Egan*, 287 So.2d 1, 7 (Fla. 1973).

¹³⁵ *Id.* But see *Lyle v. Richards*, 9 Serg. & Rawle 322, 353 (Pa. 1823) (some parts of the common law of England no longer have any binding force, because they have fallen into *desuetude* through “the silent legislation of the people”).

¹³⁶ See *Reed v. Bright*, 134 S.W. 653, 655 (Mo. 1911) (citing R.A. Daly, *Coram Nobis and Coram Vobis*, in 5 ENCY. OF PLEAD. AND PRAC. 30 (William Mark McKinney ed., 1896)); *Roberts v. Pratt*, 68 S.E. 240, 242 (N.C. 1910) (citing R.A. Daly, *Coram Nobis and Coram Vobis*, in 5 ENCY. OF PLEAD. AND PRAC. 27, 28, 30 (William Mark McKinney ed., 1896)).

¹³⁷ See *Jones v. Commonwealth*, 108 S.W.2d 816, 817 (Ky. 1937); see also *Cruz v. Silva*, 984 A.2d 295, 308-09 (Md. Ct. Spec. App. 2009) (civil claim for alimony, though “slipping off the

For these states—Delaware, Florida, Missouri, North Carolina, and Kentucky¹³⁸—the analysis for the writ’s viability today is simple. Since the writ has not been specifically repealed by statute in any of these states, it should be viable in present-day litigation.

2. The Majority View: *Desuetude* **may** render a common law writ invalid

The majority of courts leave open the possibility that a common law writ or practice, not otherwise repealed by statute, could become invalid through *desuetude*.¹³⁹ Thus, courts often consider these writs or practices on a case-by-case basis.¹⁴⁰ The analysis begins with a determination of whether the writ has in fact fallen into disuse.¹⁴¹ Typically, this amounts to no more than a statement by the court that the writ or practice either has never been used in the state, or has not been used for a significant period of time.¹⁴² As this article is specifically concerned with the writ *de homine replegiando*, which has not been used for over a century, no further analysis of this factor is necessary.

The bulk of the analysis is whether, despite this period of disuse, the writ remains viable.¹⁴³ Many states hold that a period of disuse does not necessarily render a writ invalid.¹⁴⁴ Courts analyzing the common law writs of *error coram nobis*,¹⁴⁵ *quo warranto*,¹⁴⁶ *audita*

radar screen,” remained viable as it was not superseded by the state’s Alimony Act); *State v. Senft*, 20 S.C.L. (2 Hill) 367, 369 (S.C. 1834) (disuse of writ of *certiorari* “would not destroy the right to issue it. It must be taken away by act of the Legislature, or it must exist wherever its parent, the common law, exists.”); *Hopkins v. Nashville, Chattanooga & St. Louis Ry.*, 34 S.W. 1029, 1041 (Tenn. 1896) (practice of demurrer to the evidence, though cumbersome and antiquated, was still proper because it was never overruled).

¹³⁸ Arguably, the same analysis would apply in Iowa. See, e.g., *Doyle v. Andis*, 102 N.W. 177, 183, 185 (Iowa 1905) (affirming the application of a common law rule that had never been previously recognized in the state).

¹³⁹ See, e.g., *State v. Dist. Ct. of Fourth Judicial Dist. in and for Ravalli City.*, 155 P. 278, 279 (Mont. 1916) (listing disuse as one factor in the modification of common law causes of action).

¹⁴⁰ See, e.g., *State v. Ashley*, 1 Ark. 279, 305-06 (1839).

¹⁴¹ See, e.g., *Turknett v. W. Coll. of N.M. Conference of Methodist Episcopal Church, South*, 145 P. 138, 139 (N.M. 1914).

¹⁴² See, e.g., *Carrillo v. Rostro*, 845 P.2d 130, 140-41 (N.M. 1992) (noting that “writ of error procedure has fallen into almost complete disuse”).

¹⁴³ See, e.g., *Ashley*, 1 Ark. at 306.

¹⁴⁴ See, e.g., *Carrillo*, 845 P.2d at 140-41.

¹⁴⁵ See *Howard v. State*, 24 S.W. 8, 8 (Ark. 1893); *Adler v. State*, 35 Ark. 517, 530 (1880); *People v. Vernon*, 49 P.2d 326, 327 (Cal. Dist. Ct. App. 1935). But see *U.S. v. Landicho*, 72 F.

querela,¹⁴⁷ and *habeas corpus cum causa*,¹⁴⁸ have followed a similar analysis, acknowledging that the writ has fallen into disuse, but holding it can still be used in the proper circumstances.¹⁴⁹

One key factor these courts consider in finding a writ continues to be viable is whether the writ has been wholly replaced by a new procedure.¹⁵⁰ For example, the Supreme Court of New Mexico determined that the writ of *audita querela* remained available despite falling into disuse in most states.¹⁵¹ The court acknowledged that in current practice, the remedy was typically administered by a motion, but explained that there might be cases in which the nature of the facts in dispute might render the motion inadequate to present the issues as necessary. In those cases, the remedy of the writ “would seem to be required.”¹⁵² Similarly, in *State v. Ashley*, the Supreme Court of Arkansas acknowledged the development of the practice of proceeding by information in the nature of *quo warranto*. Accordingly, the court found the new procedure to be sufficiently different from the old writ of *quo warranto* and, thus, found that the writ remained viable even though it had fallen into disuse.¹⁵³ The court explained that the introduction of the new procedure “did not subvert or destroy the former,” in part because “the mode of proceeding in them materially varied, while they were in some respects attended with different results, and the form of the judgment was never the same.”¹⁵⁴ This factor is key, as the writ of *habeas corpus* has become the more traditional procedure for challenging unlawful confinement.¹⁵⁵ However, as explained above, there are critical differences between the *habeas* writ and the writ *de*

Supp. 425, 429-30 (D. Alaska 1947) (holding under federal law that writ of *error coram nobis* had been superseded by *habeas corpus*).

¹⁴⁶ See *Violet v. Voccola*, 497 A.2d 709, 711 (R.I. 1985) (“although the writ may have fallen into disuse in England as well as in this state, it has not been abolished”).

¹⁴⁷ See *Turknett v. W. Coll. of N.M. Conference of Methodist Episcopal Church, South*, 145 P. 138, 139 (N.M. 1914).

¹⁴⁸ See *Van Hoogenstyn v. Del., Lackawanna & W. R. Co.*, 90 N.J.L. 189, 192 (1917).

¹⁴⁹ See, e.g., *Turknett*, 145 P. at 139 (“There may be cases, however, where the facts are complicated and disputed and where a motion might be inadequate In such cases, the remedy *audita querela* . . . would seem to be required.”).

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See *State v. Ashley*, 1 Ark. 279, 305-06 (1839).

¹⁵⁴ *Id.* at 306.

¹⁵⁵ See SHUMAKER, *supra* note 30, at 278 (writ of *habeas corpus* has superseded *de homine* writ).

homine replegiando, just as there were between the procedures at issue in the Arkansas *Ashley* case.¹⁵⁶ Indeed, the Pennsylvania Supreme Court has specifically recognized the procedural differences between the writ *de homine replegiando* and the writ of *habeas corpus*, which provides convincing support that the *habeas* writ should not be deemed a sufficient replacement for the writ *de homine replegiando*.¹⁵⁷

Where a new procedure has arisen that actually does replace a writ, courts holding the majority view often find the old writ invalid.¹⁵⁸ Accordingly, the Illinois Supreme Court held the writ of *error coram nobis* invalid because it had never been used in the state, had fallen into *desuetude* in England, and had been replaced by a more effective motion procedure, which the defendant had already used unsuccessfully.¹⁵⁹ The Supreme Court of Utah likewise determined that the writs of *coram nobis* and *coram vobis* had fallen into *desuetude* and been replaced by motion practice, so further use of the writs was improper.¹⁶⁰ Also, courts may determine that a statute has *effectively* superseded a prior writ or practice, even if not explicitly doing so, by providing a new procedure,¹⁶¹ as did the Supreme Court of Wyoming in holding that common law marriage, whether the practice derived from English law or colonial law, fell into *desuetude*, was replaced by statute, and was now invalid.¹⁶²

Finally, some courts consider whether a writ is appropriate for modern circumstances, or can be adapted to a new role.¹⁶³ The Supreme Court of New Mexico explained that though it had “fallen

¹⁵⁶ See *supra* Part I.B; *Ashley*, 1 Ark. at 306.

¹⁵⁷ See *Urie v. Johnston*, 3 Pen. & W. 212, 217 (Pa. 1831); *Pirate v. Dalby*, 1 Dall. 167 (Pa. 1786).

¹⁵⁸ See, e.g., *Brown v. McDonald*, 130 F. 964, 968-69 (E.D. Penn. 1904) (equity bill of discovery obsolete because remedy at law now available); *rev'd*, 133 F. 897, 899-900 (3d. Cir. 1905) (holding that the facts of the case fell within the exception that made a bill of discovery obsolete); see also *Billups v. Freeman*, 52 P. 367, 368 (Ariz. 1898) (holding that writ of *error coram nobis* was obsolete and had been replaced by motion remedy).

¹⁵⁹ See *McKindley v. Buck*, 43 Ill. 488, 490 (1867).

¹⁶⁰ See *Elliott v. Bastian*, 40 P. 713, 715 (Utah 1895).

¹⁶¹ See *Seeck v. Jakel*, 141 P. 211, 215 (Or. 1914) (recognizing that practice of livery of seisin had fallen into *desuetude* and was replaced by modern statutes); *Winchester v. Winchester*, 38 Tenn. (1 Head) 460, 497 (1858) (practice of compelling conveyance by attachment fell into *desuetude* after statute created a substitute procedure, and “could not now be lawfully restored”). *But see* *State v. Egan*, 287 So.2d 1, 6 (Fla. 1973) (“the common law is not to be changed by doubtful implication”).

¹⁶² See *In re Roberts' Estate*, 133 P.2d 492, 503 (Wyo. 1943).

¹⁶³ See *Carrillo v. Rostro*, 845 P.2d 130, 140-41 (N.M. 1992).

into almost complete disuse,” rather than being left to “lie moribund,” the writ of error could be “adapt[ed] to a new role” to solve a modern issue, though it was not the same as the use contemplated when the writ was originally incorporated into the state’s law.¹⁶⁴ This inherent flexibility in the common law is one reason why the writ *de homine replegiando* could be adapted to use by nonhuman animals.¹⁶⁵ However, the reverse can also be true—where a writ or practice no longer fits the circumstances of current practice, courts will often hold the writ or practice invalid.¹⁶⁶

The only court to arguably apply the principle of *desuetude* to the writ *de homine replegiando* affirmed that the writ’s long period of disuse as of that time did not render it invalid.¹⁶⁷ Discussing the English common law writ—that of entry *sur disseisin*—the Chief Justice of the Supreme Court of Pennsylvania explained:

The first settlers of Pennsylvania brought with them the common law, in general, except such parts thereof as were unfit for colonies. It might be expected, that in a young country, many years might elapse before there would be a necessity to make use of all the forms of action in practice in an old country, far advanced in arts, commerce and civilization; accordingly, we find that such has been the case.¹⁶⁸

Discussing the specific writ at issue, an action of ejectment, the Chief Justice found it to be “the most simple and convenient” for its purpose, and “almost the only one which has been used,” but stated further that this was “no reason for excluding all other actions; some of

¹⁶⁴ See *id.*; see also *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 247 (Cal. Ct. App. 2001), *rev’d*, 1 Cal. Rptr. 3d 32 (2003) (discussing adapting the common law tort of trespass to chattels, which suffered from *desuetude*, to the modern issue of cyberspace civil actions).

¹⁶⁵ Wise, *supra* note 7, at 290–91.

¹⁶⁶ See *Commonwealth v. Caldwell*, 5 Ky. (2 Bibb.) 8, 10 (1810) (finding that a return to an English practice of service of process that had fallen into *desuetude* would be “attended by mischievous consequences”); *Pope v. State*, 396 A.2d 1054, 1078 (Md. 1979) (invalidating common law offense of misprision of felony due to its disuse and incompatibility with modern circumstances); *Commonwealth v. Acen*, 487 N.E.2d 189, 192–93 (Mass. 1986) (common law right can lapse for “lack of applicability to current conditions”); *Dowd v. A.S. Hughes’ Sons Towing and Transp. Co.*, 170 N.Y.S. 164, 166 (N.Y. App. Div. 1918) (practice of written interrogatories to a referee assigned to take account no longer necessary, and should not be revived, because parties in modern practice can now testify for themselves).

¹⁶⁷ *Witherow v. Keller*, 11 Serg. & Rawle 271, 273–74 (Pa. 1824).

¹⁶⁸ *Id.* at 273.

which may be found, in particular cases, not only useful, but necessary.”¹⁶⁹ The Chief Justice went on to explain that:

[E]ven if the writ of entry had never been used before, it would be no answer to the action, to say, that it was the first of the kind. We have several instances of writs and remedies, known to the common law, and never introduced into practice here, till since our independence.¹⁷⁰

Finally, the Chief Justice looked to the writ *de homine replegiando* to support his decision: “It was a long time before the action of *homine replegiando* was known among us; yet it was at last perceived to be adapted to certain cases where personal liberty was invaded, and brought into practice without objection.”¹⁷¹ This last statement is the key. The Court acknowledged the period of disuse, but stated that the writ was rediscovered and found to be particularly suited to a new category of cases.¹⁷² Modern courts confronting the writ should apply the same analysis.

For those states in which the writ *de homine replegiando* has not been specifically analyzed, future analysis would likely turn on whether convincing arguments could be made that the writ has been replaced by a new, more effective procedure, or otherwise no longer fits the circumstances of modern practice.¹⁷³ One argument could be that the writ of *habeas corpus*, used prevalently in today’s practice, has replaced the need for the writ *de homine replegiando* and provides a more effective procedure.¹⁷⁴ However, as previously noted, there are important differences between these two writs, not the least of which is that the *habeas* writ does not provide a right to have the propriety of a confinement ruled upon by a jury. For this reason alone, the *habeas* writ should not be considered a replacement of the writ *de homine replegiando*. Further, modern courts faced with the writ can and should take a cue from the Supreme Court of Penn-

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 273–74.

¹⁷¹ *Id.* at 274.

¹⁷² *See id.*

¹⁷³ *See, e.g.,* Brown v. McDonald, 130 F. 964, 968-69 (E.D. Penn. 1904) (performing such an analysis to determine an equity bill of discovery was obsolete because a remedy at law now available) *rev'd*, 133 F. 897, 899–900 (3d. Cir. 1905) (holding that the facts of the case fell within the exception that made a bill of discovery obsolete).

¹⁷⁴ *See* SHUMAKER, *supra* note 30, at 278 (claiming *de homine* writ fell out of use and was superseded by writ of *habeas corpus*).

sylvania¹⁷⁵ and the Supreme Court of New Mexico and “adapt [the writ] to a new role” to solve new modern issues, including that of non-human animals deprived of their liberty.¹⁷⁶

3. The Remainder: Courts that have not applied *desuetude* to common law writs or practice

Many states have not considered whether *desuetude* can render a common law writ or practice invalid, which makes it difficult to determine how they might view the use of writ *de homine replegiando* in modern practice.¹⁷⁷ Some limited guidance can be taken from the states in this group that have considered the effect of *desuetude* on statutes. If a state’s courts are open to finding that statutes can be rendered invalid through obsolescence and disuse, as are Connecticut’s,¹⁷⁸ they may be more inclined to treat common law writs and principles similarly, though in both states, the principle seems targeted at criminal statutes, which provides additional grounds for distinction. Conversely, states that have affirmatively rejected the argument that *desuetude* can render a statute invalid—Alabama,¹⁷⁹ Colorado,¹⁸⁰ Indiana,¹⁸¹ Kansas,¹⁸² Minnesota,¹⁸³ Nebraska,¹⁸⁴ New Hampshire,¹⁸⁵ and

¹⁷⁵ *Witherow v. Keller*, 11 Serg. & Rawle 271, 274 (Pa. 1824).

¹⁷⁶ See *Carrillo v. Rostro*, 845 P.2d 130, 141 (N.M. 1992); see also *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 247 (Cal. Ct. App. 2001), *rev’d*, 1 Cal. Rptr. 3d 32 (2003).

¹⁷⁷ The following states do not appear to have considered the application of *desuetude* in any meaningful way: Idaho, Maine, Mississippi, Nevada, North Dakota, Ohio, South Dakota, Vermont, Virginia, Washington, and Wisconsin.

¹⁷⁸ See *State v. Linares*, 655 A.2d 737, 759 n.19 (Conn. 1995) (“a statute may be unconstitutional because of its lack of use”); see also *State v. Smith*, No. CR293692S, 2001 WL 283388, at *8 (Conn. Super. Ct. Mar. 7, 2001) (holding that because a statute had been recently used, the doctrine of *desuetude* did not apply).

¹⁷⁹ *Dep’t of Pub. Safety v. Freeman Ready-Mix Co.*, 295 So.2d 242 (Ala. 1974) (“popular disregard of a statute, or a custom opposed to it, will not repeal it . . .”) (quoting *First Nat’l Bank v. Nelson*, 16 So. 707, 710 (1894)).

¹⁸⁰ *Everhart v. People*, 130 P. 1076, 1081 (Colo. 1913) (“[M]any laws are enacted which lie dormant, in whole or in part, for years. We know of no court, however, that has held that things clearly within the letter and spirit of an act are excluded from the operation thereof because of such *desuetude*.”).

¹⁸¹ *Hosts, Inc. v. Wells*, 443 N.E.2d 319, 324 (Ind. Ct. App. 1982) (“The civil law doctrine of *desuetude* . . . never has been adopted in Indiana.”).

¹⁸² *Armourdale State Bank v. Kansas City*, 292 P.2d 745, 746 (Kan. 1930) (“[T]hat doctrine does not prevail in Kansas”).

¹⁸³ *Moskovitz v. City of St. Paul*, 16 N.W.2d 745, 750 (Minn. 1944) (statute cannot become invalid through *desuetude*); see also MINN. STAT. § 645.40 (2014) (“A law shall not be deemed repealed because the reason for its passage no longer exists.”).

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Texas¹⁸⁶—might be more likely to reject its application to the common law.

E. *States That Would Likely Take A Favorable View Towards The Writ*

Taking the list of states with a history of using the writ *de homine replegiando* or whose statutes incorporate English common law, and combining that list with the list of those states where *desuetude* should not be found to render the writ invalid, produces the following list of states that should be amenable to a modern use of the writ: Alaska, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Massachusetts, Missouri, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, and Wyoming.¹⁸⁷ All of these states at some time recognized that the writ was part of their common law, either explicitly through judicial decision, or implicitly through English common law.¹⁸⁸ All are open to arguments that *desuetude* may not have rendered the writ invalid. Of these states, based on their history of cases in which the writ has been utilized, Delaware, New York, and Pennsylvania should be considered the most receptive venues.

CONCLUSION

PETA's attempt to obtain judicial recognition of the rights of nonhuman animals failed, but the result can still be taken as a learning experience and as motivation to seek a new approach.¹⁸⁹ It is no great

¹⁸⁴ *State v. Am. Sur. Co.*, 135 N.W. 365, 368 (Neb. 1912) (holding law not repealed due to nonenforcement)

¹⁸⁵ *Doe v. O'Brien*, 217 A.2d 189, 193 (N.H. 1966) ("The failure to enforce a law neither repeals it nor sanctions disobedience of it.")

¹⁸⁶ *Interstate Forwarding Co. v. Vineyard*, 3 S.W.2d 947, 957 (Tex. Civ. App. 1928) (holding the statute "remains in full force and effect, although, so to speak, in a state of hibernation, because of nonenforcement.")

¹⁸⁷ This article makes no judgment on the following states, which have not assessed the application of *desuetude* to common law writs: Alabama, Colorado, Connecticut, Indiana, Kansas, Minnesota, and New Hampshire. We have also left out Maine and South Carolina, as it is unclear whether the writ has been abolished in those states. See *supra* note 120.

¹⁸⁸ See *supra* note 59–60; see also *supra* Part II.B (explaining that states such as Maine, New Hampshire, New York, Pennsylvania, and South Carolina have recognized the writ of *de homine replegiando*).

¹⁸⁹ *Tilikum v. Sea World Parks & Entm't, Inc.*, 842 F. Supp. 2d 1259, 1265 (S.D. Cal. 2012).

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controversy to argue as we have that under the common law, as opposed to under statutory interpretation, a legal “person” is not required to be a human being. A “person” in this sense is “a term of art;” it is not about biology.¹⁹⁰ As one scholar has explained, it is instead about whether an entity has a legal right that should be protected, i.e., “[p]ersonhood is thus a conclusion, not a question.”¹⁹¹ There is no reason that nonhuman animals, many of whom possess similar capacities to humans, should not have the access to the same common law procedures as do other living beings nonetheless considered under the law to be things or property.

A number of categories of legal non-persons have employed the common law writ *de homine replegiando* to obtain a jury decision on their legal personhood. The cases in which the writ has been utilized provide no reason why nonhuman animals, which have a similar legal status as those non-persons, should not be able to do the same. And most importantly, as a common law procedure, the writ is not subject to the type of legislative interpretation arguments that derailed PETA’s Thirteenth Amendment claim.¹⁹²

If Judge Miller’s sentiment in *Tilikum* that the goal of protecting the welfare of the orcas was “laudable” is any indication, there are judges who may be sympathetic to a nonhuman petitioner, so long as the claim is legally sound.¹⁹³ This article concludes that there are at least twenty-three states which, based on both their historical use of the writ *de homine replegiando* or incorporation of English common law and their analysis of the principle of *desuetude*, should consider the writ legally viable. It is to these states, and in particular, Delaware, New York, and Pennsylvania, that those interested in challenging the confinement of nonhuman animals through civil litigation should turn. Whether an attempt to use the writ in this manner will find success in these courts depends on a host of other factors, including the nonhuman animal chosen as the petitioner, the specifics of its confinement and treatment, the willingness of the particular judge assigned to consider this admittedly novel argument, and the individual personalities of the jurors selected. But based on the prior usage

¹⁹⁰ *Wartelle v. Women’s & Children’s Hosp., Inc.*, 704 So. 2d 778, 780 (La. 1997).

¹⁹¹ Michael D. Rivard, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1466 (1992).

¹⁹² See *Tilikum*, 842 F. Supp. 2d at 1264.

¹⁹³ *Id.* at 1264-65.

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of the writ in these courts, and their analyses of procedures in disuse generally, such an attempt would be grounded on a solid legal foundation and could succeed where *Tilikum* faltered.

