

Elephant and Wild Rice: Bringing Rhetorics of Materiality into Judicial Spaces

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**Abstract**

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Rhetorics of new materialism have articulated an awareness that humans are not alone or centered in their interests and behaviors, and that possession of this worldview makes us accountable to nonhuman entities and things. Past scholarship on new materialism has focused on the necessity and development of such awareness; I take this to be a first move—an epistemic condition for moral action. For the rhetoric of materiality to fulfill its ethical responsibility, we must *act* through *advocating* for, and in consideration of, nonhumans. One way to do so is by advocating for nonhumans in court. Despite being traditionally conservative in their rhetoric, legal spaces and actors are producing discursive openings for new materialist awareness to inform jurisprudential philosophy, decision making, and action.

Using close reading, I analyze rhetorical artifacts from two cases that involve new materialist rhetorics. The first is *Nonhuman Rights Project v. Breheny* (2022), in which a nonprofit animal rights organization argues for Happy, an elephant, to be transferred from the Bronx Zoo to an elephant sanctuary. Happy's advocates argue for her transfer under habeas corpus. The New York Court of Appeals rules against Happy's release, reasoning that habeas corpus applies only to humans. The second case is *Manoomin v. Minnesota DNR* (2021), in which Chippewa Anishinaabe peoples argue against the Minnesota Department of Natural resources granting a permit for a pipeline construction project to drain five billion gallons of water from an area adjacent to Tribal lands. Manoomin is a wild rice that grows on water, and its wellbeing is inextricable from that of Anishinaabe peoples. The White Earth Band of Ojibwe Court of Appeals ultimately ruled against Manoomin because of the location of water-taking was outside the boundary line of Tribal lands.

This project begins to bridge the scholarly gap between rhetoric of materiality and jurisprudence, demonstrates how public understanding of materiality is moving into legal spaces, provides examples of how to analyze legal artifacts for discursive openings for rhetoric of materiality, and contributes new materialist scholarship by moving it from description of necessary awareness to ethical and legal action.

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## Introduction

In Athens, Georgia, there is a tree that owns itself. The white oak lives at the corner of Dearing and Finley Streets, and its somewhat legendary history periodically bubbles up in newspaper articles that drive visitors to seek it out. The tree is believed to have sprouted between the mid-1500s and the late 1700s, well before the city of Athens was formed around it.<sup>1</sup> At the bottom of the tree there is a stone plaque, attributed to William H. Jackson, 1832. It reads: “For and in consideration of the great love I bear this tree and the great desire I have for its protection for all time, I convey entire possession of itself and all land within eight feet of the tree on all sides.”<sup>2</sup> Some say that Jackson grew up under the shadow of the white oak and wanted to preserve it for future generations, though this is far from substantiated; historians date Jackson’s arrival in what is now Athens to be during his adulthood.<sup>3</sup> The legend that Jackson deeded the tree to itself was spread through an August 12, 1890 article published in the Weekly Banner newspaper, though no such deed has ever been recovered.<sup>4</sup> According to the Farmer’s Almanac, “The thinking is that the Weekly Banner article about the tree popularized the story so much that the people living in this area of Athens decided to go along with it, allowing the tree to own the square of land that it was growing on.”<sup>5</sup>

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<sup>1</sup> Amber Kanuckel, “A Tree That Owns Itself?” *Farmers Almanac*, January 26, 2021, <https://www.farmersalmanac.com/a-tree-that-owns-itself-25869>.

<sup>2</sup> “The Tree That Owns Itself,” *Visit Athens GA*, accessed April 15, 2023, <https://www.visitathensga.com/things-to-do/attractions/the-tree-that-owns-itself/>.

<sup>3</sup> E. Merton Coulter, *The Toombs Oak, The Tree That Owned Itself, and Other Chapters of Georgia* (Athens, Georgia: The University of Georgia Press, 1966), 20-21.

<sup>4</sup> Kanuckel.

<sup>5</sup> *Ibid.*

The story of the tree that owns itself is most remarkable precisely because even though it does not, indeed cannot own itself in the legal sense, the people of Athens act as though it does. Although some tree species have more legal protection than others (usually for preservation of old growth, or protection from invasive species), trees have no legal standing in the US. On the page dedicated to the tree that owns itself, the website How Stuff Works quotes Victor D. Merullo, “an Ohio-based attorney who specializes in tree law,” for a definitive answer on the matter. The tree “has no ‘legal standing’ on its own,” Merullo says, “but only through proper legislation would it gain such rights.”<sup>6</sup> But the same webpage—on a site called How Stuff Works, remember—also includes a history of care: “What’s important to acknowledge, however, is that the citizens of Athens, and the city and county government, have honored the tree’s standing. Though it partly blocks the roadway, the tree is ‘accepted for care’ by municipal authorities, as well as those who live on the street.”<sup>7</sup> In 1906, a resident named George Foster Peabody noticed erosion around the tree’s base, so he paid for restoration and preservation work.<sup>8</sup> After getting damaged in an ice storm in 1907, the tree weakened and eventually fell on October 9, 1942. From the Farmer’s Almanac:

While the original tree was gone, the community in Athens loved the Tree That Owns Itself so much that several gardeners in the area took acorns from it and sprouted saplings. The plot on which the tree once stood remained empty for four years until it was suggested that the Athens’ Junior Ladies Garden Club do something about it. One of the saplings grown from the original tree’s acorns was chosen—a five-foot tall specimen that gardeners agreed would have the best chance of survival. Roy Bowden, with the University of Georgia College of Agriculture, oversaw the planting

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<sup>6</sup> Jamie Allen, “A ‘Tree That Owns Itself’ Grows in Athens, Georgia,” *How Stuff Works*, accessed on April 15, 2023, <https://science.howstuffworks.com/life/botany/tree-that-owns-itself-athens-georgia.htm>.

<sup>7</sup> Allen.

<sup>8</sup> Kanuckel.

of the new tree, and on December 4, 1946, Mayor Robert L. McWhorter conducted an official dedication ceremony for the Son of the Tree That Owns Itself. Since that time, the Son of the Tree That Owns itself has flourished. A 50-year anniversary ceremony was held on December 4, 1996. Today, the Son still stands on the land it inherited from its parent tree, having grown to over 50 feet tall.<sup>9</sup>

Not only did the people of Athens care for the original tree that owned itself, they care for its progeny as well, and the land on which it grows. The Athens-Clarke County’s landscape management administrator provides regular checkups for the tree: “If there was outside damage, like from a storm, we would prune the damage. It has little to no signs of damage or stress.”<sup>10</sup> On University of Georgia game days, due to the fact that the tree’s plot narrows Finley Street to a one-lane road, increased traffic has some residents concerned for the tree, but students don’t seem to mind: “Traffic is everywhere. One tree in the face of all of that is not going to impede that much. We can chill out about it,” reported one college sophomore.<sup>11</sup> In fact, the tree’s mythical self-ownership has become so entrenched in the minds of Athenians that they joke about its agency: “its closest neighbors who rake up its leaves...refer to it as ‘the tree that doesn’t pick up after itself.’”<sup>12</sup>

The acceptance and care of the tree and its progeny have created a discourse that simultaneously acknowledges legal ambiguity and good naturedly undermines any sense of urgency to codify the tree’s status, e.g.: “Is this deed legally binding? We’re not sure, as

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<sup>9</sup> Ibid.

<sup>10</sup> Kyle Nazario, “See the Georgia tree that owns itself,” *The Atlanta Journal-Constitution* online, April 29, 2016, <https://www.ajc.com/travel/see-the-georgia-tree-that-owns-itself/KyJlCnulu42y461oPfvG1L/>.

<sup>11</sup> Lindsay Owens, “The fascinating story behind Athens’ most famous tree,” *The Red & Black*, October 26, 2022, updated November 5, 2022, [https://www.redandblack.com/culture/the-fascinating-story-behind-athens-most-famous-tree/article\\_9addc97e-54c9-11ed-ad27-df154a5fe7a3.html](https://www.redandblack.com/culture/the-fascinating-story-behind-athens-most-famous-tree/article_9addc97e-54c9-11ed-ad27-df154a5fe7a3.html).

<sup>12</sup> Allen.

no one has ever contested the tree's property rights;"<sup>13</sup> "While there's no proof of the legality of Jackson's deed, the people of Athens have never contested the tree's rights to the land;"<sup>14</sup> "It's quite a story, but we treat it as kind of a public street tree;"<sup>15</sup> "And what difference should it make, whether William H. Jackson ever deeded to itself a tree which he never owned [...] The sentiment is there, unique and beautiful. Athenians enjoy the honor of having nurtured this sentiment by clothing the tree with a personality and giving it greater protection than any formal legal document could ever have done."<sup>16</sup> In other words, the tree does not own itself. But its lack of legal rights doesn't deter the humans who nurture it, pick up after it, drive around it, prune it, and ensure the survival of its progeny by affording it space—space legally belonging to the municipality. They act as if it owns itself.

The remarkable state of affairs in Athens demonstrates that while US law has not yet acknowledged the rights of nonhumans, the ways in which humans relate to nonhuman actants suggests that we are ready for—and in some locales have already accepted—the need for that acknowledgment. Yet in our current sociopolitical moment, we see that “beautiful sentiment” may not be sufficient or lasting. The political rhetoric around climate change, for example, may turn economic interests against the preservation of nonhuman entities. Even good faith actors who desire to end poverty may be willing to cull trees to erect much needed infrastructure. We must also consider time, effort, and resources of willing advocates in establishing the rights of nonhumans. All this is not to say

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<sup>13</sup> *Visit Athens GA.*

<sup>14</sup> Owens.

<sup>15</sup> Nazario.

<sup>16</sup> Coulter, 20-21.

that the legal interests of nonhumans should be presented as above those of humans—even on a planet on fire. It is not that nonhumans should de facto win any argument over who or what matters most. The point is that we must voice, hear, and deliberate on arguments on the behalf of nonhumans. We must learn to advocate for them, and with their interests in mind. We must also accept that considering nonhuman interests may, paradoxically, better serve our own.

In this dissertation, I will make two main arguments. First, I argue that the rhetoric of materiality and new materialism have articulated an awareness that humans are not alone or centered in their interests and behaviors, and that possession of this worldview makes us accountable to nonhuman entities and things. To be clear, these views are not unique: they appear in belief systems like Shintoism, Shamanism, Taoism, and Buddhism; and in the rituals and lifeways of Inuit peoples, Indigenous Australians, First Nation and Indigenous American peoples, Tuareg and Berber peoples of the Sahara region, Aymara peoples of the Andes—to name just a few. New materialism is an iteration tailored for Western audiences seeking to challenge underlying assumptions derived from the Enlightenment and its sociopolitical offshoots. Past scholarship on new materialism has focused on the necessity and development of non-anthropocentric awareness; I take this to be a first move—an epistemic condition for moral action. For the rhetoric of materiality to fulfill its ethical responsibility, we must act through advocating for, and in consideration of, nonhumans. Second, that despite being traditionally conservative in their rhetoric, legal spaces and actors are producing discursive openings for new materialist awareness to inform jurisprudential philosophy, decision making, and action. There are three goals for

these arguments: 1) bridge scholarly gaps between rhetoric of materiality and jurisprudence; 2) demonstrate how public understanding of materiality is moving into legal spaces, even if the results are not advantageous to nonhumans; 3) provide examples of how to analyze legal artifacts for discursive openings for rhetoric of materiality; and 4) reinvigorate new materialist scholarship by moving it from description of necessary awareness to ethical and legal action. To make these arguments, I will first define new materialism and new materialist ethics in a review of scholarly literature.

### Literature Review: New Materialism

Seeking discursive openings for rhetorical invention in judicial spaces requires an understanding of new materialism and its explicit (and implicit) ethics. To state the obvious, ethics are required for justice. The connection between new materialism, ethics, and the law is undertheorized in current scholarship. There are many reasons for this, a significant number of which may be accounted for by the difficulty of interdisciplinary work in the academy: rhetoric, philosophy, and law are inherently related but not always studied as such. However, the gap in scholarly literature I hope to bridge in this dissertation is more specific: the rhetoric of materiality is ready to evolve, and current real-world conditions make this evolution not only probable but necessary to fulfill our ethical obligations to nonhumans and ecological systems. With this goal in mind, this literature review will consider: 1) how new materialism is defined; 2) scholarly applications of new materialism thus far; 3) how new materialism explicitly and implicitly makes ethical

arguments, and current critiques thereof; and 4) how new materialism—or more accurately, its progenitors—respond to law.

### *Defining New Materialism*

In rhetoric, new materialism has emerged partially as a response to the limits of epistemology. Epistemic frameworks give humans hierarchical advantage over all other things, living and non-living. As rhetoricians Scot Barnett and Casey Boyle critically reflect, in the epistemic view “the world matters, but only insofar as it matters for us.”<sup>17</sup> Indeed, too much emphasis on epistemology comes with a price: it constrains our ability to grasp thingness, or the non-discursive materialities that call for response. Consequently, rhetorical scholars have more recently shifted from epistemology to ontology, leading them to embrace what has come to be known as new materialism. At its core, new materialism is about radically de-centering humans and breaking down—or at least questioning—some of our most damaging conceptions of the world and its nonhuman inhabitants. To define new materialism for the purposes of this dissertation, I will briefly review three of its key moves: challenging binaries, emphasizing becoming, and encouraging attunement.

Binaries are a system of classification, a way to keep things in their place. Any list of binaries demonstrates embedded power relations through the arrangement of terms, the

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<sup>17</sup> Scot Barnett and Casey Boyle, “Rhetorical Ontology, or, How to Do Things with Things,” in *Rhetoric Through Everyday Things*, ed. Scot Barnett and Casey Boyle (Tuscaloosa, Alabama: The University of Alabama, 2016), 3.

first of which is held over the second: subject-slash-object, mind-slash-matter, human-slash-nonhuman. The slash cuts between, severing connections for the purposes of individuation and containment. The binary mechanism encourages subjugation and othering. Significant work has been done by rhetoric and materiality scholars to trouble and dismantle this mechanism. Rhetorical scholar Jenny Rice reconceives the rhetorical situation as one not limited to independent variables, but more of an ecology of emergent processes that defy containment: “Situation bleeds in the concatenation of public interaction. Public interactions bleed into wider social processes. The elements of rhetorical situation simply bleed.”<sup>18</sup> Political philosopher Jane Bennett, drawing on the work of Gilles Deleuze and Felix Guattari, dissolves boundaries in favor of assemblages, or “living, throbbing confederations” with “uneven typographies” in which some areas are more powered and/or trafficked than others.<sup>19</sup> Physicist and feminist theorist Karen Barad uses a diffractive methodology that takes into account what she calls intra-action, in which things are a “mutual constitution of entangled agencies” that delegitimize the inside/outside binary in favor of a nondeterministic dynamism.<sup>20</sup> This is conceptual slippage: bleeding, throbbing, entangled matter that defies classification and subjugation.

New materialism’s second move is emphasizing what Barad calls “a dynamic intra-active becoming.”<sup>21</sup> “Matter,” Barad writes, “is not a thing but a doing, a congealing of

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<sup>18</sup> Jenny Edbauer, “Unframing Models of Public Distribution: From Rhetorical Situation to Rhetorical Ecologies,” *Rhetoric Society Quarterly* 35, no. 4 (2005): 9.

<sup>19</sup> Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Durham and London: Duke University Press, 2010), 33, 140, 177.

<sup>20</sup> Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Durham and London: Duke University Press, 2007), 33.

<sup>21</sup> Barad, *Meeting the Universe Halfway*, 151.

agency.”<sup>22</sup> Agency itself is an enactment, not an attribute to be possessed. Barad underscores this point by explaining that agency never runs out, there is no finishing point or done-ness—only continual iterative reconfiguration. This results in changes to our understanding of time and determinism. The past is not behind us, nor is the future what lies ahead. Rather both are “enfolded participants in matter’s iterative becoming. Becoming is not an unfolding in time, but the inexhaustible dynamism of the enfolding of mattering.”<sup>23</sup> Rhetorician Thomas Rickert’s exploration of chora also emphasizes becoming. The chora is a third space, a dreamspace, a “strangely displaced place” that while appearing passive, is simultaneously generative and withdrawing.<sup>24</sup> It is an inventional space that enables creation of things and ways of being while also withdrawing from them, like a bubble wand that recedes to the background once a bubble has been released to float. Subjectivity is not the purview of humans alone, but “condensations of probabilities realized in movement, materializes in space, and invented in place.”<sup>25</sup> Note Rickert’s language here: condensation, a transformative collection; probabilities, potentialities and likelihoods; realization, an act of growing awareness.

This prepares us for new materialism’s third move: encouraging attunement. There are at least two ways to locate attunement; one envisions attunement as something that works through humans while the other considers attunement as an action taken by humans. Falling into the first category, Rickert argues that attunement is a fundamental

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<sup>22</sup> Barad *Meeting the Universe Halfway*, 151.

<sup>23</sup> Barad *Meeting the Universe Halfway*, 234.

<sup>24</sup> Thomas Rickert, *Ambient Rhetoric: The Attunements of Rhetorical Being* (Pittsburgh, PA: University of Pittsburgh Press, 2013), 50.

<sup>25</sup> Rickert, 97.

entanglement that is always already present between things. It is not something we do, but a thing that is done to and through us, in order to reveal potentialities and potential ontological commonalities: “rhetoric reveals by attuning us to the affordances of beings that are held in common.”<sup>26</sup> The other, more common description of attunement is one of an active stance that humans take to attend to materiality, or even an activity we perform. Rhetorical scholar Jodie Nicotra writes that attunement requires deliberate and intentional attention to multiple elements in a system and their potentialities. Attunement to the nonhuman, nonorganic actants is particularly important because it requires “the interruption of customary modes of perception” and promotes “the development of new habits of attention.”<sup>27</sup> Likewise, anthropologist Kathleen Stewart associates attunement with being “called to a state of attention that is also an impassivity—a watching and waiting, a living through.”<sup>28</sup> These atmospheric attunements encourage exploration of new potentialities, including forms of writing and critique that “detour into descriptive eddies and attach to trajectories.”<sup>29</sup>

Scholars have included all three of new materialism’s theoretical moves—challenging binaries, emphasizing becoming, and encouraging attunement—in projects that seek a change in perception and a deepening of understanding. To see these concepts in action reveals what rhetoric of materiality can do.

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<sup>26</sup> Rickert, 187.

<sup>27</sup> Jodie Nicotra, “Assemblage Rhetorics: Creating New Frameworks for Rhetorical Action,” in *Rhetoric Through Everyday Things*, ed. Scot Barnett and Casey Boyle (Tuscaloosa, Alabama: The University of Alabama, 2016), 187.

<sup>28</sup> Kathleen Stewart, “Atmospheric Attunements,” *Environment and Planning D: Society and Space* 29 (2011): 446.

<sup>29</sup> Stewart, 452.

## *Scholarly Applications of New Materialism*

Current conceptions of new materialism have been put to work in significant scholarship, especially in critical work where increased awareness is a vital component of repair to persons, things, cultures, histories, and viewpoints that have been subject to oppression, erasure, and irreparable harm. In other words, attunement is a laudable goal because it produces new kinds of awareness about the world. I will focus on three areas of inquiry that excel at the application of new materialism, particularly in encouraging attunement: methods in field rhetoric; environmental, animal, and bio rights; and critical cultural studies.

In rhetorical field methods, scholars are encouraged to take on new materialist perspectives in their research, through which “the places of persuasion become not only heuristics for locating and enacting the available means of persuasion, but also the tangible places in which rhetoric as capacity and constellation reveals itself.”<sup>30</sup> By embedding oneself and attuning to places and materialities, researchers can better account for local enmeshments and becomings. Examples of resulting realizations include: the ways farmers form material and emotional attachments to “farms” that cannot be adequately captured by “system,” a term used by sustainability scientists;<sup>31</sup> that

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<sup>30</sup> Candice Rai and Caroline Gottschalk Druschke, “On Being There: An Introduction to Studying Rhetoric in the Field,” in *Field Rhetoric: Ethnography, Ecology, and Engagement in the Places of Persuasion*, eds. Candice Rai and Caroline Gottschalk Druschke (Tuscaloosa: The University of Alabama Press, 2018), 2.

<sup>31</sup> Carl G. Herndl et al, “What’s a Farm? The Languages of Space and Place,” in *Field Rhetoric: Ethnography, Ecology, and Engagement in the Places of Persuasion*, eds. Candice Rai and Caroline Gottschalk Druschke (Tuscaloosa: The University of Alabama Press, 2018), 71.

the concept of “the ruin” “is a homogenizing abstraction that does not resonate with the sensuous texture of actual places and objects;”<sup>32</sup> that “people challenge and support the normative cartographies of space/place by (re)articulating them through tactics of enacting material change, engaging in practices that establish vernacular boundaries and establishing (new) patterns of movement;”<sup>33</sup> that “living futures are always ‘indebted’ to the dead that surround them;”<sup>34</sup> that “interviews as affective exchanges are sites of intra-actional becoming,”<sup>35</sup> and that rhetorical research is “not following a thing, but a series of processes in which the linking and delinking of elements becomes significant to public life.”<sup>36</sup> By embracing new materialism generally and attunement specifically, these scholars are gaining an increased awareness and understanding of how the rhetoric of materiality functions and how humans respond as actants in assemblages with nonhuman actors.

In the areas of environmental, animal, and bio rights, scholars have sought to establish and embrace a worldview that better understands the rights, values, and even desires of nonhuman actants—a way of attuning to the world around us to address the

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<sup>32</sup> Gaston R. Gordillo, *Rubble: The Afterlife of Destruction* (Durham and London: Duke University Press, 2014), 7.

<sup>33</sup> Samantha Senda-Cook, Michael K. Middleton, and Danielle Endres, “Rhetorical Cartographies: (Counter)Mapping Urban Spaces,” in *Field Rhetoric: Ethnography, Ecology, and Engagement in the Places of Persuasion*, eds. Candice Rai and Caroline Gottschalk Druschke (Tuscaloosa: The University of Alabama Press, 2018), 99.

<sup>34</sup> Eduardo Kohn, *How Forests Think: Toward an Anthropology beyond the Human*. (Berkeley: University of California Press, 2013), 24.

<sup>35</sup> Kate G. Willink and Salma T. Shukri, “Performative Interviewing: Affective Attunement and Reflective Affective Analysis in Interviewing,” *Text and Performance Quarterly* 38, no. 4 (2018): 188. doi:10.1080/10462937.2018.1526409.

<sup>36</sup> Phaedra C. Pezzullo and Gerard A. Hauser, “Afterword: Traveling Worlds to Engage Rhetoric’s Perennial Questions,” in *Field Rhetoric: Ethnography, Ecology, and Engagement in the Places of Persuasion*, eds. Candice Rai and Caroline Gottschalk Druschke (Tuscaloosa: The University of Alabama Press, 2018), 257.

(sometimes unnoticed) harms humans are complicit in bringing about. For Jenell Johnson, this work includes examining what she calls bioidentification, or the “evocation of life as a shared substance, as well as the feeling that such connection produces.”<sup>37</sup> As we respond to the global material realities of climate change, pollution, mass extinctions, and pandemics, we tend to embrace species thinking, which focuses on human sameness as defined by vulnerability and finitude. Species thinking makes humans feel united in their condition, but it also tends to reinforce anthropocentrism and the belief that humans and their concerns exist outside other spheres of planetary life—a belief that spurs the kinds of exploitation that challenges our planet’s survival in the first place.<sup>38</sup> Johnson argues instead for bioplurality, a position that recognizes continuity and discontinuity across all forms of life, embraces life as a process of becoming, and attends to the ways difference accounts for power imbalance. A biopluralistic approach allows Johnson to assemble perspectives from academics across bio disciplines including ecology philosopher Dorion Sagan, environmental and sustainability expert Kyle Whyte, and plant biologist Catharine Conley—resulting in new approaches to kinship, reciprocity, symbiosis, and scientific rhetoric.

Like Johnson, Nicotra also argues for greater attention paid to life in action. Building on Bennett’s work, Nicotra connects Permaculture to a set of concepts that embrace attunement: paying attention to feedback loops, cycles, and multivariants; treating unexpected occurrences not as problems, but as catalysts for emerging opportunities; and

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<sup>37</sup> Jenell Johnson, *Every Living Thing: The Politics of Life in Common* (University Park, Pennsylvania: The Pennsylvania State University Press, 2023), 9.

<sup>38</sup> Johnson, 81-82.

accepting and trusting that actants in assemblages may make their own connections regardless of your (human) understanding. Permaculture is oriented to food production, but instead of creating systems of “hierarchy and unidirectional causality,” designers focus on “interactive food webs and feedback loops.”<sup>39</sup> Nicotra takes an example from the Permaculture handbook, which looks at chickens as able to make connections themselves. Designers of food systems that attune to the chicken’s potentialities, e.g., “We must simply trust the chickens,”<sup>40</sup> thereby avoid the cruelties and disasters of industrial farming, “which has attuned to only one or two aspects of chickenness, hence reducing the rich complexity of the chicken assemblage to meat and egg-producing machines.”<sup>41</sup> In an attuned food systems model, flexibility is prized, so instead of focusing on specific outcomes, human actants inhabit a directionality that does not overly determine or discipline nonhuman actants.

In addition to Nicotra, scholars in environmentally concerned disciplines have also worked towards increased attunement as a way to deepen understanding of the natural world and human relations in/to their surroundings: the ways in which “space, time and sensory experience function in public conversation and policy-making around the contested site of a proposed ecological improvement project;”<sup>42</sup> how “wildflower tourists” aid horticulturists working in a postcolonial Australian landscape by demonstrating that “interactions of plants and society are not assessed solely through the visual assignment

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<sup>39</sup> Nicotra, 192.

<sup>40</sup> Permaculture handbook quoted in Nicotra, 193.

<sup>41</sup> Nicotra, 193.

<sup>42</sup> Thor Kerr, “Negotiating Green Space Between Ecological Threats and Beloved Objects,” *Continuum* 29, no. 3 (2015): 403.

of value but also through how the landscapes smell, taste, sound, or feel and how one moves through them;”<sup>43</sup> and how contemporary ecophilosophy “requires the cultivation of an ecological sensibility capable of closer attunement to the expressivity of the world and to what the land, the ancestors, and the animals require from us.”<sup>44</sup>

Perhaps the most well-known ecological scholar to encourage attunement is Robin Wall Kimmerer, professor of environmental and forest biology, whose *Braiding Sweetgrass* has become canonical for rhetoricians of materiality. Kimmerer describes a way of being, or being attuned, that does not follow institutionalized or Western traditional disciplinary control. Kimmerer is Potawatomi with Indigenous knowledge of plants, as well as trained botanist; her writing demonstrates the difference between these ways of knowing. She describes interviewing for botany programs and being told that her questions, such as why goldenrod and asters are so beautiful together, are outside the realm of scientific knowledge. Her being in the world is instead influenced by the creation myths of her people, when Skywoman “buried her beloved daughter in the earth. Her final gifts, our most revered plants, grew from her body.”<sup>45</sup> The notion of plants and natural things as a gift creates an obligation, or cherishing, that rejects commodification and exploitation. In this way, Kimmerer reconfigures her knowing apparatus. She does the same with language, pointing out that English presumes that animacy is a solely human attribute. A bay, for example, is a noun in English, a dead “it.” But in Potawatomi, “the verb *wiikwegamaa*—to

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<sup>43</sup> John Charles Ryan, “Towards a Corporeal Aesthetics of Plants: Ethnographies of Embodied Appreciation Along the Wildflower Trail,” *Continuum* 24, no. 4 (2010): 555.

<sup>44</sup> Anatoli Ignatov, “African Orature as Ecophilosophy: Tuning in to the Voices of the Land,” *GeoHumanities* 2, no. 1 (2016): 78.

<sup>45</sup> Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge, and the Teaching of Plants* (Minneapolis: Milkweed Editions, 2013), 23.

be a bay—releases the water from bondage and lets it live,” acknowledging the dialogic relations the water has with shores and animals.<sup>46</sup> Kimmerer attunes by “listening in wild places.” Trees have been muted by science, but they are always talking to one another through pheromones and subterranean fungi—both below, or below the threshold of, human perception. She describes attending to vital changes in the environment, such as *puhpowee*, a word that means “the force which causes mushrooms to push up from the earth overnight.”<sup>47</sup> Kimmerer’s combination of thick description, attunement, and indigenous knowledge exemplifies how new materialism can be applied to ecological assemblages that also contain cultural actants. The ways in which materialities increase awareness of cultural harms is also eloquently expressed in scholarly work that centers Blackness and Black experience.

Producing space for Black geographies is a way of opening up discourse to address harms that have been culturally erased. Christina Sharpe’s work in English Literature and Black Studies addresses materialities that have no space, no place at all: those of living in “the wake.” Sharpe employs every meaning of the word: the wake of a ship which drags bodies along and ripples out; wake as a state of wakefulness; wake as an acknowledgment and celebration of the dead—all are mobilized in a project that is “seeking a resolution to Blackness’s ongoing and irresolvable abjection.”<sup>48</sup> The point is that transatlantic slavery has left a wake that continues to impact the lives of Black people in material and

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<sup>46</sup> Kimmerer, *Braiding Sweetgrass*, 55.

<sup>47</sup> Kimmerer, *Braiding Sweetgrass*, 49.

<sup>48</sup> Christina Sharpe, *In the Wake: On Blackness and Being* (Durham and London: Duke University Press, 2016), 11-12.

devastating ways. The wake is inseparable from history, yet institutionalized systems of knowing have forcefully denied not only an historical reckoning but a space/place to process and mourn. The lives lost linger materially, just as the nutrients of the bodies of drowned slaves linger in the ecosystems of the ocean. Wake work means attuning to the weather, as in the pervasive climate of antiblackness;<sup>49</sup> attending to the connections between “the birth industry to the prison industry, the machine that degrades and denies and eviscerates reproductive justice to the machine that incarcerates;”<sup>50</sup> staying in the hold in order to inhabit disbelief over Black and migrant suffering. This attunement is what Stewart would call the labor of living-through. It is a space making process that examines and reconfigures apparatuses of Black abjection, transforming places that were intended to erase Blackness into spaces for ethics of care, “an ethics of seeing, and of being in the wake as consciousness; as a way of remembering and observance that started with the door of no return and continued in the hold of the ship and on shore.”<sup>51</sup> It is a way of being that takes seriously and tries to repair the threat to shared, enmeshed existences seen in Kimmerer’s *Windigo* and Sharpe’s indigo-dyed hands of slaves who died in the pits of the Sea Islands off the coast of South Carolina.<sup>52</sup>

Note that the ethics Sharpe describes are an ethics of “seeing,” “being,” “remembering,” and “observance.” Sharpe’s work, as well as the others mentioned here, present new materialism as an ethical project insofar as it promotes change in perception,

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<sup>49</sup> Sharpe, 106.

<sup>50</sup> Sharpe, 87.

<sup>51</sup> Sharpe, 130-131.

<sup>52</sup> Sharpe, 126.

deepening of understanding, decentering the human, attending and attuning. These terms bring to the fore associated meanings of quiet, calm, meditation; theory, abstraction, vision; listening, learning, understanding; obligation, accountability, responsibility. These meanings have (for the most part) a positive valence—they are good things. And the hard work of scholars I have explored in this section are stellar examples of what can be co-created in and with entangled materiality. However, as new materialism argues, examples of praxis will be necessarily endlessly differentiated. Each enacts a form of justice, dependent on what Barad calls “a delicate tissue of ethicality” that “runs through the marrow of being.”<sup>53</sup> But are there core ethical principles of new materialism that we can enunciate more clearly?

### *Ethics of New Materialism*

The ethics of new materialism are, perhaps unsurprisingly, everywhere and nowhere. A review of new materialist scholarship paints a picture of a broad ethical stance (attuning and attending to materiality) with high stakes (e.g., de-centering humans as a way to combat thought and action that has led us to dominate, exploit, and cause harm to nonhumans and ecologies). What the literature does not provide is a guide to ethical action in (still) human-dominated spaces. New materialists readily admit this, but efforts to encourage evolution of new materialist ethics are presently few and far between. To assess new materialist ethics and identify gaps in the literature, I will begin by defining new

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<sup>53</sup> Barad, *Meeting the Universe Halfway*, 395.

materialist ethics as a stance or aesthetic sensibility. I will then examine challenges to new materialist ethics within the literature itself, and from scholars using other approaches. Finally, I will offer my own assessment of new materialist ethics and their connection to my dissertation project.

Defining new materialist ethics begins with decentering humans and challenging binaries/hierarchies that perpetuate human domination over other entities and things. I will draw attention to three aspects of challenging boundaries in this way. First, that nonhuman actants become productive participants in constituting reality, that we should “give up the futile attempt to disentangle the human from the nonhuman,”<sup>54</sup> and the arrogant idea “that the only way to be animate, to be worthy of respect and moral concern, is to be human;”<sup>55</sup> and acknowledge that “we are not the only active beings.”<sup>56</sup> Second, that human individualism is a denial of the multitudinous assemblages that work on, in, and through the human: “My ‘own’ body is material, and yet this vital materiality is not fully or exclusively human. My flesh is populated and constituted by different swarms of foreigners.”<sup>57</sup> Third, that causality must be understood as entangled: “intra-actions are non arbitrary, nondeterministic causal enactments through which matter-in-the-process-of-becoming is iteratively enfolded into its ongoing differential materialization.”<sup>58</sup> Following from this, agency is distributed: “agency is a matter of intra-acting; it is an enactment, not something that someone or something has.”<sup>59</sup> While this talk “reinvokes the need to

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<sup>54</sup> Bennett, *Vibrant Matter*, 116.

<sup>55</sup> Kimmerer, *Braiding Sweetgrass*, 57.

<sup>56</sup> Barad, *Meeting the Universe Halfway*, 218.

<sup>57</sup> Bennett, *Vibrant Matter*, 112.

<sup>58</sup> Barad, *Meeting the Universe Halfway*, 179.

<sup>59</sup> Barad, *Meeting the Universe Halfway*, 178.

detach ethics from moralism,” ostensibly because moralism is anthropocentric, “and to produce guides to action appropriate to a world of vital, crosscutting forces,”<sup>60</sup> specifics about how to act are hard to find. What we have instead is the encouragement toward a particular sensibility. To illuminate the differences between new materialist scholars on this point, I will briefly touch on how they situate their ethics in broader philosophic, cultural, and political genealogies.

New materialist ethics are in conversation with a variety of philosophical thinkers, most notably Michel Foucault, Gilles Deleuze, Bruno Latour, Baruch Spinoza, Emmanuel Levinas, and (occasionally) Martin Heidegger. To begin, new materialism challenges liberal humanism, which centers human concerns and individual human subjects. This is apparent in new materialism’s rejection of individuals of any kind, due to an ontological commitment to entanglements and assemblages. New materialism resonates with Foucault’s rejection of liberal humanism in favor of a model of existence that acknowledges the ways discourse works through us, as well as his intent to bring “assumptions and things taken for granted again into question, to shake habits, ways of acting and thinking, to dispel the familiarity of the accepted.”<sup>61</sup> Similarly, Deleuzian ethics are characterized by “a radical openness to the emergent, multiple being of the other, where that other is both human and nonhuman, organic and inorganic.”<sup>62</sup> Deleuze and Guattari provide new materialists with the concept of the assemblage, which shares

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<sup>60</sup> Bennett, *Vibrant Matter*, 38.

<sup>61</sup> Foucault quoted in Bronwyn Davies, “Ethics and the New Materialism: a Brief Genealogy of the ‘Post’ Philosophies in the Social Sciences.” *Discourse* 39, no. 1 (2018): 117.

<sup>62</sup> Davies, 119.

similarities with Latour's Actor-Network theory; they combine to form the basis of new materialism's understanding of entangled ideology and swarms of actants, which further destabilize the impact of human subjects. These are foundational influences on new materialism, but when new materialist scholars write about ethics they tend to focus on Spinoza, Levinas, or Heidegger.

Bennett takes her cues from Spinoza, who claims that god is "a being absolutely infinite, i.e., a substance consisting of an infinity of attributes, of which each one expresses an eternal and infinite essence."<sup>63</sup> This substance, Spinoza argues, is part of all things and expresses itself in an infinite number of ways. One of these infinite attributes is Spinoza's concept of *conatus*, a natural tendency or striving. For Bennett, *conatus* is part of the vitality of all things, the vibrancy in vibrant matter.

"Any thing whatsoever, whether it be more perfect or less perfect, will always be able to persist in existing with that same force whereby it begins to exist, so that in this respect all things are equal." Even a falling stone, writes Spinoza, "is endeavoring, as far as in it lies, to continue in its motion." As Nancy Levene notes, "Spinoza continually stresses this continuity between human and other beings," for "not only do human beings not form a separate imperium unto themselves; they do not even command the imperium, nature, of which they are a part."<sup>64</sup>

For Bennett, applying these concepts to materiality results not only in supporting new materialism's three moves (challenging binaries, emphasizing becoming, encouraging attunement), it also presents new materialism as a democratizing, egalitarian project: "a vital materialist theory of democracy seeks to transform the divide between speaking

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<sup>63</sup> Steven Nadler, "Baruch Spinoza", *The Stanford Encyclopedia of Philosophy* (Summer 2022 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/sum2022/entries/spinoza/>.

<sup>64</sup> Bennett, *Vibrant Matter*, 2.

subjects and mute objects into a set of differential tendencies and variable capacities.”<sup>65</sup>

Note that Bennett is producing an ethical stance that does not seek radical upheaval of existing political structures, though she is arguing that democracy can be made better, more inclusive, if we expand it to include nonhuman actants and their concerns. To be clear, the answer to the question of how we build a more inclusive democracy for things is not answered in Bennett’s text(s), except to say that we should expand our conceptions of materiality and our entangled existences—to develop a new materialist sensibility.

Bennett is the undisputed champion of both arguing for and describing the aesthetic sensibility of new materialism. In *The Enchantment of Modern Life*, she notes that ethics is “both a moral code and a deliberately cultivated sensibility,” and that “in addition to rules of behavior, one needs an aesthetic disposition hospitable to them” which should be perceptually refined through the application to particular cases (examples of which, I would argue, can be found in the preceding section of this literature review, Scholarly Applications of New Materialism).<sup>66</sup> In *Vibrant Matter*, she elaborates on this sensibility: “the ethical task at hand here is to cultivate the ability to discern nonhuman vitality, to become perpetually open to it.”<sup>67</sup> This combination of openness and attentiveness is akin to attunement. The idea is further sketched out in *Influx & Efflux*, in which she directly connects these evocative ways of thinking to poetry and time dilation: “poetry slows the metabolization of inflow into output [...] Here, poetry is not the linguistic

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<sup>65</sup> Bennett, *Vibrant Matter*, 108.

<sup>66</sup> Jane Bennett, *The Enchantment of Modern Life: Attachments, Crossings, and Ethics* (Princeton and Oxford: Princeton University Press, 2001), 29.

<sup>67</sup> Bennett, *Vibrant Matter*, 14.

expression of an author's ideas and feelings but an array of words that delays the landing. Poetry buys time for inexact, inarticulate percepts and influences to weigh in."<sup>68</sup> In other words, Bennett advocates for a poetic sensibility that is as open to nonhumans as possible, one that slows time to allow for what is sensed to affect human deliberation. Bennett attaches great value to this sensibility and outlines the consequences of its neglect:

I am keen to explore, for example, the ways in which a (vague, protean, ahuman) tendency for bodies to lean, make connections, and form attachments can be harnessed on behalf of a more generous, egalitarian, and ecological public culture. Neglect of such efforts has, I believe, made its own contribution to the rise of the neofascist, earth-destroying politics now threatening to become hegemonic.<sup>69</sup>

In this way, Bennett expands on her interest in a more inclusive democracy to say that the lack of such inclusion actively contributes to systems of power that create harm and suffering.

While Bennett calls the new materialist sensibility "aesthetic," Barad prefers the term "posthuman," because humanist ethics will not suffice "when the 'face' of the other that is 'looking' back at me is all eyes [like Brittlestars], or has no eyes, or is otherwise unrecognizable in human terms."<sup>70</sup> The posthuman sensibility, like Bennett's aesthetic sensibility, equates responsibility with prolonged openness: "Responsibility entails an ongoing responsiveness to the entanglements of self and other, here and there, now and then."<sup>71</sup> It also requires "learning how to intra-act responsibly" with nonhuman actants,

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<sup>68</sup> Jane Bennett, *Influx and Efflux: Writing Up with Walt Whitman*, (Durham: Duke University Press, 2020), 50.

<sup>69</sup> Bennett, *Influx and Efflux*, xix-xx.

<sup>70</sup> Barad, *Meeting the Universe Halfway*, 392

<sup>71</sup> Barad, *Meeting the Universe Halfway*, 394.

the agency of which “does not lessen human accountability; on the contrary, it means that accountability requires that much more attentiveness to existing power asymmetries.”<sup>72</sup>

Barad grounds her “ethics of mattering” in the work of Levinas, who “rejects the metaphysics of the self” on which traditional ethics are based.<sup>73</sup> Ethics is not something created or chosen by humans; like knowledge, it is produced through multitudinous intra-active becomings: “the ethical subject is not the disembodied rational subject of traditional ethics but rather an embodied sensibility, which responds to its proximal relationship to the other through a mode of wonderment that is antecedent to consciousness.”<sup>74</sup> Levinas’s ethics relies heavily on the notions of proximity and responsibility, which is interpreted by Barad to mean that when humans intra-act with other things or entities, we are responsible for the ways “the manifold of entangled relations is reconfigured” by opening some possibilities and foreclosing others. Barad comes closest to articulating what this responsibility would look like in the following:

We are accountable for and to not only specific patterns of marks on bodies—that is, the differential patterns of mattering of the world of which we are a part—but also the exclusions that we participate in enacting. Therefore accountability and responsibility must be thought in terms of what matters and what is excluded from mattering.<sup>75</sup>

Here we see that Barad is not interested in egalitarianism so much as a critical project that encourages us to pay attention (to attune) to our perceptions of what does and does not “matter.” This goal is less about equality or reducing harm than it is an acknowledgment of

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<sup>72</sup> Barad, *Meeting the Universe Halfway*, 218-219.

<sup>73</sup> Barad, *Meeting the Universe Halfway*, 391.

<sup>74</sup> Barad, *Meeting the Universe Halfway*, 391.

<sup>75</sup> Barad, *Meeting the Universe Halfway*, 394.

what we lose (or cause others to lose) in the process of intra-acting. In other words, we must be aware of and look out for the nonhumans with which we are entangled. And like Bennett, Barad sees vast implications of adopting this sensibility:

And perhaps it is this eternal link [...] this shared transience, and the possibilities for renewal that follow downfall, that is needed in confronting the rise of fascism in its connections with late capitalism, the normativity of state-sanctioned violence against the oppressed, and the ongoing devastation of the planet and all its inhabitants.<sup>76</sup>

Again, the ethical stance of new materialism is one that should be adopted by humans, with potentially great significance to humans and nonhumans alike.

Rickert prefers Heidegger as his main influence, with particular attention given to Heidegger's concept of dwelling. As Rickert points out, Heidegger argues that dwelling is "not a worldview but a principle of being," "a way of being conditioned and permeated by things so that they are inseparable from what it means to live in the world."<sup>77</sup> A way of being. Dwelling requires humans to acknowledge that they are not individuals but entangled with other materialities. Rickert argues that this means humans should value nonhumans, but this "must stem from an ambient sensibility practiced in everyday comportment, not as an imposition on the world or an assignment of value, but as emergent through everyday disclosive practices."<sup>78</sup> Rickert establishes his own version of new materialist sensibility here, and this sensibility must emerge rather than be imposed. Rickert's goal, while not limited to ecological situations but clearest when articulated as

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<sup>76</sup> Karan Barad, "What Flashes Up: Theological-Political-Scientific," in *Entangled Worlds: Religion, Science, and New Materialisms*, eds. Catherine Keller and Mary-Jane Rubenstein (New York: Fordham University Press, 2017), 75.

<sup>77</sup> Rickert, 223.

<sup>78</sup> Rickert, 239.

such, is sufficiency—a contentment that forecloses exploitative and harmful excess. However, just like valuing nonhumans, it must be and be felt rather than imposed: “for sufficiency to take hold, we have to come to see it as a manifestation of the being of the world, including human being and its practices. Sufficiency must achieve an ontological grip on us; it must be rendered from an ambient attunement rather than a relation of exteriority.”<sup>79</sup> This is a rejection of humanist ethics, like that seen in Bennett and Barad, which Rickert makes explicit by diminishing human attempts at environmental interventions (recycling, taxing bad actors, etc.).<sup>80</sup> In sum, Rickert encourages dwelling (a way of being) and practicing ambient sensibility (an emergent practice) toward the goal of sufficiency, which can only be rendered from attunement rather than imposed from the outside. Like in Bennett and Barad, an ethical guide to action—besides that of dwelling and attuning—is largely absent.

Having examined ethics in the work of Bennett, Barad, and Rickert, a quick review is in order. The ethics of new materialism: 1) are mostly ephemeral, making themselves known through a variety of descriptions; 2) require something other than humanist ethics; 3) encourage prolonged attention to nonhuman actants and their power differentials (attuning); and 4) manifest as a sensibility. The message is that the more humans develop/practice/attune this sensibility, the better equipped we are to offset/prevent/reduce our most destructive tendencies. With these findings in mind, I turn to critiques of new materialist ethics, including my own.

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<sup>79</sup> Rickert, 253.

<sup>80</sup> Rickert, 251.

New materialist ethics may have multiple theoretical vulnerabilities, but they are largely under analyzed and undertheorized. For the purposes of this project, I will attend to three: re-centering the human, the potential of getting lost, and what I call “the poetry problem.” Re-centering the human is a problem insofar as it appears to present a logical inconsistency. If the ethical goal of new materialism is to decenter the human in order to (re)value nonhuman actants and agents, any attempt to describe or prescribe ethical actions in human-centered spaces seemingly reifies the entrenched problems new materialism is attempting to tackle. This is an issue that new materialist scholars are aware of, and is either implicit or explicit in the literature. When new materialists describe ethical imperatives using “we,” they are referring to humans. Bennett and Barad dismiss this inconsistency as immaterial when compared to the necessity of developing a sensibility that can lead to just outcomes. Critics, however, are not so lenient.

Independent scholar Alex Christie writes:

While these discourses elucidate our complicity and imbrication within particular ecological and political assemblages, they also tacitly reinscribe a liberal human subject as the ethical center of an immensely complex universe who, equipped with the knowledge of their enmeshment, can act more ethically or responsibly. That is, these discourses often inadvertently privilege the individuated subject they purportedly decenter and reevaluate.<sup>81</sup>

Arguably, Rickert escapes this criticism, but only because he puts a hard stop to any inklings of ethical human action by repeatedly withdrawing to the idea of emergence from

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<sup>81</sup> Alex Christie, “‘Flying at Our Hand’: Toward an Ethics of Intra-Active Response-Ability,” *Configurations* 28, no. 1 (2020): 119.

within instead of imposition from without (translation: ethics is a way of being that must be; it cannot be imposed through society's rules).

Whether or not new materialism is contradicting itself on anthropocentrism can also lead to meta-criticism about the theory, including accusations of cherry-picking philosophical concepts and purposefully blocking challenges. Political scientists William Kujala and Regan Burles argue that Bennett's reliance on Spinoza's *Ethics* is incomplete without also acknowledging his political arguments from *The Tractatus Theologico-Politicus* and *The Tractatus Politicus*, because "in his political writings he recognizes that 'without a stable state and effective moral community the development of human powers and knowledge is impossible.'"<sup>82</sup> The critique here is that choosing to elevate Spinoza's ethics in absence of his politics allows new materialists to pretend that ontological theory can be separated from human sociopolitical order. If cherry-picking theoretical supports is not bad enough, political theorist Paul Rikert argues that new materialism's position of challenging anthropocentric views and epistemologies allows new materialist scholars to deflect criticism and dismiss critics: "the philosopher who interrogates the position of ontological contemplation is easily brushed aside as 'resentful' and 'hubristic,' still too attached to modern dualisms and concepts. Critique, it follows, is merely an affective error and need not be engaged on its own terms."<sup>83</sup> I believe these critiques of new materialist theory to be valid, and I admit to being frustrated with some new materialist scholars' insistence that returning to human spaces in order to affect change somehow

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<sup>82</sup> William Kujala and Regan Burles, "The Politics of Ethics: Spinoza and New Materialisms." *Theory & Event* 23, no. 1 (2020): 160.

<sup>83</sup> Paul Rikert, "A Critique of New Materialism: Ethics and Ontology." *Critical Psychology* 9, no. 3 (2016): 230.

defeats the usefulness of new materialism. But I do not find these critiques to be persuasive to the point of invalidating new materialist theories and methods. After all, academia is (as it should be) well practiced in applying transformative experiences from outside its discourse (e.g., ethnography); just as it is in accepting theoretical approaches that it views publics as not being ready to embrace (e.g., Marxism in U.S. contexts). What remains, then, is how to fit new materialism—which refuses anthropocentrism—into anthropocentric worldviews and ideologies. In my dissertation, I will argue that one possible answer to this question is to consider new materialism (theory and praxis) as a transformative learning experience that increases awareness of nonhuman actants and their needs, thereby meeting an epistemic condition for moral responsibility. In other words, one journeys out of human-centered spaces to learn, and journeys back to apply that learning toward just outcomes.

Of course, one can get lost along the way. New materialists themselves acknowledge this is a risk. Bennett admits that “prolonged suspension of normative categories and discriminate perception is incompatible with social order, justice, and sanity,” but argues that the risk of falling into poetic dilation is worth it.<sup>84</sup> Barad, in her take on T.S. Eliot’s *J. Alfred Prufrock*, demonstrates her views on getting lost in one’s head: “endless worries upon endless worries stacked up like dirty dishes crafted as a distraction, a prophylactic against facing the really difficult questions in life—does not amount to responsible reflection about the consequences of the choices life holds.”<sup>85</sup> Implicit here is

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<sup>84</sup> Bennett, *Influx & Efflux*, 55-56.

<sup>85</sup> Barad, *Meeting the Universe Halfway*, 395.

the idea that getting lost in feeling for a swarm of actants will not help us make better decisions on behalf of those actants. I recognize that new materialist theory and praxis can provide humans with a kind of retreat from so-called “real world” problems, but that does not negate the benefits gained from the practice. Attuning should be developed as a skill; code-switching from new materialism to anthropocentrism should also be a skill, if one is to apply the awareness gained to human spaces of deliberation.

The first two critiques of new materialist ethics—that recentering the human creates an insurmountable contradiction, and that attuning can lead to getting lost and abdicating responsibility—I take as evidence that new materialism must evolve. If we want to be responsible for nonhuman actants, for example, we must allocate energy and force to advocacy on their behalf. If cultivating a sensibility is the core of new materialistic ethics, then applying that sensibility to the arenas of human problem solving is its ethical next step. Put another way, if we equate a new materialist sensibility with the awareness required for a new kind of moral responsibility, it would be unethical not to evolve. This is where the third critique of new materialism comes in: its language is poetic. The evocative and descriptively mysterious language of new materialists, whether based in poetry (Bennett) or in science (Barad), can appear inscrutable. This language is necessary to describe and embrace the ineffable experience of attuning, but for new materialism’s evolution it seemingly produces a practical problem. Specifically, the language of new materialism is seen as maladroit in the spaces where humans often decide the fate of nonhumans and ecologies en masse: the courts.

## *New Materialism's Progenitors on Law*

Though many new materialist scholars address the ethics of their views, the relationship between new materialist ethics and legal practice remains undertheorized. But there are progenitors of new materialism in other fields who directly critique law and legal systems. I will consider legal discourse from two such sources: Deleuze and Latour. The aim of the following discussion is not to be comprehensive (I leave that to Deleuzian and Latourian scholars), but to examine a few significant points of overlap between their legal discourse and the ideas that have inspired new materialists.

Deleuze's critiques of law and legal systems are generally sparing and evocative—some are mere passing mentions made in interviews—but his influence on new materialism is profound. In *A Thousand Plateaus*, Deleuze and Guattari introduce (at least) three concepts widely taken up by new materialists: rhizomes and assemblages, emphasizing process and becoming, and a rejection of universals in favor of singularities. Deleuze and Guattari define the rhizome using four principles: connection and heterogeneity, in which “any point of a rhizome can be connected to anything other, and must be;”<sup>86</sup> multiplicity, in which “there is no unity to serve as a pivot in the object, or to divide the subject,”<sup>87</sup> and asignifying rupture, in which “a rhizome may be broken, shattered at a given spot, but it will start up again on one of its old lines, or on new lines.”<sup>88</sup> To think rhizomatically is to embrace the ontology of the assemblage—with no hierarchies,

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<sup>86</sup> Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Minneapolis: University of Minnesota Press, 1987), 7.

<sup>87</sup> Deleuze and Guattari, *A Thousand Plateaus*, 8.

<sup>88</sup> Deleuze and Guattari, *A Thousand Plateaus*, 9.

no subject/object divides, no fixity, and no ends. In one sense, law is already legible as rhizomatic, in that legal practice requires constant flow and deliberative discourse that continually acts to support, challenge, or refine existing definitions and values.<sup>89</sup> However, day-to-day observance of the legal system shows it to be extremely hierarchical, requiring deference to judges; binary in its adversarial construction; constrained by history and consequence (e.g., stare decisis); and continually trying to force material singularities (e.g., case facts) to fit anthropocentric social constructions (e.g., laws). It is the latter characterization of legal practice that Deleuze seizes upon when he emphasizes legal spaces as spaces of becoming, and rejects universals in favor of a philosophy of law that “advances by working out from [or prolonging] singularities.”<sup>90</sup>

Deleuze envisions good jurisprudence as driven solely by case law. In agreement with fellow Deleuzian David Saunders, Edward Mussawir explains the impact of this perspective on legal reasoning:

Cases in this sense are not just a collection of material “facts” or contingent “circumstances” over which claims are made in the name of law, the determination of which form lasting principles. They constitute a set of differences that activate the law on the terrain of its fundamental creativity, and through which alone it is possible to “think” it. David Saunders remarks on the way in which Deleuze inverts the usual subordination “of legal case to philosophical principle,”<sup>91</sup> allowing the case to serve as the occasion for the immanent invention of principles rather than as the occasion for the mere application of them. We don’t appeal the pre-existing principles, to pre-existing rights: we find ourselves in cases, situations. This, for Deleuze, is life. [...] It doesn’t subsume cases under principles. It starts [...] from the

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<sup>89</sup> James MacLean, “Rhizomatics, the Becoming of Law, and Legal Institutions;” and Andreas Philippopoulos-Mihalopoulos, “Law, Space, Bodies: The Emergence of Spatial Justice,” in *Deleuze and Law*, eds. Laurent de Sutter and Kyle McGee (Edinburgh: The University of Edinburgh Press, 2012).

<sup>90</sup> Gilles Deleuze, *Negotiations 1972-1990*, trans. Martin Joughin (New York: Columbia University Press, 1995), 153.

<sup>91</sup> David Saunders, “Cases against Transcendence: Gilles Deleuze and Bruno Latour in Defence of Law,” in *Deleuze and Law*, eds. Laurent de Sutter and Kyle McGee (Edinburgh: The University of Edinburgh Press, 2012), 198.

particular case (imagined or real) and ventures to go further toward its extreme singularity, its precise uniqueness for the thought of law. It “dismisses the universal in favour of emissions of singularities.”<sup>92</sup> It embeds the principles in the vicinity of an increasingly unique set of circumstances and an increasingly particular, minor, subtle and technical refinement.”<sup>93</sup>

I quote this passage at length because there is a lot worth unpacking here. To be sure, rhizomatic and assemblage thinking promote inductive over deductive reasoning. But Deleuze also hints at a more radical rethinking of jurisprudence, or at least a compelling thought experiment: a legal system without laws. Laws, principles, and universals are too abstracted from lived experience, too constrained to follow asignifying ruptures, and too interested in answering questions to which it already has the answers to recognize that “which exceeds the categories of law and judgment.”<sup>94</sup> Instead, jurisprudence should view facts, specific to the case, as a “set of differences that activate the law on the terrain of its fundamental creativity.”<sup>95</sup> In this telling, legal practice is not a space where rights and responsibilities are recognized or applied—it is where they are invented.<sup>96</sup> Spaces of invention are spaces of becoming, even (or perhaps especially) for humans. As scholar Paul Patton notes, Deleuze “identified jurisprudence as the field or process through which peoples organized” by the rule of law “enter into becomings.”<sup>97</sup>

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<sup>92</sup> Gilles Deleuze, *Two Regimes of Madness: Texts and Interviews 1975-1995*, ed. David Lapoujade, translated by Ames Hodges and Mike Taormina (New York: Semiotext(e), 2006), 350.

<sup>93</sup> Edward Mussawir, “A Modification in the Subject of Right: Deleuze, Jurisprudence and the Diagram of Bees in Roman Law,” in *Posthuman Ecologies: Complexity and Process After Deleuze*, eds. Rosi Braidotti and Simone Bignall (New York and London: Rowman & Littlefield International Ltd, 2019), 246.

<sup>94</sup> Laurent de Sutter and Kyle McGee, “Introduction,” in *Deleuze and Law*, eds. Laurent de Sutter and Kyle McGee (Edinburgh: The University of Edinburgh Press, 2012), 5.

<sup>95</sup> Mussawir, 244.

<sup>96</sup> Mussawir, 244.

<sup>97</sup> Paul Patton, “Immanence, Transcendence, and the Creation of Rights,” in *Deleuze and Law*, eds. Laurent de Sutter and Kyle McGee (Edinburgh: The University of Edinburgh Press, 2012), 20.

This leads Deleuze to his most controversial utterances on law: a seeming rejection of universal human rights discourse. Deleuze is interested in legal practice, but “precisely not ‘the rights of man’ [...] There are no ‘rights of man,’ only rights of life, and so, life unfolds case by case.”<sup>98</sup> Deleuzean scholar Alexander Lefebvre breaks down reasons why Deleuze rejects the concept of universal human rights: it “suppose[s] a universal and abstract subject of rights,” “inhibit[s] movement and becoming,” “disregard[s] the modes of existence of people provided with rights,” and “blind[s] us to harm of our own making.”<sup>99</sup> In other words—and in accordance with later new materialists—universal human rights discourse is hierarchical and anthropocentric, forecloses becomings, and ignores material singularities. Certainly, events both legal and extralegal of the past four centuries (an approximate timeline for the embrace of common law in western societies) paint Deleuze’s rejection of the principle of universal human rights as insensitive at best and dangerous at worst. But it is Lefebvre’s last observance of Deleuze’s position—that the concept of universal human rights “blind[s] us to harm of our own making”—that is most relevant to the current project. If the practice of law is meant to ensure social order (“the rule of law”) and accountability (necessary for justice), yet it creates classifications that enable, and in some cases demand harm and suffering, then perhaps a reevaluation of principles and systems is overdue. Such a reevaluation is also, and even more robustly, suggested by Latour.

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<sup>98</sup> Gilles Deleuze, *Negotiations 1972-1990*, 153.

<sup>99</sup> Alexandre Lefebvre, “Human Rights in Deleuze and Bergson’s Later Philosophy,” in *Deleuze and Law*, eds. Laurent de Sutter and Kyle McGee (Edinburgh: The University of Edinburgh Press, 2012), 50-51.

Deleuze was a philosopher, so his influence appears in new materialist works of political philosophy, such as Bennett's *Vibrant Matter*. Latour, while also considered a philosopher, was a founder of science and technology studies (STS), and as such resonates more with new materialism based in STS, such as Barad's *Meeting the Universe Halfway*. Barad does not cite Latour as a major influence, but her focus on the impact of scientific apparatuses on events and subjects suggests some similarities. One could argue that Latour's contribution to new materialism is the concept of networked being. Like Deleuze's assemblage, the Latourian vision of networked existence is decentralized, non-anthropocentric, and consisting of a multiplicity of offshoots and relationships. But it is more accurate to say that Latour is interested less in entities themselves than in the ways processes, systems, and classifications constitute how entities are perceived. As rhetoricians Carl Herndl and S. Scott Graham observe, Latour objected to the "twin errors of positivist objectivity and any correspondence theory of truth or reference, on the one hand, and the postmodern reactions of social construction and deconstruction, on the other."<sup>100</sup> This accounts for Latour's rejection of both the subject/object binary in favor of networks, and his rejection of epistemology in favor of ontology (again, seeds of new materialism)—it also explains Latour's interest in critiquing systems, systems of law.

In *An Inquiry into Modes of Existence*, Latour characterizes law as flexible in its oscillation between weakness (legal decisions may be based on a single piece of paper, a single word misinterpreted, or a missing signature) and strength (legal decisions can have

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<sup>100</sup> Carl G. Herndl and S. Scott Graham, "Getting Over Incommensurability: Latour, New Materialisms, and the Rhetoric of Diplomacy," in *Thinking with Bruno Latour in Rhetoric and Composition*, eds. Paul Lynch and Nathaniel Rivers (Carbondale: Illinois University Press, 2015), 42.

serious material outcomes, such as losing one's home).<sup>101</sup> For Latour, the juxtaposition of flimsy pretexts and weighty outcomes both describes the structure of legal systems and reveals moves it repeatedly performs:

The [LAW] form is what could be called an archive, or, to stretch the meaning of another legal term, a summons, an assignation. It is this aspect of the fabrication of "subjects," this padding with enunciators and enunciatees on which the highly distinctive mode of existence of law is going to insist quite literally. It has in common with habit [HAB + LAW] the fact that by its own discontinuities it ensures the continuity in time and space of courses of action that would otherwise always scatter by dint of undergoing the continual shock of shifting out. While in fact there is neither real continuity of courses of action nor stability of subjects, law brings off the miracle of proceeding as though, by particular linkages, we were held to what we say and what we do. What you have done, signed, said, promised, given, engages you.<sup>102</sup>

In this passage, there are two important points that deserve attention: first, legal practice is an archive; and second, the system of legal practice forces odd-shaped materialities into uniform molds.

Latour's use of "archive" here is not about what law is, but what it does. Latourian scholars write that for Latour, legal practice keeps "track of the traces," and "continuously reconnects people to their acts;"<sup>103</sup> is a practice in which "the threads knotted together in the stratified issue will be untangled and reassembled;"<sup>104</sup> and works to "attach in a robust way, and in each particular case, this action to that actor."<sup>105</sup> Take, for example, the

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<sup>101</sup> Bruno Latour, *An Inquiry into Modes of Existence: An Anthropology of the Moderns* (Cambridge, Massachusetts: Harvard University Press, 2013), 361-362, 374.

<sup>102</sup> Latour, *An Inquiry into Modes of Existence*, 369-370.

<sup>103</sup> Niels van Dijk, "The Life and Deaths of a Dispute: An Inquiry into Matters of Law," in *Latour and the Passage of Law*, ed. Kyle McGee (Edinburgh: The University of Edinburgh Press, 2015), 163.

<sup>104</sup> Kyle McGee, "On Devices and Logics of Legal Sense: Toward Socio-technical Legal Analysis," in *Latour and the Passage of Law*, ed. Kyle McGee (Edinburgh: The University of Edinburgh Press, 2015), 67.

<sup>105</sup> Laurent de Sutter, "Plasma! Notes on Bruno Latour's Metaphysics of Law," in *Latour and the Passage of Law*, ed. Kyle McGee (Edinburgh: The University of Edinburgh Press, 2015), 201.

assemblage of a single legal case that ties: dates, times, and locations to events; statue to criminal acts; evidence to acts and persons, shorthand to testimony, weapons to crimes, communication between advocates to proper procedure...one can imagine the list (or number of nodes in the network) to be endless. As Latour himself says, this is what law “does well: it attaches, it darns, it paves with continuities a world of which it has become the author despite a cascade of shiftings.”<sup>106</sup> If this sounds like a backhanded compliment, it is. Latour is openly hostile to what he sees as the legal system fabricating for the sake of its own continuity. Stare decisis, for example, is a pillar of judicial interpretation and decision-making, but staying faithful to stare decisis requires that singularities of a case be shorn off to fit the historical mold. To perform such a maneuver, Latourian scholar Kyle McGee writes, the legal system first “delocalizes” “things and practices alike,” transforming them into “disembodied legal particles mov[ing] swiftly through the normative void.”<sup>107</sup> The point here is simpler than it seems: yes, the legal system is creating ties (archiving), but this is preceded by cutting ties in ways that make reassembly serve the legal system’s needs. For the pragmatically minded, this may seem reasonable. Determining what is relevant testimony, for example, is necessary to reach conclusions. Latour, however, recognizes that the act of determining relevancy is the legal system reifying itself as consistent by editing out singularities. As new materialists reading Latour might say, determining legal relevancy is a form of reimposing hierarchy (this is more

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<sup>106</sup> Latour, *An Inquiry into Modes of Existence*, 371.

<sup>107</sup> McGee, 62.

important than that), anthropocentrism (judges and lawyers decide), and binarism (“facts” vs. “hearsay”).

Deleuze and Latour have both inspired critiques of legal practice and legal systems that would resonate with new materialists today, with the former influencing scholars with roots in political philosophy and the latter those with roots in STS. Deleuze’s and Guattari’s vision of rhizomatic and assemblage thinking, emphasis on process and becoming, and rejection of universals in favor of singularities impact the way Deleuze characterizes the legal system. Deleuze wants legal practice to be a space of invention, unencumbered by “universals” that don’t fit with material realities—even if in the case of universal human rights. Universal principles, according to Deleuze, are dangerous because they “blind us to harm of our own making.” As in the case of Deleuze, Latour’s views on law also apply concepts that would later be taken up by new materialists: networked existence and creating assemblages. Latour seeks to reveal the law as a bad-faith (or at least misguided) system that creates archives that claim consistency and perpetuate their own legitimacy. Together, the work of Deleuze and Latour exhibit points of overlap between new materialism and legal practice. Deleuzian and Latourian scholars have effectively applied their subjects’ concepts as frameworks for analysis, and analysis helps to identify existing sites for intervention.

The literature review above provides an overview of new materialist concepts and issues by examining the definition of new materialism, scholarly applications of new materialism, ethics of new materialism, and critiques of law and legal systems by new materialism’s progenitors. Next, I will introduce the milieu in which new materialism can

intervene, either to advocate for the nonhuman or to account for the impact of localized materialities: the law.

## Legal Rhetoric, Decision Making, and Appellate Law

Legal rhetoric and rhetoric about the law are, by nature, traditionally conservative. There are many reasons for this, including inheriting legal concepts from Common Law (predating the establishment of the U.S. as a nation); an enduring commitment to *stare decisis* (respect for precedent); and, as legal scholar Jennifer Sheppard writes, an emphasis, to the near exclusion of other forms of reasoning, on rule-based analysis and logic in all aspects of law school and professional training.<sup>108</sup> Despite these factors, the practice of law is, by necessity, a rhetorical endeavor that requires the employment of pathos and ethos in a variety of forms. Legal scholars are keenly aware of this. Sheppard writes that the legal audience is human: “You must never forget that you are not mechanically putting the argument you have so carefully prepared. It’s not like that. You’re persuading a human being to come to a particular viewpoint, and that’s terribly important;”<sup>109</sup> and as Judge Patricia Wald notes, “opinion writing among judges of widely disparate views and temperaments is, like governing, the art of the possible.”<sup>110</sup> Humans respond to storytelling, and its inclusion in arguments makes “the outcomes of motions

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<sup>108</sup> Jennifer Sheppard, “Once upon a Time, Happily Ever after, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda,” *Willamette Law Review* 46, no. 2 (2010 2009): 255.

<sup>109</sup> Sheppard, 255.

<sup>110</sup> Patricia M. Wald, “The Rhetoric of Results and the Results of Rhetoric: Judicial Writings,” *The University of Chicago Law Review* 62, no. 4 (Autumn 1995): 1377.

and cases [...] seem more authentic, more in line with human experience.”<sup>111</sup> According to legal scholar Keith Cunningham-Parmeter, judicial writing makes common use of the rhetorician’s tools: “The external face of the law denies the importance of language, yet metaphor’s prevalence in legal texts indicates otherwise.”<sup>112</sup> And the absence of rhetoric in judicial opinions is dangerous to the institutional reputation of the court, Wald writes: “Absence of rhetoric is principally an appellate court problem. The higher a court’s place in the judicial hierarchy, the more important it is for the court to rationalize results. What would the reaction be if the Supreme Court started to make bench rulings, or decide cases by unpublished orders?”<sup>113</sup> In fact, we know what the reaction would be: the use of the Supreme Court’s “shadow docket” has allowed them to issue orders with little or no explanation—even on matters of state execution and “bounty” laws against abortion—and this practice has had two direct outcomes: it has contributed to the Court’s public approval rating dropping to an all-time low (at the time of this writing), and it has pushed even the most centrist legal reporting to point out that law without justification is merely the exercise of raw power.<sup>114</sup> All this is to make two points: law is rhetorical by nature, and rhetoric (that it is not merely rule-based) is necessary for judicial institutional legitimacy.

In appellate law, rhetoric is particularly crucial and particularly open. This is because at the appellate level, judicial decision making is almost exclusively about interpretation rather than fact-finding. Assessment of the interpretive process in the

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<sup>111</sup> Sheppard, 296.

<sup>112</sup> Keith Cunningham-Parmeter, “Alien Language: Immigration Metaphors and the Jurisprudence of Otherness,” *Fordham Law Review* 79, no. 4 (2011): 1548.

<sup>113</sup> Wald, 1375.

<sup>114</sup> Adam Liptak, “Missing from Supreme Court’s Election Cases: Reasons for Its Rulings,” *The New York Times*, October 26, 2020, <https://www.nytimes.com/2020/10/26/us/supreme-court-election-cases.html>.

judicial system—as put forth by legal institutions—is referred to as the “legal model” by legal scholars Scott Phillips and Ryken Grattet:

The legal model suggests that the meaning of a legal rule is constrained by (a) the plain meaning of the language contained within a statute, (b) the original intent of the drafters of the statute, (c) the judge’s sense of the proper balance of societal interests embodied in the statute, (d) precedent, and (e) the Constitution (Spaeth 1995). Ideally, these factors combine to produce a singular unambiguous interpretation of what a rule covers and whether it represents a legitimate rule relative to precedent and the Constitution.<sup>115</sup>

Despite the prevalence of the legal model, Phillips and Grattet argue that social factors influencing decision making are always at play:

We take the view that judges are bricoleurs who assemble decision and opinions from multiple sources, including both preexisting “legal” factors and what is traditionally referred to as extralegal” factors (e.g., policy philosophies or popular constructions of criminal deviants). The key to this perspective is that even the way legal factors affect decisions is through a social process [...]. The “plain meaning” of a statute, the societal interests at stake, and what precedents and constitutional provisions are relevant to consider are all mediated by an interpretive process that involves a certain amount of improvisation and flexibility. However, the striking thing is that flexibility tends to diminish over time, as judges converge around particular interpretations and conform to community expectations about how to address particular matters. Put another way, our view is that parsing explanations of judicial behavior into what amounts to “legal” versus “social” factors (i.e., attitudinal, ideological) is rooted in a false understanding of legal factors as somehow non-social.<sup>116</sup>

In other words, decision making by judges and justices are always susceptible to social influence, and judges may draw on many sources and experiences. To put it in the parlance of new materialism: they are enmeshed in and affected by a variety of

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<sup>115</sup> Scott Phillips and Ryken Grattet, “Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law,” *Law & Society Review* 34, no. 3 (2000): 569.

<sup>116</sup> Phillips and Grattet, 570, footnote 3.

assemblages and actant behaviors. If they are led to see themselves in this way, or—as is more often the case—to create rhetorical openings to see in this way, they may be persuaded to interpret statutes and decide cases differently, or, at least, to acknowledge there is something missing from current jurisprudence on issues of nonhumans and environments.

This dissertation is dedicated to analyzing opportunities for new materialism in legal discourse, and to an extent, crafting strategies for new materialist interventions. I explain how in the following overview of chapters.

## Overview of Chapters

Bringing rhetorics of materiality into judicial spaces may seem like a heavy lift, largely because law's reputation precedes it. Law is seen as conservative, traditional, rules-based, positivistic, and inflexible. But while there are active and serious constraints on legal processes, law is not an opaque monolith. It is instead a kind of ecosystem, capable of generating new worldviews. In chapter one, I explore some categories of constitutive legal rhetoric that create these discursive openings: models of justice, interpretation, argumentation, and adjudication. The categories and their contents are meant to function synecdochally to represent legal practice writ large. By considering models of justice as articulated by philosopher Iris Marion Young, I explore openings for new materialism in jurisprudence, or the philosophy of law. Young's work argues that the U.S. justice system's "liability model" is incapable of addressing structural injustices that

result in harm that cannot be causally linked to single actors. Young's "social connection model" provides an alternative way of thinking about jurisprudence, in which responsibility is distributed—a model that better accounts for new materialist conceptions of distributed agency. In the category of interpretation, I examine eight common modes of interpreting the U.S. Constitution and provide hypothetical examples and lines of questioning to demonstrate how new materialist advocates may push against and beyond interpretive constraints, including: treating words as assemblages, questioning objective/subjective binaries, acknowledging how localized materialities can be read as context, and using moral reasoning to reduce harm to nonhumans. In the category of argumentation, I focus on stasis of definition. Legal processes of classification and definition are produced dialectically and iteratively, resulting in definitions that separate what a thing is from what it is not. The process is both logical and enthymematic, which can result in an implicit acceptance of hegemonic values like anthropocentrism. In the final category of adjudication, I examine aspects of decision-making that seem tailor-made for new materialist intervention: worldbuilding, emotions, imagination, and creative use of language.

Chapters two and three examine specific legal cases for instances of and openings for new materialist rhetorical interventions. Using rhetorical criticism, I examine oral arguments and judicial decisions. Oral arguments often reveal gaps between a "common sense" understanding of materiality and judicial construction of it. Judicial decisions are more formal and are comprised of the opinion of the court and dissents or concurrences.

To examine these artifacts, I rely on close reading, the practice of which both thickens our understanding of rhetorical artifacts and refines theories of judgement.<sup>117</sup>

Chapter two examines the case of Happy, an elephant at the Bronx Zoo. In 2022, the nonprofit Nonhuman Rights Project (NhRP) filed suit against the Bronx Zoo to secure Happy's transfer to an elephant sanctuary where she would be free of the mental and physical anguish of captivity. NhRP argued that Happy should be granted relief under habeas corpus, also known as the writ of liberty. Habeas corpus is part of common law, adjudicated on a case-by-case basis, and is a remedy for illegal detainment. To argue for relief under habeas, NhRP takes an animal rights approach to claim that Happy is autonomous and therefore has the right to bodily liberty. Opposing counsel takes an animal welfare approach, arguing that existing animal cruelty laws were being properly enforced and there was nothing illegal about Happy's detainment. The court issued opinion agrees with the animal welfare position, but also insists that habeas corpus only protects humans. Using close reading, I analyze two artifacts from the case: the Transcript of Oral Argument in *Nonhuman Rights Project v. Breheny*, No. 52 (NY Ct. App. 2022), and the Opinion of the Court in *Nonhuman Rights Project v. Breheny*, No. 52 (NY Ct. App. 2022). Analysis of oral argument shows that NhRP's argument is undermined by an unclear definition of autonomy; reliance on scientific evidence related to the elephant species, rather than Happy herself; and a problematic analogy comparing animal rights to the rights of dehumanized humans. Analysis of the court's opinion shows a vehement defense of

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<sup>117</sup> James Jasinski, "The Status of Theory and Method in Rhetorical Criticism," *Western Journal of Communication* 65, no. 3 (Summer 2001): 260.

both welfarism and anthropocentrism, using three binaries: human being/nonhuman animal, person/nonperson, and subject/object. Overall, Happy's case demonstrates how deeply entrenched anthropocentrism, instrumentalization, and objectification are in the legal system. In the chapter conclusion, I offer possible modes of repair based on new materialist rhetorics.

Chapter three examines the case of manoomin, the wild rice that grows on Tribal lands of the Great Lakes region of Minnesota. In 2018, the White Earth Reservation Business Committee of the White Earth Band of Chippewa Indians unanimously adopted a resolution establishing the Rights of Manoomin. In 2021, when the Minnesota Department of Natural Resources (DNR) granted the energy company Enbridge a permit to drain five billion gallons of ground water for the construction of an oil pipeline, manoomin and White Earth Band filed suit against Minnesota DNR to stop the water-taking that threatened manoomin. Because the water-taking was nearby but not within Tribal lands, manoomin's Chippewa Anishinaabe argue that the Tribal Court has jurisdiction based on Tribal sovereignty and usufructuary rights and what is known as the second Montana exception, which goes into effect when the political integrity, economy, and health and wellbeing of the Tribe are at risk. In making this argument, Chippewa Anishinaabe advocates define manoomin as part of their culture, spirituality, and survival. I analyze two artifacts from the case: *Manoomin et al. v. Minnesota DNR et al.*, Complaint for Declaratory and Injunctive Relief (White Earth Band of Ojibwe Tribal Court 2021), and Opinion of the Court in *Minnesota Department of Natural Resources, et al., v. Manomin, et al.*, No. AP-21-0516 (White Earth Band of Ojibwe Court of Appeals 2022). Analysis of the original complaint

shows congruence to what new materialists would call intra-acting, assemblage thinking, being-with, and kinship. The Chippewa Anishinaabe believe that manoomin is a familial relation tied to their creation story and the Seven Fires Prophecy, and that as such it is to be treated with respect and reciprocity. Situated in their argument, these aspects of Anishinaabe views and values effectively makes the case that manoomin and Anishinaabe are inextricable. At first, the manoomin complaint succeeds in Tribal Court, but Minnesota DNR countersued over jurisdiction, and the White Earth Band of Ojibwe Court of Appeals ultimately dismissed the complaint. As analysis of the appellate opinion shows, the decision was made for two reasons: the activity in question was outside Tribal lands, and the Tribal Appellate Court assumed that U.S. federal court would rule ultimately rule against manoomin. Unlike Happy's case, which makes a new materialist argument using strategies and tactics that match the U.S. legal system, manoomin's case presents ontological perspective that is entirely alternative to that of U.S. law. In the chapter conclusion, I propose new materialist rhetorics as both a diagnostic tool and mode of repair.

## Conclusion

In the study of rhetoric, new materialism represents a turn away from epistemology and toward ontology in an effort to radically de-center humans and question damaging conceptions of the world and its nonhuman inhabitants. New materialism is defined by three of its key moves: challenging binaries (Edbauer and Bennett), emphasizing becoming

(Bennett, Barad, and Rickert), and encouraging attunement (Bennett, Barad, Rickert, and Nicotra). These concepts are applied in numerous scholarly projects. In rhetorical field methods, attuning to places and materialities better account for local enmeshments and becomings (Rai and Druschke; Herndl; Gordillo; and Senda-Cook, Middleton, and Endres). In environmental, animal, and bio rights, scholars use new materialism to establish and embrace a worldview that better understands the rights and desires of nonhumans (Johnson, Nicotra, Kerr, Ryan, Ignatov, and Kimmerer) and reconceive relationships between nonhumans and humans (Kimmerer and Johnson). In critical studies, rhetorics of materiality help produce space for Black geographies that open up discourse to address harms that have been culturally erased (Sharpe).

While new materialist scholars working in theory and practice offer some exploration of ethics, their discussions of the subject are often evocative and ephemeral. New materialist ethics revolve around a sensibility. This sensibility is differentiated by new materialist scholars according to their philosophical influences. On aggregate, new materialism challenges liberal humanism, anthropocentrism, subject/object binaries—thereby building on critiques and values of Foucault, Deleuze and Guattari, and Latour. But individual new materialist scholars differentiate their ethical sensibilities according to their specific philosophical influences. Bennett builds on Spinoza to argue for a more inclusive democracy for humans and nonhumans alike; Barad grounds their ethics the work of Levinas to argue that we should be aware of and look out for the nonhumans with which we are entangled; Rickert looks to Heidegger's concept of dwelling to argue that valuing nonhumans must be felt rather than imposed.

Connections between new materialist ethics and law are undertheorized, but there is significant scholarship on the critique of law and legal processes by two of new materialism's progenitors, Deleuze and Latour. Deleuze, along with Guattari, introduce the concept of rhizomes (and by extension, rhizomatic assemblages), in which there are many nodes but no universal subject. Deleuze thinks rhizomatically about the law, rejecting universal abstractions in favor of case law and its embrace of singularities. Latour, building on his contribution to actor-network theory, engages more in systems critiques of the law, and is particularly concerned with the ways law engages us through an archive of texts, orders, and artifacts that can make us blind to constraints of our own making.

Envisioning how to put new materialist concepts, practices, ethics, and philosophy to work in courtrooms may be difficult, yet possible. Judges and justices are human, making them persuadable. Appellate law is particularly open to rhetorical intervention because its purview is interpretation rather than fact-finding, and interpretation as a judicial behavior applies legal and social meanings concomitantly. Looking for—and taking advantage of—discursive openings for rhetorics of materiality in appellate processes is a task taken up by the rest of this dissertation. Chapter one looks for such openings in broad categories of legal processes; chapters two and three each examines sites for intervention in a specific legal case.

For the arguments presented in this dissertation, the stakes could not be higher. Anthropocentric worldviews enable us to degrade, abuse, and exploit everything that falls below the line of the subject/object binary. The result is mass killing of animals in the billions and plants in the trillions, abdicating social responsibility for climate change

because no single human is to blame, the destruction of ecosystems that were thriving for thousands of years before industrialization, and the extermination of human beings declared not human enough to justify letting go of systems of classification. Common counterarguments to rhetorics of materiality—and particularly bringing them into the legal sphere—include 1) that humans are suffering to an extent that precludes shifting focus to nonhumans; 2) that arguing on behalf of nonhumans is colonialist and presumptive; and 3) that new materialist legal arguments are not enough, and the legal system should be abolished and begun anew. In response to the first charge, I argue that anthropocentrism is like patriarchy: despite the specificity of the label, it affects everyone. When courts dismiss tribal rights to water ways necessary for the survival of vegetation that provide sustenance, cultural value, and a reciprocal relationship with the earth, humans, plants, and ecosystems suffer together. To the second charge, I argue points both practical and ethical. Although humans act imperially with (dis)regard to nonhumans and materialities, the analogy is otherwise maladaptive. Those who are content to continue to exploit the nonhuman may cast them as subaltern, but advocates for them speak because they literally cannot speak for themselves. Is such speaking ethically suspect? Maybe, given that animals, plants, things, and landscapes do communicate, just not in ways that are immediately legible to humans. Not to try, however, means leaving the nonhuman without representation in the judicial spaces that determine their well-being, treatment, and survival. To the third charge, I say: I get it. Why should new materialists try to work within the law, a system created entirely by humans for humans? Because staying out of the system allows exploitation, abuse, and extermination of nonhumans to continue. Because

destroying the system will most likely result in anthropocentric retrenchment. Because when the citizens of Athens, Georgia treat a tree as an autonomous being, laws should protect it as such. Most of all, because seeing the world as it ought to be means little if you cannot speak intelligibly to and persuade those with (any) power to make it so.

Or, think of it in the way Deleuze and Guattari describe an organism evolving into a body without organs (BwO):

You have to keep enough of the organism for it to reform each dawn; and you have to keep small supplies of significance and subjectification, if only to turn them against either own systems with the circumstances demand it, when things, persons, even situations, force you to; and you have to keep small rations of subjectivity in sufficient quantity to enable you to respond to the dominant reality. Mimic the strata. You don't reach the BwO, and its plane of consistency, by wildly destratifying.<sup>118</sup>

The dominant reality and its judicial systems are anthropocentric; we need to meet them where they are to loosen their grip. What follows is (part of) my effort to do so.

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<sup>118</sup> Deleuze and Guattari, 160.

## Chapter 1: A “Dappled” View of the Field: Existing Discursive Openings for Rhetorics of Materiality in Law

In my introduction, I provided a scholarly review of new materialism including its definition, scholarly application, ethics, and how its philosophical progenitors thought about the law. Bringing new materialist arguments and ethics into the courtroom, however, is a significant challenge. The first step towards this goal is establishing a contextual understanding of legal practice as a field of possibility, rather than intractable in its ontology, epistemology, and axiology. Legal processes *already* create discursive opportunities for new materialist ethics and advocacy—if you know where to look for them. Acknowledging these opportunities and situating them in spheres of legal practice will provide a foundation for case-specific analysis in later chapters.

In the effort to bring rhetorics of materiality into jurisprudence and legal practice, the first encountered obstacle is reputational. In general, the law is associated with objectivity, rules, logic, and reason. Likewise reductive (but more pejorative) is rhetoric’s reputation for being subjective, emotional, empty, and manipulative. There are two obvious problems here: first, both law and rhetoric are mischaracterized; and second, the mischaracterizations support an inaccurate dissociation. Not all rhetoric is legal, but all legal discourse is rhetorical. And yet, while a hypothetical rhetorician may react to mischaracterizations of rhetoric with a mix of resignation and offense (like what we feel, I expect, when we bristle at the phrase “mere rhetoric” and are met with a reaction like “yeah, whatever”), a hypothetical legal practitioner is more likely to let stand both the mischaracterizations and the dissociation between them. Let me explain why.

Public perception is a significant factor in jurisprudence and legal practice. The simplest explanation for this is that law has an outsized mission—enacting and protecting the Rule of Law—but the judicial branch of government has no enforcement mechanism. The Rule of Law is what keeps society from solving disputes with brute force, and in western democracies it is considered the foundation of liberty. These weighty values can only be defended by willing participation and trust of the citizenry. To paraphrase legal journalist Dahlia Lithwick, the law is like Tinkerbell; it ceases to exist if you don't believe in it. Thus, the law's reputation appeals to contemporary and historical frameworks that its citizens have come to trust. Rhetorician James Boyd White writes that the dominant view of law is that it is “positivistic and rule-focused,” with “quasi-scientific overtones,” an “object of reverence,” and “a source of authority external to the will [...] of those momentarily in political power.”<sup>119</sup> In this way, law claims authority through the use of reason alone (as described by Enlightenment thinkers) and promotes obeisance through transcendence (as if law is above politics). If the hypothetical legal practitioner considers these aspects of law to be mission-critical, the public mischaracterization of rhetoric as untrustworthy and rhetoric's dissociation from law work to her benefit. Perhaps this is why, as scholar Frank Mootz III observes, “legal practice is marked by a vehement denial of its rhetorical nature.”<sup>120</sup>

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<sup>119</sup> James Boyd White, *The Legal Imagination*, (Chicago and London: The University of Chicago Press, 1985), xii.

<sup>120</sup> Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Critical Legal Theory* (Tuscaloosa: The University of Alabama Press, 2006), 128.

In this chapter, I will examine four areas in which the law presents discursive openings for rhetorics of materiality: models of justice, interpretation, argument, and adjudication. Each of these subsections will not be exhaustive, but exhaustion is not my goal. I aim instead to create a dappled effect that disrupts the flatly monochromatic reputation of legal practice and reveals pockets of possibility for new materialist advocates. In other words, to paint the field in a new light. It is an impressionist view of the legal landscape as generating forms that are legible in new ways. Such a view will help make sense of specific legal cases in later chapters.

### Models of Justice

Justice is a complex socially constructed concept, and it often requires more than the legal system can provide. But thinking about what justice is and how it can be enacted is integral to jurisprudence, or legal philosophy. The work of political philosopher Iris Marion Young is a striking example of this. In *Responsibility for Justice*, Young outlines two models for justice: liability and social connection. In Young's construction, the U.S. legal system operates under the liability model, which assigns responsibility to individuals who have a direct causal connection to a crime or injustice. But the liability model cannot assign responsibility for systemic or structural injustices, thereby preventing redress of harms caused by such injustices. Young's work is relevant to the current project because it demonstrates an existing rhetorical opening in jurisprudence for rhetorics of materiality first by suggesting that the liability model cannot address all injustices, and second, by

offering a social connection model that can be viewed as open to new materialist arguments.

Young defines the liability model for justice as originating in legal reasoning, with the goal of finding guilt or fault for a crime and assigning responsibility for redress. In the liability model, responsibility is assigned to individual persons or groups of persons when two conditions are met: a causal connection between the person(s) and the harm, and that the person(s) acted “voluntarily and with sufficient knowledge of the consequences.”<sup>121</sup> A simple example of this is a person committing premeditated murder: they are at fault because their direct actions caused the death of another, they could have chosen not to commit murder, and premeditative planning suggests an attempt to evade consequences. Adoption of the liability model constitutes a social understanding of the nature of responsibility and redress:

the liability model seeks to mark out and isolate those responsible, thereby distinguishing them from others, who by implication are not responsible. Such isolation of the one or ones liable from others who are not is an important aspect of legal responsibility in both criminal and tort law. The purposes of social practices of finding guilty, blaming, finding fault, or holding strictly liable are to focus on particular agents in order to sanction or demand compensation from them and them alone.<sup>122</sup>

In short, the liability model assigns responsibility to isolated individuals. Redress of harms is achieved, in U.S. legal contexts, by punishing that individual. Legal processes are a way to restore the status quo by removing or punishing bad actors.

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<sup>121</sup> Iris Marion Young, *Responsibility for Justice* (Oxford and New York: Oxford University Press, 2011), 98.

<sup>122</sup> Young, 105.

However, the liability model has a significant flaw: it cannot assign responsibility and redress of harms for systemic or structural injustices. Young illustrates this point with a hypothetical about a single working mother named Sandy. The landlord of Sandy's apartment building is converting to condos and has given her three months to move out. Sandy works full time but cannot save significantly, and any time outside of work is devoted to caring for her children. She applies for government assistance and is told there is a two-year waiting list. She looks for a place that is close to her work to save time and gas money, but she cannot find anything in her price range. She ultimately picks a place that is far from work and spends her savings to lease a car. But the apartment complex wants three months' rent up front, which Sandy no longer has. She is working on a solution when her three-month deadline arrives, and she is evicted, making her and her children houseless. Losing a place to live is undoubtedly a harm, but who is at fault in Sandy's story? Sandy is working hard as one is "supposed" to do to provide for her family; both old and new landlords are operating lawfully and in good faith; and government assistance is the result of lawfully enacted good-faith policies, but "fairness" requires waiting her turn. There are human actors in Sandy's story, but none of them should be blamed for the outcome "because the specific actions of each cannot be disentangled from structural processes to trace a specific aspect of the outcome."<sup>123</sup> If no persons can be causally connected to the harm Sandy experiences, the liability model cannot assign responsibility or redress the harm.

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<sup>123</sup> Young, 100.

As a solution, Young proposes a social connection model of justice wherein all individuals involved, and to a degree all of society, are responsible for contributing to structural injustices, but none are guilty of the entirety of the consequences. An example of this is climate change: most of us unintendedly participate in activities that contribute to the injustice (e.g., driving a car adds to pollution), but none are responsible for climate change as a whole. The social model assigns *distributed responsibility* for structural injustices by examining harms and conditions that lead to them. In so doing, the model does not seek to isolate a bad actor and redress harms through punishment; it seeks to understand social and material contexts that imbricate the whole of society: no one is to blame, but everyone is responsible. While the liability model supports the status quo by dealing with individuals as aberrant, the social connection model “brings into question precisely the background conditions that ascriptions of blame or fault assumed to be normal.”<sup>124</sup>

Currently, the social connection model does not produce justiciable cases, but specific legal interventions are not impossible, as I will discuss in later chapters. Nonetheless, Young’s work on both liability and social connection models of justice are evidence of a rhetorical opening in jurisprudence—one that may call for a new materialist response.

Let us put liability and social connection models in new materialist terms using Sandy’s story. The injustice is an assemblage of human and nonhuman actants,<sup>125</sup>

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<sup>124</sup> Young, 107.

<sup>125</sup> See Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Durham and London: Duke University Press, 2010).

including: Sandy; her two children; labor and wages; capitalism and economies; landlords; apartments and buildings; cars, gas money, and commutes; work and family time; government, policy, and legislation; legislators and administrators; the rhetorical construction of concepts including property, rights, family, home, and houselessness; and the ideology and associated meanings of “personal responsibility.” The liability model is insufficient to account for harms caused by the assemblage because the model is anthropocentric: it can only assign responsibility to humans, and nonhuman actants are clearly active in the assemblage. The social connection model seeks to map, evaluate, and influence the assemblage *as assemblage*: distributed agency means blame cannot be assigned to individual actants, and redress of harms must take a different form. As assemblages, systems and structures cannot be excoriated from society any more than they can be deterred from causing harm; they must be understood by working through and by repairing existing connections and making new ones, with the goal of ongoing harm reduction.

## Interpretation

Examining models of justice reveals discursive openings for rhetorics of materiality in jurisprudence, but law is not just philosophy—it is also a *practice*. Legal processes and procedures create vast networks of texts and meanings that are open to rhetorical intervention by design. Because the U.S. legal system is adversarial, interpretations and arguments are diligently examined, cross-examined, and reexamined. Each point of contention is also a point of access. Interpretation is one of the few legal processes to garner widespread public attention, largely due to its use in the U.S. Supreme Court, where

Justices' interpretation of the U.S. Constitution can have broad, serious, and material effects on the public. In the following, I examine modes of constitutional interpretation for rhetorical flexibility and potential openings for new materialist arguments. Obviously, the U.S. Constitution is not the only artifact to be interpreted by jurists, but modes of constitutional interpretation often make fundamental assumptions about language, context, tradition, and responsibility that are similarly articulated in the interpretation of state constitutions, case law, and applications of legal principles. My goal here is not to critique modes of interpretation (though new materialist views may appear critical); it is to point out that all modes present discursive openings for rhetorics of materiality, and to a lesser extent, to determine the degree to which such openings may be taken seriously.

The U.S. Constitution notably does not specify a mode of interpretation to guide justices and judges; they get to choose. However, since consistency is central to social and legal stability, it is safe to assume justices and judges are motivated in part by *constitutional fidelity*. Being faithful to the Constitution in this context means “interpret[ing] its words and apply[ing] its principles in ways that preserve the Constitution’s meaning and democratic legitimacy over time.”<sup>126</sup> To wit, constitutional interpretation is an active process in which attention to shifting material realities is (oxymoronically) required to claim universal application. Each mode of interpretation attempts to achieve constitutional fidelity in different ways, and each creates different

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<sup>126</sup> Goodwin Liu, Pamela S. Karlan, and Christopher H. Schroeder, *Keeping Faith with the Constitution* (New York: Oxford University Press, 2010), xvii.

discursive opportunities for new materialist intervention. I will consider each, but my goal is to create a picture of overall rhetorical flexibility.

Congress.gov lists eight modes of constitutional interpretation:

- 1) *Textualism* looks at the text of the Constitution as its guide, focusing on “the plain meaning of the text” at the time of ratification.<sup>127</sup> As “plain meaning” suggests, textualists often believe there is an objective meaning to words and phrases, and interpreting them does not require considering framers’ intent or historical context. First, written language is used only by humans; reliance on it is anthropocentric. Even if we were to stipulate that law is created by humans for humans, laws have direct material effects on nonhuman entities (e.g., enabling the pollution of ecosystems) using a form of communication nonhumans cannot understand—a practice universally frowned upon in inter-human relations. Second, relying on “objective” meanings of words reifies the hierarchy implied in the binary of objective/subjective and promotes a false dichotomy. A word is an assemblage of functions (as abstraction, as vehicle for associated meanings, as social label, as a sticky adherent to material realities, etc.) and becomings (language evolves due to changes over time, in structures of power, and to reflect social mores).<sup>128</sup> Words are not “mere;” they exceed their meanings.

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<sup>127</sup> “Textualism and Constitutional Interpretation,” Constitution Annotated, [Congress.gov](https://constitution.congress.gov/browse/essay/intro.8-2/ALDE_00001303/), 2022, [https://constitution.congress.gov/browse/essay/intro.8-2/ALDE\\_00001303/](https://constitution.congress.gov/browse/essay/intro.8-2/ALDE_00001303/).

<sup>128</sup> On assemblages, see Bennett, *Vibrant Matter*. On becomings, see Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Durham and London: Duke University Press, 2007).

2) *Originalism* interprets the Constitution as it would have been interpreted by the public at the time of the Founding.<sup>129</sup> It is certainly possible to reasonably assess a public's thoughts and beliefs by analyzing textual evidence (rhetoricians do so, often and well). Such an assessment acknowledges that meaning is constructed and contingent on localized material realities. The "arms" referenced in the Second Amendment's "right to bear arms," was understood at the Founding to refer to muskets with a one-round magazine and an approximate firing rate of three rounds per minute. In the present, "arms" may refer to any number of guns, including the semi-automatic AR-15 with a 30-round magazine and an approximate firing rate of 300 rounds per minute. Based on these material changes, the lethal force of firearms has arguably contributed to mass killings in the U.S. at schools, shopping malls, concerts, and other public venues. From a new materialist perspective, the issue with originalism is that one public's contingent understanding of materialities (at the time of the Founding) is relevant, while another public's (in the current moment) is not. Interpreting texts as if society has not changed since the time of writing is to deny that meanings (like other assemblages) are dynamically and continually becoming.<sup>130</sup>

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<sup>129</sup> "Original Meaning and Constitutional Interpretation," Constitution Annotated, [https://constitution.congress.gov/browse/essay/intro.8-3/ALDE\\_00001304/](https://constitution.congress.gov/browse/essay/intro.8-3/ALDE_00001304/).

<sup>130</sup> On the importance of particularities over universals, see Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Minneapolis: University of Minnesota Press, 1987); on systems of law adhering to principles that reproduce harms, see Bruno Latour, *An Inquiry into Modes of Existence: An Anthropology of the Moderns* (Cambridge, Massachusetts: Harvard University Press, 2013).

3) *Judicial Precedent*, can be broadly construed as an interpretive mode that uses the doctrine of *stare decisis* as its guide.<sup>131</sup> *Stare decisis*, translated from the Latin as “to stand by things decided,” is crucial to the Rule of Law because it provides consistency and stability throughout the judicial system (if laws are changed too quickly, publics do not know how to follow them and courts do not know how to enforce them). The result is interpreting the Constitution in the same or similar ways to previous courts. If mistakes were made, interpretation by precedent is at constant risk of repeating them; jurists know this, and most take the responsibility seriously.<sup>132</sup> Very few judicial decisions are overturned: from 1810 to 2020, the U.S. Supreme Court overruled 232 of its own precedents<sup>133</sup> out of 25,000+ decisions. What makes these few cases special? Mapping them as assemblages may reveal patterns that are themselves open to interpretation (e.g., impact of politics and culture, social receptivity to change, popular opinion, etc.). However, most successful efforts are the result of a culmination of legal efforts in multiple contexts. *Brown v. Board of Education of Topeka*, which overruled *Plessy v. Ferguson* (1896) thus ending legal segregation, and *Dobbs v. Jackson Women’s Health Organization* (2021), which

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<sup>131</sup> “Judicial Precedent and Constitutional Interpretation,” *Constitution Annotated*, [https://constitution.congress.gov/browse/essay/intro.8-4/ALDE\\_00001305/](https://constitution.congress.gov/browse/essay/intro.8-4/ALDE_00001305/).

<sup>132</sup> In his dissenting opinion in the 1932 Supreme Court case *Burnet v. Coronado Oil & Gas Co.*, Justice Louis Brandeis writes, “Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right [...] But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.” Scott Bomboy, “A Short List of Overturned Supreme Court Landmark Decisions,” *National Constitution Center*, June 24, 2022, <https://constitutioncenter.org/blog/a-short-list-of-overturned-supreme-court-landmark-decisions>.

<sup>133</sup> Bomboy.

overruled *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992) thus ending the right to abortion, have one thing in common: they represent decades-long legal projects built on numerous lower court decisions, changes to state legislation, and production of legal scholarship. In other words, precedents can be *built* by creating as many nodes as possible; overruling decisions can be *facilitated* by continually attuning to and strengthening the connective tissues between them.<sup>134</sup>

- 4) *Historical Practices* is another mode of interpretation that relies on precedent, but instead of court opinions it defers to “prior decisions of the political branches, particularly their long-established, historical practices” when the language of the Constitution is ambiguous.<sup>135</sup> Like judicial precedent, historical practices risk repeating past mistakes in interpretation and application, with the added caveat that elected representatives do not always have knowledge of the law. Unlike judicial precedent, using historical practices is more of a creative curatorial exercise in which jurists may choose which events from political history produce a pattern useful to interpretation. For example, the Speech and Debate clause of the Constitution protects members of Congress from arrest to encourage free deliberation, but it does not specify a privilege from arrest for acts of violence. One could argue that such a specification is unnecessary

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<sup>134</sup> On attuning to connections, see Bennett, *Vibrant Matter*; Barad, *Meeting the Universe Halfway*; and Deleuze and Guattari.

<sup>135</sup> “Historical Practices and Constitutional Interpretation,” *Constitution Annotated*, [https://constitution.congress.gov/browse/essay/intro.8-9/ALDE\\_00001310/](https://constitution.congress.gov/browse/essay/intro.8-9/ALDE_00001310/).

because congressional debate is usually collegial, if one ignores the 80 violent incidents—including multiple assaults, duels, and attempted murder—that took place between 1830 and 1860.<sup>136</sup> The ability to construct historical throughlines as evidence for Constitutional interpretation is therefore incredibly open to rhetorical flexibility—insofar as issues have been brought up *in the past*. New materialists will more easily construct arguments on rights of property than, say, networked capabilities of algorithms.

- 5) *Structuralism* is a mode of interpretation that “draw[s] inferences from the design of the Constitution” to understand relationships between branches (also known as the separation of powers).<sup>137</sup> There are two forms of structuralism. The first type is formalism, which is based on the idea that the Constitution contains everything necessary to define the structure of government. Because formalist structuralism assumes that contextual and material changes over time need not be considered, it provokes some of the same new materialist responses as textualism and originalism (e.g., words exceed their meanings, and if context matters at the Founding it should also matter now). The second type of structuralism is functionalism, which argues that the Constitution articulates federal branch powers at their apex, and that the details should be worked out through careful balancing of competing interests. Balancing is an open,

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<sup>136</sup> See Joanne B. Freeman, *The Field of Blood : Violence in Congress and the Road to Civil War* (New York: Farrar, Straus and Giroux, 2018).

<sup>137</sup> “Structuralism and Constitutional Interpretation,” *Constitution Annotated*, [https://constitution.congress.gov/browse/essay/intro.8-8/ALDE\\_00001309/](https://constitution.congress.gov/browse/essay/intro.8-8/ALDE_00001309/).

creative, constitutive process in which judges and justices consider intent, function, consequence, and ethos. Balancing is rhetorically flexible, offering opportunities for new materialists to argue *where* and *with whom* responsibility lies. Such arguments are especially crucial given that courts often abdicate responsibility to other branches (e.g., “it’s not our job; it’s a matter for the legislature”), as if other branches are more qualified to define, for example, which beings qualify as “legal persons.”

- 6) *National Identity or Ethos* interprets the Constitution by considering the “unique character of American institutions” and “our distinct national identity.”<sup>138</sup>

Rhetoricians may find this interpretive mode to be simultaneously too conformist and too eccentric; they are not wrong. Constitutional interpretation using national identity as a guide allows jurists to argue for legal outcomes that reflect values assigned to rhetorically constituted concepts (or assemblages) such as sanctity of life and/or family, marketplace of ideas, and private property. A concept like “family” may be defined in terms of heteropatriarchy (a man, woman, and their children), or in terms of emotional bonds and commitment (e.g., common law marriage, adoption, “chosen family,” etc.). Even though national identity interpretation is most often used by judges to favor conservative outcomes, there is nothing that *disallows* progressive or, in the case of new materialism, transformative conceptions of identity or ethos.

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<sup>138</sup> “National Identity or Ethos and Constitutional Interpretation,” *Constitution Annotated*, [https://constitution.congress.gov/browse/essay/intro.8-7/ALDE\\_00001308/](https://constitution.congress.gov/browse/essay/intro.8-7/ALDE_00001308/).

7) *Pragmatism* is an interpretive mode that considers consequences in two forms. The first concerns the public by considering “the likely practical consequences of particular interpretations of the Constitution,” and the second concerns judicial roles by examining “the extent to which the judiciary could play a constructive role in deciding questions of constitutional law.”<sup>139</sup> Public-facing pragmatism may result in dismissal of concerns based on feasibility (e.g., it is impossible to reprint ballots two weeks before an election), social cost (e.g., prohibiting certain types of interstate travel may affect economies, property values, medical care, etc.), or instability of the judicial system (e.g., withdrawing the necessity of Mirandizing at the point of arrest may cause confusion about individual rights and open argumentative space for charges of misconduct). Public-facing pragmatism may also allow for decisions that break free of legal constraints and their associated meanings to reach more just outcomes. For example, a pragmatic interpretation of the Second Amendment might argue that whatever significance “the right to bear arms” may have had to colonists and revolutionaries at the country’s founding is not worth the material, present day effects of everyday gun violence and mass shootings that occur in the present. For new materialists, public-facing pragmatism can be a winning or losing proposition: if a shift toward greater rights for nonhumans is likely to disrupt legal stability, it may be dismissed; if it prevents material harms to nonhumans

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<sup>139</sup> “Pragmatism and Constitutional Interpretation,” Constitution Annotated, [https://constitution.congress.gov/browse/essay/intro.8-5/ALDE\\_00001306/](https://constitution.congress.gov/browse/essay/intro.8-5/ALDE_00001306/).

that are enabled merely by arcane verbiage or the continuation of the status quo, it may be taken up. The second form of pragmatism considers the role of the judiciary, including questions about proper venue for deliberation. As such, it shares some discursive openings with functionalist structuralism, particularly in the question of whose job it is to decide. Unlike structuralism, however, pragmatism's focus on consequences is likely to outweigh technical arguments about constitutional structure. If an injustice persists and the Constitution does not specify how it should be addressed, a structuralist interpretation may lead to a conclusion that it cannot be remedied by any branch of the federal government, whereas a pragmatist interpretation that is self-reflexive may encourage jurists to step into the perceived void.

- 8) *Moral Reasoning* is an interpretive mode that focuses on moral concepts and ideals expressed in the Constitution that have become associated with ethical or moral principles.<sup>140</sup> For example, the Equal Protection Clause of the Fourteenth Amendment was ratified in 1868 as part of the Reconstruction Amendments, to ensure that individual states could not deny rights and protections to free Blacks. Since the 19<sup>th</sup> century, "equal protection" has been applied to cases involving segregation, the Civil Rights Act, gay marriage, and sex discrimination. For many jurists, "equal protection" is an overarching principle of the Constitution. From a rhetorical perspective, "equal protection"

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<sup>140</sup> "Moral Reasoning and Constitutional Interpretation," Constitution Annotated, [https://constitution.congress.gov/browse/essay/intro.8-6/ALDE\\_00001307/](https://constitution.congress.gov/browse/essay/intro.8-6/ALDE_00001307/).

is a good term; the phrase and its associated meanings have become valorized to the point of being a (nearly) undisputed virtue. Rather than focus on language, as seen in textualism and originalism, moral reasoning as an interpretive mode focuses on moral and ethical principles both as they are articulated in the Constitution and as they have come to be *understood and valued over time*. For new materialists, moral reasoning is thus more attentive to dynamic changes in materialities, and its categories are open to conceptual expansion. A new materialist advocate may reasonably argue for expanding equal protection to nonhumans. Indeed, many such arguments have persuaded appellate judges—at least enough for higher courts to debate the merits of specific cases involving nonhumans.

In sum, there are eight modes of constitutional interpretation, and each provides discursive openings for rhetorics of materiality—but the focus of each mode determines its rhetorical flexibility and, to an extent, the likelihood of being persuaded by new materialist discourse. Originalism, judicial precedent, historical practices, and formalist structuralism are modes of interpretation *least likely* to be open to new materialism because of their reliance on precedent, history, and highly selective attention to contexts. Textualism and national identity are *more likely* to be open, given their tendency to reflect social meaning as it is understood by present publics (though national identity is a conservative mode, obstacles may be overcome through persuasion). Pragmatism and moral reasoning are *most likely* to be open to new materialist discourse because neither prioritizes exact language of the Constitution, instead focusing on consequences and ethics, respectively.

While I am certainly not an expert in Constitutional interpretation, my goal in this section has been to suggest that even the most conservative, rule-based modes have rhetorical openings for new materialist discourse. Depending, of course, on how one argues.

## Argumentation

Argumentation is designed in part to respond to modes of interpretation. As demonstrated above, each mode rests on a set of assumptions that can be challenged with evidence like examples and hypotheticals, or with counterarguments that point out inconsistencies and logical fallacies (e.g., argument by tradition). Rather than produce a corollary list of arguments to match modes of interpretation, I will use stasis theory as a way to explore opportunities for rhetorics of materiality.

As described by Jeanne Fahnestock and Marie Secor, stasis theory is both a scheme of invention and a format arrangement used to make arguments.<sup>141</sup> Stases are sets of questions, the organization of which is both logical and hierarchical: one set of questions must be dealt with before moving onto the next. Stases should be dealt with in the following order: 1) questions of fact, 2) questions of definition, 3) questions of values, and 4) questions of procedure or policy.<sup>142</sup> The legal process equivalents may be described as establishing facts, how facts are characterized, possibilities of justification or excuse, and procedural objections.<sup>143</sup> There is one important distinction between how stases are taken

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<sup>141</sup> Jeanne Fahnestock and Marie Secor, "The Stases in Scientific and Literary Argument," *Written Communication* 5, no. 4 (October 1988): 429.

<sup>142</sup> *Ibid*, 428.

<sup>143</sup> See Hanns Hohmann, "The Dynamics of Stasis: Classical Rhetorical Theory and Modern Legal Argumentation," *The American Journal of Jurisprudence* 34, no. 1 (1989): 171-197.

up by the courts, and debate. The fourth stasis, questions of procedure, are dealt with *first* in order to save time. For example, if the court decides a plaintiff lacks standing to bring a case, then cause of action (factual and legal grounds) and merits of the case (legal principles and their application) become moot. Apart from this deviation, arguments in individual cases follow the classical order: facts, then definitions, then values. It is also helpful to think of the U.S. judicial system as similarly structured. Cases first appear in lower courts, where facts are determined, definitions are discussed, and values-based conclusions are reached in civil or criminal trials. If a case is then appealed to a higher court (i.e., an appellate court), judges or justices may wish to hear arguments regarding definitions and values, but it is extremely rare for them to question facts as established by lower courts. Because this project focuses on discourse at the appellate level, and values will be discussed in detail in later chapters, my focus here is on stasis two: definitions.

As rhetorician James Boyd White writes, law is “a culture of argument, perpetually remade by its participants.”<sup>144</sup> More specifically, “the [legal] case is always an invitation to the reconstitution of the language in the light of new circumstances and new intractabilities.”<sup>145</sup> The process of applying the law to unique, locally materialized events is a challenge that requires legal actors to engage in multiple acts of definition. In *Rhetoric and the Rule of Law*, Neil MacCormack notes that this process begins with naming and classification: “events which occur in the world are not self-labeling. Therefore any

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<sup>144</sup> James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*, (Madison: The University of Wisconsin Press, 1985), 35.

<sup>145</sup> James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago and London: The University of Chicago Press, 1984), 265.

classification of events which occur under some predicate-term as stated in a rule-formulation would necessarily involve a kind of decision, not a pure act of cognition.”<sup>146</sup> Decisions entail choices, and choices may be influenced by rhetoric—within the specific constraints of the legal system. Chaim Perelman explains that unlike the field of ethics, where decisions can be motivated by conscience alone, courts must also consider the established order.<sup>147</sup> These constraints, in conjunction with the justice system’s reliance on dialectical discourse, often result in Sartrean-style arguments about what an event is and what it is not. For example, whether the killing of a person can be labeled “murder” as opposed to “manslaughter” rests on both the material singularities of the event *and* how the two terms have been traditionally defined in legal texts. The purpose of this definitional process is to provide clarity, consistency, and finality. Definitions are also critical to achieving justice that is seen to be egalitarian; all events and persons in the same category deserve the same treatment (e.g., any two people who commit “fraud” should be treated the same).<sup>148</sup>

The process of defining also results in the reification of anthropocentric binaristic thinking with which new materialists take issue. Classification and categorization are human ways of defining events and things, and labels act similarly to metaphors in that they are inferential: some meanings are brought to the fore while others are sent to the

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<sup>146</sup> Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford and London: Oxford University Press, 2005), 70.

<sup>147</sup> Chaim Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning*, (Dordrecht, Holland; Boston, U.S.A.; and London, England: D. Reidel Publishing Company, 1980), 18-19.

<sup>148</sup> *Ibid*, 11.

background.<sup>149</sup> To label a person a “felon,” for example, highlights that person’s involvement in felonious acts over any and all other events, identities, and descriptors they have inhabited across time; citizen, voter, taxpayer; parent, child, sibling; educated, successful, ethical; carpenter, teacher, laborer, etc. From a new materialist perspective, such a process is atomistic in its attempts to name what is essential, as opposed to rhizomatic in a way that can account for multiple, dispersed singularities.<sup>150</sup>

Legal definitional processes constitute binaries of an “or not” variety: public/not public, subject/not subject, person/not person. What is not explicit is that the “or not” term is enthymematically determined by both judicial precedent and common understanding: public/not public translates to public/private; subject/not subject to subject/object; and person/not person to person/animal, person/embryo, person/corporation, etc. While all such binaries ignore dispersed singularities, many of them also enforce hegemonic hierarchies, as in subject *over* object and person *over* animal.<sup>151</sup> Thus, the construction of hierarchic binaries makes the stasis of definition bleed into the stasis of value—and gives new materialist advocates an expanded terrain on which to argue.

Binaries that rank persons over non-persons are of special interest to new materialists, and not just because they are anthropocentric. For example, say a river is

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<sup>149</sup> Michael C. Leff, “Topical Invention and Metaphoric Interaction,” in *Rethinking Rhetorical Theory, Criticism, and Pedagogy*, eds. Antonio de Velasco, John Angus Campbell, and David Henry, 115-132, (East Lansing: Michigan State University Press, 2016).

<sup>150</sup> On rejection of atomism as described by liberal humanism, see Barad, *Meeting the Universe Halfway*; on rhizomes, see Deleuze and Guattari.

<sup>151</sup> See Mel Y. Chen, *Animacies: Biopolitics, Racial Mattering, and Queer Affect*. (Durham, NC: Duke University Press, 2012).

being polluted by runoff waste produced by several independently held companies.

Government policy permits only trace amounts of harmful substances in the wastewater of each company. No single company is in violation of regulations, but the cumulative effect of the combined pollutants is making the river water unsafe and eroding its ecosystem. A lawyer sues the state, arguing that the river has rights that have been violated. A court denies their claim because: 1) the plaintiff is a river (stasis of fact), 2) a river is not a person (stasis of definition), and 3) only persons should have rights under the law (stasis of value).

The claim that a river is not a person is supported by phenomenological experience and common understanding: *of course* rivers are not persons—they do not look, feel, act, or communicate as persons do. This observation both *reveals* and *provides cover for* a significant assumption made in the definitional process: that persons are human.

The label “person” carries associated meanings that have been extensively and continually valorized in U.S. political, historical, and cultural contexts—as in “We the People.” While “the people” as rhetorically constituted at the time of the founding did not include all humans, the original purpose of such a construction was most likely to draw a distinction between “the people” of a nation and “the subjects” of a king. Accordingly, the term “people” carries connotations of individual rights in a democracy. U.S. legal texts assert several such rights, including what Isaiah Berlin calls “positive rights,” or rights that provide liberties, such as freedom of speech and the right to due process; and “negative rights,” or rights that protect, such as equal protection under the law and protection from illegal search and seizure. Therefore, the rhetorical construction of “people,” reified by U.S. legal discourse spanning two-and-a-half centuries, leads to legally defining “person”

as 1) a bearer of rights, and 2) entitled to remedy when those rights have been violated.

There is nothing illogical or unjust about this classification—as long as the class of “persons” includes all individuals, groups, or things that *ought* to have rights and access to remedies.

From a new materialist perspective, the problem is that jurists assume all “persons” to be human. Certainly, all humans should be considered “persons” with the legal rights the designation entails. But should all “persons” be considered human? If we subject the term “human” to the same legal definitional process as “person”—by defining it by what it is not—the resulting binary would be human/not human. What are the terms most likely to be enthymematically determined as replacements for “not human” in such a binary? Strong possibilities include “animal,” “machine,” “nature,” “technology,” and “divine,” all of which are based on perceived ontological, biological, and agential differences that constitute them as human opposites. It is highly improbable that any context, including the law, would produce a replacement like “a thing without rights”—for the simple reason that humans generally believe they have always been human, before and outside the invention of rights. At the very least, this makes the classifications of “persons” and “humans” non-synonymous.

To revisit the hypothetical example of the lawyer suing on behalf of a river, the judge dismisses the case because the river is not a person (stasis of definition), and only persons should have rights (stasis of value). If a “person” is defined as a rights bearer, the reasoning is tautological: the river is not a rights bearer (stasis of definition), and only rights bearers should have rights (stasis of value). The argument is only sound (logically if not

ethically) if what the judge means to say is “human” instead of “person:” the river is not a human (stasis of definition), and only humans should have rights (stasis of value). Then why the obfuscation? Two reasonable possibilities, neither of which impugns the judge: anthropocentric habitus continually affirmed by legal discourse and precedent (i.e., the law has always meant “person” to be synonymous with “human”), or fear of consequences that may destabilize the Rule of Law (e.g., if “person” includes the nonhuman, it will challenge all rights to own “property”).

In sum, legal processes of definition provide multiple discursive openings in argumentation for rhetorics of materiality. Advocates can argue stasis of definition by questioning the method of defining terms by their opposites, how binaries are constructed, the hierarchical nature of binaries, and the hidden assumptions made by definitional mistakes. There is also an added benefit to arguing stasis of definition. As Fahnestock and Secor point out, the stases can “become a sensitive tool for audience analysis.”<sup>152</sup> Advocates must learn to tailor arguments to their most important audience: judges and justices. They too are members of White’s “culture of argument,” constantly remaking the world of law, but their decisions have consequences that far exceed the confines of the courtroom.

## Adjudication

Court orders, rulings, opinions, dissents, and concurrences are among the most impactful artifacts of constitutive rhetoric in existence. They can protect or destroy

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<sup>152</sup> Fahenstock and Secor, 431.

biological individuals, entire species, and full ecosystems; they can challenge or reify structural injustices, bigotry, and exploitation; they can uphold or disregard contracts, commitments, and ethics. Even with stakes this high, advocates must remember that judges and justices are also human beings with emotions and imagination—and that it is *part of an adjudicator's job to employ these tools*. For new materialist advocates, this is fertile ground for discursive intervention. Rhetorics of materiality argue that we should adopt a new *vision* of material reality that acknowledges complexity, enmeshment, and dynamic relations; and a new *sensibility* that attunes to the needs, ways, uneven typographies, and distributed agency of humans and nonhumans alike. In other words, judges should be persuaded to see and feel in new ways. Discursive opportunities for such interventions already exist in the way adjudicators respond to and make use of stories, emotions, imagination, and language.

Judges and justices are bound by cultural and structural constraints in interpretation, argumentation, and adjudication—but this does not result in formulaic legal practice. White describes the legal process as creating a narrative:

The lawyer, one might say, begins with his client's story and ends in the court of appeals, arguing a point of statutory interpretation or constitutional law. And the judge must take two or more such arguments—two ways of connecting a particular story with a system or theory that will explain and act upon it—and with their aid fashion his own account, a version that concludes with a judgment or order in legal language, with words that work on the world. The endless possibilities for narrative, the retellings of the story in ever more various terms, come to an end at last with a characterization of experience in the terms of the law, a claim of meaning for which the judge must take responsibility. So it is that one story, one set of experiences, can be connected with others; so it is that the law is made. Might it not be suggested that the central act of the legal mind, of judge and lawyer alike, is this conversion of the raw material of life—of the actual experiences of people and the thousands of ways they can be talked about—into a story that will claim to tell the truth in legal terms? To do this, one must master both sorts of discourse (both

narrative and analysis) and put them to work, at the same time and despite their inconsistencies in the service of a larger enterprise.<sup>153</sup>

Converting “raw material of life” into “a story that will claim to tell the truth in legal terms” is an apt description of legal process; it is also a succinct explanation of how rhetorics of materiality, which aim to de-center the human, work in a legal system designed by and for humans: through translation.<sup>154</sup> The advocate argues on behalf or in consideration of the nonhuman; the judge takes up and weaves together elements of these arguments to craft a decision that “validate[s] a new vision of the world”<sup>155</sup>—in a language that can be understood and acted upon by fellow humans.

Building worldviews is exactly the kind of activity jurists like to deny engaging in, and partly accounts for their (aforementioned) resistance to acknowledging the rhetorical nature of legal processes. It is easy to see why: judicial system stability depends on public validation, and many jurists either mistakenly believe that logic, objectivity, and calculated coolness alone support validity, or they believe the public believes it. The result is what legal scholar Benjamin Zipursky calls “cultivated dispassionateness,” or a “practiced resilience to gripping individual circumstances.”<sup>156</sup> In fact, to adjudicate well is to embrace subjective, emotional engagement. Emotions are not a distraction from or a threat to

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<sup>153</sup> James Boyd White, *The Legal Imagination*, (Chicago and London: The University of Chicago Press, 1985), 243.

<sup>154</sup> The idea of justice as translation comes from James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism*, (Chicago and London: The University of Chicago Press, 1990). The application of this idea to new materialism is my own.

<sup>155</sup> James Boyd White, *Justice as Translation*, 101.

<sup>156</sup> Benjamin C. Zipursky, “Austerity, Compassion and the Rule of Law,” in *Virtue, Emotion and Imagination in Law and Legal Reasoning*, eds. Amalia Amaya and Maksymilian Del Mar (Oxford and New York: Hart Publishing, 2020), 62.

reasoning, they are an underused resource *in aid of* reasoning. As legal scholar Catherine Elgin writes, “emotions disclose; they do not typically confabulate.”<sup>157</sup> Emotions improve perceptibility,<sup>158</sup> help identify salience,<sup>159</sup> and curb cruel impulses.<sup>160</sup> The last of these is critical not just to judicial process but to justice itself.

Legal scholar Emily Kidd White notes that emotional engagement is a bulwark against excesses of abstraction. When judges engage in abstractions like legal principles, doctrinal minutiae, and textual fidelity, they pull away from themselves as embodied, living, and materially enmeshed. In Deleuzean terms, they prioritize transcendence over immanence, universals over particulars.<sup>161</sup> The result is a hobbling of empathy and the apparent injustice of caring more about legal doctrine than material reality and lives. Lack of empathetic capacity can also lead to selective empathy, or empathy for the few but not the many. Legal scholar Amy Kind argues that “The greater one’s capacity for empathy, the more easily one will be able to extend it widely. A sufficiently empathetic judge will be able to empathize not only in cases where suffering is obvious, or where the figures involved are especially sympathetic ones, but in more difficult cases as well.”<sup>162</sup> In this way, empathy is essential to egalitarian adjudication.

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<sup>157</sup> Catherine Z. Elgin, “Impartiality and Legal Reasoning,” in *Virtue, Emotion and Imagination in Law and Legal Reasoning*, eds. Amalia Amaya and Maksymilian Del Mar (Oxford and New York: Hart Publishing, 2020), 57.

<sup>158</sup> Amalia Amaya and Maksymilian Del Mar, “New Horizons for the Study of the Legal Mind: Relating Virtue, Emotion and Imagination,” in *Virtue, Emotion and Imagination in Law and Legal Reasoning*, eds. Amalia Amaya and Maksymilian Del Mar (Oxford and New York: Hart Publishing, 2020), 11.

<sup>159</sup> Elgin, 57.

<sup>160</sup> Benjamin C. Zipursky, “Austerity, Compassion and the Rule of Law,” in *Virtue, Emotion and Imagination in Law and Legal Reasoning*, eds. Amalia Amaya and Maksymilian Del Mar (Oxford and New York: Hart Publishing, 2020).

<sup>161</sup> See Deleuze and Guattari.

<sup>162</sup> Amy Kind, “Empathy, Imagination and the Law,” in *Virtue, Emotion and Imagination in Law and Legal Reasoning*, eds. Amalia Amaya and Maksymilian Del Mar (Oxford and New York: Hart Publishing, 2020), 188.

Arguing for extended empathy as a pathway to egalitarian justice is important for new materialist advocates in some cases. Animal rights cases, for example, call for judges to relate empathetically to plaintiffs. But engaging a judge's emotions should not be restricted to moves toward empathy. For new materialists, the most common emotion in cases involving nonhumans is, or stems from, fear: fear of responsibility (e.g., "this is a question best left to legislators," or "such a decision will result in courts being overwhelmed with new claims"), fear of losing status (e.g., "are you saying animals should have the same rights as humans?"), fear of losing mastery or control (e.g., "whether materially present or not, national borders need defending), etc. New materialist advocates need not challenge the validity of these fears, but they should be prepared to acknowledge and attend to them in argumentation. If emotions are tools for recognizing salience, emotional responses from judges should tell advocates where to focus their efforts.

Legal scholars argue that good reasoning also involves imagination: Simon Stern observes that the use of fictions and hypotheticals open thinking space;<sup>163</sup> Amalia Amaya and Maksymilian Del Mar argue that imagination helps construct narratives from facts and case descriptions;<sup>164</sup> and Elgin notes that imaginative thinking helps notice patterns and understand motivations.<sup>165</sup> Adjudication also engages moral imagination, enabling jurists

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<sup>163</sup> Simon Stern, "The Legal Imagination in Historical Perspective," in *Virtue, Emotion and Imagination in Law and Legal Reasoning*, eds. Amalia Amaya and Maksymilian Del Mar (Oxford and New York: Hart Publishing, 2020), 226; Iris van Domselaar, "All Judges on the Couch? On Iris Murdoch and Legal Decision-Making," in *Virtue, Emotion and Imagination in Law and Legal Reasoning*, eds. Amalia Amaya and Maksymilian Del Mar (Oxford and New York: Hart Publishing, 2020), 80.

<sup>164</sup> Amaya and Del Mar, 12.

<sup>165</sup> Elgin, 55.

to see oneself as they see others,<sup>166</sup> and to imagine how their preferred models of justice would affect themselves.<sup>167</sup> It is in constructing their worldview, however, that judges rely on imagination the most. Although laws are made in response to injustices and bad acts, adjudication requires imaginative constructions that propel the law beyond redressing harms. As Justice Louis Brandeis writes in his dissent in 1928's *Olmstead v. U.S.*,

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a Constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.<sup>168</sup>

When Brandeis writes that "time works changes" bringing "new conditions and purposes," he is implicitly modeling the use of imagination in adjudication: circumstances change, and judges should imagine how those circumstances would fit decisions they make today. "The future" of constitutions is "their care and provision" for events "of which no prophecy can be made," the Justice argues, so adjudication "cannot be only show what has been but

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<sup>166</sup> Iris van Domselaar, "All Judges on the Couch? On Iris Murdoch and Legal Decision-Making," in *Virtue, Emotion and Imagination in Law and Legal Reasoning*, eds. Amalia Amaya and Maksymilian Del Mar (Oxford and New York: Hart Publishing, 2020), 79.

<sup>167</sup> Amalia Amaya, "Admiration, Exemplarity and Judicial Review," in *Virtue, Emotion and Imagination in Law and Legal Reasoning*, eds. Amalia Amaya and Maksymilian Del Mar (Oxford and New York: Hart Publishing, 2020), 30.

<sup>168</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

of what may be.” Brandeis acknowledges that while we cannot know the future, we should imagine material and discursive challenges that may arise. This reflects what Amaya calls backward and forward thinking: an imaginative exercise that links past, present, and future.<sup>169</sup> Essentially, Brandeis views the law as reactive *and* proactive, requiring not just application of the law to the specific case, but imagining its application to a multiplicity of future cases, each with its own singularities. This is how one builds a worldview: by imagining multiple instances, multiple contexts, multiple consequences.

For new materialists, exercising the imagination presents a crucial opportunity for discursive intervention. To see life as a brittlestar, made up entirely of eyes;<sup>170</sup> to answer the question, “what kind of I is alive in a world of vibrant matter?”;<sup>171</sup> and to dwell in the *chora*, “the matrix of all becoming,”<sup>172</sup> require imagination. To shift away from anthropocentrism toward a vision of being more enmeshed, entangled, and attuned requires imagination. Arguing for these imaginings in legal contexts need not be daunting. New materialist advocates can draw attention to, for example, how a case description implicitly reifies species thinking,<sup>173</sup> how patterns consistently ignore the assemblage-like nature of events,<sup>174</sup> how profit motivations commodify crops instead of treating them like a

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<sup>169</sup> Amaya, 30.

<sup>170</sup> Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Durham and London: Duke University Press, 2007), 372.

<sup>171</sup> Jane Bennett, *Influx & Efflux: Writing up with Walt Whitman* (Durham and London: Duke University Press, 2020), 118.

<sup>172</sup> Thomas Rickert, *Ambient Rhetoric: The Attunements of Rhetorical Being* (Pittsburgh, PA: University of Pittsburgh Press, 2013), 55.

<sup>173</sup> See Jenell Johnson, *Every Living Thing: The Politics of Life in Common* (University Park, Pennsylvania: The Pennsylvania State University Press, 2023).

<sup>174</sup> See Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Durham and London: Duke University Press, 2010).

gift that needs to be reciprocated,<sup>175</sup> or how living “in the wake” means that events from long ago still affect material conditions and living bodies in the present.<sup>176</sup>

Legal language may appear too formal, traditional, and restrictive to account for rhetorics of materiality, but what if these constraints were viewed as exigencies calling for more creative communication? Stern observes that “the law itself turns out to be a barren and arid domain, replete with ossified, regimented, hidebound abstractions [...] What’s required is an antidote—a balm that will rejuvenate this desolate landscape and help life to flourish again.”<sup>177</sup> Legal scholar Iris van Domselaar agrees, and believes the antidote may be found by adopting a new language:

Perhaps one could argue, for example, that in order for an epistemic community to enable and enhance the flourishing of collective open-mindedness and inquisitiveness, which would be of value to collective inquiry, such an epistemic community might need an appropriate language. This would need to be a language that would allow the community as a whole to detach itself from its commitments and consider alternatives to its views [...] A language like this would need to have the capacity to surprise, to pull members of the community out of their ordinary run of communication with each other, to enable them to pause and hesitate together—to make, in short, language less automatic, less ready to hand, and something in itself strange or requiring attention and care.<sup>178</sup>

The “epistemic community” van Domselaar refers to is comprised of legal actors—the same community White describes as having a “culture of argument” in which language is continually made and remade through legal practice; they have the power to embrace new linguistic expressions if they choose. Van Domselaar does not suggest abandoning the

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<sup>175</sup> See Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge, and the Teaching of Plants* (Minneapolis: Milkweed Editions, 2013).

<sup>176</sup> See Christina Sharpe, *In the Wake: On Blackness and Being* (Durham and London: Duke University Press, 2016).

<sup>177</sup> Stern, 217.

<sup>178</sup> Van Domselaar, 255.

knowledge produced by Stern's "barren and arid domain;" instead she argues for the legal community to *try a new language* to foster the "flourishing" of "open-mindedness and inquisitiveness;" a new way of translating White's "raw material of life" into a story legible to the legal and public sphere. This new language would allow the community to "detach itself from its commitments" and "consider alternatives to its views." Such commitments could include anthropocentrism, or the atomistic vision of the individual, or the binary of subject/object that enables humans to exploit nonhumans on a massive scale. When new materialists consider alternatives to anthropocentrism, atomism, and hierarchical binaries, they use a language fitting van Domselaar's description of what's necessary in law: a language of surprise, extraordinary in its distinction from stale ways of communicating, that asks us to pause and think, that speaks of strangeness and requires care. Even the idea of a language that is "less automatic, less ready-to-hand" suggests a new materialist approach that values a thing's *being* over whatever *use* humans have determined for it. Van Domselaar suggests that such a language might be poetic in its embrace of the lyric, associated meanings, "symbols and blank spaces," and "rhythms and melodies."<sup>179</sup> What is more in line with new materialist ethics than poetic sensibility?

If a new language is needed to revitalize law; if that language enables detachment from commitments and consideration of alternatives; if it should capture attention through poetic description and affectivity; if it should ask us to pause together, to view things differently, to flourish open-mindedness—that language may be based in rhetorics of materiality. Bennett provides an exemplar:

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<sup>179</sup> van Domselaar, 255.

It might be called “dilation,” [Walt] Whitman’s term for a body’s capacity to open its pores to the outside, to (in the example given by Michael Moon) “dilate the throat in utterance, in speech, ‘chant,’ or song.” To be dilated is, as Whitman says in “By Blue Ontario’s Shore,” to be “unclosed to good and evil” alike. Dilated, one is vulnerable to affectations, to being affected by the world: “My limbs, my veins dilate; The blood of the world has fill’d me full.” The dilated self encourages more of the outside to seep in—even as more of its insides ooze out. “Dilation,” the complement to the more detached witnessing that is “nonchalance,” is a presumptive friendliness. This effusive affability is at the same time a becoming-diffuse and trans-individual; it is to inhabit a personality that is distributed and distributive; it is to live an existence that goes beyond the human being experiencing it.<sup>180</sup>

Bennett’s language describes the process of dilation, but it also evokes. As in the poetry she cites, evocation allows for slowing down, finding one’s feelings, imagining the world as other than it claims to be. If such language is new or foreign to jurists, they should aim to become polyglots. The point is not for the legal community to abandon traditional or conservative ways of defining, arguing, interpreting, and modeling justice; it is that such ways should not be the *only* resources for shaping what White calls a “story that will claim to tell the truth in legal terms.”

## Conclusion

In this chapter, I present what I call a “dappled view” of the legal field. My aim is not to be comprehensive, but to highlight a few areas of possibility for new materialist intervention in legal discourse—and to challenge the idea that the law’s conservative reputation forecloses the possibility of such interventions to be heard and persuasive. I

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<sup>180</sup> Bennett, *Influx & Efflux*, 15.

examine discursive opportunities in four areas of law that are not case-specific: models of justice, interpretation, argumentation, and adjudication.

Modeling justice is a jurisprudential activity concerned with responsibility and redress of harms; in essence, it provides a philosophical foundation for legal practice. According to Young, the current U.S. legal system follows the liability model, which assigns responsibility to individuals based on causal connection to harm. But the liability model cannot assign responsibility and redress for harms caused by structural injustices, in which human actors may be acting in good faith and following the law, but harm results nonetheless. Young's alternative is the social connection model of justice, in which responsibility for structural injustice—including responsibility for remedying harm—is distributed throughout society. Young's social connection model is promising for new materialist advocates for both ethical and practical reasons. Ethically, it acknowledges and takes seriously harms that cannot be remedied by the liability model and are therefore illegible to the current judicial system. Because the social connection model considers the agential power of structures, it is less anthropocentric and less atomistic than the liability model and more adroit in describing enmeshed ways of being. Practically, the social connection model suggests two possibly winning lines of argument. The first is fairness: if society's actions led to harm, society should be held responsible. The second is a kind of easy out: while everyone is responsible, no one is to blame. Although cases using the social connection model are not currently justiciable, new materialist advocates can use related rhetoric to frame their cases, even within the liability model, so as to encourage

judges and justices to respond to structural injustice during oral arguments and in written opinion.

As with Young's models of justice, philosophy and ethics generally seek out new lines of inquiry in response to changing material realities (e.g., ethics of AI). The courts have a hard time evolving at a similar rate due to their deference to historical legal documents. Thus, interpretation has a critical role in the legal system. I take constitutional interpretation as an example of how different interpretive modes can be probed by new materialist arguments. There are eight modes of constitutional interpretation at use in current appellate courts, and some modes are more likely than others to be open to a new materialist challenge. Originalism, judicial precedent, historical practices and formalist structuralism are least likely open to intervention, given their reliance on precedent, history, and highly selective consideration of context. Textualism and national identity are more likely to be open, given their tendency to validate meaning as currently constructed by society. Pragmatism and moral reasoning are most likely to be receptive because as interpretive modes, they prioritize consequences and ethics. While I suggest some tactics new materialist advocates might use to probe, challenge, or argue against each of these interpretive modes, the key takeaways are again, ethical and practical. Ethically, all modes of interpretation can and should be challenged when they rely on anthropocentrism that justifies continued exploitation and extinction of the nonhuman. Practically, interpretive modes constitute serious obstacles; it is difficult to imagine a Justice Scalia, for example, tolerating a discussion on meaning as an assemblage that is continually and dynamically becoming. Judges and justices are also unlikely to change their preferred mode of

interpretation because it may cast doubt on their previous rulings. Practical advice for new materialist advocates is therefore twofold: advocates should always be prepared to argue interpretation with judges who embrace more open interpretive modes; and they should seek to intervene at the law school level, before jurists have made ideological commitments to interpretive modes.

Broadly and substantively, arguments often directly correspond to interpretive modes, but there are other opportunities for new materialist discourse in argumentation. Using stasis of definition as an example, I examine the typical legal process of definition and its production of binaries. Because legal processes of definition rely on dialectical reasoning and arguments, entities tend to be defined by what they are not, such as person/not person). On its face, there is nothing wrong with this line-drawing technique; the problem is the law's seeming or feigned ignorance of the role played by enthymemes in processes of definition, in ways both grammatic and colloquial. At the grammatic level, dialectical definitional processes result in the "or not" term replaced enthymematically by what is socially constituted to be the term's opposite: person/nonperson becomes person/animal, or person/property. The resulting binaries function hierarchically because the second term is seen as a pretender; the binaries read as reality over appearance. Such hierarchies not only degrade nonpersons, but they can also justify punishment of nonpersons for their seeming pretense, as in the case of legal immigrant/illegal immigrant. Colloquially, the situation is worse. The term "person" and its plural "people" are heavily weighted with associated meanings that historically pertain to humans, as in "We the people." Due to the continual renewal of these connections in political and legal

discourse, jurists sometimes take “person” to be synonymous with “human”—*without engaging in dialectical definitional process*. The inevitable result is anthropocentrism at its most entrenched: if persons have certain rights and nonpersons do not, and persons are de facto human, then only humans have those rights. For new materialist advocates, it is an ethical imperative to question definitional processes that disregard nonhumans at best and punish them at worst. Practically, advocates should always be prepared for challenges in stasis of definition. In some cases, the judicial outcome may depend on it; in others, stasis of definition may be used as a diagnostic tool to determine a judge’s openness to intervention.

When it comes to adjudication, new materialist advocates should remember that worldbuilding, consulting emotions, imaginative exercise, and creative use of language are part of decision making—and they present a multiplicity of discursive openings. Judges and justices create texts (rulings, opinions, etc.) that apply abstract legal principles to locally materialized facts; in doing so, they must envision the world their decision would constitute. Emotions are a significant factor in this process because they guide judges toward what is salient, fair, and moral. Increased empathy, for example, is necessary to combat what Zipursky calls “cultivated dispassionateness” in judging. Imagination is also a rich resource, used in description, hypotheticals, counterfactuals, and moral deliberation. According to legal scholars, new and creative uses of language may also work to revitalize seemingly arid and ossified legal discourse, making judicial decision making more responsive to nuance and open minded. All of these aspects of judging present a perfect call and response scenario for new materialist advocates. Recall that the ethics of

new materialism are mostly ephemeral and descriptive, require something other than humanist ethics, encourage attunement to nonhuman actants their power differentials, and manifest as a sensibility. Moving away from anthropocentrism and humanist ethics necessitates envisioning the world as different than it currently is (worldbuilding and imagination), attuning to nonhumans requires a desire to empathize with alterity (emotions and imagination), and cultivating a sensibility often means opening oneself up to poetic articulations (new and creative use of language). In terms of practical strategies, advocates should practice worldbuilding as judges do, by imagining how different decisions constitute different future worlds. Advocates should also prepare for judges to respond emotionally, especially if they express fear of consequences. Finally, advocates should not be afraid to use poetic language when appropriate. For every judge that withdraws support because of a commitment to arcane, reductive, dispassionate communicative style, there is a judge waiting to be inspired by language that is ephemeral, slow and searching, and lyrical.

By presenting this view of the legal field, I argue that the law is not as impervious to as it may seem. If we are to take new materialist ethics seriously, advocates can and should take advantage of openings across legal discourse, including in the areas of modeling justice, interpretation, argumentation, and adjudication. The alternative is to accept a status quo that routinely ignores, dismisses, degrades, and punishes nonhuman subjects and entangled realities. In its current iteration, law allows for mass abuse and destruction of animals, decimation of ecosystems, global pollution resulting in climate change, near limitless circulation of weapons of violence, and state-sanctioned killing of

foreigners who cross materially non-existent borders. Not all strategies for new materialist intervention will succeed in terms of judicial rulings, but no effort will be wasted: law, as Latour notes, is like an archive. Every attempt builds a record for advocates to draw from in support of case-specific arguments.

But as the saying goes, when plans meet reality, reality always wins. The specifics of a case may narrow or widen discursive opportunities for intervention; presenting a case requires advocates to think on their feet; and judges may be responsive and open or stubborn and recalcitrant. To see rhetorics of materiality in legal action, each of the following chapters examines a single case of significance for new materialist advocates.

## Chapter 2: Elephant

On February 18, 2020, Justice Alison Y. Tuitt of the Supreme Court of the State of New York, County of Bronx, issued an opinion in the case of the Nonhuman Rights Project on behalf of Happy the Elephant v. Breheny. The Nonhuman Rights Project (NhRP) had argued that Happy, an Asian elephant at the Bronx Zoo, was entitled to *habeas corpus* relief—a remedy for unjust detention—which meant Happy would be transferred from the Zoo to an elephant sanctuary. Justice Tuitt denied NhRP’s petition, but did so “regrettably,” stating that “this court agrees that Happy is more than just a legal thing, or property”—but Happy is not a “person,” and therefore not eligible for habeas relief.<sup>181</sup> NhRP appealed this decision to the State of New York Court of Appeals and received the same result: Happy is not eligible for habeas relief because she is not a “person.”

On June 14, 2022, *The New York Times* reporter Ed Shanahan published an article on both court decisions titled, “Happy the Elephant Isn’t Legally a Person, Top New York Court Rules.”<sup>182</sup> Comments on the article vary, but most comment on the concept of personhood.<sup>183</sup> Those who are familiar with the Supreme Court’s decision in *Citizens United* (2010) express a kind of sarcastic resignation: “Elephant not a person. Check. Maybe this elephant should band together with other elephants and form a corporation,”

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<sup>181</sup>Nonhuman Rights Project, Inc., on behalf of Happy v. James J. Breheny, 2020 N.Y. Slip Op. 35291 (N.Y. Sup. Ct. 2020).

<sup>182</sup> Ed Shanahan, “Happy the Elephant Isn’t Legally a Person, Top New York Court Rules,” *The New York Times*, June 14, 2022, <https://www.nytimes.com/2022/06/14/nyregion/happy-elephant-animal-rights.html>.

<sup>183</sup> For this and future discussions involving readers’ comments, I acknowledge that: comments on a particular platform reflect certain biases associated with that platform (e.g., readers of *The New York Times* have a particular epistemological bent); and it is impossible for me to know whether commenters are posting in good faith, or even if they are bots. These facts do not render comments useless; for readers, they are intertextual.

“So highly intelligent animals aren’t people but corporations are? Got it,” “Incorporate Happy: Happy, P.C. If Happy is a corporation, Happy will be a person.”<sup>184</sup> Some comments mark what they see as a moral tragedy: “No shortage of rationalizations for treating animals badly,” “These are the kind of arguments someone reads 100 years later and cannot believe how ignorant and cruel the people of the time were,” “It’s long past time that we regard other species as no less worthy than ourselves.”<sup>185</sup> And then, there’s this: “A human and a person are two different things. Person and personhood are philosophical concepts that can be applied legitimately to human and nonhuman entities.”<sup>186</sup>

Collectively, these and similar comments demonstrate a gap between the language and values of the judiciary and those of the public: the courts, however “regrettably” they come to their decisions, support the legal status quo of animals as property; the public is galled by what they see as semantic justifications for ongoing cruelty and anthropocentrism. The types of arguments the public may wish to see *are taking place* in courtrooms, but they are not succeeding. This chapter is dedicated to why that is.

Using a new materialist lens, I will analyze two rhetorical artifacts from the case’s final stage at the State of New York Court of Appeals: oral argument and the opinion of the court. Analyzing oral argument reveals values, interests, and strategies of the parties involved. The advocate *for* granting Happy habeas relief argues that Happy is autonomous and therefore deserving of rights, but this argument is undermined by its lack of a clear

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<sup>184</sup> Comments on Shanahan’s article from users Jeremy, 6/14/22; William James, 6/14/22; and Sarah Mann, 6/14/22; respectively.

<sup>185</sup> Comments on Shanahan’s article from users SR, 6/14/22; John Navarre, 6/14/22; and Cate, 6/15/22; respectively.

<sup>186</sup> Comment on Shanahan’s article from user Thomas, 6/14/22.

definition of autonomy; reliance on scientific evidence related to elephant *species*, rather than Happy herself; and use of an analogy to illustrate the flexibility of habeas that risks causing offense to potential allies *and* provides an opening for opponents to feign offense to shut down deliberation. The advocate *against* granting Happy habeas relief argues that Happy's detainment is lawful because it does not violate animal welfare laws—laws that are inherently anthropocentric. Analysis of the opinion of the court demonstrates a vehement defense of welfarism and anthropocentrism. It is a tale told in three binaries: “human being” / “nonhuman animal,” person/nonperson, and subject/object.

Based on artifact analysis, I argue that Happy's case overall demonstrates how deeply entrenched anthropocentrism and perpetuation of the human/animal binary (in its many iterations) is embedded in law, and how analogizing human and animal suffering is deeply problematic. I will begin by giving background on Happy and her case history, followed by the legal context of the case. Next, I will analyze oral argument and the opinion of the court using a new materialist lens. I then provide a new materialist critique of the case as represented by the artifacts. In my conclusion, I provide some possible modes of repair based in rhetorics of materiality.

### Background: The case of Happy

Happy was born in Thailand.<sup>187</sup> While her exact age is unknown, caretakers believe her to have been born around 1971-1972. As a baby, she was captured, caged, and

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<sup>187</sup> Unless otherwise specified, biographic details in this paragraph are from Jill Lepore, “The Elephant Who Could Be a Person,” *The Atlantic*, November 16, 2021, <https://www.theatlantic.com/ideas/archive/2021/11/happy-elephant-bronx-zoo-nhrp-lawsuit/620672/>.

shipped to the U.S. to partly fulfill an order for seven baby elephants to be housed at an animal park in Florida. The elephants were named after the seven dwarfs: Happy, Grumpy, Sleepy, Doc, Sneezy, Dopey, and Bashful. In 1974, the elephants were separated and sold off to zoos and circuses. Happy and Grumpy had bonded and were shipped as a pair to a safari park in Texas. In 1977, when their owner hit economic hard times, Happy and Grumpy were sold to the Bronx Zoo, where they were dressed in costumes and forced to give rides to children and perform tricks like salutes and bows. In 2002, two other elephants at the Bronx Zoo, Patty and Maxine, attacked Grumpy so badly that she was euthanized. After Grumpy's death, Happy could no longer get along with Patty and Maxine, and was housed separately. In 2006, the zoo brought in a young elephant named Sammy to be a companion for Happy, but Sammy died shortly after arriving. That same year, the Bronx Zoo announced that it had ended the practice of bringing in new elephants.<sup>188</sup> As of 2025, Happy and Patty are the last two elephants at the Bronx Zoo where they are separated by a fence and have minimal contact.<sup>189</sup> Happy effectively lives alone, spending her days moving between in a 1.15-acre yard and an indoor stall barely twice her body length.<sup>190</sup>

Happy is a member of an endangered species. In 2024, there were approximately 40,000-50,000 Asian elephants left, and their average lifespan is about 70 years in the wild.<sup>191</sup> The daily life of an elephant "is distinguished by need, purpose, challenge, choice,

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<sup>188</sup> Shanahan.

<sup>189</sup> Lawrence Wright, "The Elephant in the Courtroom," *The New Yorker*, February 28, 2022, <https://www.newyorker.com/magazine/2022/03/07/the-elephant-in-the-courtroom>.

<sup>190</sup> Brandon Keim, "An Elephant's Personhood on Trial," *The Atlantic*, December 28, 2018, <https://www.theatlantic.com/science/archive/2018/12/happy-elephant-personhood/578818/>; Wright.

<sup>191</sup> Michael Gross, "Of Elephants and Men," *Current Biology* 34, no. 2 (2024): R37–40.

will, autonomy and camaraderie.”<sup>192</sup> Elephants are highly social animals, and female elephants form matrilinear societies<sup>193</sup> in which family members move in and out of bonded groups.<sup>194</sup> They use diverse and complex forms of communications including “sounds, signals, touch, and seismic vibrations,”<sup>195</sup> and can identify family members through olfaction; some elephants can recognize the scent of their mother’s urine for up to 27 years after their parting.<sup>196</sup> They engage in cooperative helping behaviors<sup>197</sup> such as “target assistance,” in which they aid disabled or injured elephants, including those outside their communal groups.<sup>198</sup> They “excel at long-term, extensive spatial-temporal [...] and social memory.”<sup>199</sup> Elephants exhibit advance cognitive abilities including “behavioral innovation in the manufacture, modification, and use of tools,” and display behaviors “related to the theory of the mind (the capacity to understand what others see, feel, and know).”<sup>200</sup> Elephants also mourn their dead and engage in ritualized handling of remains.<sup>201</sup>

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<sup>192</sup> Joyce Poole and Petter Granli, “Mind and Movement: Meeting the Interests of Elephants,” in *An Elephant in the Room: The Science and Well-Being of Elephants in Captivity*, eds. Debra L. Forthram, Lisa F. Kane, David Hancocks, and Paul F. Waldau, (North Grafton, MA: Tufts Center for Animals and Public Policy, 2008), 7.

<sup>193</sup> Lucy A. Bates, Joyce H. Poole, and Richard W. Byrne, “Elephant Cognition,” *Current Biology* 18, no. 13 (2008): 545.

<sup>194</sup> Catherine Doyle, “Elephants in Captivity,” in *The Palgrave Handbook of Practical Animal Ethics*, eds. Clair Linzey and Andrew Linzey, (United Kingdom: Palgrave Macmillan UK, 2018), 183.

<sup>195</sup> Doyle, 184.

<sup>196</sup> Bates et al, 545-546.

<sup>197</sup> Elizabeth A. Krisch Pirutinsky and Joshua M. Plotnik, “Exploring the Social Minds of Elephants,” in *The Cambridge Handbook of Animal Cognition*, eds. Allison B. Kaufman, Josep Call, and James C. Kaufman (Cambridge: Cambridge University Press, 2021), 366.

<sup>198</sup> Doyle, 186.

<sup>199</sup> *Ibid*, 185.

<sup>200</sup> *Ibid*.

<sup>201</sup> *Ibid*, 186.

Zoologists have engaged elephants in mirror self-recognition (MSR) tests, which are thought to indicate self-awareness. In 2005, Happy was the first elephant to pass the test for MSR.<sup>202</sup>

In captivity, elephant behavior and sociality are determined by severe constraints. They are limited in “interactions, choices, and self-determining activities,” and incapable of social bonds due to their often-solitary existence. In the wild, elephant pathways range between 100-200 square kilometers; captive enclosures are at least ten thousand times smaller.<sup>203</sup> Trainers at zoos rely almost entirely on negative reinforcement, using a bullhook (like a fireplace poker, but with a pointed end) to jab elephants in sensitive areas; captive elephants learn to anticipate pain inflicted not only on themselves, but on other elephants.<sup>204</sup> Signs of poor welfare in captive elephants include “abnormal repetitive swaying, rocking, and head bobbing,” which are “ubiquitous” in zoos.<sup>205</sup> Captivity itself is usually the cause of death for captive elephants; individuals die of injury or disease, “from chronic foot disease caused by standing on hard surfaces to musculoskeletal disorders from extreme inactivity in small enclosures.”<sup>206</sup> In short, the lives of captive animals are often bleak and cruel. For humans seeking relief for captive animals, the legal sphere becomes a space of potential intervention.

Several of the high-profile animal cases in the past decade share the same legal representation: the Nonhuman Rights Project (NhRP), a nonprofit organization founded by

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<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*, 189.

<sup>204</sup> *Ibid.*, 191.

<sup>205</sup> *Ibid.*, 190-191.

<sup>206</sup> *Ibid.*, 189-190.

animal rights lawyer Steven Wise in 1995. According to their website, NhRP’s mission is to challenge “an archaic, unjust legal status quo that views and treats all nonhuman animals as legal ‘things’ with no rights,” and to argue that “as with human rights, nonhuman rights are based on fundamental values and principles of justice such as liberty, autonomy, equality, and fairness.”<sup>207</sup> NhRP’s clients are (to date) individual members of species that have been extensively studied by scientists and show signs of advanced cognition and autonomy: elephants, cetaceans, and great apes (Jane Goddall is an NhRP Board Member). NhRP states that “the law has to catch up to what we know about nonhuman animals, and courts and legislatures have to begin figuring out which species are entitled to which rights on what basis.”<sup>208</sup> Two of NhRP’s earliest cases were based in New York state: Tommy, a chimpanzee held in a shed on a trailer lot in Gloversville (case filed December 2, 2013); and Kiko, a chimpanzee held in a cage in a storefront in Niagara Falls (case filed December 3, 2013). Both were shackled, confined, and alone; both were denied relief by New York courts; and both have since died in captivity.<sup>209</sup> The chimpanzee cases generated press interest, debates amongst animal law scholars, and an important concurring opinion by Justice Eugene Fahey, in the case of Tommy, in which he wrote:

The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it.

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<sup>207</sup> “About Us,” *Nonhuman Rights Project*, accessed May 20, 2025, <https://www.nonhumanrights.org/about-us/>.

<sup>208</sup> “About Us,” *Nonhuman Rights Project*.

<sup>209</sup> “Tommy,” *Nonhuman Rights Project*, accessed May 20, 2025, <https://www.nonhumanrights.org/client/tommy/>; “Kiko,” *Nonhuman Rights Project*, accessed May 20, 2025, <https://www.nonhumanrights.org/client/kiko/>.

While it may be arguable that a chimpanzee is not a ‘person,’ there is no doubt that it is not merely a thing.<sup>210</sup>

Justice Fahey’s concurrence demonstrated that there was *at least one* voice on the court receptive to *some* of NhRP’s arguments. Encouraged to keep up the pressure, NhRP took Happy’s case in 2018.

On October 2, 2018, NhRP filed a petition on behalf of Happy for a common law writ of habeas corpus in the New York Supreme Court. The Wildlife Conservation Society, which manages the Bronx Zoo, filed a memorandum in opposition one week later, with an affidavit from the zoo’s Director, Jim Breheny. The parties battled one another using procedural rules, motions to dismiss, and temporary restraining orders, until the case reached Justice Tuitt’s court in 2019. Tuitt was sympathetic to Happy’s plight, but felt she was bound by the New York Supreme Court’s decision in *Lavery*, which stated that Tommy could not be granted habeas relief because he was not human, and ultimately Judge Tuitt decided against NhRP and Happy in 2020. NhRP then appealed to the New York Supreme Court, and after back-and-forth procedural challenges, the Court heard oral arguments on May 18, 2022. The NhRP submitted amicus briefs in support of Happy’s case, including two renowned elephant scientists, Joyce Poole and Cynthia Moss; three habeas corpus scholars, including Laurence Tribe; five Catholic theologians; 12 philosophers, including Martha Nussbaum and Peter Singer; and 50 animal law professors. The Court issued its decision on June 14, 2022. The New York Supreme Court’s 2022 oral arguments and its

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<sup>210</sup> The Nonhuman Rights Project, Inc., on behalf of Tommy v. Patrick C. Lavery, &c, et al., Motion No. 2018-268 (N.Y. Sup. Ct. 2018): 7.

2022 opinion are the focus of this chapter. Before analyzing these artifacts, I will provide the legal context most relevant to the case.

### Legal Context: Habeas Corpus and Animal Law

The legal doctrine at issue in this case is that of *habeas corpus subjiciendum et recipiendum*, which roughly translates as “‘to undergo and receive’ the *corpus*—or body—of the prisoner.”<sup>211</sup> Habeas corpus is “a judicial remedy available to litigants challenging the legality of their confinement.”<sup>212</sup> The law of habeas corpus originated in England, and its development is historically intertwined with the country’s evolution from monarchy to parliamentary governance. In the Magna Carta of 1215, chapter 39 states, “No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.”<sup>213</sup> In the early seventeenth century, habeas corpus became one focal point in an ongoing dispute between Parliament and King Charles I, who adamantly believed in the divine right of kings. When Charles imprisoned nobles for disagreeing with him, they petitioned the Court of the King’s Bench to be released under habeas corpus. In response, the Crown argued the action was justified solely “per speciale mandatum Domini Regis,” or by special command of the king.<sup>214</sup> Many jurists and

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<sup>211</sup> Amanda L. Tyler, *Habeas Corpus: A Very Short Introduction* (Oxford and New York: Oxford University Press, 2021), 2.

<sup>212</sup> Kermit L. Hall, James W. Ely, and David S. Clark, *The Oxford Companion to American Law* (Oxford, UK: Oxford University Press, 2002), 349.

<sup>213</sup> Magna Carta quoted in Tyler, 1-2.

<sup>214</sup> Tyler, 7-8.

parliamentarians viewed this exertion of royal will to be in direct conflict with the Magna Carta.

After the English Civil War and Charles' execution in 1649, England briefly became a republic. Parliament declared that any person detained by the King had the right to challenge detainment under habeas corpus. When the monarchy was restored in 1660, Parliament wanted to shore up this right, so it passed the English Habeas Corpus Act of 1679, which "both limited dramatically the power of the executive to detain and compelled the courts to implement the law's mandates under threat of penalty."<sup>215</sup> The key takeaway from this history is that habeas represents a refusal to submit to the whims of a monarch—whose only justification is "because I said so"—and an insistence on reasoned legal deliberation. This is how habeas became known as "the Great Writ:" it protects bodily liberty and is foundational to the concept of due process. Consequently, habeas corpus is explicitly mentioned in Article I, Section 9 of the U.S. Constitution.

Although the public focus on habeas corpus is on its affordances (release from unjustifiable detention), jurists are equally concerned with who the law empowers: judges. Habeas corpus is part of the common law tradition, and common law is "born in the decisions of individual cases."<sup>216</sup> This aspect of habeas is also connected to its origin story; authority had to shift from the crown to the court in a way that the people could understand. As habeas scholar Amanda Tyler explains: "at its origins, habeas corpus was a prerogative writ—a writ pursuant to which a court exercised the authority of the monarch—

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<sup>215</sup> Tyler, 11-12.

<sup>216</sup> Hall et al, 126.

empowering the royal courts to act on behalf of the king.” The apparent paradox of challenging the actions of the monarch with the monarch’s authority results in common law adjudication that is highly individualized and highly discretionary. Mapping this onto contemporary jurisprudence in the U.S., one might think of it as a power tradeoff: the legislature makes rules that apply to everyone, but courts decide—in *individual cases*—if the rules are justly applied. Although principles of stare decisis are strong in the U.S. legal tradition, in the case of habeas and other common law writs, judges have enormous flexibility in adjudication because their decisions apply to single individuals.

With these key points about habeas in mind—that it is a remedy for detainment without reasons, and that judges have great power in individual cases—NhRP filing a writ of habeas for Happy becomes legible. From NhRP’s perspective, there is no *good* reason why Happy is detained at the zoo, and no *good* reason not to treat her case as singular. Those who favor denying Happy habeas relief certainly may argue that there *are* good reasons to keep her at the Zoo, and that her case could open judicial “floodgates” to endless habeas claims—but opponents are more interested in arguing that Happy is not a “person,” and habeas applies only to “persons.” This leaves Happy’s advocates with a choice: concentrate on the historic flexibility of habeas, which allows judges to overrule unjustifiable containment no matter the litigant; or focus on the issue of personhood, including what constitutes a “person” and whether Happy meets that definition. As the upcoming artifact analysis will show, for better and worse, NhRP relies more on the flexibility approach.

The second tension that runs through the artifacts from Happy's case comes from animal law, which has historically sorted advocates into two groups based on preferred approach to animal injustice: animal welfare and animal rights. These two approaches dominate animal case history, even though some advocates have, since the 1970s, embraced a variety of "third way" options often originating in ecofeminism and ethics of care. Each approach has its own roots in philosophy and ethics, but they are largely outside the scope of this project. Animal welfare is the oldest approach, which bodes well for jurists who prize tradition, but it also exposes a significant problem: animal welfare laws are not well enforced. Consequently, advocates of animal welfare argue that what is needed is not new laws or legal protections, but enforcement of already existing welfare laws.<sup>217</sup> When animal rights advocates point out that animals are considered property in U.S. law, and that such status reduces animals to "mere things," animal welfarists like Richard L. Cupp respond, "Mere things' do not have laws protecting them." Cupp is referring to laws that prohibit animal cruelty, but these laws are rarely enforced due to the vagaries of defining "cruelty" and efforts to keep cruelties away from public view (e.g., tiny restrictive zoo enclosures). The animal welfare position typically assigns responsibility to single individuals and companies, such as a person who tortures a pet or a zoo that uses

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<sup>217</sup> Richard L. Cupp, "Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals," *Pace Environmental Law Review* 33, no. 3 (2016); Richard L. Cupp, "Animals as More Than 'Mere Things,' but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm," *University of Cincinnati Law Review* 84, (2016); Ridge Hughbanks, "Consider the Elephant: Can the Writ of Habeas Corpus Change Society's Approach to Animal Rights?" *Washington University Jurisprudence Review* 16, no. 1 (2023); Emily Jenks, "The Bear Necessities: Why Captive Exhibited Animals Need Stronger Regulation Based on Their Species-Specific Biological Needs," *Michigan State Law Review*, (2019); Pablo Lerner, "Animals are not Objects but are not Yet Subjects: Developments in the Proprietary Status of Animals," *Animal & Natural Resource Law Review* 18, (2013).

prods and electric devices to control animals. What the animal welfare position *does not* do is account for broader systemic injustices such as industrialized slaughtering of animals for food, animals kept in solitary confinement in zoos, or animals effectively tortured in consumer product testing.

The animal rights position has evolved as a response partly to welfarists and partly to significant advancements in science (e.g., zoologists studying animal cognition), human-animal relations (e.g., an explosion of pet ownership), and the proliferation and popularization of animal ethics (e.g., veganism, “save the whales,” David Attenborough’s documentaries). Animal rights advocates are united in their rejection of the claim that welfare laws are sufficient, but they are diverse in their proposed solutions. Though not exactly abolitionists, many legal scholars are highly critical of the animal-as-property position that is assumed by an anthropocentric legal system.<sup>218</sup> Animal rights advocates reason that to end animal mistreatment in such a system, animals should be given rights. Some suggest the allocation of such rights be determined by levels of cognition and sentience (e.g., whales would have rights but insects would not);<sup>219</sup> others believe animals

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<sup>218</sup> John Bolliger, “On the Rights of Sentient Beings: The Case for Expanding Due Process of Law to Non-Human Animals,” *Mitchell Hamline Law Review* 50, no. 1, (February, 2024); Carter Dillard and Matthew Hamity, “From Social Justice to Animal Liberation,” *Animal & Natural Resource Law Review* 18, (August 2022); Angela Lee, “Telling Tails: The Promises and Pitfalls of Language and Narratives in Animal Advocacy Efforts,” *Animal Law* 23, no. 2 (Spring 2017); Pablo Lerner, “Animals are not Objects but are not Yet Subjects: Developments in the Proprietary Status of Animals,” *Animal & Natural Resource Law Review* 18, (2013); Matthew Liebman, “Animal Plaintiffs,” *Minnesota Law Review* 108, no. 4 (April 2024); Michael B. Mushlin and David N. Cassuto, “Powerless Beings: Solitary Confinement of Humans and Nonhumans in America,” *Nebraska Law Review* 102, no. 3 (2023); Stacey Gordon Sterling, “Out to Save the World: The Intersection of Animal Welfare Law, Environmental Law, and Respect for Fragile Ecosystems,” *Belmont Law Review* 7, (Spring 2020).

<sup>219</sup> Mackenzie Holden, “Nonhuman Personhood: Recognizing Liberty Interests for Highly Sentient Animals,” *Arizona State Law Journal* 55, no. 4 (Winter 2023); Julian F. Gorelli, “Courts Beginning to Recognize Needs of Highly Intelligent Species,” *New Jersey Law* 344, (October 2023); Steven M. Wise, “Nonhuman Rights to Personhood,” *Pace Environmental Law Review* 30, no. 3 (2013).

should be granted legal personhood<sup>220</sup>—but most argue that all animals should be viewed as some kind of legal subjects.<sup>221</sup> Because the U.S. legal system *is* inherently anthropocentric, giving animals rights could bring sweeping social changes, like the abolition of zoos, medical testing, and meat eating. Consequently, animal rights advocates are constantly defending against entrenched fear of change, slippery slope arguments, and accusations of prioritizing animal suffering over human suffering.

These are legal tropes associated with each approach: The welfare advocate thinks existing laws are sufficient and should be enforced, defends against charges that they consider animals to be “mere things,” and views animal cruelty as a crime committed by bad actors. The rights advocate thinks welfare laws are insufficient and legal rights are additionally necessary, defends against charges of seeking uncontrollable, massively disruptive social change, and views animal cruelty as an inevitable result of an anthropocentric legal system that treats animals as property for humans to do with as they like. Traces of both approaches are evident in Happy’s case. NhRP argues that Happy should have a right to relief under habeas corpus; the Bronx Zoo argues that Happy belongs to them, and her treatment is not illegal under existing animal welfare laws.

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<sup>220</sup> Craig Ewasiuk, “Escape Routes: The Possibility of Habeas Corpus Protection for Animals Under Modern Social Contract Theory,” *Columbia Human Rights Law Review* 48, no. 2 (2017); Macarena Montes Franceschini, “Animal Personhood: The Quest for Recognition,” *Animal & Natural Resource Law Review* 17, (2021); Gorelli; Bailey Soderberg, “Reassessing Animals and Potential Legal Personhood: Do Animals Have Rights or Duties?” *Vermont Journal of Environmental Law* 24, no. 2 (2022).

<sup>221</sup> Bolliger; Irus Braverman, “Law’s Underdog: A Call for More-Than-Human Legalities,” *Annual Review of Law and Social Science* 14, (2018); Ewasiuk; Franceschini; Gorelli; Holden; Liebman; Mushlin and Cassuto; Soderberg; and Wise.

The history of habeas corpus and the tension between animal welfare and animal rights approaches to animal law are important to understanding the legal context in which Happy's case is taken up and adjudicated.

### Artifact Analysis

In this section, I use a new materialist lens to analyze two rhetorical artifacts from Happy's case: oral argument in front of the State of New York Court of Appeals (OA)<sup>222</sup> and the Opinion of the Court (OC), authored by Chief Judge DiFiore. A close reading of artifacts reveals the values each argument defends—and how those values are shaped by underlying assumptions and prejudices reflected in lexical choices, types of evidence, use of analogy, framing, and appeals to emotion. The artifacts differ from one another in modes of expression, each of which has unique possibilities and constraints. Opinions are polished pieces of writing, produced over several weeks or months, and circulated amongst the judges for feedback. Oral arguments, while formal in presentation, are largely unscripted despite thorough preparation of all parties involved. Advocates also face strict constraints in oral argument: they are frequently interrupted and redirected by judges, forcing them to adapt in real time; and they have a time limit, so not all ideas can be flushed out. Due to these constraints, it is important to read oral argument with patience and generosity.

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<sup>222</sup> Transcript of Oral Argument, *The Nonhuman Rights Project, Inc., on behalf of Happy v. James J. Breheny*, 2020 N.Y. Slip Op. 35291 (N.Y. Sup. Ct. 2022).

### *Oral Argument*

On May 18, 2022, the State of New York Court of Appeals heard oral arguments in *Nonhuman Rights Project v. Breheny*. Monica L. Miller, Esq. argued for the appellant (NhRP) and Kenneth A. Manning, Esq. argued for the respondent (Breheny, et al.). The Court had seven judges: Chief Judge Janet DiFiore, Associate Judge Jenny Rivera, Associate Judge Michael J. Garcia, Associate Judge Rowan D. Wilson, Associate Judge Madeline Singas, Associate Judge Anthony Cannataro, and Associate Judge Shirley Troutman.

Analysis of oral argument reveals the underlying values and premises of the appellant's position, the respondent's position, and the interests of the judges. For the appellant, Miller argues that Happy is an autonomous being who has bodily liberty rights and is therefore eligible for transfer to an elephant sanctuary under habeas corpus, and that habeas has historically been flexible enough in application to release individuals who were not considered legal persons. For the respondent, Manning argues that under existing animal welfare laws, Happy is not being harmed by the Bronx Zoo and that finding in favor of Happy would result in legal and social chaos. The judges appear to be focused on stock issues related to changing the status quo: necessity, implementation, and consequences.

Analyzing Miller's participation in colloquy reveals some successes and significant drawbacks in her arguments: 1) to emphasize the importance of bodily liberty Miller uses anthropomorphic language to describe what Happy's life would look like if she were free, which is emotionally engaging but risks criticism for sentimentality; 2) Miller argues Happy is autonomous but does not provide a clear definition of autonomy, thereby allowing

opponents to maintain associations between autonomy and capacity for reasoning; 3) Miller emphasizes the scientific consensus that elephants *as a species* are autonomous and endangered by captivity, which undermines Happy's claim to habeas relief as an individual; and 4) to establish habeas as flexible enough to apply to Happy, Miller refers to the history of the writ as expansive in its inclusion of humans who were granted habeas rights despite less-than-human status—an analogy that, while supported by the record, is rhetorically perilous.

To begin, Miller must establish that Happy has the right to bodily liberty, and the Bronx Zoo's infringement of that right is causing ongoing harm to Happy. Because Happy has been confined at the Bronx Zoo for decades, Miller conjures a vision of what it would be like if she were free: "If she hadn't been kidnapped from Thailand as a baby, Happy could be a matriarch herself. But instead of leading her sisters, and cousins, and grandchildren hundreds of miles through ancient migratory roots [*sic*]" (OA, 2). Freedoms associated with bodily liberty (e.g., freedom of movement and reproductive freedom) are greatly significant to humans, and Miller aims to remind the judges of this by using anthropomorphic language: Happy was "kidnapped" instead of captured, as "a baby" instead of a calf, and having "sisters, and cousins, and grandchildren" instead of a herd. By using language that typically is associated with humans, Miller encourages members of the court to connect with Happy. Miller's description of how Happy would be "leading" family members along "hundreds of miles through ancient migratory roots [*sic*]" draws attention to what should be Happy's localized material embodiment: she would freely move across space and time, surrounded by relations, mapping and remapping

remembered routes of migration—a stark contrast to her solitary condition and confined existence at the Zoo, which reduces Happy from an individual to an abstraction, an object of human observation.

Miller’s introductory description of Happy is interrupted by a procedural question from Judge Rivera: “so how—let’s say we accept your argument that habeas turns on the autonomy of the petitioner. So how do we define autonomy for purposes of habeas when it’s a nonhuman for—when it’s a member of the animal kingdom?” (OA, 2-3). Judge Rivera’s question redirects the colloquy away from Happy as an individual towards her membership in “the animal kingdom.” Miller obliges by subsequently arguing that scientists (relentlessly associated with rationality and objectivism) agree that elephants, as a species, are autonomous:

**Judge Rivera:** Is that going to be a fact-specific analysis, do we need consensus in the scientific community; how do—how do we get to that?

**Ms. Miller:** Thank you, Your Honor. I’m really glad you asked me that. The scientific understanding of autonomy is—is basically the same as our general understanding of it, but it’s a little bit more complex in that it includes complex cognitive abilities as well as empathetic, and, like, emotional capabilities. (OA, 3)

When Miller says the scientific definition of autonomy is “basically the same as our general understanding,” but more “complex,” she injects unnecessary ambiguity into her argument, allowing her audience to assume or fill-in necessary conditions from non-scientific discursive spheres—law and philosophy. *Black’s Law Dictionary* dates the concept of autonomy to the seventeenth century, defining it as “1. The right of self-government. 2. A self-governing country. 3. An individual’s capacity for self-

determination.”<sup>223</sup> The philosophical meaning of autonomy, according to The *Oxford English Dictionary*, comes from the Enlightenment era (dating from 1798): “In Kantian philosophy: the freedom of will which enables a person to adopt the rational principles of moral law (rather than personal desire or feeling) as the prerequisite for his or her actions; the capacity of reason for moral self-determination.”<sup>224</sup> In both legal and philosophical definitions, autonomy is connected to reason. The legal definition includes forms of governance, which require reasoning; the philosophical connects autonomy to moral law and rationality. The bioethical definition, however, makes no mention of reasoning as a necessary condition for autonomy. In bioethics, autonomy is determined by meeting two essential conditions: “(1) liberty (independence from controlling influences) and (2) agency (capacity for intentional action).”<sup>225</sup> It is under the bioethical definition that scientists have determined elephant autonomy. Elephant observers note sophisticated cognition, emotional intelligence, memory, and self-awareness—but not reason *per se*. Thus, by not providing a specific bioethical definition of autonomy, Miller creates an opening for opponents to argue that Happy is not autonomous because she cannot reason.

Ambiguity related to the definition of autonomy is largely overshadowed by Miller’s use of scientific consensus and scientific ethos. Miller argues that consensus has already been reached on elephant autonomy: “scientists are unanimous” in their opinion that elephants are not only autonomous, but “complex, emotionally intelligent, altruistic, [and]

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<sup>223</sup> “Autonomy,” *Black’s Law Dictionary*, 12<sup>th</sup> edition, ed. Bryan A. Garner (Thomson Reuters, 2024).

<sup>224</sup> “Autonomy,” *Oxford English Dictionary*, September 2024, <https://doi.org/10.1093/OED/6331580041>.

<sup>225</sup> Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*. (New York: Oxford University Press, 2001), 58.

highly communicative” (OA, 3). Throughout her argument, Miller emphasizes that the relevant scientific evidence is consistent, proven, and unrefuted by experts: “five of the world’s most renowned elephant scientists that are in consensus” (OA, 3), “scientifically proven” (OA, 6), “unrefuted scientific evidence” (OA, 8), “the scientific record” (OA, 8), “unrefuted scientific evidence” (OA, 8), “the scientists are [...] are showing” (OA, 11), “unrebutted scientific expert reports” (OA, 12), “extraordinary consensus among the scientific community” (OA, 12), “the science is clear” (OA, 13), “elephant scientists that are real scientists” (OA, 29). While none of the judges question or refute the scientific evidence in Happy’s case, such evidence is based on observation of animal *species* rather than animal individuals. Speciesism poses a significant problem for Miller’s argument: habeas is a remedy for individuals, and the scientific evidence does not discuss Happy as an individual.

As understood in common law, habeas provides a remedy for individuals; judicial decisions are made on a case-by-case basis. Scientific evidence of elephant autonomy, cognition, intelligence, and behaviors therefore presents a subordination problem for Miller’s argument; such evidence is about Happy’s *kind*, not Happy *herself*. This mismatch takes on extra significance because NhRP’s elephant experts make no mention of Happy specifically or her condition at the Bronx Zoo. Miller’s opposing counsel, Manning, takes full advantage of this during colloquy:

I think it’s significant in this case that the so-called experts that have offered opinions have never even been to see Happy. They didn’t ask to see her. They didn’t ask to examine her. They didn’t ask to come look at her. They didn’t seek a court order granting discovery. [...] So [...] no interest was taken in this particular animal. (OA, 23-24).

Manning uses anaphora and epistrophe to emphasize and impugn the actions of scientists that offer evidence on elephants as a species rather than Happy specifically. Zoologists can speak to the harm of captivity in general (the horrors of twentieth century zoos and circuses have provided them with a significant sample size), but none of those cited in Happy's case have directly observed or documented her embodied, material reality and the harms caused by her singular, localized captivity. The result of Miller repeatedly focusing on scientific testimony, in addition to creating an opening for the other side, is that it maintains the abstraction that Happy's captivity creates in the first place. Happy is a sample or a data point, rather than an individual in singular context.<sup>226</sup>

On the subject of habeas, Miller uses an analogy to support her flexibility argument. Historically, habeas corpus has been used in a number of historical cases to guard the rights of people that society deemed less than human. Miller cites the "rich body of precedent for using the writ of habeas corpus in novel situations that go beyond codified laws' reach in order to free those who would not have any other remedy at law," and specifically mentions "wives, children, as well as slaves" (OA, 5). Miller then refers to the case of James Somerset, an enslaved man who was brought to England by his "owner," ran away in 1771, and was recaptured and set to be sold.<sup>227</sup> The chief justice of the King's Bench, Lord Mansfield, held abolitionist views and, under the writ of habeas corpus, granted Somerset liberty. Though Mansfield's decision affected only one man, it was a significant point in abolitionist history because it rejected one of the foundational beliefs

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<sup>226</sup> To be clear, I am not arguing that science inherently objectifies what it examines. I am saying that overreliance on evidence focusing on species attributes obscures individualized bodies and contexts.

<sup>227</sup> Tyler, 26.

that made chattel slavery possible: that Black folks were property, not human beings. Similarly, Miller cites another case to come before the King's Bench which used habeas corpus to transfer "a wife who at the time was considered chattel property to change her custody to a—different non-abusive household" (OA, 5). The "wife" example, like the Somerset case, is used to illustrate the flexibility of the writ. Miller's argument is that if habeas can be expanded to protect the bodily liberty of women, children, and enslaved persons—all of whom were treated like property—it can be expanded to protect Happy.

This analogy is rhetorically perilous. Equating the legal predicament of humans considered chattel with that of Happy creates a rhetorical situation in which offense can be taken in either good or bad faith. For some, any comparison between human and animal suffering is offensive. We are confronted with persistent systemic racism and the abjection of Black bodies every time a Black person is killed by police, the public lynching is captured on video and viralized, protests erupt, and effectively nothing changes.<sup>228</sup> In such circumstances, advocating for animal rights appears hypocritical at best. For others, scientifically defined autonomy coupled with discourse about who counts as fully human echoes century-old horrors of eugenics, which were lawful in the U.S. before WWII and resonate with contemporary neo-natalist movements supported by white supremacists. Miller does not mention systemic racism nor eugenics, but she presents necessary ingredients for an emotionally charged discursive stoppage. Judges who are sensitive to human rights abuses may take offense; and judges who see animal rights as an

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<sup>228</sup> I am thinking here of George Floyd, Philando Castille, Alton Sterling, and Tyre Nichols. There are countless others.

encroachment upon or a cheapening of human rights can *feign* offense to dismiss the argument in its entirety. Yet Miller must address historical precedent to argue that habeas is flexible enough to protect the bodily rights of animals—the analogy is baked into the flexibility argument.

The essential elements of Miller’s argument are that Happy is autonomous, she therefore has rights of bodily liberty which makes her eligible for habeas relief, and she should be transferred from harmful captivity at the Bronx Zoo to an elephant sanctuary. Manning, counsel for the respondent, argues against granting Happy relief under habeas. Analyzing Manning’s arguments demonstrates strengths and weaknesses of the case against granting Happy habeas relief: 1) Manning claims Happy’s detainment at the zoo cannot be unlawful because no existing animal welfare laws have been broken—a claim that ignores the difference between illegal containment and illegal *conditions* of containment; 2) to counter the flexibility argument, Manning argues that habeas has historically only applied to persons, though he does not offer compelling support as to why; and 3) Manning argues that granting Happy relief under habeas would result in legal and social chaos, seemingly prioritizing order over justice for the individual.

The crux of Manning’s argument is that Happy is not illegally detained because no statutory laws have been broken regarding her captivity. Manning argues that Happy is fine where she is: “the animal is treated well” (OA, 26), “she’s not isolated” (OA, 24), “No one’s claiming any harm to this animal. There’s been no harm to the animal. And you have three affidavits from the people at the zoo attesting to that” (OA, 28). The affidavits Manning mentions are from the Bronx Zoo’s director, chief veterinarian, and curator, who claim that

Happy is well cared for “based on [their] personal knowledge” (OA, 23). Evidence provided by those with first-hand knowledge of Happy should be a strong argument to counter Miller’s scientific experts who have not personally interacted with Happy. But Manning’s point is not as strong as it could be, since the director, curator, and chief veterinarian have reputational and financial incentives to deny that Happy is being harmed at the zoo. Regardless, Manning repeatedly insists that Happy’s detainment is not illegal: “there was no illegal detainment” (OA, 19), “here there’s been no illegal detainment” (OA, 19), “there’s absolutely no illegality whatsoever” (OA, 20), “there’s no illegal detainment” (OA, 20). Manning supports his argument that Happy’s detainment is legal by citing existing animal welfare regulations and guides, including the Elephant Protection Act (OA, 20), Animal Welfare Act (OA, 25), and best practices outlined by the Association of Zoos and Aquariums (OA, 22).

Manning takes his position further by arguing that if Happy’s detainment is legal, habeas corpus does not apply:

this petition does not allege that Happy is illegally confined because she is kept in unsuitable conditions, nor does it seek improved welfare for Happy. If that’s the case, why would—why would the habeas corpus remedy apply in the first place? She’s perfectly legally detained where she is now, authorized by the legislature. There’s no illegal detainment. (OA, 20)

Manning’s argument runs counter to the origin, intent, and practical uses of habeas corpus: the writ is a remedy from illegal detainment in cases where *the act of detainment* is unjust, not when the conditions of detainment are unjust. Certainly, habeas can (and has been) used to free or transfer individuals detained in poor or torturous conditions; perhaps the frequency of such cases has blinded Manning to the writ’s overall intent. Judge Rivera

pushes back on this point: “But—yeah, doesn’t habeas apply? I mean, even a gilded cage is still a cage, right? Wouldn’t the habeas apply? [...] let’s say someone is incarcerated. If they’re incarcerated wrongfully so, no matter how lovely the setting” (OA, 22). Rivera’s strong use of a common aphorism, “a gilded cage is still a cage,” gets to the heart of the matter so well that when Manning asks her to repeat her question, she uses it again:

**Judge Rivera:** I was saying, no matter how comfortable the setting, if one is wrongfully detained, [...] no matter how wonderful the—setting, the conditions, it’s still, as I was saying, a gilded cage. You’re still—your liberty is being restrained.

**Mr. Manning:** The assumption in your question that we take issue with, Your Honor, is whether they’re illegally detained.

Rivera is pointing to a distinction between illegal detainment and illegal *conditions* of detainment. Whether Manning does not grasp this distinction or rejects it on principle is difficult to discern. After Rivera’s repeated efforts to nail down Manning on this point, Judge Wilson attempts to get to an answer using a different tactic: gauging Manning’s response to a previous NhRP case involving Tommy and Kiko, chimpanzees who were shackled, confined, and displayed for the public. The result is a back-and-forth that captures both the animal welfarist position and why animal rights advocates find such a position inadequate:

**Judge Wilson:** [...] you’re familiar I think a little bit at least with the case involving Tommy and Kiko, the---

**Mr. Manning:** Oh, yeah, of course.

**Judge Wilson:** ---chimpanzees?

**Mr. Manning:** Of course.

**Judge Wilson:** Right. So, would you say that habeas was not available to them there because they were not being illegally detained?

**Mr. Manning:** If they were not being illegally detained—

**Judge Wilson:** No, I’m asking you whether your view is they were being illegally detained or not?

**Mr. Manning:** Well, I think the Tommy and Kiko case, there was questions about the suitability of their conditions.

**Judge Wilson:** Correct.

**Mr. Manning:** I—I don't remember well enough from the record in that case whether there was a finding of illegality or not, but if they were kept in unsuitable conditions, and it violated the Animal Welfare Act, or the statute involving animal cruelty, then they would be being illegally detained at that point.

**Judge Wilson:** And therefore, you would conclude in that circumstance habeas could reach them?

**Mr. Manning:** At least that element of habeas, Your Honor. (OA, 25-26)

Manning's persistent avoidance of whether detainment itself can be illegal reveals his position as a staunch animal welfarist: if it is legal insofar as it does not break animal welfare laws, it is sufficiently just. The animal rights position, in contrast, is that detainment or captivity is inherently harmful and therefore unjust.

Although Miller makes a flexibility argument on habeas, Manning recalls (OA, 19) that in Tuitt's court, the argument focused on whether Happy is a "person" with the legal protections "personhood" entails (including habeas corpus protection).<sup>229</sup> Manning is adamant in addressing an issue he has not been asked to address by Miller:

our premise is fundamentally a very simple one. And that is that historically animals have not been the subject of habeas corpus relief. All the definitional requirements that exist, including the Agricultural and Markets Law, the Penal Law, the Elephant Protection Act, and also the Estates, Powers and Trusts law, all of them have definitional phrases dealing with animals and people that would be completely inconsistent with labeling an elephant a person for habeas corpus relief. (OA, 26)

This passage exposes two important elements in Manning's argument. First, Manning mentions the history of habeas, the wording of past legislation, and consistency. Even allowing for the importance of precedent under *stare decisis*, Manning's argument

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<sup>229</sup> The Nonhuman Rights Project, Inc., on behalf of Happy v. James J. Breheny, 2020 N.Y. Slip Op. 35291 (N.Y. Sup. Ct. 2020).

constitutes an appeal to tradition, a common logical fallacy. Just because courts have not, as of yet, considered animals eligible for habeas relief does not mean that their views are correct. Second, Manning exposes the ways in which animal welfare law insists on denying rights to animals through objectification and instrumentalization. The legislation Manning cites protects animals and their body parts *as property*: Agricultural and Markets Law regulates how animals are slaughtered for human consumption; the Penal Law punishes criminal acts of cruelty toward animals owned by humans as pets, by scientists as experiment subjects, and by zoos as entertainment; the Elephant Protection Act “conserves” African elephant populations by targeting the human sale of ivory; the Estates, Powers and Trusts law regulates how pet care can be included in the distribution of funds and property as willed by a human. Welfare laws present an instrumentalist view of animals because they are used to judge humans based on how they *use* animals.

Manning also makes the slippery slope argument that granting Happy habeas relief—a ruling that would apply to her only—would have outsized negative consequence for the legal system and society. When Rivera comments that any expansion of habeas corpus rights would have ripple effects, Manning responds with a combination of vague alarm and doubling down on human subjugation of animals:

I wouldn't call this a ripple, Your Honor. To—to take animals that have never been subject to rights of people, given the social compact that forms the basis for our federal and state constitutions, and all the laws that we—we promulgate to effectuate those two documents, it—it puts them in the same category as people, which we oppose. (OA, 27)

To some extent, Manning is correct about widespread effects. To acknowledge that a nonhuman has rights would constitute a significant step in countering anthropocentrism in

the legal system. However, putting Manning's argument in context of the case renders the prospect absurd on its face: transferring Happy to an animal sanctuary would result in a breakdown that encompasses not only the entirety of the legal system, but the foundations of government and self-governance on which U.S. society is based. And why? Because animals do not belong in the same category as people. Presumably, Manning does not specify the warrant for this claim *because he thinks he doesn't have to*. The binary of human/animal—and the separation and domination it implies—is so deeply embedded as to be unquestionable. For some of Manning's audience, this seems to be the case.

As already seen in exchanges with both counsels, the judges also have interests on display. In terms of questions and redirects, oral argument is dominated by two judges: Rivera and Wilson. Excluding introductions, casual utterances, and repetitions for audible clarity, the breakdown of substantive contributions per judge is as follows: Rivera 15, Wilson 10, Cannataro 3, Troutman 2, Singas 1, Garcia 1, and DiFiore 1. The judges who make the most contributions, Rivera and Wilson, show a desire for clarity, proper procedure, and a defense of the court's role in the issue of animal rights. The judges who contribute least appear attentive mostly to questions of consequence.

Rivera has two apparent interests demonstrated by her questions and interjections: pushing both counsels away from obfuscation and towards clarity, and an interest in the court's role in deciding the issues. Rivera's strength is in asking the questions counsels would like to leave unanswered. When questioning Miller, Rivera asks how courts are meant to determine autonomy (OA, 3); how a transfer from the zoo to a sanctuary would be better for Happy and how habeas applies to custody transfers (OA, 4); how the history of

habeas, which has covered only humans, can be applied to nonhumans (OA, 5); and whether the decision in this case would affect pet ownership (OA, 12). The last of these constitutes one of the most important moments in oral argument, when Rivera asks Miller about attaching bodily liberty to autonomy, if autonomy is defined by sophisticated cognition and communication as seen in elephants:

[...] so does that mean that I couldn't keep a dog? I mean, dogs can memorize words. And I think most people who have dogs or any kind of domesticated pet in that way would say that they feel there's a special connection and a bond, they're like their family, as I think you pointed out in the brief. If I had a dog, I could leave property to them. So why—why isn't then what you're arguing for endangering these kinds of human animal relationships? (OA, 12)

The key question, “does that mean that I couldn't keep a dog?” is crucial to be asked and answered. As legal scholars Mushlin and Cassuto observe, “Americans love their pets,” so much so that the framework of ownership becomes invisible. A person may love and care for their dog, but if they sold that dog to a laboratory, love and care may be replaced by isolation, experimentation, or death.<sup>230</sup> The point of this hypothetical is to illustrate two facts: because animals are legally considered property, the dog has no inherent value independent of contextual contingency; *and* the horror that pet owners feel at even thinking such a thing is a result of humans preferring to foreground positive human-animal relations and render negative relations practically invisible. Simply put, we *want* to believe that our pets are better off with us than without us, but to do so we must *insist* that our relationship to pets is fundamentally different than that of a scientist to the object of their experiments. In legal terms, there is no difference. So when Rivera asks, “does that mean I

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<sup>230</sup> Mushlin and Cassuto, 550.

couldn't keep a dog?" she expresses (for herself or others) a fear that reveals the shaky ground on which anthropocentric instrumentalism of animals depends. It also explains why Miller's answer is deeply unsatisfying: "we don't have the evidence about dogs that we have about elephants right now" (OA, 12), as if science may accumulate evidence and form consensus about dog autonomy such that all dogs could be liberated from their owners. The more prudent response might have been that habeas corpus applies only to individuals like Happy, whose reasons for and conditions of detainment require judicial deliberation; yet the importance of Rivera's question still stands, reminding audiences of the ways human fears can shape legal considerations.

Rivera's questions for Manning are similarly probing, with some important issues going unaddressed. Rivera asks Manning to address the historic flexibility of the writ to expand habeas protection to women, children, and enslaved peoples—to which Manning argues that habeas only applies to humans, thereby revealing the anthropocentrism that belies his other arguments about detainment (OA, 19-20); she pushes him on what makes any detainment unlawful (OA, 20); argues against a welfare strategy by stating that "a gilded cage is still a cage" (OA, 22); and draws Manning into a debate about whether Happy's detainment is harmful to her (OA, 24-25). In addition to pushing for clarity, one of her exchanges with Manning indicates the second of Rivera's interests: establishing the role of the courts in disputes like Happy's. Manning repeatedly suggests that consideration of animal rights is a job for the legislature, first in his brief (referenced at OA, 18); when stressing that "the court shouldn't be in a position to simply take that on" (OA, 21); and finally, when he asks that "if there's going to be an entire rewrite, and a granting of animals

to rights that they've never had before, shouldn't that be done by the legislature [...]?" (OA, 26). To this last question, Rivera responds by referencing the legal history of expanding habeas rights to those once considered less than human: "isn't a decision from the court about an expansion of something like the great writ always going to have ripple effects moving forward?" (OA, 27). Manning suggests it is not the court's job to decide if habeas covers animals; Rivera counters by assuming it is the court's job *even if* it results in significant social change. Overall, Rivera is active throughout oral argument and seems genuinely interested in getting clarity from both counsels, and effectively repudiates the claim that deciding Happy's case should be left to the legislature.

Like Rivera, Wilson is very active in oral argument and appears interested in clarifying counsel's positions. Additionally, Wilson demonstrates an attentiveness to philosophical and ethical arguments regarding animal rights, and issues of proper procedure and jurisdiction. Wilson's clarifying questions appear late in oral argument. He asks Manning about the Tommy and Kiko case, which famously focused on egregious shackling and confinement of two chimpanzees, and insists Manning answer the question of whether they were illegally detained. During Miller's rebuttal, Wilson asks a balancing question:

My question is whether you're [...] arguing about the recognition of rights of animals allows for some balancing of those rights against some other societal values. So, for a simple example, somebody uses a horse for transportation. If we—if the horse [...] crosses the autonomy threshold, under your theory, we recognize the right of that horse to some form of liberty, is that absolute, inviolate, or can it be balanced against the person's need for transportation? (OA, 29-30)

Wilson's question demonstrates both an openness to courts deciding rights of animals and a struggle with anthropocentric instrumentalism. In short, it seems Wilson is looking

for a middle way. Miller avoids a direct response to this question, instead referring to expertise of amicus briefs. Wilson does the same, picking out Peter Singer's brief based in utilitarianism, again suggesting that Wilson seeks a balancing test (OA, 30). The reference to Singer also reveals Wilson's interest in animal ethics outside of law; he is the only judge to cite a philosopher. Wilson is also the only judge who takes an interest in the findings of the lower court. When Miller argues that a transfer to an elephant sanctuary would be best for Happy, Wilson responds: "there's evidence [in the court below], but there's not a factual finding below, and there is contradictory evidence, right? So [...] at most it seems to me, if I were to rule in your favor, we'd need to send this back for factual determination, no?" (OA, 7-8). Wilson is accurately describing a weakness in NhRP's case: they have not submitted evidence as to *which* sanctuary would be best for Happy and *why*. This could be interpreted as judicial delay or avoidance of duty, but in light of Wilson's questions about balancing tests, it reads more like a genuine attempt to un muddy a case with lots of moving parts. Wilson sees a hole in the argument that must be resolved by fact-finding and acknowledges that it is improper for appellate courts to resolve such issues. Wilson may be more concerned than Rivera about proper legal procedure, but they are similar in their view that issues of Happy's case can and should be decided by courts.

In contrast to the remarkable contributions to deliberations made by Rivera and Wilson, questioning by other judges appears anemic at best. Two ask questions about the role of habeas in cases of transfer as opposed to complete release (Cannataro, OA, 8-9; Garcia, OA, 10). All other instances concern the scope and consequences of the decision in Happy's case: Singas asks Miller if her position is that any third party could bring a

habeas case for any autonomous animal and “demand release to any location of their choosing” (OA, 7); Troutman asks if the decision will affect other animals besides Happy (OA, 13); Cannataro asks about “the scope of [...] the population” of animals that could be affected (OA, 13), and whether other animals will “be covered under this decision” (OA, 14). Chief Judge DiFiore asks only one question in oral argument, during Miller’s rebuttal: “what about the potential impact your colleague referenced here to the other industries, the agricultural, market, and industry, the biomedical researchers, even pet ownership?” (OA, 28). Considering consequences of their decisions is an integral part of judicial decision-making, but these are questions about legal, social, and human consequences—not about the consequences for Happy. DiFiore’s question exemplifies peak anthropocentric instrumentalism: What happens to businesses who thrive on the use of animals? What happens to the precarious human dependence on the invisibility of animal conditions when the animals are not pets? When such concerns outweigh the materially embodied misery of a single individual named Happy, the decision by the court comes as no surprise. The opinion of the court denying habeas protection for Happy was authored by DiFiore and signed onto by Garcia, Singas, Cannataro, and Troutman—the judges that spoke least during argument. When they did speak, their questions show few interests other than technicality and, frankly, fear.

Reviewing oral argument allows for a rich and detailed view of the issues, values, and biases in Happy’s case—only some of which are addressed in the written opinion of the court, which I will analyze next.

### *Opinion of the Court*

Happy's case was decided on June 14, 2022. The Opinion of the Court is a document containing three opinions. Authored by Chief Judge Janet DiFiore, the majority opinion affirmed the order of the lower court, bringing Happy's legal case to a close by denying her relief under habeas corpus. Substantively, DiFiore's opinion is a tale of three binaries: human being/nonhuman animal, person/non-person, and subject/object. Each of these binaries exemplify anthropocentrism. What DiFiore does *not* say is as important as the claims she makes: she offers little to no reasoning for anthropocentrism and the instrumentalization of animals—apparently, because she thinks it unnecessary to do so. DiFiore takes full advantage of the weaknesses of the NhRP's argument and Miller's presentation of it: she dismisses scientific evidence as not pertaining to Happy as an individual and expresses contempt for any analogy of humans to animals as presented in the plaintiff's flexibility argument. Lastly, DiFiore makes a number of slippery slope arguments regarding the consequences of granting Happy relief under habeas—which she ultimately uses to shrug off the duty of the Court to seek justice. Because the opinion is a written document having gone through multiple iterations including a back-and-forth with dissenters, my analysis is more granular, with greater attention to lexical choice and sentence construction.

Writing for the majority, DiFiore argues to preserve the status quo: the anthropocentric subjugation and instrumentalization of animals. The majority of her argument revolves around three binaries: human being/nonhuman animal, person/non-person, and subject/object. In DiFiore's introduction, she writes: "Because the writ of

habeas corpus is intended to protect the liberty right of *human beings* to be free of unlawful confinement, it has no applicability to Happy, a nonhuman animal who is not a ‘person’ subjected to illegal detention” (OC, 2, emphasis original). The binary she presents is human being/nonhuman animal. “Human being” is a commonly used compound noun that the *Oxford English Dictionary* (O.E.D.) defines as “a person, a member of the human race; a man, woman, or child.”<sup>231</sup> In this sense, “human being” is a synonym for “human.” However, the way DiFiore weighs “human being” against another compound noun, “nonhuman animal,” not only emphasizes the anthropocentrism of the adjectival components (“human” and “nonhuman”), it foregrounds the associated meanings of the modified nouns (“being” and “animal”). As a noun, “being” is defined by O.E.D. as “something that exists or is conceived as existing,” from philosophical language referring to material or immaterial objects; “with defining word or phrase: God. Esp. in Supreme Being,” which is “sometimes used to avoid specifically Christian (or other religious) theological implications;” and “a living creature, either corporeal or spiritual; esp. a human being a person (frequently used with either contemptuous or idealistic overtones). Also: a person from another world, an alien.”<sup>232</sup> In other words, the term “being” is not limited to material entities, much less humans; it can have associated meanings derived from theology (particularly Christianity); and in reference to humans, it connotes an essentialism that separates the ideal from the contemptible or foreign. The “being” in

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<sup>231</sup> “human being (n.),” *Oxford English Dictionary*, March 2025, <https://doi.org/10.1093/OED/8782314458>.

<sup>232</sup> “being (n.), sense 4.a,” *Oxford English Dictionary*, March 2025, <https://doi.org/10.1093/OED/1150031639>; “being (n.), sense 4.b,” *Oxford English Dictionary*, March 2025, <https://doi.org/10.1093/OED/7411717567>; and “being (n.), sense 4.c,” *Oxford English Dictionary*, March 2025, <https://doi.org/10.1093/OED/5840914676>, respectively.

“human being” carries connotations of ineffability, spiritual transcendence, familiarity, and virtue.

In comparison, the compound “nonhuman animal” does not appear in *O.E.D.* The noun “animal” is defined biologically as “a living organism which feeds on organic matter, typically having specialized sense organs and a nervous system and able to respond rapidly to stimuli; any living creature, including man;” and “In ordinary or non-technical use: any such living organism other than a human being.”<sup>233</sup> “Animal” is also defined in extended use as “a person viewed as or likened to an animal; (in non-pejorative sense) a human being, an individual, a ‘creature’ (now *rare*); (with negative connotations) a person without human attributes or civilizing influences; one who is very cruel, violent, or repulsive;” “With *the*. The animal nature of a person;” and “*colloquial*. A person or (in later use) thing of a particular type, esp. as distinguished from others.”<sup>234</sup> These definitions are contradictory. “Animal” is a biological category that *includes* humans, but when it appears in the compound noun “nonhuman animal,” commonality is replaced by division: a separation of one kind of animal from all other kinds. “Animal” also describes *part* of human nature—a part related to feelings, appetites, and carnality; “animal” names the so-called lower forms of human behavior, including “cruel, violent, or repulsive” acts considered uncivilized. In this colloquial, non-biological sense, “animal” is *less than*

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<sup>233</sup> animal (n.), sense 1.a,” *Oxford English Dictionary*, March 2025, <https://doi.org/10.1093/OED/4889002944> and “animal (n.), sense 1.b,” *Oxford English Dictionary*, March 2025, <https://doi.org/10.1093/OED/8885938463>, respectively.

<sup>234</sup> “animal (n.), sense 2.a,” *Oxford English Dictionary*, March 2025, <https://doi.org/10.1093/OED/6449606408>; “animal (n.), sense 2.b,” March 2025, <https://doi.org/10.1093/OED/1176476182>; and “animal (n.), sense 2.c,” March 2025, <https://doi.org/10.1093/OED/3695830308>, respectively.

*human or inhuman*. Taking these varied associated meanings of “animal” into consideration, the compound noun “nonhuman animal” can be read one of two ways: as giving special importance to human animals by purposively othering the remainder of animals; or as emphasis through redundancy, a doubling down on pejorative meaning. In the context of DiFiore’s entire claim, the latter reading is more likely: sentence structure literally puts human interests before animal interests, with the compound “human beings” appearing even before the name of the plaintiff, Happy; “human beings” is italicized to emphasize its importance while “nonhuman animals” is not; and the choice to use compound nouns over the simpler terms “humans” and “animals” suggests a purposeful evocation of associated meanings.

Putting together all these elements, DiFiore’s claim that habeas corpus applies to “human beings” rather than “nonhuman animals” can be read as an oppositional binary rooted in anthropocentrism that justifies elevating humans because human essence is ineffable, spiritual, virtuous and familiar; and degrading animals because animal essence is uncivilized, violent, repulsive, foreign, and most importantly, *less than human*. Though it is possible that DiFiore consciously holds these views, it is just as likely that her reasoning has been influenced by habitus: society writ large is anthropocentric and derogatory towards animals. In fact, many legal scholars explicitly note the embedded nature of such views, observing that animal law is inherently anthropocentric because it is grounded in liberal humanism;<sup>235</sup> animals were objectified by enlightenment reasoning;<sup>236</sup> the

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<sup>235</sup> McLaughlin, 157.

<sup>236</sup> Lee, 247.

human/animal divide is predicated on that of subject/object;<sup>237</sup> and humans are invested in instrumentalist views of animals made possible by extreme objectification.<sup>238</sup> What remains inexplicable, however, is DiFiore's construction of another binary in the same passage: person/nonperson.

DiFiore writes that Happy is “a nonhuman animal who is not a ‘person’ subjected to illegal detention.” As discussed in chapter one, legal definitional processes often define a thing by what it is not, resulting in an implicit oppositional binary with the positive term in the upper position and the negative term in the lower (e.g., person/nonperson). In an implicit binary, the negative term is left unspoken, resulting in ambiguity that is resolved by enthymematic determination based on a combination of judicial precedent and common understanding (e.g., public/non-public becomes public/private). DiFiore's implicit binary of person/nonperson is the result of the same definitional process. But in this case, the positive term is ambiguous while the negative term is defined: “person” is not defined, but a nonperson is a “nonhuman animal.” DiFiore's syntax obviously assumes that the implicit binary of person/nonperson should mirror the explicit binary of human beings/nonhuman animals, meaning that a “person” is equivalent to a “human being”—but this assumption is merely a product of enthymematic determination on DiFiore's part. Defining “person” as a “human being” makes sense colloquially, but not legally.

“Person” is a term of juridical art with a precise meaning. As legal scholar Bailey Soderberg notes, legal persons are “artificial or fictional persons” that are “not precluded

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<sup>237</sup> Lerner, 274; remarks by Angel Harris in Joan Schaffner et al., “Animal Rights: From Why to How,” *Animal Law*, (2016): 229.

<sup>238</sup> Remarks by Sherry F. Colb in Schaffner et al., 235.

from having some of the same rights” as humans.<sup>239</sup> A “person” need not be an individual entity, living or dead: “the personhood granted to non-human entities simply serves as a mechanism to allow lawyers to bring issues before the court.”<sup>240</sup> For example, the U.S. legal system recognizes the personhood of corporations, as recently affirmed by the Supreme Court in 2010’s *Citizens United*, which determined that an organization’s political spending is protected by the First Amendment.<sup>241</sup> DiFiore *knows* the use and history of “person” as a juridical term, as demonstrated by her placing the word in quotation marks (OC, 2), and by her later statement on corporate personhood: “Nor does any recognition of corporate and partnership entities as legal ‘persons’ lend support to petitioner’s claim. Corporations are simply legal constructs through which human beings act” (OC, 11). For DiFiore, the mere *involvement* of humans can justify personhood.

Lest anyone believe that DiFiore’s definition of “persons” values colloquial over juridical meaning, her treatment of habeas corpus provides ample textual evidence of deference to *stare decisis* (as defined in chapter one). DiFiore notes that NhRP’s previous petitions of habeas corpus rights for animals have been “unsuccessful, with no court granting such petitions and most of these courts dismissing the proceedings on the basis that nonhuman animals are not legal ‘persons’” (OC, 2); that “nonhuman animals are not, and never have been, considered ‘persons’ with a right to ‘liberty’ under New York law” (OC, 9); and, in an absolutest tone, that “Nothing in our precedent, or, in fact, that of any

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<sup>239</sup> Soderberg, 194, and Emily A. Fitzgerald, “[Ape]Rsonhood,” *The Review of Litigation* 34, no. 2 (2015): 340-341.

<sup>240</sup> Soderberg, 181. See also Holden, 1596-1597; Liebman, 1757; and Franceschini, 148.

<sup>241</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

other state or federal court, provides support for the notion that the writ of habeas corpus is or should be applicable to humans” (OC, 9). The principle of *stare decisis* need not lapse into argument by tradition, but DiFiore provides little additional reasoning as to why animals are not legal persons. Instead, she gives a four-page historical view of “the ancient writ of habeas corpus” by citing the U.S. Constitution, the New York Constitution, and 18 different cases—all of which refer to the rights of “persons,” and none of which define “persons” as “humans.” The argument that habeas is only for humans peaks in the following passage:

The selective capacity for autonomy, intelligence, and emotion of a particular nonhuman animal species is not a determinative factor in whether the writ is available as such factors are not what makes a person detained qualified to seek the writ. Rather, the great writ protects the right to liberty of humans *because* they are humans with certain fundamental liberty rights recognized by law [...] (OC, 9, emphasis original)

DiFiore rejects NhRP’s argument that Happy is autonomous, deserving of bodily liberty, and eligible for habeas relief. Her reasons are that “autonomy, intelligence, and emotion” are *not* sufficiently determinative for eligibility, but being human *is*. Textual clues in the above passage suggest there are two ways to understand DiFiore’s argument. The first is blatant speciesism: DiFiore excludes “nonhuman animal species” from eligibility regardless of their capacities and includes the human species “*because* they are human.” Such speciesism is undoubtedly anthropocentric, but it is also a response to NhRP’s own speciesism: their autonomy argument and expert testimonial evidence are focused on elephants as a species rather than Happy as an individual.

The second way to understand DiFiore’s argument is that humans possess some kind of capacity that makes them eligible for habeas protection—a capacity *other than*

autonomy, intelligence, and emotion. DiFiore's phrase, "certain fundamental liberty rights recognized by law" suggests a likely candidate. The word "fundamental" indicates core or base-level importance, and "recognized by law" implies that rights are named, but not granted, by the state. These are principles of Enlightenment-era natural law theory, which posits that humans are born with God-given rights that no person, government, or state, can take away. For John Locke, perhaps the most influential natural law theorist of the eighteenth century, these were rights to life, liberty, and property.<sup>242</sup> The influence of Lockean natural law is evident in many of the U.S. founding documents, including the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." Certainly, DiFiore is familiar with the Declaration; even her phrasing of "certain fundamental liberty rights" is similar to Jefferson's "certain unalienable rights." By echoing natural law discourse, she pulls on its key precept: humans have natural rights because they can *reason*. After all, both Locke and Jefferson present a triad of rights, two of which are states of being (life, liberty) and a third depends on long-term reasoning to determine what one needs to thrive over a lifetime (right to property, pursuit of happiness). It is the capacity for reason—not autonomy, intelligence, or emotion—that she suggests makes humans eligible to seek the writ of habeas corpus.

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<sup>242</sup> "Locke's Political Philosophy," *Stanford Encyclopedia of Philosophy*, November 9, 2005, Substantive revision October 6, 2020, <https://plato.stanford.edu/entries/locke-political/>.

Like her use of the compound noun “human being,” DiFiore’s allusions to natural law allow her to imply that humans possess a special or God-given capacity for reason that makes them eligible for the writ; animals do not have this capacity, so they are ineligible. The cover DiFiore provides for this claim is common amongst those who reject personhood arguments outright: humans have rights in exchange for legal duties (OC, 11), with legal duties broadly construed as obeying laws—which requires the capacity to reason. While we cannot know why DiFiore chooses to *imply* rather than *explicitly state* the importance of reason, the effect is clear: it makes her argument harder to rebut, despite that argument being morally, ethically, and legally insupportable. A person cannot reason when they are asleep or in a coma; babies have limited ability to reason; persons under duress and persons with some disabilities or injuries may have impaired reasoning—all of them have rights and are eligible for habeas relief.

After human being/nonhuman animal and person/nonperson, the third binary—also implicit—in DiFiore’s opinion is subject/object. Like Manning in oral argument, DiFiore takes an animal welfare position that is primarily concerned with whether an animal’s confinement is legal or illegal with regards to anti-cruelty statutes (as opposed to an animal rights approach, which argues all animal captivity is wrong). DiFiore points out that NhRP “did not dispute” that Happy’s detainment at the Zoo “complies with all applicable federal and state statutes and regulations governing the elephant case” (OC, 3), and that NhRP “did not otherwise allege that Happy is subjected to cruel, neglectful, or abusive treatment” (OC, 4). This position may prevent cruelty toward animals, but only in instances where that cruelty *cannot be justified by human use*. DiFiore writes that New York law

prohibits “person[s] other than those involved with accredited zoos and wildlife sanctuaries from using elephants in entertainment acts” and “largely prohibits and penalizes the sale and import of ivory articles” (OC, 16). When DiFiore references statutes that “prohibit and penalize the torture, unjustifiable killing or harming” of animals and “mandate minimum safety and welfare standards” (OC, 15 and 16), she cites Agriculture and Markets Law—a body of law that regulates animals for food production. In her consideration of the legal consequences of granting Happy habeas relief, DiFiore imagines such a ruling “would have significant implications for the interactions of humans and animals in all facets of life, including risking the disruption of property rights, the agricultural industry (among others), and medical research efforts” (OC, 12). DiFiore use of the word “interactions” suggests parity, but the examples she gives depend on objectification and instrumentalization: animals as property, animals as food, animals as experimental objects.

DiFiore’s use of binaries demonstrates a commitment to reify an impermeable boundary between humans and other animals. DiFiore enforces this boundary by rejecting elements of NhRP’s scientific evidence and their flexibility argument. In oral argument, Miller relies on scientific evidence to establish that elephants are autonomous. Wilson, in an attempt to think through how determinations of autonomy might affect working animals like horses, suggests a kind of balancing test. DiFiore takes Wilson—and scientific determinations of autonomy—to task for such a suggestion. DiFiore writes, “giving a court authority to interpret the relevant “science” (Wilson, J. dissenting op at 59-65) so as to make judgments regarding “who” deserves a right to “liberty” would have perilous

implications far beyond the issue here” (OC, 14-15). The statement is short on details but evocative, and the worst instances of “perilous implications” in U.S. history come immediately to mind. For example, the U.S. practiced eugenics prior to WWII, with the judiciary taking a major role in forced sterilization. In the case of scientific determination of autonomy, DiFiore’s strategic ambiguity about potential implications serves her argument well.

The same cannot be said for DiFiore’s approach to the historical record of habeas protections extending to humans that were not treated as such. DiFiore states that this history concerns “the liberty of *human beings*—even those whose rights had not yet been properly acknowledged through established law” (OC, 9, emphasis original). The dissenting opinions authored by Wilson and Rivera cite this history to argue that habeas should be extended to Happy, and DiFiore dismisses their opinions in a tone dripping with disparagement:

That flexibility, however, is not limitless and the extension of the writ would far exceed its bounds here, where petitioner seeks its application to a nonhuman animal. In that regard, the dissents are long on historical discourse but woefully short of any cogent legal analysis identifying any recognizable source of a proclaimed liberty right or so-called fundamental right to be free that they seek to bestow upon autonomous nonhuman animals. Instead, the dissenters conclude that the logical progression of our common law runs from extending habeas to “abused women and children and enslaved persons” [...] to granting an elephant the right to bring a habeas proceeding, an odious comparison with concerning implications—as both dissenters acknowledge but one on which they nevertheless rely. We are unpersuaded. (OC, 9-10)

Just as she did with regards to scientific determination, DiFiore alludes to “concerning implications” without addressing or rebutting them specifically. Unlike the science example, this statement reads like DiFiore is using offense to shut down deliberation.

Habeas flexibility was addressed in oral argument, though neither DiFiore nor any of her cosigners asked a single question about it; and in his dissenting opinion, Wilson devotes 21 pages of his 70-page opinion to the history of habeas expansion to which DiFiore's only answer is to call it "an odious comparison." Even if DiFiore is correct in this assessment, there is nothing in her opinion that directly explains *why*. Such an omission is itself evidence of consistent anthropocentrism; if humans are exceptional and animals are lesser irrational beasts, any comparison of the two is obviously an insult to humans.

DiFiore is so intent on reinforcing the barrier between humans and other animals, so content with anthropocentric instrumentalization, that she makes several assertions that claim a finding in favor of Happy would result in "an enormous destabilizing impact on modern society" (OC 12). Animal "owners" would be affected: "followed to its logical conclusion, such a determination would call into question the very premises underlying pet ownership, the use of service animals, and the enlistment of animals in other forms of work" (OC 12-13); "owners of numerous nonhuman animal species—farmers, pet owners, military and police forces, researchers and zoos, to name a few—would be forced to answer and defend those actions" (OC, 13). Courts would also be affected: granting Happy relief would "displace the carefully devised state and federal statutory frameworks governing animal welfare" (OC, 15) and "courts would face grave difficulty resolving the inevitable flood of petitions" (OC, 13). DiFiore's fear of change is also evident in her adamantly derisive characterization of the dissenting opinions by Wilson and Rivera: "neither of our dissenting colleagues identify any intelligible standard upon which to resolve these labyrinthine issues" (OC, 13), that any attempt to examine or balance issues

of animal autonomy and rights “bears no relationship to the merits analysis properly undertaken in a habeas corpus proceeding” (OC, 13), that little attention is paid to “the undeniably slippery slope [dissenters’ views] would set us upon” (OC, 14), and that “the dissenters’ wholly unsatisfactory attempts” to distinguish between treatment of domestic and wild animals “is divorced from practical reality, devoid of support, and demonstrates the internally contradictory foundation on which their analyses are built” (OC, 14). There is nothing inappropriate about expressing concern over consequences of adjudication, and it is important to judicial procedure to point out weaknesses in opposing arguments. However, given DiFiore’s lack of participation in oral argument and the avid anthropocentric instrumentalization of her opinion, such critiques read as fear of change and annoyance at those who attempt it.

DiFiore’s opposition to change is ultimately coupled with an abdication of responsibility disguised as a structuralist objection (as described in chapter one). DiFiore forecloses the possibility of future litigation on animal personhood by simply stating, “it is not this Court’s role to make such a determination” (OC, 12). According to DiFiore, it is the legislature’s job determine which animals deserve rights and legal protection. This assertion is not incorrect so much as incomplete: legislation is one way of fixing the problem. But holding parties responsible for harm and remedying injustice is a task for the judiciary, no matter how difficult, inconvenient, or destabilizing. Regardless of what DiFiore thinks the Court’s role is, it has the power and authority to give Happy relief under habeas; it even has the power to do so by declaring Happy is a legal “person.” But it chooses not to try. In the closing paragraph of her opinion, DiFiore again averts responsibility for

addressing Happy's harmful detainment—and adds a kind of admonishment for the concerned public:

We close with the observation that, despite the relative simplicity of the legal issue presented, this case has garnered extraordinary interest from amici curiae and the public—a testament to the complicated and ever-evolving relationship between human beings and other animals. Though beyond the purview of the courts, we appreciate that the desire and ability of our community to engage in a continuing dialogue regarding the protection and welfare of nonhuman animals is an essential characteristic of our humanity. Such dialogue, however, should be directed to the legislature. (OC, 17)

In other words, DiFiore seems to state: It is not our job to decide; it is not our job to even listen to the debate. It seems fitting that, according to this brief passage, all the majority of the court has learned from Happy's case is that talking about the value and rights of animals can also be instrumentalized for human use; such talk “is an essential characteristic of our humanity.”

In some respects, the majority opinion can be viewed as a type of reception evidence for oral argument: DiFiore agrees with Manning's argument that no animal welfare laws have been broken in Happy's case, and this sufficiently rules out Happy's eligibility for relief under habeas corpus; that habeas applies only to humans; that a finding for Happy would upset the social order; and that animal rights concerns should be taken to the legislature, not the courts. Likewise, one could view DiFiore's opinion as reception evidence that she disagrees with Miller's argument that captivity is an infringement on Happy's right to bodily liberty; that Happy has this right because she is autonomous, as demonstrated by scientific evidence; that legal history suggests habeas is flexible enough to include Happy, when it has previously been expanded to exclude humans once considered less-than-human; and that the court is acting appropriately by granting habeas

relief to a single individual. Yet a close reading of DiFiore’s opinion reveals more than which arguments she accepts or rejects. In all, the opinion dismisses more than it engages the issues presented in Happy’s case. DiFiore states that humans have rights “because they are human”—a dismissive tautology, not a reasoned argument. She dismisses scientific evidence and the flexibility argument’s use of analogy as “perilous” and “odious” respectively, without any elaboration or reflexivity. She dismisses the harm Happy experiences due to captivity because existing animal welfare laws do not acknowledge it as a harm. And she uses anthropocentric instrumentalist binaries in a way that indicates not only that she has no reasoned explanation for these dismissals, but that none is required—a tragic irony given that the original intent of habeas corpus was to ensure that *reasons* had to be given for detainment, and that “because I said so” does not qualify as such.

Analyzing oral argument and the DiFiore’s majority opinion thus present several questions. Why did Miller’s arguments fail to persuade the court? Why do Manning and DiFiore believe they do not need to explain why humans can avail themselves of the writ but animals cannot? Why is a finding for Happy in this case so disturbing that DiFiore guards against it with such disdain? And what, if anything, can animal law advocates do to improve their chances in future, similar cases? To answer these questions, I return to the rhetorics of materiality.

### A New Materialist Critique

The artifacts in Happy’s case present several areas for improvement: anthropocentrism, use of binaries, and racial analogy. As noted in chapter one, the U.S.

legal system is anthropocentric at its foundation—a problem that only grows in significance in cases concerning animals. The U.S. legal system is based on liberal humanism with, as Maneesha Deckha points out, the “liberal *humanist* subject at the heart of law: a human who is self-sufficient, independent, and fully rational and who needs no positive assistance from the state to get on in life” (emphasis original).<sup>243</sup> DiFiore embraces the liberal humanist position when she argues that autonomy, intelligence, and emotion are not sufficient conditions for rights, but the capacity to reason is. Without reason or rationality, an elephant cannot be viewed as a subject deserving of rights. Several animal ethicists trace the focus on reason to Enlightenment philosophy, particularly Cartesianism. Ralph Acampora writes that “we are not in some abstract, retro-Cartesian position of species solipsism,” where minds float free of bodies and humans rise above other animals, for “that is a portrait borne not of philosophic rigor but of psychological malady or hyper intellectual pretense (or both).”<sup>244</sup> The reason we maintain this “malady” is comfort, as Kelly Oliver explains: “In the Cartesian scenario, the automatic actions of animals assure us of the freedom of our own—we are not animals; therefore, we are not automata;” and in this way, “animals not only operate to assure us, but they also make us certain about what is clearly and distinctly different between man and animal.”<sup>245</sup> The separation between reasoning and non-reasoning animals is so strong and so fearfully maintained that even some animal ethicists fall prey to it, as in the works

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<sup>243</sup> Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (Toronto: University of Toronto Press, 2021), 12.

<sup>244</sup> Ralph R. Acampora, *Corporeal Compassion: Animal Ethics and Philosophy of Body* (Pittsburgh: The University of Pittsburgh Press, 2006), 4-5.

<sup>245</sup> Kelly Oliver, *Animal Lessons: How They Teach Us to Be Human* (New York: Columbia University Press, 2009), 26-27.

of Tom Regan and Peter Singer. Regan claims that “reason—not sentiment, not emotion—reason compels us to recognize the equal inherent value of [...] animals and [...] their equal right to be treated with respect.”<sup>246</sup> Ecofeminist scholar Josephine Donovan explains the consequences of taking this position: for Regan and Singer,

rejection of emotion and their concern about being branded sentimentalist are not accidental, rather, they expose the inherent bias in contemporary animal rights theory toward rationalism, which, paradoxically, in the form of Cartesian objectivism, established a major theoretical justification for animal abuse.<sup>247</sup>

In other words, relying on rationalism at the expense of emotion promotes the objectification of animals that enables their captivity and abuse. Whether these animal ethicists support rationality unwittingly out of habit, or they are attempting to work with the master’s tools, the result is the same: co-reification of anthropocentrism and liberal humanism.

The argument that reason is a necessary condition for deserving rights is a symptom of a larger, indeed systemic, misunderstanding of how anthropocentrism came to be hegemonic and what that hegemony elides. For example, when DiFiore argues that habeas protects liberty rights of humans “*because they are humans*” (emphasis original, OC, 9), she engages in anthropocentrism without consideration of how it became a structural force in legal discourse. Deckha explains how jurists like DiFiore—along with opponents of anthropocentrism who do not understand its origin—tend to pluck the concept out of much needed context:

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<sup>246</sup> Regan quoted in Josephine Donovan, “Animal Rights and Feminist Theory,” in *Beyond Animal Rights: A Feminist Caring Ethic for the Treatment of Animals*, eds. Josephine Donovan and Carol J. Adams, (New York: Continuum, 1996), 35.

<sup>247</sup> Donovan, 35-36.

This liberal humanist approach to animal law precludes a full accounting of the origins and dynamics of violence against animals because it conflates anthropocentrism with speciesism without considering that anthropocentrism is actually a construct given shape by a confluence of multiple historical structural exclusions, including racism, colonialism, and sexism.<sup>248</sup>

In other words, DiFiore conflates “humans” with *homo sapiens*, even though the history of the species is replete with members enacting entire systems of power that distinguish between “humans,” who are white, cis, hetero, anglophone, abled, educated, property-owning males; and “subhumans” who are Black, Hispanic, Asian, Indigenous, Semitic, women, queer, disabled, non-anglophone, undereducated, or poor—and especially those with intersectional identities. Deploying anthropocentrism without context or reflexivity, as both DiFiore and Manning do, not only contributes to the erasure of historic injustices, but hides extant lines of connection between oppressed groups that could be used to build solidarity.

Ignoring the history of anthropocentrism’s immoral iterations is partially to blame for the schism in animal law between welfare and rights approaches. In the animal welfare camp, advocates protect animals as property while utterly ignoring any similarities between the objectification of animals and that of humans. In response, the animal rights camp often charges full speed into arguments that insist animals deserve rights because they are like “us,” forgetting that not all of “us” have rights, nor are they equitably enforced. Both camps reinforce anthropocentrism: welfarism, while attempting to limit cruelty and mistreatment, objectifies and instrumentalizes animals; animal rights, while attempting to give animals some of the same rights as humans, either measures animal value by their

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<sup>248</sup> Deckha, 12.

similarity to humans or argues that animals should fit into the legal category of “persons.” Both approaches are evident in the artifacts of Happy’s case.

Manning and DiFiore take an animal welfare position in oral argument and written opinion, respectively. The U.S. legal system views animals as property: animals are owned *en masse* by farming industries, zoos, aquariums, scientific industries, and security apparatuses; and individually as workers, modes of transportation, and pets. Animal welfare laws punish human mistreatment of animals within these contexts. In this sense, as rhetorician S. Marek Muller explains, the welfarist position is “anthropocentric at its core in that it advocates for compassion for animals on the part of humans, but does not question if it is ultimately natural, normal, right, or wrong to consider animals as chattel with predominantly instrumental value.”<sup>249</sup> This anthropocentrism is on display when Manning refuses to acknowledge that captivity itself could be harmful, even when the captive animal is not being tortured. In fact, his refusal is persistent to such a degree as to seemingly cast doubt on his even *understanding the concept*—until he begins arguing that a decision for Happy is a threat to world order.

DiFiore’s opinion follows a similar pattern, taking the welfarist position and claiming dire consequences of straying from that position. DiFiore not only considers animal welfare laws to be sufficient, but something to be *proud* of: she argues that New York state law is strong in its protection of animals, then proceeds to list statutes against torturing animals and selling their body parts. As Deckha explains, the reason such laws exist is not

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<sup>249</sup> S. Marek Muller, *Impersonating Animals: Rhetoric, Ecofeminism, and Animal Rights Law* (East Lansing: Michigan State University Press, 2020), xxv.

to protect animals from harm, but humans from degradation: “animals are presumed to be lower creatures; treating them without cruelty is mainly for the purpose of cultivating desired moral sensibilities regarding the treatment of other humans.”<sup>250</sup> Accordingly, “anti-cruelty prosecutions target socially deviant acts and not what mainstream society considers socially acceptable animal abuse.”<sup>251</sup> The sport of dog fighting is unacceptable because it encourages human cruelty and blood lust; the farming industry practice of caging chickens so tightly as to cause self-mutilation is acceptable because it produces human sustenance. Zoos are not an exception to socially acceptable instrumentalization. To justify the captivity of an individual animal, interested parties argue the importance of preserving species for future generations *of humans* to learn from and enjoy. To claim welfare law as a sufficient bulwark against animal harm, as DiFiore does, is to defend anthropocentric instrumentalization.

In terms of anthropocentrism, animal rights advocates have their own problems. In oral argument, Miller makes what animal legal scholars refer to as a similarity argument: animals should have rights because they are like humans in important aspects. Muller, who has studied NhRP’s arguments in animal cases, notes that NhRP’s founder Steven Wise’s choice of cognitively complex animals as plaintiffs “appears to come from a rejection of animal alterity—a desire to protect those particular species in which he sees himself.”<sup>252</sup> This desire is anthropocentric not only because it favors animals that can most accurately mimic human behaviors and capacities; it also presumes that animal alterity is

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<sup>250</sup> Deckha, 48.

<sup>251</sup> Deckha, 51.

<sup>252</sup> Muller, 51.

uniform across individuals and species. To lump all animals together under the label of alterity is to erase observable and significant power differentials between individuals and species, thereby making it impossible for humans to ethically interact with them according to their vulnerabilities. For example, human-bee relations depend on humans attending to the bee's tiny size, the delicacy of the hairs on its thorax, its sensitivity to air pollutants; human-bear relations depend on humans attending to the bear's larger size, its apex predator behavior, and its willingness to enter human spaces in search of food when its own food supply is jeopardized. Different animals have differently localized material embodiments, creating different power distributions and singular vulnerabilities across assemblages. To intra-act responsibly, as Barad would say, one must stay attuned to such differences.

In addition to erasing differences, the similarity argument creates other ethical problems. In oral argument, Miller uses scientific evidence and consensus to prove that Happy is like a human in her autonomy, sophisticated communication, memory, and emotional intelligence. Similarity arguments based in science present three immediately observable ethical issues. First, claiming rights for animals that possess traits like those of humans may result in the fewest protections granted to entities that may need it most. Humans relate well to animals with two front-facing eyes because their view of the world is not dissimilar to ours; we can empathize with dogs, cats, tigers, and elephants. We do not relate well to jumping spiders, box jellyfish, or chitons—with 12, 24, and 1000 eyes respectively—because their sensory experience of the world is fundamentally different to our own. It is precisely this inability to relate that makes humans more likely to objectivity

or disregard such animals, making them vulnerable to harm. Second, there are 2.16 million animal species on earth *that we know of*,<sup>253</sup> the vast majority of which have not been extensively studied by scientists. By the logic of similarity, none of these animals would be eligible for rights because they are yet to be compared to humans. Third, though scientific objectivism may produce reliable data, the interpretation and legal use of such data can be unethical. Modern history includes multiple examples of scientific evidence used to separate out humans thought to be poor specimens, resulting in crimes repugnant in nature and incomprehensible in scale: eugenics; forced sterilization; the medical racism of the Tuskegee experiments; and the extermination of Jews, ethnic minorities, and disabled persons during the Holocaust.

In consideration of the scientific evidence, DiFiore's written opinion shows little interest in the first and second ethical problems. DiFiore takes up the argument that scientific determination is not an ethically viable method for allocating rights, but her language is evocative and contains no examples. By evoking emotionally charged topics without giving specific examples, DiFiore shuts down various avenues for rebuttal, the most obvious of which is that scientists do not decide who has rights or when those rights have been infringed upon—that would be the job of the legislature *and the judiciary*. By taking advantage of an opening created by Miller's similarity argument, DiFiore again demonstrates an anthropocentric view; her concern is for how humans will be adversely affected. It is important to note, however, that the ethical problems presented by Miller's

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<sup>253</sup> Talitha Van Niekerk, "How Many Animals Are in the World in 2024," *World Animal Foundation*, <https://worldanimalfoundation.org/advocate/how-many-animals-are-in-the-world/>.

reliance on scientific evidence may just have well been exploited by a judge who is on the side of animal rights.

DiFiore uses three binaries, each of which communicate an anthropocentric dominance: human being/nonhuman animal, person/nonperson, and subject/object. In context, these binaries are different iterations of an ancient, deeply embedded, universally familiar binary: human/animal. Throughout history humans have projected onto animals a wildness as ambiguous as it is flexible. As critical scholar Mel Chen observes, “animals serve as objects of almost fetishistic recuperation, recruited as signifiers of ‘nature,’ or ‘the real,’ and used to stand in for a sometimes conflicting array of other cultural meanings (including fear, discipline, sexuality, purity, wisdom, and so on).”<sup>254</sup> Such projections simultaneously hide the fact that humans *are* animals and reveal human fears of *becoming* animal. Put another way, the human/animal binary both defines us against animals and adheres us to our animality. The line of separation may be thin, but anthropocentrism demands that it be constantly policed and vehemently enforced: for humans to maintain their dominant status, we must control ourselves, our environments, and other animals.

From the ancient Greeks to the Enlightenment, our chosen method of control has been reason. Defined as a capacity for logical thinking, reason acts as a bulwark against the dissolution of the boundary between human and animal, so much so that the oppositional binary of reason/emotion often becomes synonymous with that of human/animal. Chen explains:

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<sup>254</sup> Mel Y. Chen, *Animacies: Biopolitics, Racial Mattering, and Queer Affect* (Durham and London: Duke University Press, 2012), 100.

For the “human,” feeling must then be forever in battle with rationality, and as humanity’s categorical guarantor, rationality had every time to win out as the exclusive and primary property of humans. The responsibilities of feeling then fell to lower places on the hierarchy—women, animals, racialized men, disabled people, and incorporeals such as devils or demons.<sup>255</sup>

For humans, to keep one’s emotions in check is to keep one’s animal nature at bay. It is why humans cage animals: to exert control and assuage fear of losing control. It also explains some of the worst human behavior towards other humans in history.

In Happy’s case, human history is part of the flexibility argument on habeas corpus. Historically, common law judges have used habeas on a case-by-case basis to grant relief from illegal detention to human individuals who were considered chattel at the time of their detention, including enslaved persons, women, and children. The flexibility argument posits that if habeas can be expanded to consider such persons, it can be expanded to consider autonomous animals. The obvious issue with this argument is that it analogizes objectification of humans to that of animals. Most participants in Happy’s case address the analogy without issue: Miller paints habeas history as one that corrects injustices (e.g., describing how Lord Mansfield’s 1772 ruling freed an enslaved man); Manning responds that all such cases were about humans, but he does not object to the analogy on ethical grounds; dissenting opinions by Wilson and Rivera take up the analogy to agree with Miller’s flexibility argument. Only DiFiore calls the analogy “odious” while offering no further explanation or context. There is nothing inappropriate or even unusual in DiFiore’s reaction to analogizing the objectification of humans to that of animals—but it reveals why the analogy is problematic for both sides in Happy’s case. For those who would grant relief

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<sup>255</sup> Chen, 46.

to Happy, using the analogy is risky because the level of offense may be high, and it may be feigned.

After Happy’s case was decided, *Harvard Law Review* (HLR) published a 2023 case review with a powerful opening line: “Elephant is not the new Black.”<sup>256</sup> Focusing on the analogy as “fraught with racist implications,” HLR argues that “analogies between Black people and animals cannot be uncoupled from racism because the user intends to equate the horrors of enslavement with the horrors of animal captivity.”<sup>257</sup> Any discursive strategy that results in Black pain is untenable. Beyond affective response, the analogy effectively displaces conversations about racist violence by shifting the field of engagement. Deckha examines the work of gender studies scholar Malini Zohar Schueller to illustrate this kind of rhetorical move. Schueller argues that analogies comparing the mechanisms of racism to those of misogyny or homophobia are a kind of “colonial fetish that enables the (white) theorist to displace the potentially disruptive contradictions of racial difference onto a safer and more palatable notion of similarity,” which ultimately “helps whiteness retain its privilege by being uninterrogated.”<sup>258</sup> In Happy’s case, analogizing enslavement to animal captivity allows audiences to *look away* from entrenched white supremacy to more closely examine entrenched objectification and instrumentalization of animals—despite the fact the injustices of each are intertwined.

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<sup>256</sup> “Animal Rights—Utilization of Racial Precedent—New York Court of Appeals Rejects Extending Writ of Habeas Corpus to Elephant—Nonhuman Right Project, Inc., Ex Rel. Happy v. Breheny, No. 52, 2022 WL 2122141 (N.Y. June 14, 2022), *Reargument Denied*, No. 2022-552, 2022 WL 17588057 (N. Y. Dec. 13, 2022) (Mem.) (Unpublished Table Decsion), *Harvard Law Review* 136, no. 4 (February 2023): 1292.

<sup>257</sup> *Harvard Law Review*, 1292 and 1295.

<sup>258</sup> Quoted in Deckha, 28.

As animal scholar John Miller explains about slavery analogies in animal rights discourse, “The topic is ‘dreaded’ because slavery’s dehumanization of millions of Africans surely necessitates a vigorous restatement of human status rather than its apparent, continuing erosion through association with the suffering of animals.”<sup>259</sup> Yet such a “restatement of human status”—either as a method of repair or an ode to equality—assumes that “human” is an innocent category and not what history has often shown it to be: a social construct used by colonialists, imperialists, racists, misogynists, homophobes, and other bigots to exploit, contain, or eliminate others.<sup>260</sup> More importantly, objections to transspecies analogies unintentionally elide how animal rhetoric *presages* racist violence, and acts as “discursive resource” for those who would justify that violence: “the exploitation and denigration of people traditionally involves viewing them *as* animals, treating them *like* animals, and justifying their ‘inferior’ status on the basis of their supposed animality or proximity to animals” (emphasis original).<sup>261</sup> These are sound reasons why the analogy *could* hold, but if it manifests the pain of Black abjection in any way, using the analogy is inadvisable. The new materialist’s goal *must* be to seek out and support allies who have suffered from “shared animalizing narratives that sustain violence across species lines.”<sup>262</sup>

For those on Happy’s side, using the analogy carries a high risk of causing genuine offense and foreclosing efforts toward solidarity. For those opposed to granting relief to

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<sup>259</sup> John Miller, *Empire and the Animal Body: Violence, Identity and Ecology in Victorian Adventure Fiction* (London: Anthem Press, 2012), 14.

<sup>260</sup> Deckha, 30.

<sup>261</sup> Cary Wolfe, *Before the Law: Humans and Other Animals in a Biopolitical Frame* (Chicago: The University of Chicago Press, 2013), 10; Oliver, 25.

<sup>262</sup> Deckha, 29.

Happy, it is an opportunity. Offense may be feigned. There is no quicker way to discursively pivot away from the substance of an argument than an expression of outrage. DiFiore's simple and unexplained dismissal of the analogy as "odious" does not necessarily mean she is feigning offense. Our culture is heavily influenced by internet discourse and social media, and sometimes a shutdown is merely a sign of overexposure to the same talking points: if we see the same argument produced hundreds of times, we tend to circumvent the process as soon as we can interpret signs of discursive similarity. That is, DiFiore may have repeated exposure to arguments using the same analogy, and if she thinks she knows where the argument is headed, she may want to nip it in the bud. Overexposure is a possible explanation for DiFiore dismissing the analogy, but it is not a justification for her lack of explicit reasoning in the opinion. If DiFiore finds the analogy offensive, she must demonstrate an understanding of the ways objectification and degradation of animals is used to dehumanize humans. Her other option is to not address the analogy at all; her anthropocentric, welfare-based argument does not require it.

In sum, a new materialist critique of the artifacts in Happy's case highlights three important areas for improvement: anthropocentrism, binaries, and analogy. But what can rhetorics of materiality offer in terms of repair? In my conclusion, I provide a few possibilities.

## Conclusion

*Nonhuman Rights Project v. Breheny* is a case about the fate of Happy, an elephant in the Bronx Zoo. Happy's advocates argue that she should be free roaming across her homelands, participating in the matriarchal structure of her herd, and forming emotional

and communicative bonds with other elephants. Instead, she is held at the Zoo in a barn that barely extends past her body length; she has no companions other than an elephant who killed her companion, who she communicates with through a fence; and she exhibits signs of the negative effect of confinement (swaying, walking little, a lack of interest, etc.). On behalf of Happy, NhRP filed suit against the Bronx Zoo under the writ of habeas corpus, the so-called “great writ” of liberty. In the contemporary era, habeas corpus is most frequently associated with *conditions* of detainment, but the law was originally devised as a check on the British King’s ability to arrest and detain subjects on a whim—that is, without reasoned judgement. NhRP chose to argue for Happy’s transfer to an elephant sanctuary using habeas, in part, because the writ is part of common law, meaning judgement is rendered on a case-by-case basis. A ruling for Happy need not have set a precedent.

In court proceedings, the ambiguity of the phrase “illegal detention” leads to retrenchment of two frequently argued positions in animal law: animal rights and animal welfare. Animal rights advocates frequently argue for animal personhood, believing such a classification to be the best avenue for securing inherent (or inalienable) rights for individual animals. NhRP clearly argues for Happy to be granted rights, though they do not specifically request a personhood designation. NhRP instead argues that Happy’s cognitive, emotional, and communicative capacities constitute autonomy, and thus she deserves bodily liberty. Animal welfarists, in contrast, accept the anthropocentric instrumentalization of animals. By insisting that animal cruelty laws are sufficient to address animal wellbeing, welfarists tacitly endorse a variety of human uses for animals.

When animal rights advocates hear “illegal detainment,” they think of detainment as unjust on its face. When animal welfarists hear the same phrase, they evaluate the *conditions* of detainment. These distinctions are evident in the artifacts of the case.

I analyze two artifacts from Happy’s case: oral argument and the subsequent opinion of the court. In oral argument, Miller, counsel for NhRP, argues: 1) Happy’s captivity denies her the right to bodily liberty; 2) Happy has a right to bodily liberty because she is autonomous; 3) there is a scientific consensus that elephants are autonomous; and 4) habeas corpus is flexible enough to include Happy. Manning, counsel for the Bronx Zoo, argues: 1) habeas is a remedy for illegal detainment, and if no animal welfare laws have been broken in Happy’s captivity, habeas does not apply; 2) habeas is a remedy available only to persons, and Happy is not a person; and 3) a finding in favor of Happy would result in upheaval not only for animal law but for the entire legal system, social values, and the foundations of government. The judges, through questions and interjections, appear to have their own interests. The two judges that dominate colloquy are Rivera and Wilson, both of whom consistently push for clarity from both counsels and acknowledge that it is the court’s job—*their* job—to understand the issues presented and to rule on them. The other judges, including Chief Judge DiFiore, ask minimal questions and seem overly focused on consequences of their ruling, especially for human interests.

The opinion of the court, authored by DiFiore, uses three binaries to argue that habeas is only for humans. The explicit binary of human being/nonhuman animal valorizes “human beings” as exceptional, spiritually transcendent, familiar, and virtuous; while “nonhuman animals” are cruel, violent, foreign, and repulsive. The implicit binary of

person/nonpersons suggests that juridical “persons” must be humans with a capacity to reason—thus *including* corporations while *excluding* even those animals possessing autonomy, intelligence, and emotion. The implicit binary of subject/object, common in the animal welfare approach, embraces instrumentalization by protecting animals from human cruelty only when it cannot be justified for the betterment of humans. DiFiore defends these anthropocentric binaries by suggesting that neither scientific determination nor the historical expansion of habeas rights to dehumanized humans should be used to advance animal rights. The vigor with which DiFiore defends anthropocentrism is matched by the fear and annoyance she expresses over potential consequences of granting Happy habeas relief. Ultimately, DiFiore decides that it is not the job of the Court to expand habeas protections to an animal—but denying those protections somehow is.

A new materialist critique of Happy’s case reveals three areas of concern: anthropocentrism, binaries, and analogies to race. Anthropocentrism plays a significant role in Happy’s case. The U.S. legal system considers animals property; and liberal humanism prizes reason and rationality, thereby elevating humans over animals. Anthropocentrism is also evident in arguments from the welfarist position (Manning and DiFiore) and from the animal rights position (Miller). Welfarists pursue laws against animal cruelty, but cruelty is defined as behavior that would cause human degradation. Animal rights advocates using a similarity argument to defend the rights of animals that are “like us,” which erases important differences between animal individuals and species. DiFiore’s use of three binaries (human being/nonhuman, person/nonpersons, subject/object) in the opinion of the court perpetuates their use as discursive tools of othering. DiFiore defends

these anthropocentric binaries by suggesting that neither scientific determination nor the historical expansion of habeas rights to dehumanized humans should be used to advance animal rights. Indeed, analogies that compare animal oppression to the racist violence experienced by enslaved peoples can retraumatize affected humans—risking potential allyships that the animal rights cause cannot afford to lose.

In addition to critique, a new materialist approach to Happy's case can suggest a few modes of repair. To shape legal discourse about Happy and other individual animal plaintiffs, advocates should embrace bioplurality, work on attunement, and describe animal life as an assemblage to combat abstraction. Johnson describes bioplurality as way to understand human relations with nonhumans in terms of both difference and similarity.<sup>263</sup> For example, all living entities share the threat of extinction under climate change, but some are more vulnerable than others due to their unique capacities, environmental requirements, and situational constraints. Happy's vulnerability to the effects of pollution and climate change may be like that of humans because we breathe the same air and are subject to the same volatile weather events, but Happy has less access to levers of power that might affect climate change, such as government regulation. Happy is more vulnerable to ecosystem change because she requires fresh vegetation for sustenance, whereas humans can eat preserved or frozen foods. Happy is more affected by situational constraints than humans because of her captivity and vulnerability to human methods of domination: she is trapped at the zoo and she does not use weapons beyond or outside of her body. Recognizing similarities in shared

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<sup>263</sup> Johnson, 96.

vulnerability—rather than comparable cognitive capacities—fosters understanding and empathy. Recognizing differences highlights the ways humans are to blame for Happy’s conditions, and how we have an outsized responsibility for repair.

Another potential mode of repair is to work on attunement. One way to practice attunement with animals is to follow the approach described by Deckha as a kind of emotional rehabilitation to combat dehumanization and objectification of animals. The process begins with “the cultivation of certain caring dispositions toward animals, namely attentiveness, but also responsiveness and respect.”<sup>264</sup> Deckha takes cues from feminist animal care theory which emphasizes the relational aspects of dependent relationships between caregiver and recipient. The goal, even in non-voluntary relationships, is to be aware of how our “moral selves emerge” in the process.<sup>265</sup> Once humans achieve experience and awareness in this respect, they can explore what their responsibility is to animals with which they have not had personal contact. Exploration relies on observation, concentration, evaluation, and judgement.<sup>266</sup> The result is a type of call and response ethics, where humans need not know—or even presume to know—the wants and needs of animals in order to care for them. When these thoughts and actions are practiced enough to become habit, not only is animal objectification disrupted, but attuning with animals becomes possible. As with adopting bioplurality, working on attunement produces strategic advantages. If experts, zoo keepers, visitors, naturalists, or biologists engaged in attunement work in Happy’s case, the resulting testimony would effectively silence

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<sup>264</sup> Deckha, 100.

<sup>265</sup> Kamalini Ramdas quoted in Deckha, 101.

<sup>266</sup> This idea comes from Justine Donovan, feminist animal ethicist, who is quoted in Deckha, 100.

opposing counsel's claims that no one had directly observed Happy's symptoms of harm caused by captivity.

Lastly, assemblage thinking and descriptions can be used to repair one of the underlying mechanisms of instrumentalization and objectification of animals: abstraction.

Animals in zoos exist as specimens, as Acampora explains:

exhibiting an animal not only renders it homeless, but also—consequently—disembodies that creature of its world-flesh identity. This deconstruction of incarnate worldhood is given testimony by the engaged animal's chronically bored monotony of bodily behavior; broadly stated, the distinctive way in which a particular animal lives her species-identity is existentially flattened out into conduct becoming of generic animality.<sup>267</sup>

Held captive at the zoo, Happy is not just removed from her natural habitat but from her material embodiment as Happy—even from her material embodiment as elephant. She is only “animal.” In Happy's legal case, this kind of abstraction is not addressed by NhRP's advocate, nor is it addressed in the opinion of the court. The *problem* of abstraction need not be explained in court for the *solution* to be useful. Thinking of Happy as a member actant in an assemblage is a way of recontextualizing her and, to a degree, re-embodiment her. Mapping the assemblage of which Happy is a member means identifying other members and the weight of their connections to Happy. A partial list of these member actants might include: the artificial landscape she inhabits, the paths she walks, the local climate and weather, the food she eats, her feeding schedule, her sleep habits, what her sensory organs pick up, her lost companions, her grief, her self-recognition, her memory, her display, the human who grooms her, the human who locks her in, the human who

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<sup>267</sup> Acampora, 104.

feeds her, the customers who visit her, and the commenter on the news site who can see sadness in her eyes. Happy is not a slide under a microscope nor a picture in a book, but an embodied living entity living in a specific, localized materiality. The more advocates, judges, and the public realize this, the more likely they are to see a need for relief.

After NhRP's 2022 loss in Happy's case, public scrutiny of Happy's captivity increased. On September 12, 2024, Sarah Maslin Nir published an article in *The New York Times* titled "Happy the Elephant Hasn't Been Seen in Months. What's Going On?" Officials at the Bronx Zoo responded saying that Happy would come out of her barn "when she chooses to do so."<sup>268</sup> When she did reappear, she showed signs of osteoarthritis and foot problems. On February 12, 2025, the New York City Bar sent a letter to New York City officials regarding Happy's condition, stating they were "gravely concerned" about her and Patty, the last elephants remaining at the Bronx Zoo. The letter, submitted by New York City Bar President Muhammad U. Faridi, ended with the following:

We implore the City, acting through its various agencies and the City Council, to relieve Happy's and Patty's obvious suffering and exercise its powers and/or its influence to allow Happy and Patty the chance to live out the remainder of their lives at an accredited sanctuary, free of the impoverishments they have been forced to endure.<sup>269</sup>

*Nonhuman Rights Project v. Breheny* may be over, but the legal pressure is still mounting, and the fight for Happy goes on.

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<sup>268</sup> Sarah Maslin Nir, "Happy the Elephant Hasn't Been Seen in Months. What's Going On?" *The New York Times*, September 12, 2024, <https://www.nytimes.com/2024/09/12/nyregion/happy-the-elephant-bronx-zoo.html>.

<sup>269</sup> Muhammad U. Faridi, "Letter to NYC officials regarding the condition of Happy the Elephant," *New York City Bar*, February 12, 2025, <https://www.nycbar.org/reports/letter-to-the-bronx-zoo-regarding-the-condition-of-happy-the-elephant/>.

The focus of this chapter exposes how anthropocentrism is deeply embedded in U.S. law and legal practices. Both sides of the dispute rely on anthropocentric arguments. In the case of Happy's advocates, such arguments may be an attempt to invite agreement from the legal establishment, but the gambit ultimately failed. In the next chapter, I examine a case in which human advocates for a species of wild rice argue *against* the anthropocentrism of the U.S. legal system by holding an alternative view—one that embraces the interconnectedness of all beings.

## Chapter 3: Wild Rice

Manoomin is the Chippewa Ojibwe Anishinaabe word for “wild rice.”<sup>270</sup> Western science knows manoomin as the species *Zizania palustris*, a grass that grows in the shallow waters of the Great Lakes region of the U.S. Winters around the Great Lakes can be bitterly cold, and manoomin seeds embedded in sediment bide their time until the spring sun melts the ice and raises the water temperature to 45°F, at which point the seeds begin to germinate. Tall thin plants reach just above the water, spreading out floating leaves. When its roots are strong enough, the plant “stands up,” creating stalks that sway in both wind and water. In the spring and early summer, manoomin makes tiny white flowers pollinated by the wind, some of which are replaced with grains by the fall.<sup>271</sup> Chippewas harvest manoomin by hand, taking care to not to not take too much and ensuring that enough seeds are knocked into the water, where they plummet down to the sediment to rest until spring comes again. Manoomin is an ancient plant; its existence in the Great Lakes region predates prehistoric cultures by a thousand years.<sup>272</sup> But it was not until recently that manoomin has been threatened so severely that Chippewas have taken legal action on its behalf.

On December 31, 2018, the White Earth Reservation Business Committee of the White Earth Band of Chippewa Indians unanimously adopted resolution 001-19-009,

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<sup>270</sup> “manoomin,” The Ojibwe People’s Dictionary, Accessed on 5-20-2025, <https://ojibwe.lib.umn.edu/main-entry/manoomin-ni>.

<sup>271</sup> Barbara J. Barton, *Manoomin: The Story of Wild Rice in Michigan* (East Lansing: Michigan State University Press, 2018), 5.

<sup>272</sup> Winona LaDuke, *Recovering the Sacred: The Power of Naming and Claiming* (Cambridge, MA: South End Press, 2005), 168.

establishing the Rights of Manoomin.<sup>273</sup> The document outlines rights of Tribal members, sovereignty, prohibitions, and enforcement—but it begins with the rights of manoomin itself:

Manoomin, or wild rice, within the White Earth Reservation possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation. These rights include, but are not limited to, the right to pure water and freshwater habitat; the right to a healthy climate system and a natural environment free from human-caused global warming impacts and emissions; the right to be free from patenting; as well as rights to be free from infection, infestation, or drift by any means from genetically engineered organisms, trans-genetic risk seed, or other seeds that have been developed using methods other than traditional plant breeding.<sup>274</sup>

This passage enumerates positive rights that are “inherent” and support the survival, health, and flourishing of manoomin; and negative rights that protect manoomin from a range of harms caused by humans. It also contains a geographical constraint: “within the White Earth Reservation.” The constraint acts as a dividing line in more ways than one. In legal terms, the line demarcates jurisdictions originally established by treaties between the Tribes and the U.S. government: tribal courts adjudicate disputes on tribal lands, and U.S. courts adjudicate nearly everything else. In cultural terms, the line separates those

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<sup>273</sup> A note on names of Tribes and Tribal identities: *White Earth Band* members are associated with White Earth Nation, located in the northern region of the U.S. state of Minnesota. The people of the White Earth Band may identify *Chippewa*, or by using the name European settlers gave them, *Ojibwe*. White Earth Band peoples are part of a larger group of Tribes in the region, known as *Anishinaabe*. When dealing with primary sources, I adhere to their preference.

A note on names of courts and laws, from the Harvard online database: “Tribal Law is the law of sovereign Indigenous entities. Federal Indian law covers the inter-governmental relationship between Tribes and the United States. Terminology is fraught.”

A note on spelling: I adhere to spellings as presented by individual sources, and sources vary based on personal experience and approaches to transliteration. The result is unlikely to cause confusion for anglophonic readers because variations are minimal.

<sup>274</sup> Rights of Manoomin, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-010 (Dec. 31, 2018), 6.

who see vegetation as ornament or obstacle from those who embrace plants as kin, as prophecy, as sustenance, and as a gift that should be reciprocated. In new materialist terms, the line is evidence of what Jane Bennett might call a “fantasy of mastery:”<sup>275</sup> that humans dominate and control the land with maps and lines, as if all other material embodiments can be imprisoned by the cells of an abstract imperial grid. The lines of jurisdiction, cultural identity, and human maps are looped and knotted into a choric matrix<sup>276</sup> from which many court cases emerged, including the focus of this chapter: *Manoomin et al. v. Minnesota Department of Natural Resources (DNR) et al.*<sup>277</sup>

Manoomin has been subjected to increasingly severe threats since the 1960s, prompting the White Earth Band to become the first Tribal court to recognize the rights of a plant species in 2018.<sup>278</sup> Yet establishing the rights of manoomin was not enough to protect the wetlands held by Chippewas. A few years later, the Canadian energy company Enbridge was working on replacing a degraded section of pipeline carrying oil from Alberta to Wisconsin. The planned path of “Line 3” ran close to White Earth Nation, but the construction site was not on Tribal lands. In 2021, DNR issued a permit for Enbridge to extract five billion gallons of water from the area around construction, and the White Earth Band reached its breaking point. On behalf of manoomin, they filed suit against DNR and

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<sup>275</sup> Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Durham and London: Duke University Press, 2010), 25. Bennett uses this phrase to describe one of the actants in the assemblage that is the electrical grid.

<sup>276</sup> As defined by Thomas Rickert, *Ambient Rhetoric: The Attunements of Rhetorical Being* (Pittsburgh, PA: University of Pittsburgh Press, 2013), 55.

<sup>277</sup> I refer specifically to *Manoomin*; *White Earth Band of Ojibwe v. Minn. Dep't of Nat. Res.*, No. 0:21-cv-01869-WMW-LIB (White Earth Band of Ojibwe Tribal Ct. Aug. 5, 2021).

<sup>278</sup> “Rights of Manoomin,” Center for Democratic and Environmental Rights, accessed on May 13, 2025, <https://www.centerforenvironmentalrights.org/rights-of-manoomin>.

asked the tribal court for declaratory and injunctive relief to stop the water extraction. In this chapter, I examine the original complaint filed on August 4, 2021 in White Earth Band of Ojibwe Tribal Court and the opinion from the White Earth Band of Ojibwe Court of Appeals that ultimately decided against manoomin on March 3, 2022, citing issues with jurisdiction.

In many ways, *Manoomin v. Minnesota DNR* is a case about clashing ontologies. Chippewa Anishinaabe peoples embrace what new materialists might call a vitalist ontology (or what philosophers might call a new animism): all material and materially embodied entities are alive, imbricated, relational, spiritual, and to be respected. The U.S. legal system views the nonhuman world as populated by objects to be bought, sold, controlled, or otherwise instrumentalized because of anthropocentric objectification. Using a new materialist lens to analyze the case artifacts, I argue that Chippewa Anishinaabe worldviews and values exemplify ways of being that new materialist scholars wish to see enacted in the world, but the U.S. legal system cannot accept because it prefers to maintain anthropocentric fantasies of mastery.

I begin by exploring new materialist concepts most applicable to *Manoomin v. Minnesota DNR*: intra-acting, assemblage, being-with, and kinship. I then detail the background of the case, including the history of manoomin and the construction project that threatens its survival. Next, I discuss relevant legal context, including the rights of nature movement, the importance of treaty documents in establishing Tribal sovereignty, and the “Montana exceptions”—the existing guidelines for establishing the jurisdiction Tribal court to adjudicate matters which involve non-Tribal members. I then move on to

artifact analysis to see how Chippewa Anishinaabe ways of being are reflected in the August 2021 complaint—and how they are eschewed in the March 2022 Appellate Court opinion.<sup>279</sup> In my conclusion, I offer some final thoughts and potential modes of repair.

## A New Materialist Lens

There are four concepts from new materialism that are essential to understanding the case of Manoomin: intra-acting, assemblage, being-with, and kinship. In defining new materialist ontology, Karen Barad makes a crucial distinction. Anthropocentric individualism encourages us to view relations between subjects as *inter-action*, “which presumes the prior existence of independent entities or relata.”<sup>280</sup> Barad argues the more accurate term is *intra-action*, which “signifies the mutual constitution of entangled agencies.”<sup>281</sup> They explain:

Intra-actions are non-arbitrary, nondeterministic causal enactments through which matter-in-the-process-of-becoming is iteratively enfolded into its ongoing differential materialization. Such a dynamics is not marked by an exterior parameter called time, nor does it take place in a container called space. Rather, iterative intra-actions are the dynamics through which temporality and spatiality are produced and iteratively reconfigured in the materializations of phenomena and the (re)making of material-discursive boundaries and their constitutive exclusions.<sup>282</sup>

In other words, the world does not produce isolated subjects and definitively causal events, e.g., there is no “me,” “my plant,” and “me watering my garden plant on Saturday.”

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<sup>279</sup> Minnesota Dep't of Nat. Res., et al. v. Manoomin, et al., No. AP21-0516 (White Earth Band of Ojibwe Ct. of Appeals March 10, 2022).

<sup>280</sup> Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Durham and London: Duke University Press, 2007), 139.

<sup>281</sup> *Ibid*, 33.

<sup>282</sup> *Ibid*, 179.

Instead, the materials, states, attributes, and agencies of “me” and “my plant” are continually entangled in different ways, times, and spaces—creating a me-plant phenomena that takes part in the making of the world. Separation is an illusion. Other new materialist scholars make similar points: Jenell Johnson examines an approach to life “that cannot be understood outside of the relations it constitutes—and by which it is constituted,”<sup>283</sup> Thomas Rickert describes subjectivity as “condensations of probabilities realized in movement,”<sup>284</sup> Tim Ingold argues that materials do not exist, but “occur” and their properties “cannot be identified as fixed, essential attributes of things, but are rather processual and relational,”<sup>285</sup> and Anna Lowenhaupt Tsing notes that “each living thing remakes the world through seasonal pulses of growth, lifetime reproductive patterns, and geographies of expansion [...] as organisms enlist each other and coordinate in making landscapes.”<sup>286</sup> Together, these arguments constitute a new materialist ontology that focuses on intra-action, relations, processes, and states of becoming.

The heuristic for new materialist ontology is the assemblage. The concept of the assemblage comes from the work of Gilles Deleuze and Felix Guattari, who use it to describe reality as intertwined, dynamic, and non-hierarchical. Looking at a book, for example, there is no “tripartite division between a field of reality (the world) and a field of

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<sup>283</sup> Jenell Johnson, *Every Living Thing: The Politics of Life in Common* (University Park, Pennsylvania: The Pennsylvania State University Press, 2023), 35.

<sup>284</sup> Rickert, 97.

<sup>285</sup> Tim Ingold, *Being Alive: Essays on Movement, Knowledge and Description* (London and New York: Routledge, 2011), 30. Note: Ingold does not describe himself as a new materialist (and may in fact be horrified at his inclusion in this list); he identifies as an anthropologist.

<sup>286</sup> Anna Lowenhaupt Tsing, *The Mushroom at the End of the World: On the Possibility of Life in Capitalist Ruins* (Princeton and Oxford: Princeton University Press, 2015), 21.

representation (the book) and a field of subjectivity (the author).”<sup>287</sup> Instead, they are relationally interconnected. Bennett builds on this concept of the assemblage, emphasizing its inherent diversity, openness, and vitalism:

Assemblages are ad hoc groupings of diverse elements [...] Assemblages are living, throbbing confederations that are able to function despite the persistent presence of energies that confound them from within. They have uneven topographies, because some of the points at which the various affects and bodies cross paths are more heavily trafficked than others, and so power is not distributed equally across its surface. Assemblages are not governed by any central head: no one materiality or type of material has sufficient competence to determine consistently the trajectory or impact of the group. The effects generated are, rather, emergent properties [...] an assemblage is never a stolid block but an open-ended collective.<sup>288</sup>

In this way, an assemblage is a way of looking at a field of intra-actions and seeing how agency is unevenly distributed across that field. Humans may be “actants” in assemblages (Bennett uses Latour’s term for a “source of action”), but their power is as open, diffuse, and subject to the push-and-pull of relationality as other actants.<sup>289</sup> When applied to the natural world, assemblage thinking allows us to witness, attend, and participate in the making, unmaking, and remaking of landscapes. As Tsing writes in *The Mushroom at the End of the World*, “if we are interested in livability, impermanence, and emergence, we should be watching the action of landscape assemblages. Assemblages coalesce, change, and dissolve: this is the story.”<sup>290</sup> A harvest is one such story, with actants including earth, soil, plants, water, sun, seeds, stalks, growth, atmosphere, temperature,

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<sup>287</sup> Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Minneapolis: University of Minnesota Press, 1987), 23.

<sup>288</sup> Bennett, *Vibrant Matter*, 23-24.

<sup>289</sup> Bennett explains Latour’s use of “actant” in *Vibrant Matter*, 9.

<sup>290</sup> Tsing, 158. Emphasis original.

humans, acts of gathering, cooking, recipes, fire, heat, sustenance, bellies, bodies, life—each with their own agential power—and the story is always unfolding.

New materialist rhetoric is concerned not only with the ontology it describes, but they ways humans come to *be-with* nonhumans.<sup>291</sup> Barad argues for a new materialist ethic that is “not about right response to a radically exterior/ized other, but about responsibility and accountability for the lively relationalities of becoming of which we are a part.”<sup>292</sup> As actant-members of assemblages that include the natural world, we must take care in our relations with other actants. A perfect understanding of what it is to *be nonhuman* is not required for such caretaking. Instead, the necessary condition is to *be-with* nonhumans: observing, witnessing, and listening; attending, attuning, and living amongst or alongside; sharing growth patterns, seasons, and threats of decay; leaning on, propping up, and spreading out with one another. Different human groups and cultures have different ways of rhetorically expressing being-with nonhumans. For the Indigenous peoples of the U.S. it is often described as kinship.

In Johnson’s book *Every Living Thing*, she interviews Kyle Whyte, Professor of Environment and Sustainability at University of Michigan and member of Citizen Potawatomi Nation. Whyte defines kinship as “moral relationships that have a particular purpose,” where that purpose is communal.<sup>293</sup> These relationships have multiple qualities,

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<sup>291</sup> I am building on the concept of “being with” as articulated by Ralph R. Acampora, *Corporeal Compassion: Animal Ethics and Philosophy of Body* (Pittsburgh: The University of Pittsburgh Press, 2006), 27.

<sup>292</sup> Barad, *Meeting the Universe Halfway*, 393.

<sup>293</sup> Whyte quoted in Johnson’s *Every Living Thing*, 45.

such as trust, transparency, and responsibility. Qualities of kinship are not based on rules that enforce or prohibit certain actions, but a type of interdependency.<sup>294</sup> Whyte explains:

If you look at a lot of Indigenous people's ceremonies and other activities, they can actually be explained as a constant reminder and acknowledgment that we're dependent. We're in mutual responsibilities with a number of other beings [...] And it's kind of a never-ending process of being patient, of trying to learn, grappling with the dilemmas of death and harm and ecological change. [...] And we have to remind ourselves every year, every season, whatever it is, that we're very, very grateful for the fact of that interdependency.<sup>295</sup>

What Whyte describes is being-with: engaging in cultural practices that help constitute interdependent relations with nonhumans and foster the value of reciprocity. To act reciprocally, with respect and gratitude, is a practice of kinship.

Perhaps the most famous Indigenous scholar cited by new materialists today, Robin Wall Kimmerer, anchors her work in the relational qualities of reciprocity. Kimmerer is an educated botanist and Potawatomi member, and her immensely popular book *Braiding Sweetgrass* is wildly beautiful in its rich descriptions of how reciprocity is enacted in relations among humans and nonhumans. In particular, Kimmerer describes reciprocity as it is enacted by Anishinaabe peoples (a collection of many tribal nations in the Great Lakes region, including Potawatomi and Chippewa): treating nonhumans as familiar relations, giving gifts, and asking for permission. Kimmerer examines the way Anishinaabe people talk about natural beings as nonhuman kin: “in Potawatomi and most other indigenous languages, we use the same words to address the living world as we use for our

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<sup>294</sup> Ibid.

<sup>295</sup> Ibid, 52-53.

family. Because they are our family.”<sup>296</sup> This includes animals and plants, but also rivers and lakes. Kimmerer illustrates this point with the example of a bay. In English “bay” is a noun, but to refer to it as such removes its vibrancy and animacy. Instead, the Potawatomi word *wikwegamaa*, which means “to be a bay,” effectively “releases the water from bondage and lets it live,” acknowledging “the wonder that, for this moment, the living water has decided to shelter itself between these shores.”<sup>297</sup> Thinking of a bay as “deciding” may appear to be anthropomorphizing, as does Kimmerer’s description of how the land shows its love: “She loves us with beans and tomatoes, with roasting ears and blackberries and birdsongs. By a shower of gifts and a heavy rain of lessons. She provides for us and teaches us to provide for ourselves. That’s what good mothers do.”<sup>298</sup> But *the goal* of this anthropomorphizing language is not equating beings but acts; not about “mothers” but “what good mothers do.” The same emphasis on action is present in Kimmerer’s description of the Potawatomi relationship with water:

women are the Keepers of Water. We carry the sacred water to ceremonies and act on its behalf. “Women have a natural bond with water, because we are both life bearers,” my sister said. “We carry our babies in internal ponds and they come forth into the world on a wave of water. It is our responsibility to safeguard the water for all our relations.” Being a good mother includes the caretaking of water.<sup>299</sup>

If we combine this description of good mothering with the previous, we see human and nonhuman action *mirror one another*: the land “loves,” “provides,” and “teaches;” the women “carry,” “act” on behalf of, and “safeguard” the water. This is not about equality,

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<sup>296</sup> Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge, and the Teaching of Plants* (Minneapolis: Milkweed Editions, 2013), 55.

<sup>297</sup> *Ibid*, 55.

<sup>298</sup> *Ibid*, 122.

<sup>299</sup> *Ibid*, 94.

as so much anthropomorphizing language is—like anthropomorphizing animals to make them similar and similarly valued as humans. For Potawatomi, sameness is not the point; reciprocal action is.

The language of family relations is present in Kimmerer’s discussion of gifts and giving. Kimmerer tells the creation story of Skywoman falling to the earth, bringing her unborn child with her. Skywoman gave birth to a daughter who grew to be loved by all living beings, but who died giving birth to her own children: “Heartbroken, Skywoman buried her beloved daughter in the earth. Her final gifts, our most revered plants, grew from her body.”<sup>300</sup> The Potawatomi reciprocate these gifts by caring for them; the gifts bestow an obligation and an ongoing relationship. In *The Serviceberry*, Kimmerer explains how gift-giving is a dynamic, living process:

I don’t mean a bilateral exchange in which an obligation is incurred, and can then be discharged with a reciprocal “payment.” I mean keeping the gift in motion in a way that is open and diffuse, so that the gift does not accumulate and stagnate, but keeps moving, like the gift of berries through an ecosystem.<sup>301</sup>

It is this vital reciprocation that creates health and well-being for humans and nonhumans alike. Underscoring this point is the nature of the Windigo, a “legendary monster” of the Anishinaabe which “cares more for its own survival than for anything else.”<sup>302</sup> Greed, ingratitude, and isolation go together; the fate of the Windigo is ostracization. As Kimmerer writes, “It is a terrible punishment to be banished from the web of reciprocity, with no one

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<sup>300</sup> Ibid, 23.

<sup>301</sup> Robin Wall Kimmerer, *The Serviceberry* (New York: Scribner, 2024), 14-15.

<sup>302</sup> Kimmerer, *Braiding Sweetgrass*, 304.

to share with you and no one for you to care for.”<sup>303</sup> Giving and gratitude form the bonds of kinship. To be without them is to be alone.

Reciprocity between people can be articulated in speech. We ask for permission and consent and wait to act until they are freely and explicitly given. Asking for permission from nonhumans is more complicated. Before harvesting leeks, for example, Kimmerer engages in an assessment that calls for both left- and right-brain thinking: she uses empirical observation to judge the health and number of plants, and she uses intuition to read “something else:” “a sense of generosity, an open-handed radiance that says take me, or sometimes a tight-lipped recalcitrance that makes me put my trowel away.”<sup>304</sup> Both types of assessment are foundational for the ethical guidelines Anishinaabe peoples call the Honorable Harvest. There are no written guides or rules for the Honorable Harvest; there need not be. Living with, giving to, and taking from nonhuman kin is embodied to such a profound degree for the Anishinaabe that it is almost ineffable. Nevertheless, Kimmerer imagines what a list of guiding principles might look like:

Know the ways of the ones who take care of you, so that you may take care of them.  
 Introduce yourself. Be accountable as the one who comes asking for life.  
 Ask permission before taking. Abide by the answer.  
 Never take the first. Never take the last.  
 Take only what you need.  
 Take only that which is given.  
 Never take more than half. Leave some for others.  
 Harvest in a way that minimizes harm.  
 Use it respectfully. Never waste what you taken.  
 Share.  
 Give thanks for what you have been given.  
 Give a gift, in reciprocity for what you have taken.

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<sup>303</sup> Ibid, 207.

<sup>304</sup> Robin Wall Kimmerer, *The Democracy of Species* (United Kingdom: Penguin Books, 2021), 30.

Sustain the ones who sustain you and the earth will last forever.<sup>305</sup>

The values expressed in Kimmerer's list bring together Anishinaabe qualities of kinship, with special attention given to treating nonhumans as familiar relations, giving gifts, and asking for permission. They also overlap with the new materialist concepts of intra-acting, assemblage, and being-with. To intra-act responsibly is to "share," to "know the ways of the ones you take care of you, so that you may take care of them," to "be accountable." To "give a gift, in reciprocity for what you have taken" is to acknowledge that the harvest is an assemblage constituted by relationships; to "take only what you need" and "only that which is given" is to recognize the push-pull tendencies of member-actants in the harvest assemblage. To "be," "know," "take care," "ask," "abide," "take," "give," "share," "give," and "sustain"—these actions are what it means to be-with.

The new materialist concepts of intra-acting, assemblage, being-with, and kinship are integral to understanding the case of *Manoomin v. Minnesota DNR*, both in presence and in absence. They shape the background, legal context, and cultural context of the case, as well as the case artifacts themselves.

### Background: The Case of Manoomin

*Manoomin v. Minnesota DNR* marks the intersection of two histories. The first is the history of manoomin and Chippewa; the second, the history of the Enbridge Line 3 project.

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<sup>305</sup> Kimmerer, *Braiding Sweetgrass*, 40.

Manoomin has endured numerous threats from settler colonialists and profiteers, of which I will focus on three: capitalist commodification, scientific exploitation, and construction projects. Winona LaDuke, Chippewa activist and manoomin advocate, details the twentieth century history of manoomin in her 2005 book, *Recovering the Sacred*. Non-tribal observers of the wild rice harvest wrote in a paternalist tone and degrading language typical of settler colonialists; they viewed wild rice as a valuable commodity. Researchers from the University of Minnesota began observing Chippewa ricing techniques in 1906, with anthropologist Albert Jenks reporting that “the primitive Indians do not take [wild rice] production very seriously,”<sup>306</sup> and that “wild rice, which has led to their advance thus far, held them back from further progress...for with them it was incapable of extensive cultivation.”<sup>307</sup> A 1969 report to the Minnesota legislature was just as bad, referring to the harvest as “a good berry Mardi Gras,” and “the excuse and provision for a spending spree.”<sup>308</sup> Eager to get their share of profits, the state of Minnesota vowed to cultivate a domesticated species of wild rice in the 1950s. Over the next 20 years, agribusiness began to widely produce and distribute a lesser version of the crop, and in 1977 Minnesota named wild rice Minnesota state’s official grain, pouring funds into its domestication and mass production—an effort that was eventually superseded by “wild” rice production in California in the 1980s. These events are linked by an anthropocentric view of plants as commodities, as well as a colonialist attitude that a crop cannot be

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<sup>306</sup> Jenks quoted in Winona LaDuke, 170.

<sup>307</sup> LaDuke, 170.

<sup>308</sup> Ibid, 171.

properly handled by the Indigenous people who have been harvesting it for over a thousand years.

Commodification of manoomin is closely linked to scientific exploitation, particularly in the field of genetic engineering. The University of Minnesota began mapping the genome of wild rice in 1987 and completed the project in 2000—without asking for permission from the Chippewa bands. In addition to violating consent, the university had established relationships with agricultural business of which Chippewas were aware. As LaDuke notes:

Some of us take notice when two of the four researchers in the wild rice genome study (Alan W. Grombacher and Wayne C. Kennard) come from little companies like DuPont and Monsanto, the two largest seed companies in the world. Their interests are more likely in terms of gene prospecting: securing DNA material from wild rice to assist in rice crops elsewhere.<sup>309</sup>

And she is not wrong. In 1999, the California seed and agriculture company Nor-Cal, obtained a patent for “a breeding process of a wild rice strain improving the productivity of field-grown wild rice by facilitating mechanical harvesting and augmenting yield.”<sup>310</sup>

Chippewas were particularly worried about industrial production of “terminator seeds,” which grow into sterile plants. Even if these seeds were restricted to non-tribal lands, the possibility of cross-contamination presented an existential threat to plants which are fertilized by the wind. Attempts by Chippewas to protect wild rice from these efforts resulted in the introduction of legislative bills in 2005 and 2006 calling for stricter regulations on genetic engineering; both died in the legislature. When an omnibus bill

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<sup>309</sup> Ibid, 175.

<sup>310</sup> Aurelian Bouayad, “Wild Rice Protectors: An Ojibwe Odyssey,” *Environmental Law Review* 22, no. 1 (2020): 33.

containing regulations on genetic engineering finally passed in 2007, it required the DNR to commission a study on threats to wild rice. Protecting manoomin from genetic piracy and terminator seeds had brought non-tribal “inspectors” into local ricing and harvesting practices.

Chippewas are not alone in facing these challenges. Multiple construction, landscaping, and energy projects have resulted in damage to manoomin for many Anishinaabe peoples. In the early 1920s, Northern States Power Company built the Winter Dam to control the Chippewa River, leading to “drowned villages, forced resettlement, and submerged rice beds on the Lac Courte Oreilles Reservation.”<sup>311</sup> According to LaDuke, “the damage has neither been forgotten nor forgiven.”<sup>312</sup> In 1934, the U.S. Fish and Wildlife Service dammed Rice Lake for waterfowl production resulting in excess biomatter sinking to the lake bottom and preventing manoomin seeds from reaching the sediment.<sup>313</sup> Since the late nineteenth century, the U.S. Army Corps of Engineers has tried to manipulate the flow of the Chippewa and Mississippi rivers, including draining wetlands to create more land for farmers and builders, and strategic flooding for the fishing industry.<sup>314</sup> Along with commodification and scientific exploitation, these construction projects have threatened the health and wellbeing of Anishinaabe peoples and manoomin for over 100 years. And then came the oil pipelines.

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<sup>311</sup> LaDuke, 185

<sup>312</sup> *Ibid.*

<sup>313</sup> *Ibid.*, 184

<sup>314</sup> *Ibid.*, 84-5.

The Canadian energy company Enbridge originally built Line 3 in 1968 to transport crude oil from Alberta to Wisconsin along a 4,100-mile route that crosses Minnesota, at a rate of 2.4 million barrels per day.<sup>315</sup> During its first 46 years of operation, there were more than 950 excavations for maintenance and repairs and 15 failures, seven of which were in Minnesota.<sup>316</sup> On March 3, 1991, a rupture in Line 3 near Grand Rapids spilled 1.7 million gallons of crude oil, making it one of the largest oil spills in U.S. history.<sup>317</sup> In 2017, Enbridge proposed replacing Line 3, sparking public protests from environmental groups and Indigenous groups. Four Tribal members who were also members of the Minnesota House of Representatives—Jamie Becker-Finn of the Leech Lake Band of Ojibwe, Peggy Flanagan of White Earth Nation, Susan Allen of Rosebud Sioux, and Mary Kunesh-Podein of Standing Rock Sioux—felt compelled to write an opinion piece for *The Minnesota Star Tribune* after the environmental impact report for Line 3 was released. In the July 21, 2017 article, they write:

When the inevitable oil spill occurs, there is no way to be certain that the affected waters and soils could ever be properly rehabilitated to allow wild rice to thrive again. Enbridge states that any damages would be “mitigated appropriately.” But appropriately according to whose point of view? And how can we trust that these hundreds of miles of pipelines will be monitored forever? Because of the extremely high cultural and spiritual importance of wild rice to Ojibwe people, it would be impossible for Ojibwe people to be made whole again if wild rice beds were destroyed.<sup>318</sup>

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<sup>315</sup> Dan Kraker, “Line 3 Oil Pipeline Environmental Review Released,” *MPR News*, August 17, 2017, <https://www.mprnews.org/story/2017/08/17/line-3-oil-pipeline-environmental-review-released>.

<sup>316</sup> *Ibid.*

<sup>317</sup> Julie Siple, Bill Wareham, Dan Kraker, and Cody Nelson, “Rivers of Oil, Episode 2: The Largest Inland Spill,” *MPR News*, June 20, 2018, <https://www.mprnews.org/story/2018/06/20/rivers-of-oil-podcast-line3-pipeline-ep2-spill>.

<sup>318</sup> Jamie Becker-Finn, Peggy Flanagan, Susan Allen, and Mary Kunesh-Podein, “Counterpoint: Enbridge’s new Line 3 simply disregards the Ojibwe People,” *The Minnesota Star Tribune*, July 21, 2017, <https://www.startribune.com/counterpoint-enbridge-s-new-line-3-simply-disregards-the-ojibwe-people/435922403>.

In this passage, the authors illustrate a considerable value gap. In most instances, when oil spills are “mitigated properly,” it means a monetary payout, relocation, or both. Chippewashave no interest in this outcome, prioritizing instead the wellbeing of future generations—whether the pipeline will be “monitored forever”—and the extent to which wild rice and Chippewa peoples are tied together at an existential level. The Representatives ended their opinion piece by writing, “It is our hope that this message will not only be heard, but also respected.”<sup>319</sup> It was not.

From 2017 to 2021, relations between Tribes, the state legislature, the DNR, local law enforcement, and the Public Utilities Commission (PUC) became increasingly toxic. Tribal members wanted a “tribal cultural resources study,” but the PUC failed to do so<sup>320</sup> and Minnesota state regulators officially rejected the request.<sup>321</sup> As Line 3 protests expanded and sometimes coincided with George Floyd protests, the Minnesota state legislature passed a bill stating that any person that intentionally “aids, advises, hires, counsels or conspires” with any person who trespasses or damages a pipeline may be

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<sup>319</sup> Becker-Finn et al.

<sup>320</sup> Mike Hughlett, “Tribes Ask PUC to Reconsider Review of New Enbridge Pipeline Route, Saying Cultural Study Wasn’t Done,” *The Minnesota Star Tribune*, January 4, 2018, <https://www.startribune.com/tribes-ask-puc-to-reconsider-review-of-new-enbridge-pipeline-route-saying-cultural-study-wasn-t-done/468049673>.

<sup>321</sup> Mike Hughlett, “Minnesota Regulators Turn Down Tribal Request that Could Delay Enbridge Pipeline Project,” *The Minnesota Star Tribune*, February 22, 2018, <https://www.startribune.com/minnesota-regulators-turn-down-tribal-request-that-could-delay-enbridge-pipeline-project/474902243>.

subject to criminal charges.<sup>322</sup> Line 3 protesters were arrested<sup>323</sup> again<sup>324</sup> and again.<sup>325</sup> The PUC handled public response by chilling free speech at public hearings, Minnesota state regulators kept changing their minds, the DNR fought lawsuits seeking to stop construction, and local law enforcement harassed Tribal activists and attempted to thwart protests.<sup>326</sup> These events and issues created an atmosphere of distrust, fear, and anger over Line 3.

What clearly emerges from the combined history of manoomin, Chippewa and other Anishinaabe peoples, and Line 3 is a fundamental value mismatch. Enbridge and proponents of Line 3, including government agencies, were determined to build and profit. Chippewa and Anishinaabe peoples see Line 3 as yet another wound in an over 100-years long campaign of disdain and disrespect for Anishinaabe peoples, culture, and manoomin—a campaign in which tribal members were belittled and exploited by colonialist attitudes; wild rice was appropriated, commodified, and exploited by science and industry; waterways were polluted, disturbed, or destroyed by dams, floods, droughts, pollution, and oil spills.

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<sup>322</sup> Jessie Van Berkel, “House Approves Increased Penalties for Freeway Protests and Pipeline Damage,” *The Minnesota Star Tribune*, May 1, 2018, <https://www.startribune.com/house-approves-increased-penalties-for-freeway-protests-and-pipeline-damage/481444331>.

<sup>323</sup> Mike Hughlett, “Protesters in Custody After Tampering with Enbridge Pipelines in Itasca County,” *The Minnesota Star Tribune*, February 4, 2019, <https://www.startribune.com/protesters-in-custody-after-tampering-with-enbridge-pipelines-in-itasca-county/505324542>.

<sup>324</sup> Brooks Johnson, “22 Protesters Arrested at Enbridge Pipeline Construction Site,” *The Minnesota Star Tribune*, December 15, 2020, <https://www.startribune.com/22-protesters-arrested-at-enbridge-pipeline-construction-site/573398531>.

<sup>325</sup> Kristen Leigh Painter, “69 Arrested at Line 3 Pipeline Protest Outside Gov. Walz’s Residence,” *The Minnesota Star Tribune*, August 28, 2021, <https://www.startribune.com/69-arrested-at-line-3-pipeline-protest-outside-walz-s-residence/600091931>.

<sup>326</sup> Mike Hughlett, “Court Rules Hubbard County Sheriff Must Stop Blocking Property Associated with Winona LaDuke,” *The Minnesota Star Tribune*, July 23, 2021, <https://www.startribune.com/court-rules-hubbard-county-sheriff-must-stop-blocking-property-associated-with-winona-laduke/600080904>.

Chippewa efforts to stop Line 3 included multiple legal cases, but the case at the center of this chapter, *Manoomin v. Minnesota DNR*, focuses on Enbridge’s taking of 5 billion gallons of water from the Great Lakes region. To drain water is to threaten the survival of manoomin and by extension, Chippewa and other Anishinaabe peoples. The following timeline of *Manoomin v. Minnesota DNR* demonstrates the commitment of both Chippewa and state opposition. The timeline is based on the work of the Center for Democratic and Environmental Rights.<sup>327</sup> The case filings that represent artifacts I will examine in this chapter are in bold.

MM/DD/YYYY	Legal Action
12/31/2018	White Earth Band (WEB) adopts “Rights of Manoomin.”
6/4/2021	Minnesota Department of Natural Resources (DNR) issues a permit for Enbridge to use 5 billion gallons of water for Line 3.
<b>8/4/2021</b>	<b><i>Manoomin v. Minnesota DNR</i> filed in WEB Tribal Court, seeking to stop Line 3 water-taking.</b>
8/12/2021	DNR files motion to dismiss in WEB Tribal Court.
8/19/2021	DNR files suit against WEB and the Tribal Court Judge to block the Tribal court from ruling in the case; suit is filed in federal District Court.
9/3/2021	Federal District Court denies DNR’s motion against WEB Tribal Court.
9/10/2021	DNR appeals to Eighth Circuit Court of Appeals.
9/13/2021	DNR files an appeal in WEB Tribal Court.
9/21/2021	Eighth Circuit Court of Appeals denies DNR’s request to stop WEB Tribal Court from hearing the case.
9/24/2021	Manoomin and WEB file a request for injunction to stop Line 3 water-taking in WEB Tribal Court.
<b>3/10/2022</b>	<b>White Earth Court of Appeals rules WEB Tribal Court did not have jurisdiction over the case.</b>
3/25/2022	Manoomin and WEB file a motion to reconsider.
7/26/2022	White Earth Court of Appeals denies motion to reconsider.

<sup>327</sup> “Rights of Manoomin,” *Center for Democratic and Environmental Rights*, accessed on May 13, 2025, <https://www.centerforenvironmentalrights.org/rights-of-manoomin>.

As shown, the legal battle was ultimately decided in favor of DNR and Enbridge. Though White Earth Band Chippawa argued that they were well within their rights to protect the sacred covenant between their people and manoomin, the final decision was based on *stare decisis* and structuralist arguments (both defined in chapter one) that effectively sidestepped arguments on the merits. Why and how this happened depends largely on the legal context of the case, which I will discuss next.

### Legal Context: Rights of Nature, Tribal Law, and the Montana Exception

The relevant legal context for *Manoomin v. Minnesota DNR* contains three interwoven legal traditions: the rights of nature movement, which has roots in Indigenous ways of being; Anishinaabe principles of law, which are inseparable from Anishinaabe culture; and laws that constitute the relationship between Tribes and the U.S. government, including treaties, sovereignty, and what is known as the *Montana* exception. Of these legal traditions, the most recent is the rights of nature. In the 1972 Supreme Court case *Sierra Club v. Morton*, the question of whether nonhumans (in this case, a valley) have standing was answered in the negative by a slim majority, but dissenting opinions by Justices Douglas, Brennan, and Blackmun were open to the possibility that the valley was, in fact, the injured party seeking relief. In these dissents, the Justices referred to environmentalist Christopher Stone's argument that nonhumans—rivers, streams, valleys,

forests—should have legal standing because of intrinsic value.<sup>328</sup> Stone himself advocates for legal guardianship as a solution to these issues (e.g., a human ensures the safety and well-being of a nonhuman), but his arguments have been used to spur environmental activists around the world to argue that nonhumans should be given not only standing, but rights. Thus, the name of the approach and the movement: rights of nature.

Legal scholarship largely acknowledges ties between rights of nature and indigenous cultures from around the world.<sup>329</sup> Anishinaabe legal scholar Kekek Jason Stark confirms this, at least in the case of Anishinaabe culture which he views as an exemplar of the rights of nature.<sup>330</sup> Elizabeth Kronk Warner and Jensen Lillquist identify two general components to rights of nature, “both in proposals and implementations: (1) legal personhood and (2) substantive rights.”<sup>331</sup> As discussed in chapter two, legal personhood is a juridical term, not a biological one, and legal arguments for rights of nature do not always argue for personhood *per se*. The point is not that natural entities are entitled to the same rights as humans, but that personhood provides what Oliver Houck describes as “a seat at the table, in advance of development decisions, for nature rights to appear through the lens of its own needs and not simply the cacophony of competing human interests.”<sup>332</sup> Although rights of nature are modeled on Indigenous systems of value and law, it is

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<sup>328</sup> Christopher D. Stone, *Should Trees Have Standing?: Law, Morality, and the Environment* (Cary: Oxford University Press, 2010).

<sup>329</sup> Juliana Smith, “Rights of Nature and Tribal Sovereignty: Protecting Natural Communities, Wild Rice, and Salmon in the United States,” *Maryland Journal of International Law* 38, (2022): 162-163.

<sup>330</sup> Kekek Jason Stark, “Bezbigwan Ji-lzhi-Ganawaabandiyang: The Rights of Nature and its Jurisdictional Application for Anishinaabe Territories,” *Montana Law Review* 83, no. 1 (2022): 80.

<sup>331</sup> Elizabeth Kronk Warner and Jensen Lillquist, “Laboratories of the Future: Tribes and Rights of Nature,” *California Law Review* 111, no. 2 (2023): 331.

<sup>332</sup> Oliver A. Houck, “Noah’s Second Voyage: The Rights of Nature As Law,” *Tulane Environmental Law Journal* 31, no. 1 (2017): 35.

important to note that not all Indigenous people agree with rights of nature legal approaches because of possible conflicts with traditional practices. If a plant species has rights, the Indigenous people who have harvested that plant for over a thousand years may be subject to new laws or regulations affecting the practice.

The strength of a rights of nature approach is that it enables nonhumans to have standing in human courts of law, a prerequisite for a legal recognition of injury. The weakness of the approach is that “a court may lack power to *redress* these injuries.”<sup>333</sup> This lack of power to redress stems from foundational problems with the U.S. legal system, such as the liability model of justice and anthropocentrism. As discussed in chapter one, the U.S. legal system uses a liability model for justice in which accountability is assigned to isolated individuals or groups through establishment of intent and causal logic. Harms caused to ecosystems are often structural or systemic, making it impossible to isolate individual human actors to hold accountable. Further, as discussed in chapter two, anthropocentrism is a comforting control mechanism: it allows humans to objectify, instrumentalize, and retain dominance over nonhumans. Anthropocentrism makes it unlikely that courts will side with nonhumans over humans in a dispute—an outcome that adjudicators will surely claim as inevitable due to precedent. Due to this seemingly obstinate judicial behavior, some suggest that advocating for the rights of nature in the public sphere should precede legal attempts to give nonhumans rights. Stone points out the problem with this approach:

There is something of a seamless web involved: there will be resistance to giving the thing “rights” until it can be seen and valued for itself; yet, it is hard to see it and

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<sup>333</sup> Warner and Lillquist, 338.

value it for itself until we can bring ourselves to give it “rights”—which is almost inevitably going to sound inconceivable to a large group of people.<sup>334</sup>

This web of resistance may prevent courts from recognizing rights of nonhumans, but its presence does not prove an absence of an equally “large group of people” who are qualified and passionate about wanting to help nonhumans. As acknowledged by Eamon Danieu: “Guardianship for natural objects has historically been stymied by unwillingness to recognize the rights of those natural objects; it is not for want of competent guardians.”<sup>335</sup>

If U.S. courts are not even able to overcome resistance to *guardianship*, which requires a human intermediary, then recognizing and protecting *inherent* rights of plants, rivers, and mountains may seem a bridge too far. It may be that rights of nature approaches face difficulty in U.S. courts because it is difficult for jurists to make sense of them against a backdrop of anthropocentrism and liability model thinking. What the rights of nature *can* provide is a language of argument that has already been adapted for acceptance by the judiciary. Such language is evident in the articulation of the Rights of Manoomin. Analyzing *Manoomin v. Minnesota DNR* provides an opportunity to partially examine how rights of nature fare when they *accord* with values on which legal foundations are based.

*Manoomin v. Minnesota DNR* was filed in White Earth Band of Ojibwe Tribal Court. Chippewa peoples share Anishinaabe beliefs, values, and laws. Stark, who self-identifies

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<sup>334</sup> Stone, 3.

<sup>335</sup> Eamon Danieu, “Release the River: Recognizing Legal Rights for Natural Objects to Remedy Continuing Issues in American Environmental Law,” *Buffalo Law Review* 70, no. 5 (2022): 1936.

as Anishinaabe, provides a remarkable perspective on Anishinaabe legal constructs and principles. Most relevant to the current discussion are the understanding of *Gidakiiminaan* (Our Earth)<sup>336</sup> and three principles that stem from it: *mino-bimaadiziwin* (to live a good life), *inawendiwin* (connectedness of all relations), and *gwayak ateg onaakonigewi dibenjigewin* (correctly putting in place a decision of control).<sup>337</sup> Anishinaabe law originates from the Anishinaabe story of creation, and Stark presents a version told by Campbell Papequash. I repeat it here in full because of its importance in understanding Anishinaabe law, philosophy, and ways of being:

The Great Spirit beheld a vision. In this dream He saw a vast sky filled with Sun, Earth, Moon, and Stars. He saw an Earth made of mountains and valleys, islands and lakes, plains and forests. He saw flowers, grasses, fruits, and trees. He saw crawling, flying, swimming, and walking beings. He saw and witnessed birth, life, growth and the end of things - decay. And at the same time He saw other things live on. Amidst change there was constancy. He touched wind and rain. He felt love and hate, fear and courage, joy and sadness. The Great Spirit meditated to understand His vision. In His wisdom, the Great Spirit understood that His vision had to be fulfilled. He was to bring into being an existence that He had seen, heard, and felt. Out of nothing He made the sacred fire, rock, water and the winds. Into each he breathed the breath of life. On each He gave with His breathe a different essence and nature. Each substance had its own power, which became its soul spirit. From these four substances the Great Spirit created the physical world of sun, moon, and stars.

To the sun, the Great Spirit gave the power of light and heat. To the earth, he gave the power of growth and healing. To the waters, He gave the power of purity and renewal. And to the winds, He gave the power of music and the breath of life itself.

On earth the Great Spirit formed mountains and valleys, plains and forests, islands and lakes, bays and rivers. Everything was in its place. Everything was beautiful. Then the Great Spirit made the plant beings. There were four kinds, flowers, grasses, fruits and trees. To each He gave a spirit of life, growth, healing, and beauty. Each he placed where it would be the most beneficial and would lend to the earth its great beauty, harmony and order. After the plant beings the Great

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<sup>336</sup> Stark, "Bezhigwan Ji-lzhi-Ganawwabandiyang," 83.

<sup>337</sup> Kekek Jason Stark, "Gwayak Ateg Onaakonigewi Dibenjigewin: Decolonizing Jurisdiction in Anishinaabe Tribal Courts," *Nebraska Law Review* 103, (2024): 204, 219, and 229, respectively.

Spirit created the animal beings, and conferred on each special powers and natures. There were four kinds: crawlers, winged ones, swimmers, and the four-legged beings.

Last of all, He made Man. Though last in the order of creation, least in the order of dependence, and weakest in bodily powers, Man had the greatest gift: the power to dream.

The Great Spirit then made the Great Laws of Nature for the wellbeing and the harmony of all things and all creatures. The Great Laws governed the world, and movement of the sun, earth, moon and the stars. The Great Laws of Nature governed the fire, rock, water, and winds. The Great Laws governed the rhythm and continuity of birth, life, growth, and decay. All things lived and worked by these laws. The Great Spirit had brought into existence His vision ....

There are four orders in creation: the physical world, the plant world, the animal world, and the human world. All four parts are so intertwined, and they make up life and one whole existence. With less than the four orders, life and being are incomplete and unintelligible. No one portion is self-sufficient or complete without, rather each component of creation derives its meaning from, and fulfils its function and purpose within the context of the whole creation. It is only by the relationship of the four orders that the world has sense and meaning. Without animals and plants, Man would have no meaning nor would he have much more meaning if he were not governed by some immutable law. There is a natural law. It is the law that everyone is ruled by, including all things in creation. It is an absolute law. It is a law that has no mercy. It is a law that will always prevail. The basis of this great law is peace. And peace is a dynamic force. Peace takes a lot of effort. It is harder to keep peace than to have war. For the wellbeing of all, there must be harmony in the world to be obtained by the observance of these laws.

Man must seek guidance outside himself. Before he can abide by this law, human beings must understand the framework of the ordinances of creation. In this way, Man will honor the order as was intended by the Great Spirit. Both Sun and Earth were mutually necessary and interdependent in the generation of life. The sun illuminates, the earth sustains with beauty and nourishment. One cannot give or behold life without the other.<sup>338</sup>

There is a lot to unpack here, but there are three areas to highlight: views on life and nature, the interconnectedness of beings, and natural law. The Creator's position is not withdrawn from the human plane. The world appears to him as it would to the Anishinaabe, making it easy to share his vision: he sees "a vast sky," the land made of "mountains and

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<sup>338</sup> Quoted in Stark, "Bezhighwan Ji-Izhi-Ganawwabandiyang," 82-83.

valleys, islands and lakes, plains and forests,” and touches “wind and rain.” When the Creator makes his vision into the world, order of creation matters. First are the four kinds of “plant beings,” each of which has a “spirit of life, growth, healing, and beauty,” and each is placed where each would be beneficial to the earth. Second are the four types of “animal beings,” each with “special powers.” Animal beings and plant beings are not differentiated by ensoulment—both are imbued with spirit—but by their ability to move: “crawlers, winged ones, swimmers, and the four-legged beings.” Then the Creator makes humans: “last in order of creation, least in the order of dependence, and weakest in bodily powers.” Even with the unique ability to dream, humans are not the center of anything; they depend upon the sky, the land, plant beings and animal beings. Put together, these elements of the Anishinaabe creation story describe a worldview that acknowledges the spirit in all things, embraces material changes in lifecycles, and de-centers the human.

The Creation story describes “the physical world, the plant world, the animal world, and the human world” as inherently related and interdependent. None can exist without the others: “it is only by the relationship of the four orders that the world has sense and meaning.” The relationship between humans and nonhumans is specifically called out, like a warning: “Without animals and plants, Man would have no meaning.” The law that governs these relationships is “a natural law” that rules “all things in creation.” This law is “absolute,” “has no mercy,” and “will always prevail.” The story provides little detail about this natural law apart from its basis in peace, and it being a prerequisite for “the wellbeing of all” and “harmony in the world.” But two things are clear. First, the law is not defined by humans, nor does it center them: “Man must seek guidance *outside himself*” (emphasis

mine). Second, the law cannot be obeyed before it is understood in context: “*Before* he can abide by this law, human beings must understand the framework of the ordinances of creation” (emphasis mine). To sum up, the creation story describes a world view that is of the human plane; recognizes a non-hierarchical multiplicity of entities, including landscape features, plants, animals, elements, and humans; imbues all such entities with spirit; places great importance on interconnectedness; decenters not just the human but his ego; and declares that all of the above must be understood *before* one can abide by the natural law. This is what it means to understand *Gidakiiminaan*.

Rooted in *Gidakiiminaan*, the two concepts of *mino-bimaadiziwin* (to live a good life) and *inawendiwin* (connectedness of all relations) pair together to constitute principles of Anishinaabe living to achieve harmony and balance “with all of creation.”<sup>339</sup> These principles are exemplified in Kimmerer’s work, which stresses reciprocity, treating all entities as if they are familial relations, and balance. Looking back to Kimmerer’s imagined rules for the Honorable Harvest, one sees themes of reciprocity: “know the ways of others” in order to take care of them, “share,” and “give a gift, in reciprocity for what you have taken.” Themes of relationality are present in introducing oneself to the plant and asking for “permission before taking,” and “give thanks for what you have been given.” And the value of balance is reflected in substance and form of Kimmerer’s do’s and don’ts: “Never take the first. Never take the last. Take only what you need. Take only that which is given.” The creation story and principles derived from it are not just foundations for Anishinaabe life, but for law.

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<sup>339</sup> Stark, “Gwayak Ateg Onaakonigewi Dibenjigewin,” 204.

The last concept defined by Stark, *gwayak ateg onaakonigewi dibenjingewin*, translates to “correctly (or rightfully) putting in place a decision (law or policy) of control (or measurement of thought on it).”<sup>340</sup> In practice, the term refers to jurisdiction. For Anishinaabe peoples, the idea of jurisdiction is rooted in another creation story of sorts, that of Turtle Island. Set in a time when the earth was covered with water, the story begins with the protagonist, Nenabozho, floating on a log in search of land. After some time had passed, he encountered another floating log carrying several animals. Instead of waiting for land to appear, Nenabozho asks each animal in succession if they will dive underwater and bring back a clump of earth. A muskrat finally succeeds at this task, and Nenabozho takes the earth from him and sets it on a turtle. The Creator helps the clump of earth expand into an island, and “the caribou, fox, bear, and wolf were sent to measure the width of this new land.”<sup>341</sup> Stark explains the relevance of this story to Anishinaabe culture and law:

The four runners who measured the width of the territory encompassed the entire range of Anishinaabe territory. The movements of the caribou outlined the area needed for an individual family. The circular movements of the fox outlined the land needed for a village. The bear outlined the traditional hunting area. The movements of the wolf, by running a straight line, defined the extent of the lands of the Anishinaabe. As we reflect upon this teaching, these movements collectively establish our jurisdictional obligations and relationships.<sup>342</sup>

This telling of animals measuring Anishinaabe lands is important because it illustrates three important points. First, the concept of jurisdiction is rooted *Gidakiiminaan*: humans look outside themselves for answers by letting animals determine spaces for living.

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<sup>340</sup> Ibid, 229.

<sup>341</sup> Ibid, 216-217.

<sup>342</sup> Ibid, 217.

Second, defining jurisdiction is largely about obligations to relations, human and nonhuman: a place for family, a place for a community, and a place for hunting. Third, the outer limits of Anishinaabe territory are defined by a wolf running: borders are not precise, but instead depend upon the memories of ancestors; they are outlined not on a map but through embodied movement in the material world. The way Stark describes *Gidakiiminaan*, *mino-bimaadiziwin*, *inawendiwin*, and *gwayak ateg onaakonigewi dibenjigewin* helps to understand the foundations of Anishinaabe culture and law as embracing Our Earth, balance, harmony, and reciprocity—and where the Great Law of Nature should apply.

When Anishinaabe peoples signed a treaty with the U.S. in 1867, it was obviously under duress. Despite this, Anishinaabe peoples understood the treaty as constituting new relationships with the Americans. Heidi Kiiwetinipinesilk Start explains:

[The Anishinaabe] spoke not only for the land, but also for the newcomers to this land. [They] vouched for these newcomers. In doing so [the Anishinaabe] responsible for [the] Americans...for how they would relate to aki [the land]. [The Anishinaabe] brought them into [their] long-standing relationships with aki and thus took on a responsibility for how they would relate with all of creation.”<sup>343</sup>

The Americans were not only viewed as new relations, but as such they were *vouched for* by Anishinaabe peoples. The Americans, on the other hand, mostly viewed treaties in ways antithetical to Anishinaabe culture and values. Anishinaabe peoples view the land as familial relations to be treated with respect and reciprocity; the U.S. views it as property. Anishinaabe think of jurisdiction as space for family and community, outlined by the path of the wolf; the U.S. views it as a place where the Anishinaabe are contained by lines drawn

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<sup>343</sup> Quoted in Stark, “Gwayak Ateg Onaakonigewi Dibenjigewin,” 233.

on a map. Because the U.S. forced Indigenous groups to sign treaties as a result of settler colonialism backed by genocidal violence, the U.S. views of land and jurisdiction have dominated. The result is an overly enforced border between Tribal nations and the U.S., and a jurisprudential record that consistently treats that border as permeable from only one side. Federal Indian Law defers to Tribal Courts for matters of dispute that fall on the Tribal side of the boundary line—U.S. local, state, and federal governments have their own interests to protect.

There are three aspects of Federal Indian Law relevant to the case of *Manoomin v. Minnesota DNR*: Tribal sovereignty, the Tribal exhaustion doctrine, and the *Montana* exception. Tribal sovereignty was established for Anishinaabe peoples by multiple treaties from the nineteenth century. For what would become White Earth Nation was established by a treaty between Anishinaabe and Americans in 1867. The meaning of sovereignty in this context is defined as “‘the highest legal authority’ or ‘the authority to employ the power of the state, including the authorities of law, above which there is no higher authority,’” including the establishment of government and the right “‘to determine membership requirements, enact legislation, and establish law enforcement and court systems.’”<sup>344</sup> In other words, sovereignty means that Tribes have the right to their own governments, courts, laws, and method of enforcement. Because sovereignty is established as a result of the 1867 treaty (and other overlapping treaties between Anishinaabe and the U.S.), legal cases that focus on the infringement of Tribal rights refer back to the text of the treaties

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<sup>344</sup> Emily Reeves, “Taking Back Sovereignty: The Importance of Native Voices in Addressing Environmental Harms to Native Lands,” *California Western International Law Journal* 52, no. 2 (2022): 619.

themselves. Consequently, Federal Indian Law provides guidelines for interpretation that follow Indian canons of treaty construction. These guidelines are: “(1) ambiguous expressions must be resolved in favor of the Indian parties concerned; (2) Indian treaties must be interpreted as the Indians themselves would have understood them; and (3) Indian treaties must be liberally construed in favor of the Indians.”<sup>345</sup> These rules for interpretation should empower Tribal peoples in defense of Tribal sovereignty and rights, but they are rarely enforced by the U.S. legal system. Federal courts, including the U.S. Supreme Court, have repeatedly failed to recognize treaty rights and Tribal sovereignty regarding pipeline construction projects on Tribal land that “not only pose environmental risks, but also denigrate Native land, culture, and resources.”<sup>346</sup> Effectively, U.S. courts pick and choose which matters deserve deference to Tribal courts.

The situation is worse in jurisdictional matters. Cases of dispute between Tribal members/groups and non-Tribal persons/groups are first adjudicated in Tribal courts. In Federal Indian Law this is referred to as the Tribal exhaustion doctrine, which “establishes that the Tribal Court should have the first opportunity to evaluate the factual and legal basis for a challenge to its own jurisdiction.”<sup>347</sup> In other words, if a plaintiff claims that Tribal court does not have jurisdiction to adjudicate their case, they will have to convince the Tribal court. The Tribal exhaustion doctrine is intended to bolster control of Tribal courts over matters that most concern them, but it can result in an unintended effect: “In furtherance of the tribal exhaustion doctrine, a federal court *will not generally review a*

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<sup>345</sup> Stark, “Bezhigwan Ji-lzhi-Ganawwabandiyang,” 99.

<sup>346</sup> Reeves, 623.

<sup>347</sup> Stark, “Bezhigwan Ji-lzhi-Ganawwabandiyang,” 99.

*case on its merits and will focus solely on the issue of tribal court jurisdiction and whether all tribal remedies have been exhausted” (emphasis mine).*<sup>348</sup> In other words, some cases die on jurisdictional grounds alone, before substantive arguments can even be discussed. One can easily imagine scenarios in which bad faith actors use this mechanism to hinder the cause of justice:

1. An appellate Tribal court decides all remedies have been exhausted and sends the case to a federal court. The federal court disagrees on exhaustion of remedies and sends the case back down. The process is repeated until plaintiffs lose the will or resources to continue.
2. An appellate Tribal court judge suspects the federal court will send the case back down or rule against Tribal plaintiffs on the merits, and in an effort to avoid potential reputational damage to the Tribal court, himself, or the Tribal Nation, he issues a decision that effectively ends the case.
3. A federal judge or justice wants to rule against Tribal plaintiffs without appearing to do so, so he sends the case back down to avoid addressing the issues on the merits.

As a non-lawyer, I cannot assess the likelihood of these scenarios, but as a citizen and rhetorician I can say that the public skepticism of judicial motives would be reasonable were any of the projected outcomes to occur. While it is important to give judges and justices the benefit of the doubt, both the appearance of impartiality and the reputation of the courts are of significant concern (as discussed in chapter one).

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<sup>348</sup> Ibid, 96.

Regarding jurisdiction, the most contentious cases are those brought by Tribal entities against non-Tribal actors. As legal scholar Rosemary Mahaffey states, the default rule is that “tribes do not have civil adjudicatory jurisdiction over nonmembers.”<sup>349</sup> But there is one exception. In 1981, the Supreme Court issued a decision in *Montana v. United States*,<sup>350</sup> a case in which the Crow Tribe argued its courts had the authority to prevent non-Tribal persons from fishing in waters “within the reservation in which the tribe did not hold the beneficial interest to the underlying land,”<sup>351</sup> (i.e., land inside the reservation owned by a non-Tribal member). The Supreme Court ruled against the Crow Tribe, stating that Tribes did not have regulatory authority over non-Tribal members. However, the Court articulated three exceptions to this rule, known as the Montana exceptions:

- (1) “A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements;”
- (2) “a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe;”
- (3) a Tribe may exercise jurisdiction over nonmembers when Congress authorizes them to do so.”<sup>352</sup>

The second Montana exception is crucial to *Manoomin v. Minnesota DNR*. White Earth Band claim usufructuary rights of land outside the White Earth reservation, as determined by treaty. DNR officials granted Enbridge permission to drain five billion gallons of water from the land in question. For White Earth Band to stop the taking of water which will

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<sup>349</sup> Rosemary Mahaffey, “The Montana ‘2.0’ Test for Tribal Civil Adjudicatory Jurisdiction: A Grain of Rights,” *One J: Oil and Gas, Natural Resources, and Energy Journal* 45, (2023): 52.

<sup>350</sup> *Montana v. United States*, 450 U.S. 544 (1981).

<sup>351</sup> “Montana V. U.S.,” Environment and Natural Resources Division U.S. Department of Justice, updated June 6, 2023, <https://www.justice.gov/enrd/indian-resources-section/montana-v-us>.

<sup>352</sup> Stark, “Bezhigwan Ji-Izhi-Ganawwabandiyang,” 98.

endanger Manoomin, they must prove that Tribal courts have jurisdiction under the second Montana exception.

The legal context of *Manoomin v. Minnesota DNR* is bifurcated. Anishinaabe law is rooted in the creation story of *Gidakiiminaan* (Our Earth), which decenters the human and acknowledges the spirit and interconnectedness of land, water, plants, and animals. Anishinaabe peoples consider all these entities to be familial relations and are consequently governed by the twin principles of *mino-bimaadiziwin* (to live a good life) and *inawendiwin* (connectedness of all relations), which encourage treating nonhuman relations with respect and with an eye toward reciprocity, harmony, and balance. To protect nonhuman relations, Tribal members sometimes recruit language and concepts from the Rights of Nature movement. Jurisdictional matters are complex. *Gwayak ateg onaakonigewi dibenjingewin* (correctly putting in place a decision of control) is the Anishinaabe concept of jurisdiction, which is also based on the creation story and defines Tribal spaces for families, communities, and hunting. All of these principles are in stark contrast with U.S. law, which sees land as property and borders as enforceable. Federal Indian Law requires that treaties be interpreted in ways that defer to Tribal understanding to respect Tribal sovereignty, but U.S. courts often fail to enforce such interpretations. The Tribal exhaustion doctrine, which requires Tribal courts to exhaust all possible remedies before U.S. appellate courts can take up a case, can be used to support Tribal interests and sovereignty—but it also creates opportunities for bad faith actors (either Tribal or federal) to kill cases before they reach arguments on the merits. Jurisdiction becomes most contentious when Tribal members bring suit against non-Tribal members for actions

taken on land that is used, but not owned, by Tribal members. In such cases, the Tribal courts have jurisdiction *only* when one or more of the *Montana* exceptions apply.

Applying this legal context to *Manoomin v. Minnesota DNR* brings focus to what, why, and how manoomin and White Earth Band of Ojibwe are arguing. A rough sketch of their arguments is as follows: 1) manoomin is a relation of the White Earth Band of Ojibwe, and its wellbeing is inextricable from the wellbeing of Chippewa people; 2) Minnesota DNR is unlawfully allowing Enbridge to drain water from lands Chippewas have the right to use under Tribal sovereignty as established by treaty, and this water-taking severely endangers manoomin; 3) White Earth Band of Ojibwe Tribal Court has jurisdictional authority to stop the water-taking because it falls under the second *Montana* exception: when action by non-Tribal members threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. In the next section, I will demonstrate how each of these elements are described or constituted in case artifacts.

## Artifact Analysis

In this section, I will analyze two artifacts from *Manoomin v. Minnesota DNR*. The first is the original complaint filed on August 4, 2021, in which plaintiffs manoomin and White Earth Band of Ojibwe, et al. seek declaratory and injunctive relief against defendants Minnesota DNR, et al. The declaratory relief would acknowledge the Rights of Manoomin, the infringement of these rights by Minnesota DNR, and the jurisdictional rights of the White Earth Band to exercise its authority under the second *Montana* exception. The injunctive relief would stop Minnesota DNR from allowing Enbridge to take over five billion

gallons of water from lands used by manoomin and the White Earth Band. I will also briefly touch on the second artifact, the opinion of the White Earth Band of Ojibwe Court of Appeals, which states that the second *Montana* exception does not apply—meaning the White Earth Band of Ojibwe Court does not have jurisdiction in this matter—thereby effectively concluding the case.

### *Manoomin v. Minnesota DNR*

My analysis focuses on four themes: jurisdiction, the importance of manoomin to the White Earth Band, Rights of Manoomin, and how plaintiffs describe the actions of defendants.

To avoid dismissal based on jurisdictional grounds, the plaintiffs must establish that their sovereign rights extend to land that they do not own because treaties explicitly allow their use (known as usufructuary rights). The plaintiffs argue this by citing the opinion of the court in *U.S. v. Brown*,<sup>353</sup> which includes an affirmation on the duty of courts to interpret treaties in ways that defer to Tribal understanding of the text:

When seeking to determine the meaning of Indian treaties, “we look beyond the written words to the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties.” *Mille Lacs Band*, 526 U.S. at 196 (quotation omitted). We interpret such treaties liberally, resolving uncertainties in favor of the Indians, and we “give effect to the terms as the Indians themselves would have understood them.” *Id.* at 196, 200. (C, 4)<sup>354</sup>

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<sup>353</sup> *United States v. Brown*, No. 13-1590 (8th Cir. 2015).

<sup>354</sup> In-text citations referring to the 2021 complaint filed in *Manoomin v. Minnesota DNR* will be designated with a “C” for “complaint.”

From a new materialist perspective, deference to Tribal meaning acts as a tacit understanding that Tribal members intra-act with nonhumans—including land and landscape features—in different way than their U.S. counterparts. The plaintiffs go on to cite Treaty Journals that documented the 1837 treaty negotiations between the U.S. and the Chippewa. Including these passages in their complaint accomplishes three goals: to provide evidence that Chippewa understood they were receiving what are now known usufructuary rights *as part of the treaty*; to communicate the substantive relationship between Chippewa and the land; and to demonstrate that two U.S. courts have included these passages as part of their judicial opinions. Before reading the journal passages, it is important to note that they are written by non-Tribal persons who worked with translators, so accuracy may be in question. However, it is equally important that such texts are considered foundational to understanding treaties and the sovereignty they enact, so they are commonly scrutinized down to the letter by jurists who are likely not speakers of Anishinaabe. Accurately translated or not, U.S. jurists look to these texts for guidance.

To argue for usufructuary rights of lands outside property owned by the Tribe, plaintiffs again cite *U.S. v. Brown*:

During these negotiations, the Chippewa chiefs emphasized the importance of reserving their rights to fish, hunt, and gather on the land, also called usufructuary rights. According to the treaty journal, **Ma-ghe-ga-bo** stated, “Of all the country that we grant to you we wish to hold on to a tree where we get our living, & to reserve the streams where we drink the waters that give us life.” 1837 Treaty Journal at 142. The secretary who recorded the proceedings noted that he transcribed the statement as provided by the underqualified interpreters, but he “presume[d] it to mean that the Indians wish to reserve the privilege of hunting & fishing on the lands and making sugar from the Maple.” *Id.* (C, 4; emphasis original)

To break this down, Ma-ghe-ga-bo makes a distinction between the land as property and land as living resource. Because the interpreters were “underqualified,” it is difficult to know exactly what Ma-ghe-ga-bo means by “we wish to hold on to a tree where we get our living,” but given the United States’ recent purchase of land nearby for its lucrative pine timber, he may be referring to Chippewa’s ability to harvest, trade, and sell such timber. Based on the rest of his statement, it seems equally possible Ma-ghe-ga-bo is referring to the trees *giving* life, and the translator defaults to what makes most sense to him: “get our living.” There is no such ambiguity in Ma-ghe-ga-bo’s second phrase, “reserve the streams where we drink the waters that give us life.” This statement is not about ownership but interconnected relationships and intra-active becoming. The places he indicates are “where” Tribal members intra-act with the natural world: “where we get our living” and “where we drink the waters that give us life.” In the latter phrase, he also acknowledges the gift given by the waters: life. The language of gift-giving reflects a reciprocal relationship with the land.

Plaintiffs also pull text from the Minnesota District court decision in *U.S. v. Brown*, which cite the same Treaty Journals:<sup>355</sup>

Chippewa leader **Hole in the Day** stated: “My father, in all the country we sell you, we wish to hold on to that which gives us life—the streams and lakes where we fish, and the trees from which we make sugar.” Henry Dodge, Proceedings of a Council with the Chippewa Indians, 9 Iowa J. Hist. & Pol. 408, 424 (1911). Governor Henry Dodge of Wisconsin Territory, which in 1837 included all of the future State of Minnesota, later responded that “I will agree that you shall have the free use of the rivers and the privilege of hunting on the lands you are to sell, during the pleasure of your great father.” *Id.* at 427, Another Chippewa leader, **Flat Mouth**, a chief from Leech Lake, stated:

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<sup>355</sup> Memorandum Opinion and Order Rejecting the Reports and Recommendations of the Magistrate Judge, 11/25/2013, *U.S. v. Brown* Criminal No. 13-68 (JRT/LIB).

Your children are willing to let you have their lands, but wish to reserve the privilege of making sugar from the trees, and getting their living from the lakes and rivers as they have heretofore done, and of remaining in the country. It is hard to give up the land. It will remain and cannot be destroyed, but you may cut down the trees, and others will grow up. You know we cannot live deprived of lakes and rivers.

Id. at 428. Governor Dodge responded to this: “My friends, I have listened with great attention to your chiefs from Leech Lake. I will make known to your great father your request to be permitted to make sugar on the lands, and you will be allowed during his pleasure to hunt and fish on them.” Id. at 429. (C, 5; emphasis original)

While this passage fulfills its intended purpose—to demonstrate the Chippewa understanding of the treaty terms and acceptance of those terms by the Governor—it also lends itself to a new materialist reading. Both Hole in the Day and Flat Mouth use language of kinship, referring to the Governor as “my father,” and Flat Mouth refers to his Tribal relations as “your children.” To be clear, I am not suggesting that there is love, affection, or deference in familial language in this context—only that Chippewa, even in negotiations with settlers, acknowledge others as relations.

Hole in the Day states, “we wish to hold on to that which gives us life—the streams and lakes where we fish, and the trees from which we make sugar.” Like Ma-ghe-ga-bo, Hole in the Day refers to members of the Tribe intra-acting with nature rather than possessing it. The phrase “that which gives us life” is a reference to the earth as mother, and to life as a gift she has given. In contrast, the Governor responds with, “you shall have the free use of” the land, implying an instrumentalist view; and “privilege of hunting on” the land, as if the land is an empty stage for human actors rather than a collection of living entities. Flat Mouth’s statement is more emotional. Through his relational bond to the land, he has noticed, like the Creator in the story of Our Earth, the coexistence of constancy and change. He refers to chronological time by referencing the past and future:

“as they have heretofore done, and of remaining in the country.” He also refers to the enduring resilience of the land and the lifecycles of its inhabitants: the land “It is hard to give up the land. It will remain and cannot be destroyed, but you may cut down the trees, and others will grow up.” While we cannot know if these words were delivered in a tone of defiance, acknowledgment, or grief, it is obvious that Flat Mouth respects the land and trees as one would respect a family member or fellow ensouled entity. Equally obvious from a new materialist perspective is his assemblage-like vision. The subjects are the land and trees; humans are de-centered to an extent that they are not even mentioned, nor are the tools they use to cut down trees. Land and trees are affected by the actions of other actants in the assemblage but continue their own states of change and becoming. Power is unevenly distributed across the assemblage: humans have axes and saws; trees cannot move to flee, nor can they fight for themselves. But they are strong in their roots and in their reciprocal relationship with the soil, sun, water, and air—all of which sustain the trees and enable them to grow. For the plaintiffs, these passages from the Treaty Journals provide evidence of Chippewa understanding of usufructuary rights granted to them *and* the willingness of U.S. courts to consider them in adjudication. As discussed, the passages also communicate a way of being-with the natural world that includes viewing natural entities as familial relations, honoring their gifts, and exemplars of the constancy and change of Our Earth. The views communicated by Ma-ghe-ga-bo, Hole in the Day, and Flat Mouth are reflected in the language used to describe one of the Anishinaabe’s most important relations: manoomin.

Upon first reading the complaint, language describing the ways in which manoomin are critical to the survival of the Tribes seems thin. This is most likely because the complaint is being filed in the White Earth Band of Ojibwe Tribal Court, where judges are familiar with Anishinaabe beliefs and laws. Nevertheless, the language is important and evocative. The introduction begins with the following passage:

Manoomin (Wild Rice), *the food that grows on water*, is the most important cultural and sacred food of the Chippewa, Ojibwe, Anishinaabe peoples. Manoomin has been part of our traditional stories, teachings, lifeways and spirituality since the earliest times to the present day. For the Chippewa Manoomin is alive like all living creatures and they are our relatives. We Chippewa have a sacred covenant with Manoomin and the water (Nibi) and all living creatures, without which we cannot live. (C, 1-2; emphasis original)

Here Manoomin is described as “the most important cultural and sacred food.” In addition to providing life-giving sustenance, manoomin is quite literally a part of the Anishinaabe. Eating, writes Bennett, is “a series of mutual transformations in which the border between inside and outside becomes blurry: my meal both is and is not mine; you both are and are not what you eat.”<sup>356</sup> This kind of transformation allows the Anishinaabe and the land to become one in embodiment. An example is provided by Kimmerer, in reference to preparing food for her children: “I ask these leeks to renew the bonds between this ground and my children, so that they will always carry the substance of home in the mineral of their bones.”<sup>357</sup>

In addition to providing food, the Chippewa state: “Manoomin has been a part of our traditional stories, teachings, lifeways and spirituality since the earliest times to the

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<sup>356</sup> Bennett, *Vibrant Matter*, 49.

<sup>357</sup> Kimmerer, *The Democracy of Species*, 35-36.

present day.” The list indicates the extent to which manoomin is intertwined with Chippewa Anishinaabe identity. The word “lifeways” refers to the multiplicity of intra-actions shared by Tribal members and manoomin. Elements of being-with manoomin are evident in the following excerpts, taken from a 1976 article by Robert Treuer, author, nature advocate, and tree-planting activist. Treuer is a white man who married a Chippewa woman; he was adopted by the Tribe. He writes of manoomin as lifelong sustenance in recounting his wife’s memories of ricing:

As a child growing up on Leech Lake Reservation, she had to participate in the harvest. It was a matter of survival, of enough food for the family, of enough cash for school clothes and family needs in the fall. For many families it was the major or only source of income during the year. Later, when Peggy had completed high school and gone on to nurse’s training, she went ricing to earn tuition and money for clothing and books.<sup>358</sup>

He describes the dangers and difficulty of harvesting:

There are drownings, mishaps, accidents; and in some small towns and villages there is police harassment of Indian ricers: speed traps are set up to cash in on the earnings. But above all, for those to whom ricing means income and food, there is physical exertion beyond belief: fighting wind, making one’s way through boggy, low water, and just plain getting to and from the fields.<sup>359</sup>

The interactive, sustainable, sensory-rich traditional method of harvesting:

There’s an art to poling, keeping the canoe moving steadily and not jerkily, keeping it in the rice field among the reedy-looking stalks rising five or six feet above the water. There’s skill also in traversing the rice fields so as to do minimum damage to the plants, saving them for a second round at a later time.

But there’s an art to knocking too. The knocker uses a pair of sticks up to thirty inches long, tapering to a point, and an inch thick at the handle. You reach out with one as the canoe glides through the rice, bend the gathered stalks over the canoe, and stroke the heads with the end of the other. The ripe grains fall into the bow of the canoe. If you do it right, the milky, unripe grains remain behind to be knocked up another day. Then you reach out on the others side, bend stalks and

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<sup>358</sup> Treuer, Robert. *The Rice Is Wild. Atlantic*. Vol. 238. Boston: Atlantic Monthly Co, 1976, 47.

<sup>359</sup> Ibid.

heads over the canoe, knock the heads with the free stick. When you start in the morning you can hear the ripe grains rattle into the bottom of the canoe. As the day goes on the sound becomes softer as grain falls on grain, and finally there is only the *swish-swish* of the knocker against sheaves, *drip-drip* from the pole, and a splash as the pole is rest. The canoe fills with rice, the long barbed beards at the tips of the grains up, the heavier grain ends down, until there is a fuzzy green-brown blanket stretching out before the knocker in the canoe.<sup>360</sup>

The time spent carefully observing and checking for the right time to harvest manoomin:

Checking is a special occasion. You drive back roads rarely taken otherwise, look for partridge and deer signs on the way and next year's berry prospects, keep an eye out for wild grapes, for bittersweet for Christmas. It's a time when mosquitoes and deerflies are gone and wood ticks all but forgotten, a sweet time made richer by the prospect of the harvest. Everyone has his own place to check, his own bellweather, like old-timers forecasting weather.<sup>361</sup>

The sensory experience of threshing manoomin:

There is a mix of several very distinct smells. The predominate smell of roasting is not so much the smoke from the wood fire, which pervades everything and is shoved subliminally into the background, as it is the moisture evaporating, the increasing pungency of the nutmeg-like wild rice.<sup>362</sup> [...] A huge iron kettle is over the fire and rice is roasting, being stirred with a canoe paddle, being finished the old way.<sup>363</sup>

And the care taken in seeding manoomin for future harvests:

We make clay balls, about two inches in diameter, imbedding a few grains of ripe green rice in each. When we are done there is a pail full of clay balls. I take the canoe down to the little lake, and set about the seeding. The cay will drop to the bottom, dissolve slowly, and release the seeds, protecting the grains from ducks and other wildlife.

We've been doing this almost every year, and there is a green-and-beige fringe of rice growing around the little lake in the midst of the tree plantation. We keep seeding it, letting it take hold, and somehow never think of harvesting it: it's too sparse, too fragile yet. That's what we say. What we feel is that harvesting the little lake would denigrate the act of offering.<sup>364</sup>

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<sup>360</sup> Treuer, 48; emphasis original.

<sup>361</sup> Ibid.

<sup>362</sup> Ibid, 52.

<sup>363</sup> Ibid, 53.

<sup>364</sup> Ibid.

All of Treuer's descriptions are associated meanings being called upon by plaintiffs when they write that manoomin has been part of their "lifeways." This is what it means to be-with manoomin, in endless assemblages of material embodiments: watching and waiting; movement and patience; times and lifecycles; sights, sounds, and smells; taking but never taking too much.

The plaintiffs also state: "For the Chippewa Manoomin is alive like all living creatures and they are our relations. We Chippewa have a sacred covenant with Manoomin and the water (Nibi) and all living creatures, without which we cannot live." This is an explicit expression of kinship and connection to Our Earth. Manoomin is a living familial relation; Chippewa have an obligation to manoomin; and Chippewa survival depends on looking outside of themselves to nature, with whom they have a reciprocal relationship. In the next paragraph of the complaint, the Chippewa detail their spiritual connection with manoomin: "*Manoomin's* story is revealed as part of our migration story and the *Seven Fires Prophecy* which tells of the westward migration from the Atlantic coast, through the Great Lakes to our current homelands and territories of the Chippewa of the Mississippi" (C, 2; emphasis original). The Seven Fires Prophecy is the source of the "sacred covenant" mentioned earlier in the document. It is both history and spirituality to Anishinaabe, and it brings with it obligations.

In *Braiding Sweetgrass*, Kimmerer describes the Seven Fires Prophecy. "The 'fires,'" she writes, "refer to the places we have lived and the events and the teachings that

surround them,” as told by “Anishinaabe knowledge keepers.”<sup>365</sup> During the First Fire, Anishinaabe peoples lived along the shore of the Atlantic ocean, when

a prophet foretold that the Anishinaabe would have to move to the west or else they would be destroyed in the changes that were to come. They were told to search until they found the place “where the food grows on the water,” and there they would make their new home in safety.<sup>366</sup>

In the Second Fire, the peoples moved west, and during the Third Fire, they found the food that grows on water: manoomin. In the Fourth Fire, Kimmerer writes, the “history of another people came to be braided into ours;” they were *zaaganaash*, the offshore people who came in ships—settlers.<sup>367</sup> The Fifth Fire brought war, devastation, forced resettlement, “re-education,” and death; in the Sixth Fire, “the cup of life would almost become the cup of grief.”<sup>368</sup> But the Anishinaabe remembered another prophecy from the time of the First Fire:

They say that a prophet appeared with a strange and distant light in his eyes. The young man came to the people with the message that in the time of the seventh fire, a new people would emerge with a sacred purpose. It would not be easy for them. They would have to be strong and determined in their work, for they stood at a crossroads.

The ancestors look to them from the flickering light of distant fires. In this time, the young would turn back to the elders for teachings and find that many had nothing to give. The people of the Seventh Fire do not yet walk forward; rather, they are told to turn around and retrace the steps of the ones who brought us here. Their sacred purpose is to walk back along the red road of our ancestors’ path and to gather up all the fragments that lay scattered along the trail. Fragments of land, tatters of language, bits of songs, stories, sacred teachings—all that was dropped along the way. Our elders say that we live in the time of the seventh fire. We are the ones the ancestors spoke of, the ones who will bend to the task of putting things back together to rekindle the flames of the sacred fire, to begin the rebirth of a nation.<sup>369</sup>

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<sup>365</sup> Kimmerer, *Braiding Sweetgrass*, 365.

<sup>366</sup> *Ibid.*, 365-366.

<sup>367</sup> *Ibid.*, 366.

<sup>368</sup> *Ibid.*, 367.

<sup>369</sup> *Ibid.*, 367-8.

In her telling of the Seven Fires Prophecy, Kimmerer explains both the importance of manoomin and the fight to protect it. If present-day Chippewa are tasked with picking up what has been dropping away, the preservation of manoomin is indeed a sacred covenant. The introduction of the complaint therefore describes values, spiritual meaning, and lifeways of being-with manoomin: manoomin is alive; it is a relation; it is part of Chippewa identity and marks the land of their ancestors; it gives life as food; it is a “gift from the Creator” (C, 2); its life is interwoven with Chippewa peoples through endless cycles of harvest and seeding.

In addition to explicating the significance of manoomin to Chippewa peoples, the complaint asks the court to declare the rights of manoomin itself. In an abbreviated form of the Rights of Manoomin passed by White Earth Band Reservation Business Committee of White Earth Band of Chippewa Indians, the passage reads:

Manoomin, or wild rice, within all the Chippewa ceded territories is protected and possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation. These rights include, but are not limited to, the right to pure water and freshwater habitat; the right to a healthy climate system and a natural environment free from human-caused global warming impacts and emissions. (C, 11)

As written, the rights of manoomin are an exemplar of the rights of nature movement (as previously mentioned by Stark). Rights of nature usually means arguing for personhood and substantive rights, but there is no mention of personhood here. This is most likely because Chippewa are not as anthropocentric and binaristic as the U.S. legal system, in which “person” is effectively equivalent to “rights-holder.” For Chippewa Anishinaabe, humans are not the only entities with inherent rights. Manoomin has “inherent” rights that

are not dependent on human action or consideration: rights to “exist, flourish, regenerate, and evolve.” Manoomin also has substantive rights in the form of entitlements, obligating humans to aid manoomin in times of need: rights to “restoration, recovery, and preservation.” As with other rights of nature claims, the problem is with the court’s ability to redress certain kinds of injury. Manoomin claims “the right to pure water and freshwater habitat,” and “to a healthy climate system and a natural environment free from human-caused global warming impacts and emissions.” There are limits to what any court can do in these instances. It is possible to *limit* harm through legislation and regulation and to *ameliorate* damage done to water sources and habitats with restoration projects and practices. It is less feasible to protect manoomin against climate change and emissions, since these are global and atmospheric conditions. Despite these apparent weaknesses, the argument for rights of manoomin is strongly supported by textual evidence detailing its cultural import; and by extratextual evidence documenting a long history of threats to manoomin, including the capitalist commodification, scientific exploitation, and construction projects recorded by LaDuke and other Anishinaabe advocates.

The plaintiffs argue that recognizing rights of manoomin is urgent and necessary due to it being “under constant threat from Minnesota permitting agencies inability or unwillingness to protect or work with affected tribes” (C, 3). Given Chippewa peoples’ view of relations with others, “unwillingness to protect or work” with Tribal members is disrespectful of kinship. As part of the complaint, the plaintiffs ask the court to declare:

Chippewas (and related 1825-26 treaty beneficiaries) individually, and collectively as historic Bands, have a right to invite guests to their various waters and lands associated public properties, and that invited guests both tribal and non-tribal have

a right, if not intrinsic duty to help defend endangered Chippewa property rights and interests (i.e., house/car on fire, help put fire out). (C, 12)

An invitation is an offer, an extension of generosity. In exchange for accepting the offer, “guests both tribal and non-tribal,” including government officials, the Minnesota DNR and Enbridge Line 3 workers, have “a right, if not intrinsic duty to help defend” Chippewa “interests,” which undoubtedly include the health and wellbeing of manoomin. A historic reminder is necessary here: at nineteenth century treaty negotiations and signings, Chippewa peoples recognized settlers as new familial relations and *vouched for them*. Mistreating land, water, and manoomin is a betrayal of that trust.

Accordingly, when the plaintiffs list what they consider violations committed by the defendants, they do so in strong and damning language. When the Minnesota DNR granted the Enbridge Line 3 project permits to drain five billion gallons of public ground water, they did so “abruptly, unilaterally and without formal notice to tribal leaders (quasi-secretly), and *without Chippewa consent*” (C, 7; emphasis original). In fact, the complaint contains multiple mentions of this lack of consent: “impermissibly” (C, 12), “without official notice to tribes, without Chippewa consent” (C, 14), “requiring free, prior, informed consent” (C, 17). In addition to not asking for permission or consent, the DNR is “abdicating its responsibilities,” and “failing to protect freshwater resources for Manoomin and the rest of Nature’s creations, with callous disregard for the Rights of Nature, Rights of Manoomin and Rights of the Chippewa” (C, 8-9). The complaint claims Minnesota DNR is violating Tribal and Constitutional rights, including harassing and arresting protestors: “Presently more than 700 arrests have been made by DNR and local law enforcement” (C, 10). The state of Minnesota is “infringing on” Chippewa rights, “systematically using” DNR to protect

“climate change culprits,” and “unjustly tak[ing]” ground water (C, 0). Because Minnesota DNR, along with other state officials, violate the consent of Chippewa peoples, threaten the wellbeing of water sources and manoomin, and disregard the sacred relationship between Chippewa and manoomin, plaintiffs state: “DNR state oppression and imperialism fosters and enforces cultural genocide in Minnesota” (C, 9).

To see how all elements of the plaintiff’s argument fit together, recall that Tribal courts do not have jurisdiction or enforcement authority over non-Tribal members outside of Tribal lands (in U.S. legal speak, Tribal property). There are few exceptions to this rule, collectively named the *Montana* exceptions. The second *Montana* exception states that a Tribe may “retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation *when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe*” (emphasis mine). Actions taken by Minnesota DNR and Enbridge affect the “political integrity” of Chippewa because they violate the usufructuary rights established by treaties as part of Tribal sovereignty. The same actions affect “the economic security” of Chippewa by threatening manoomin, which is sometimes their primary food and tradable commodity. The actions also significantly affect the “health or welfare of the tribe,” by harming manoomin—which has ties of kinship to Chippewa peoples, is a gift from their Creator, marks their land and future in the Seven Fires Prophecy, ties together their lifeways in the good harvest, and with which Chippewa hold a sacred covenant to ensure the future of *Gidakiiminaan* (Our Earth). To threaten manoomin and its protectors is, indeed, an act of cultural genocide.

If proving the conduct of DNR threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe per the second *Montana* exception was all that was required to find in favor of the plaintiffs, they would have succeeded. Unfortunately, the White Earth Band of Ojibwe Court of Appeals focused on another part of the *Montana* exception text: “within its reservation.”

### *Appellate Court Opinion*

After the complaint was submitted in White Earth Band of Ojibwe Tribal Court on August 4, 2021, there were numerous filings on both sides in disputes over jurisdiction. On August 19, 2021, DNR filed a motion in Federal District Court to block the Tribal Court from deciding the case—this was the first time a living plant was party to a case in the U.S. legal system. The Federal District Court denied DNR’s suit; the DNR then appealed to the Eighth Circuit Court of Appeals on September 10, 2021. Just eleven days later, the Eighth Circuit denied the appeal. Recall that the U.S. legal system, in accordance with Federal Indian Law, requires that all potential remedies must first be sought in Tribal Court, even when the result is the Tribal Court limiting its own jurisdiction. And that is what happened: on March 10, 2022 the White Earth Court of Appeals ruled that White Earth Band Tribal Court did not have jurisdiction over the case, effectively ending the case (the ruling was appealed, but the appeal was denied).

In this section, I will briefly look at the reasoning of the appellate court’s opinion in *Minnesota DNR v. Manoomin*.<sup>370</sup> I focus on two key elements of the opinion. First, the opinion cites several cases resulting in the recognition of Tribal Court jurisdiction. What the cases have in common is some kind of material or embodied presence *on reservation lands*. Second, while claiming sympathy with manoomin and White Earth Band, the Appellate Court states that it is bound by U.S. legal precedent—even going so far as to predict what a U.S. appellate court may ultimately decide.

The White Earth Band of Ojibwe Court of Appeals is a three-judge panel. The decision was unanimous, with the opinion written by Judge George W. Soule, Judge Lenor Scheffler Blaeser, and Judge David Harrington. The opinion refers to the second *Montana* exception, outlining three factors: “was the party allegedly subject to regulation a non-Indian, did the party’s activity occur on reservation land or on non-Indian fee land on the reservation, and did the effects of the activity ‘threaten the Tribe’s political or economic security’” (AO, 8). Conveniently, in its rephrasing of the text from the original *Montana* case, the court omits “the health or welfare of the tribe.” Regardless of the importance of manoomin to Chippewa peoples, the Appellate Court focuses on the second factor: whether the activity occurred on the reservation.

The Appellate Court argues that requirements for the *Montana* exception were not met because the activity occurred *outside* the reservation. The Court cites numerous past cases in support of this claim. In 2010’s *Attorney’s Process & Investigation Servs. V. Sac &*

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<sup>370</sup> Minnesota Dep’t of Nat. Res., et al. v. Manoomin, et al., No. AP21-0516 (White Earth Band of Ojibwe Ct. of Appeals March 10, 2022). Note: for in-text citations, I will refer to this document as “AO” for Appellate Opinion.

*Fox Tribe*, the Eighth Circuit upheld the Tribal Court’s jurisdiction because the API raided facilities *on Tribal lands* (AO, 9; emphasis mine). In 2013’s *FTC v. Payday Fin., LLC*, a federal court upheld Tribal jurisdiction because “the contract between lender and borrower was ‘formed *on the Reservation*,’” (AO, 10; emphasis mine). In 2015’s *Sprint Communs. Co. L.P. v. Wynne*, a federal court upheld Tribal jurisdiction because “Sprint provided phone service to customers *on the reservation* using wires that entered the reservation” (AO, 10; emphasis original). In 2019’s *FMC Corp. v. Shoshone-Bannock Tribes*, the Ninth Circuit Court of Appeals upheld Tribal Court jurisdiction because FMC stored “millions of tons of hazardous waste *on the Reservation*” (AO, 10; emphasis mine). The Appellate Court lists each of these to underline the fact that U.S. Courts will acknowledge a Tribal Court’s jurisdiction when the activity at issue—raiding facilities, forming contracts, running wires, and storing waste—happened *on Tribal reservations*.

The one case the Appellate Court examines in detail is *Wisconsin v. EPA*, a 2001 case decided by the Seventh Circuit Court. The EPA had granted TAS (treatment-as-state) status to the Sokaogon Chippewa Community “to establish water quality standards for bodies of water within its reservation and to require permits for any action that may create a discharge into those waters” (AO, 12). In other words, the EPA gave the Tribe the authority to regulate the activity of non-Tribal members *outside* the reservation if they were sending pollutants *inside* the reservation. The state of Wisconsin responded by suing the EPA. The Seventh Circuit ultimately decided in favor of the EPA (and the Tribe by association) because of the *third Montana* exception: an act of congress. The U.S. Congress authorizes the EPA, and the EPA authorizes the Tribe. However, as a comment on

this ruling, the Appellate Court in *Minnesota DNR v. Manoomin* finds it necessary to quote the following from the Seventh Circuit opinion: “we think Wisconsin exaggerates the power of the tribe to veto upstream discharge activities. The tribe cannot impose any water quality standards or take any action that goes beyond the federal statute of the EPA’s power” (AO, 13). What this means is that the Tribe cannot exert authority over and above that of the EPA, so if the EPA regulations are weak, the Tribe is out of luck. And *Wisconsin* is a case where polluted water flowed *into* reservation waters.

In sum, what all the cases cited in the Appellate Court’s opinion have in common is a material or embodied presence within the borders of reservation lands: humans, wires, waste, and polluted water. Because manoomin is threatened by activity taking place outside the reservation’s borders, the Appellate Court concludes that the Tribal Court does not have jurisdiction. The opinion states that there are

no cases—to this day—that support jurisdiction under the facts of this case, where the allegedly unlawful activity—grant of an amended water use permit and excessive use of waters—occurred outside the boundaries of the reservation. To the contrary, courts have suggested an underlying assumption that Montana applies to activities on the reservation: “tribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries.” (AO, 14)

The idea that Tribal jurisdiction is “of course, cabined by geography” may seem reasonable in the context of existing U.S. property law, but it is, *of course*, anathema to Anishinaabe peoples. Even setting aside ontologies and their associated values, the position of the U.S. legal system as laid out in the Appellate Court opinion approaches absurdity. Pushing polluted water into the reservation? Jurisdiction applies. Pulling unpolluted water out of the reservation? Jurisdiction does not apply. Draining water from an aquifer that supports a

stream on the reservation? Hm, depends. Is the draining apparatus outside the reservation border? Yes? Tribal Court jurisdiction does not apply. Borderlines are human constructs, determined by surveyors using limited human senses and mathematical calculation. Borders do not materially exist. Even when marked by a fence, they cannot contain land, water, or sky.

The U.S. legal system's stubborn enforcement of boundary lines is what ultimately decides the case for the Appellate Court. Even though the Appellate Court in this case is a Tribal Court, they find themselves "constrained by long-standing jurisdictional principles in federal case law" (AO, 16). In an amazingly clear admission, the Appellate Court states:

We believe that federal case law requires dismissal of this case. If we were to allow the case to proceed on its merits in the Tribal Court, and the Court granted a remedy against Appellants, and this Court affirmed such remedy, we believe that a federal court would apply the same case laws we cite to enjoin the remedy and the Tribal Court from further proceedings. (AO, 17)

Here the White Earth Band of Ojibwe Court of Appeals admits that its decision is made in anticipation of a U.S. federal court deciding the same way. As discussed previously in this chapter, this is one of the worst-case scenarios enabled by the Tribal exhaustion doctrine: the Appellate Tribal Court panel suspects a federal court will find that the Tribal Court does not have jurisdiction or sends the case back to an Appellate Tribal Court to force the same result. To avoid the reputational damage that may result from a federal court dismissal, the Appellate Tribal Court instead ends the case. Ultimately, the interests served by this process are only those of U.S. courts and U.S. property owners.

In this artifact analysis, I have examined two documents: the original complaint in *Manoomin v. Minnesota DNR*, and the opinion of the Appellate Tribal Court that effectively

ends the case. In the complaint, plaintiffs Manoomin and White Earth Band ask the Tribal Court to declare the rights of Manoomin and stop Enbridge's excessive water-taking. Because Minnesota DNR and Enbridge are non-Tribal entities and the activity takes place outside reservation boundary lines, plaintiffs must argue that their case meets the requirements for the second *Montana* exception, in which "conduct of non-Indians" within the Tribe's reservation "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." The plaintiffs successfully argue that the actions of DNR and Enbridge constitute such threats. However, while the effects of excessive water-taking are experienced *inside* the reservation, the actions that caused those effects took place *outside* the reservation. For the Appellate Tribal Court, it is this inside/outside distinction that rules the day.

## Conclusion

At the beginning of this chapter, I describe *Manoomin v. Minnesota DNR* as a clash between ontologies embraced by Chippewa Anishinaabe and the U.S. legal system. It is perhaps more accurate to say that their ways of being are brought together in an assemblage that contains multiple member actants: manoomin, soil, water, land, sustenance, myth, kinship, Anishinaabe, the Line 3 pipeline, the state of Minnesota, permits, oil, capitalism, borders, sovereignty, colonialism, fantasies of mastery, and courts—to name a few. Tsing, whose own work examines the relations between humans, disturbed ecosystems, and matsutake mushrooms, writes:

The question of how the varied species in a species assemblage influence each other—if at all—is never settled: some thwart (or eat) each other; others work together to make life possible; still others just happen to find themselves in the same place. Assemblages are open-ended gatherings. They allow us to ask about communal effects without assuming them. They show us potential histories in the making.<sup>371</sup>

A new materialist analysis of *Manoomin v. Minnesota DNR* reveals it to be just such an open-ended gathering, encouraging us to ask questions and inspiring the patience to wait for answers.

From a new materialist perspective, Chippewa Anishinaabe practices can be described as forms of intra-acting, assemblage, being-with, and kinship. Barad's concept of intra-action stresses that all things are engaged in dynamic becomings through relations with others. When we focus on a selection of intra-actions, they form what Bennett, drawing from the original concept from Deleuze and Guattari, calls an assemblage. Manoomin and Chippewa Anishinaabe peoples are member-actants of an assemblage: they become what they are through constant intra-action of states and practices, including growth, life, decay; seasonal changes; harvesting and seeding; cultural and spiritual rituals. From the human perspective, the total of these imbricated experiences resemble attunement. Acampora's concept of being-with describes observation, witnessing, and attending to the nonhuman. Chippewa Anishinaabe peoples practice being-with manoomin in their shared lifecycles, their sensory experiences, their keen observation, and their reciprocity. Being-with closely aligns to new materialist and Indigenous ideas of kinship. As expressed by Anishinaabe botanist Kimmerer, kinship is predicated upon love,

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<sup>371</sup> Tsing, 21.

relationality, respect, and reciprocity. To practice kinship with plants is to ask them for permission and abide by the answer; to learn the ways of plants to better care for them; and to return, in kind, the gifts plants have given.

To be clear, Chippewa Anishinaabe peoples engage in their own cultures, values, beliefs, and ontologies. It is not my intention to appropriate their lifeways, nor to impose new materialist frameworks in any way that erases their unique ways of being and speaking. My aim is to listen and understand. As a scholar interested in exploring how new materialism can be operationalized in the pursuit of justice, I view my study of *Manoomin v. Minnesota DNR* as reciprocation for the gift of Chippewa Anishinaabe advocacy for the land and its inhabitants.

It is difficult to sum up the case without paying attention to its details and complex weave, but the ethics of new materialism suggest a starting place: acknowledging the multiplicity of agents and attending to vulnerabilities and strengths. Manoomin, the food that grows on water, is crucial to the ongoing health and wellbeing of Chippewa Anishinaabe peoples, who have been in a reciprocal relationship with the grain for as long as they have been in what is now referred to as the Great Lakes region of the U.S. Manoomin-Chippewa relations have been under threat for almost as long, due to colonialist racist violence, capitalist commodification, scientific exploitation, and environmental threats. Since the 1960s, another threat has emerged: oil pipelines. In 2017, the Enbridge energy company proposed replacing a section of their Line 3 pipeline, which transports oil from Alberta, Canada to Wisconsin, and runs through Minnesota territory. There had already been multiple instances of pipeline failure, resulting in hundreds of

barrels of oil being spilled into vulnerable ecosystems. The proposed pipeline construction resulted in escalated tensions between Indigenous peoples in the area and the state of Minnesota, which viewed the pipeline as a job-producing source of profit. Chippewa Anishinaabe peoples and environmental groups protested, and many were arrested and harassed in violation of their civil rights. The final straw was Minnesota DNR issuing a permit for Enbridge to draw five billion gallons of groundwater from the area of construction. Manoomin needs water to live, and Chippewas need manoomin. The Chippewas responded by adopting the Rights of Manoomin, which uses a rights of nature framework to articulate manoomin's right to exist and thrive. Manoomin, along with the White Earth Band Chippewas, then sued Minnesota DNR in Tribal Court.

The legal context of *Manoomin v. Minnesota DNR* is also braided with complexity. Legal interests of Chippewa Anishinaabe peoples are derived from their creation story, *Gidakiiminaan* (Our Earth). As told to Anishinaabe legal scholar Kekek Jason Stark, the story of *Gidakiiminaan* begins with the creation of the natural world, inhabited by rivers, lakes, plains, mountains, plants, trees, and animals—all of which have spirits and are considered familial relations to humans, who were created last. The story urges humans to look to nonhumans for guidance, and to treat nonhumans with respect and reciprocity. This is what it means to embrace *mino-bimaadiziwin* (to live a good life) and *inawendiwin* (connectedness of all relations). The Anishinaabe concept of *gwayak ateg onaakonigewi dibenjigewin* (correctly putting in place a decision of control) is what others may refer to as jurisdiction. Anishinaabe view jurisdiction spatially and spiritually; it is mapped by the path of a wolf during the time of creation. In practice, *gwayak ateg onaakonigewi*

*dibenjingewin* means a careful consideration of doing what is best based on kinship and ways of knowing. Kimmerer describes what the practice looks like when enacted by a single individual:

Asking permission shows respect for the personhood of the plant, but it is also an assessment of the well-being of the population. Thus I must use both sides of my brain to listen to the answer. The analytic left reads the empirical signs to judge whether the population is large and healthy enough to sustain a harvest, whether it has enough to share. The intuitive right hemisphere is reading something else, a sense of generosity, an open-handed radiance that says take me, or sometimes a tight-lipped recalcitrance that makes me put my trowel away. I can't explain it, but is a kind of knowing that is for me just as compelling as a no-trespassing sign.<sup>372</sup>

Despite her expression of ineffability, Kimmerer explains the practice well. In some sense, jurisdiction is about intra-acting responsibly: authority over one's place—the place you belong to and belongs to you—is constituted by repeated intuitive intra-actions, assessments of communal health and safety, and listening. The values and precepts of Anishinaabe law and justice are ever-present, even when Chippewas practice contemporary law in Tribal Court.

Of course, Tribal Courts do not operate in a vacuum. Anishinaabe and other Tribal peoples are alienated from *Gidakiiminaan* by imperialism, colonialism, racism, and capitalism. Many live on reservations mapped out by the U.S. government; others are driven out by financial need. Consequently, Tribal advocates must be familiar with the constraints of U.S. and Federal Indian Law. Tribal sovereignty is established by treaties with the U.S., which must be interpreted in deference to Tribal understanding of treaty agreements and language—though enforcement of rules based on such interpretations are

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<sup>372</sup> Kimmerer, *The Democracy of Species*, 30.

historically rare. Federal Indian Law also asserts the Tribal exhaustion doctrine. Though originally intended to make sure disputes on Tribal lands are adjudicated in Tribal courts, the doctrine also allows for U.S. federal courts to keep sending cases back to Tribal courts without hearing the merits. This is especially troubling in cases like *Manoomin v. Minnesota DNR*, in which manoomin and Chippewas are bringing suit against a non-Tribal entity. Non-Tribal entities are typically not subject to the jurisdiction of Tribal Courts; they are under U.S. jurisdiction. There are three possible exceptions to this jurisdictional divide originate from the *Montana* case: when contracts are formed between Tribal and non-Tribal entities; when actions of non-Tribal entities inside the reservation affect the political integrity, economic security, or health or welfare of the Tribe; and when the U.S. Congress overrides the jurisdictional dispute. The original complaint filed in *Manoomin v. Minnesota DNR* argues for the second *Montana* exception. The Appellate Tribal Court opinion effectively ended the case by rejecting that jurisdictional argument.

Analysis of these two legal documents reveals that an argument under the second *Montana* exception requires a merits-based approach, while the rejection of such an argument does not. In the original complaint, *Manoomin v. Minnesota DNR*, plaintiffs argue that Tribal Court has judicial authority to stop Minnesota DNR and Enbridge from excessive water-taking under the second *Montana* exception. To explain why manoomin is integral to the politics, economics, health, and safety of Chippewa Anishinaabe peoples, the complaint examines: treaty agreements and journals to argue that usufructuary rights are part of Tribal sovereignty; that manoomin is a living, spirited relation of Chippewa Anishinaabe peoples, part of the Seven Fires Prophecy that establishes Tribal identity and

territory, and has its own inherent rights to survive and thrive; and that violations committed by Minnesota DNR have endangered manoomin, violated civil rights of Tribal members, and betrayed the relational trust granted to non-Tribal entities. The plaintiffs' argument initially succeeded, but when Minnesota DNR appealed to federal court on jurisdictional grounds, the court sent the case back to the Appellate Tribal Court to reconsider jurisdiction.

The opinion, signed by all three judges of the Appellate Tribal Court, rejects the argument that Tribal Courts have jurisdiction based on the second *Montana* exception. The court gives numerous examples of when the *Montana* exception has been successfully applied, all of which are cases that involved some presence of non-Tribal entities *on reservation lands*: telecommunications infrastructure installed, contracts made, hazardous waste stored—all *inside* the boundaries of the reservation. Boundaries and borders, though non-existent in material reality, must be enforced to perpetuate anthropocentric control of property. Because Minnesota DNR authorized Enbridge to drain water from *outside* reservation boundaries, the court rules that the *Montana* exception does not apply. Remarkably, the court is candid about extratextual reasons for ending the case: they do not believe that the case will succeed in federal court because of the precedent set by the judicial record. Whether it is to save face, save time, or some other reason, the Appellate Tribal Court abdicates its responsibility by simply refusing to try.

On one hand, the timeline and eventual dismissal of *Manoomin v. Minnesota DNR* shows what happens when Indigenous practices—hewn to what new materialists might call ethical intra-action, assemblage living, and kinship—come into conflict with the

anthropocentric, property-focused U.S. legal system: the latter wins the day. On the other hand, U.S. courts *never heard arguments on the merits* because the jurisdictional issue was adjudicated first. It is impossible to say if merits-based arguments would ultimately succeed in U.S. courts. The U.S. legal system remains anthropocentric in its adamant insistence that humans can “use” any “property” they like, but times are changing. Environmentalists, climate change activists, and new generations of advocates who seek to protect nonhuman entities are increasingly realizing what Indigenous peoples and critical scholars have known for some time: “dispossessed communities preserve memories, share knowledges, and enact ways of being that reflect an awareness of and resistance to the detrimental consequences of enduring structures of colonialism, imperialism, and neoliberal capital accumulation.”<sup>373</sup> The rest of us should be listening; some already are.

What *Manoomin v. Minnesota DNR* gives to the study of new materialist rhetoric is twofold. First, the plaintiffs and their arguments constitute an exemplar of the resonance between Indigenous cultures and new materialism. Rhetorics of materiality are often seen as too theoretical or too disconnected from critical areas of power imbalance amongst humans. The *Manoomin* case is neither: it relies on lived experiences and cultural beliefs of living human beings in the present, and it makes direct connections between new materialist ontology and structural racism. Second, *Manoomin* provides an opportunity to examine and evaluate the operationalization of new materialist principles in lawfare.

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<sup>373</sup> Leilani Nishime and Kim D. Hester Williams, “Introduction: Why Racial Ecologies?” in *Racial Ecologies*, eds. Leilani Nishime and Kim D. Hester Williams (Seattle: University of Washington Press, 2018), 6.

Ethics of new materialism may be ephemeral, but legal practice forces them towards concreteness and subjects them to rigorous debate.

What new materialist rhetoric *gives back* is both diagnostic and reparative. A new materialist critique of *Manoomin v. Minnesota DNR* first helps locate points of stoppage. In this case, the major stoppage is the anthropocentric reliance on a particular social construct: the boundary line. Border and property lines are not locally materialized; they make up two dimensional frameworks that are superimposed on a four-dimensional world. Water cannot be bound by such lines, nor can plants, animals, sun, air, earth, pollen, seeds, and so forth. To enforce the boundary lines of Tribal lands is to *excise* them from their surroundings, or as Kimmerer might say, to banish them from the web of reciprocity. Repairing this loss requires fundamental changes to the legal system that makes excision possible.

The anthropocentric view of property enforced by the U.S. legal system must change. This requires a multipronged approach, including continued legal pressure, efforts toward legislation, and requiring students of law to be educated in non-anthropocentric jurisprudential philosophy. To achieve these goals, the plaintiffs in *Manoomin* and similar cases will need resources and allies. New materialism can be a flexible enough framework to create partnerships between Indigenous groups and environmentalists, climate change activists, and social justice advocates. These groups have specific goals, but they share similar obstacles: embedded prejudices, solipsism, alienation, lack of imagination regarding potential consequences, lack of commonality, and a legal system built on a liability model of justice which cannot redress structural harms. Overcoming these

obstacles requires exactly the kinds of thinking-through new materialist rhetoric promotes: de-centering the human to pinpoint areas of stoppage in complex systems, understanding the stakes of reifying the status quo, recognizing power imbalances within networked systems or assemblages, and viewing all entities as inherently interconnected. To return to Tsing: “this *is* the story.”

Next, I will conclude this dissertation project with some thoughts on how new materialist analyses of *Nonhuman Rights Project v. Breheny* and *Manoomin v. Minnesota DNR* complement one another in a broader discussion of new materialist interventions in legal discourse, summarize strategies for new materialist advocates, and offer possible avenues for future scholarly inquiry into the intersection of new materialist rhetoric and law.

## Conclusion

In June 2022, the Supreme Court issued a decision in *Dobbs v. Jackson Women's Health Organization* which overturned *Roe v. Wade* and allowed individual states to decide rights to abortion. The result was mass confusion and upset in lower courts, legislatures, and the public. Advocates for reproductive health and justice sprang into action, planning and fundraising to support pregnant women needing abortion care, including transporting them to states where the procedure was legal. State level anti-trans laws were being passed at record pace, resulting in trans adults and parents of trans children planning to travel to states where they could receive gender-affirming care.

Six months later, the high court heard oral arguments on *National Pork Producers Council v. Ross*, a case about a California state law outlawing the sale of pork from pigs raised in cruel conditions. The case reached the high court because the law was being challenged under the Dormant Commerce Clause. Because it restricts states from passing laws that burden interstate commerce and is considered part of the right to travel, the Dormant Commerce Clause acts as a check on state power: state laws cannot extend pass their own borders.<sup>374</sup> The Supreme Court had a choice. They could strengthen the Dormant Commerce Clause by striking down the California law, exposing more pigs to cruel conditions. Or they could weaken the Dormant Commerce Clause by upholding the California law, resulting in states which have outlawed abortion extending their authority to

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<sup>374</sup> Mark Joseph Stern, "How a Challenge to California's Animal Cruelty Law Became a Stealth Abortion Case," *Slate*, October 11, 2022, <https://slate.com/news-and-politics/2022/10/supreme-court-california-pork-case-abortion.html>.

arrest its own citizens for out of state abortion or gender-affirming care. Either way, somebody was going to get hurt: pigs or humans (in this case, women and trans people).

How did we get here? The answer is historically and legally complex, as are the reasons the Supreme Court eventually voted to uphold the California law, five to four. But the real lesson of *National Pork* is that humans have constructed a legal system that has led to pitting the interests of the most vulnerable against each other. Anthropocentrism, oppositional binaries, dehumanization, objectification, instrumentalization, solipsism, the primacy of reason, fantasies of mastery, colonialism, capitalism, imperialism, racism, the concept of property and boundary lines—all play a part in the inability of U.S. courts to address structural and other harms experienced by humans and nonhumans alike. As in many areas of law, it is incorrect to assume that courts are in moral or ethical alignment with the public on issues of nonhuman existence. Some humans instinctively understand how to treat others; many more at least understand we should be treating them better than we are.

New materialism constitutes a worldview different than that of the U.S. legal system. In its ontological focus, new materialism radically de-centers the human; displaces reductive hierarchical binaries with ontologically flat assemblages; focuses on “dynamic intra-active becoming;”<sup>375</sup> and encourages attunement, a set of practices that develop sustained attention to the nonhuman. New materialist ethics are ephemerally expressed and difficult to practice, but the work of new materialist scholars including Bennett, Barad, and Rickert suggests three realizations that should be taken up and

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<sup>375</sup> Barad, *Meeting the Universe Halfway*, 151.

practiced: nonhumans are active players in constituting the world; human individualism and exceptionalism deny the multitudinous assemblages that work on, in, and through the human; and that causality and being are entangled. To intra-act responsibly, as Barad would say, is to be attentive to nonhuman actants in the assemblages in which we are enmeshed, the ways in which power is unevenly distributed across those assemblages, and our responsibility to the assemblage's most vulnerable actants. The concepts of new materialism and the ethics they engender are both reactive and proactive; they require unlearning the world as dominated by anthropocentric solipsism and relearning it as an enmeshment, a gathering of assemblages, a "web of reciprocity."<sup>376</sup> Unlearning and relearning are difficult tasks that may produce instability, status anxiety, and fear of the unknown. Humans often need to be persuaded to take on such tasks. It is no coincidence that scholars working with new materialism are rhetoricians by training.

Defined by Aristotle, rhetoric is "the faculty of observing, in any given case, the available means of persuasion."<sup>377</sup> As Leah Ceccarelli points out,

the word 'observing' in Aristotle's definition can have two meanings: to see (I observe the sunset) or to do (I observe the law). So 'rhetoric' can denote the inspection of the means of persuasion or the performance of the means of persuasion. That makes rhetoric both an academic field that analyzes suasion as well as the suasion itself that is being studied.<sup>378</sup>

Accordingly, scholarship on new materialist rhetorics is concerned both with how entities are entangled and how humans talk about that entanglement. By extension, new

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<sup>376</sup> Kimmerer, *Braiding Sweetgrass*, 307.

<sup>377</sup> Aristotle, *Rhetoric*, translated by W. Rhys Roberts (New York: Cosimo Classics, 2010), 1355b.

<sup>378</sup> Leah Ceccarelli, "Language and Science from a Rhetorical Perspective," in *The Routledge Handbook of Language and Science*, eds. David R. Gruber and Lynda C. Olman (London: Routledge, 2020), 9.

materialist rhetorical criticism is hermeneutically focused on artifacts that exemplify new materialist ways of being and artifacts that constitute, support, undermine, describe, or proscribe new materialist ways of being. Like all forms of rhetorical criticism, new materialist rhetorical critique is rooted in context: successes, failures, modes, and methods depend on the target audience.

This dissertation analyzes legal discourse of and pertaining to new materialist rhetorics, so I share target audiences with the artifacts I study: the public, legal actors, and scholars of rhetoric. Despite their habitual use of jargon and highly technical minutiae, U.S. courts are meant to speak directly to the public and give reasons for their decisions. If legal arguments and court decisions are unintelligible or built on harmful assumptions, the public has the right hold lawyers and courts accountable for resulting injustices. A narrower audience is comprised of legal actors: jurists, lawyers, legal scholars, legal journalists, jurisprudential philosophers, legal ethicists, judges, justices, and advocates. Their job descriptions include an obligation to pursue justice, redress harm, and maintain the Rule of Law. To do their jobs, legal actors should be familiar with the affordances and constraints of new materialist rhetorics. The narrowest audience is comprised of scholars of new materialist rhetorics and those interested in “operationalizing” such rhetorics for the common good.

I use the word “operationalize” because the study of new materialist rhetorics and the practice of new materialist rhetorical criticism have often been characterized by some as esoteric, inert, or feckless compared to the work of critical rhetorical scholars. In the 2025 special issue of *Quarterly Journal of Speech* on Abolition Rhetorics he helps to

introduce, Omedi Ochieng takes an implicit swing at new materialist rhetorics in his article, “Infraconstitutive Rhetoric: Insurgent Abolition and the Black Radical Imagination.” Ochieng defines infraconstitutive rhetoric as “a praxis for attending to Black rhetorical formations—and specifically, Black insurgent practice” that “labors to theorize how it mediates the ecological, the political, the ethical, the aesthetic, and the existential.”<sup>379</sup> He continues:

Such a reading cuts against theoretical accounts—now rife in the so-called “ontological turn”—that are powered by the conceit that their stipulation of a particular metaphysical ontology immediately issues into a radical politics. The labor of the political is precisely a praxis of collective realization, not the fastidious clerking of the clerisy.<sup>380</sup>

Ochieng is a brilliant scholar but here he is misguided. However theoretical or metaphysical new materialism may be, its tenets are realized by people all over the world. More importantly, if new materialist rhetorics are political, then they should be compatible with critical and political rhetorics. After all, new materialist rhetorics value intra-active becoming, non-hierarchical assemblages, and ethical ways of attending to power differences—all of which can be marshalled against the reductive dehumanization and objectification with which Ochieng is concerned. The evidence of potential allyship is Ochieng’s own use of language: the praxis he describes is “ecological” in its view of social lives as “constituted by the interaction of situated, creaturely beings and non-human organisms in diverse ecological contexts across a planetary scale;”<sup>381</sup> breaks with “the

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<sup>379</sup> Omedi Ochieng, “Infraconstitutive Rhetoric: Insurgent Abolition and the Black Radical Imagination.” *The Quarterly Journal of Speech* 110, no. 4 (2024): 531 and 536.

<sup>380</sup> Ochieng, 536.

<sup>381</sup> *Ibid*, 533.

binary oppositions of North Atlantic philosophy” including “between mind and body, theory and practice, knowledge and action, thought and performance;”<sup>382</sup> and attends to the rhetorical formation’s “spatial imaginary, its temporal punctuations, its resonant and dissonant voices, its gustatory gestures, its olfactory receptors, its haptic registers, its kinetic force, its proprioceptive equipoise.”<sup>383</sup> Tell me we can’t talk about intra-actions and nonhumans, challenging binaries, and vital assemblages. My point is not that new materialist rhetorics are a subsuming force. It is that opportunities for solidarity exist and should be strengthened.

My belief in the critical potential of new materialist rhetorics has led me to this project. Some humans treat nonhumans with respect, care, and attention to our responsibility toward them. The U.S. legal system does not recognize these ways of being (and being-with). Instead, they view nonhumans as objects, instruments, and property. The two case studies I present in this dissertation put these differences on display in complementary ways. The case of Happy reveals how U.S. law and legal actors objectify and instrumentalize nonhuman animals, resulting in a refusal to redress the harms they experience. Happy’s advocates challenge U.S. law on its own terms, thus my analysis includes extensive close reading of the legal artifacts of the case. The case of manoomin reveals the strengths and weaknesses of a legal argument based on cultural understandings of nonhumans as kin. Manoomin’s advocates openly embrace a worldview

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<sup>382</sup> Ibid, 536.

<sup>383</sup> Ibid, 535.

and language that is antithetical to those of the U.S. legal system, thus my analysis is more heavily weighted toward cultural context.

Both legal cases eventually failed to achieve their stated goals. But new materialist rhetorics offer modes of repair. Advocates for nonhumans should adapt their jurisprudential philosophy away from the liability model of justice and towards the social connection model described by Young. Only then can we begin to account for structural and systemic injustices that harm humans and nonhumans alike. Advocates should understand the relative flexibility of different modes of legal interpretation so they know when and where to advance new materialist arguments. For the modes of interpretation that are less flexible, like originalism and structuralism (the interpretive modes that ultimately contributed to legal losses for Happy and manoomin, respectively), nonhuman advocates should seek to intervene at the level of legal education. Law students should explore a variety of jurisprudential philosophies, interpretive modes, and definition of concepts, focusing on unintended harmful effects. And all advocates arguing for nonhumans should experiment with the language of new materialism and the varied evidentiary support it can provide (e.g., mapping assemblages, documenting moments of attunement or attuning practices, poetic descriptions and narratives).

Judges and justices who believe in redressing harms experienced by nonhumans should listen attentively to advocacy efforts described above to embrace the imaginative and creative aspects of deliberation. But they must also work to counter their own fear. As seen in both case studies, adjudicators experience fear of all kinds: fear of responsibility, fear of loss of control or status, fear of more work, fear of chaos or destabilization, fear of

being wrong, fear of losing face. Such fears are no excuse to avoid the work to which they have dedicated themselves: justice. The Rule of Law may depend on consistency, but its evolution depends on moral courage.

Scholars of law, rhetoric, and new materialism should collaborate whenever possible, and advance the “operationalization” of new materialist rhetorics. These efforts could include structural, disciplinary, and individual efforts. At the university or college level, educators could work collaboratively on curricula, departments could offer collaborative workshops and interdisciplinary colloquia, and colleges could cross list courses to diversify collaborative projects (e.g., anthropocentrism in the law, property law and living earth, personhood as understood by different modes of legal interpretation). At an individual level, scholars of new materialist rhetoric and new materialist rhetorical criticism could engage in close-reading of more legal texts and artifacts, critique legal journalism when it fails to properly explain the stakes of cases that involve nonhumans, conduct ethnographic studies to analyze new materialist ways of being in situ, and act as public intellectuals to hold adjudicators accountable for rhetorical sleights of hand that allow them to abdicate the courts’ responsibility. There are countless cases of significant harm done to lands, waters, nonhumans, and humans due to judicial enforcement of anthropocentric, binary, objectifying concepts in the law that are not easy to parse. Scholars of new materialist rhetorics have the skills to parse them, to recognize blockages and stoppages in the legal system and what drives them, and to construct arguments that will persuade jurists to move past them. And we should show solidarity by showing up for

colleagues who seek justice for humans, because we share an urgent need to dismantle structures and modes of thought that endanger humans and nonhumans alike.

In the introduction to this dissertation, I stated four goals: to bridge scholarly gaps between rhetoric of materiality and jurisprudence; to demonstrate how public understanding of materiality is moving into legal spaces, even if the results are not advantageous to nonhumans; to provide examples of how to analyze legal artifacts for discursive openings for rhetoric of materiality; and to reinvigorate new materialist scholarship by moving it from description of necessary awareness to ethical and legal action. It is my hope that in achieving these goals, I have issued an invitation for more collaborations and more scholarly work at the intersection of new materialist rhetorics and judicial spaces. Because more work is needed.

If humans continue to view the world through an anthropocentric lens, treating nonhumans like objects for our use, and degrading what we find foreign, we will ensure the continuation of environmental exploitation, climate change, degradation of animals, extinction of species, waste of foods and plants, pollution of waters, and the racist subjugation of our fellow humans. If we take up new materialist rhetorics to create new lifeways, worlds, and modes of thought, we can better equip ourselves to tackle systemic and structural injustices, identify and remove obstacles to redressing harm, and show ourselves that we can fix some of what we have broken. New materialist rhetorics are fundamentally hopeful, like the pursuit of justice. As described, this work reinvigorates the discipline of rhetoric by concomitantly investing in the rhetorical method of close reading and new materialist ethics, strengthens interdisciplinary ties between rhetoric and law,

contributes to decolonization by centering Indigenous materialities, and advances new materialist rhetorics by putting them to use in judicial spaces. Through collective efforts we may begin to realize legally what we do materially: the tree owns itself.

## Coda

May 15, 2025

We live in an unstable world. In the U.S., we're experiencing ideologically driven turmoil in families, communities, institutions, courtrooms, political parties, and government. Academic institutions, free speech, due process, and habeas corpus are under attack. So are journalists, protesters, activists, and artists. Some of us have lost fundamental rights, while the rest read the same Martin Niemöller poem in every comment section of *The New York Times*. To quote Burt Lancaster's character in *Judgment at Nuremberg*, "I am aware!" And I am appalled.

For many of us, every day we are presented with increasingly difficult choices: to stay or go, to live or fight, to stay silent or speak—even if only to each other. It reminds me of spending time with cancer survivors, who each have a different way of living through. Some dedicate their energy to their work; some to the loving care of others. Some weep through time; some breathe only the moment of now. Some learn to scream; some grow silent and keep faith only with the trees. There is no wrong way to survive.

The law seems to change every day. Legal professionals and scholars are often at a loss when asked questions about precedent, fundamental principles, and ethics. Anti-intellectualism is on the rise and rhetorical scholarship seems to be receding into the background, as it tends to during periods of rising authoritarianism. Deliberation and persuasion are difficult when, to paraphrase Hannah Arendt, everything is possible and nothing is true.

Yet I am still here.

I still believe in the production of knowledge, in curiosity, learning, and teaching. I still believe in law's ability to question and hold accountable, that opportunities for justice will always present themselves, and that the human mind is capable of a jurisprudence that can value and protect all the inhabitants of this world. I still believe that rhetoric can empower and unite while reveling in the richness of difference. I still believe that rhetoric grounds us profoundly in the land and earth, in the contexts of cultures and stories, in bodies and materials, in ideas and the breaths we take.

I recognize that humans across the globe still need to fight for their own survival, dignity, autonomy, and flourishing—and right now, that need is growing. Sometimes that fight blinds us to the ways we are intertwined with nonhumans, making us lost even when we're at home. As Dave Hickey writes, "it's hard to find someone you love, who loves you—but you can begin, at least, by finding someone who loves your love song." This project is my love song, and it's okay if it takes a long time to find an appreciative ear. My hope for the future is that my fellow humans will want to remember, like an elephant, the wild and free spaces they come from; and that their hopes, after dropping like seeds through the dark to the riverbed, will grow to seek the light and feed the earth.

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