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ARTICLE

Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals

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Abstract
Examples abound of national and international legal developments that indicate growing concern and respect for animals. However, a key barrier remains: animals are not recognized as legal persons and therefore do not have standing to pursue independent legal action. This significantly limits the scope for legal redress when animals' interests are harmed. This article examines recent attempts in the United States and Europe to establish standing for animals via strategic litigation and the barriers that have so far undermined this project. The article argues that, despite their lack of success to date, cases that seek to establish standing for animals should continue to be pursued. Societal views about the value of animals' lives are continually evolving such that these cases may soon be successful. Furthermore, even if unsuccessful, these cases help in creating the socio-cultural space required to redefine the human–animal divide and potentially transform animals into rights bearers.

Keywords: Animal rights, Legal personhood, Standing, Strategic litigation, Human–animal divide

1. INTRODUCTION

Over forty years ago, Christopher Stone's seminal article 'Should Trees Have Standing?' posited a novel idea: that natural objects should be recognized as legal persons with standing to pursue their own legal interests, quite separately from the interests of any human being.[1] Just as legal categories have been progressively expanded to protect the rights and interests of racial minorities, women, foetuses and even corporations, so too, argued Stone, could legal personhood be extended to the natural

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1 C.D. Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review*, pp. 450–501 ('Trees').

world.[2] When first espoused in 1972, Stone's idea was a radical one, and it remains divisive to this day.[3] Its controversy lies in its direct challenge to the centrality of the human person within the Anglo-American legal order. Historically, the law has afforded natural objects little value in their own right and legal protection for the environment has generally been available only as a means to address indirect harm to human interests.[4] The notion of trees, rivers and oceans pursuing claims in their own right challenges this anthropocentrism and forces humans to 'attend to their self-serving partialities and preferences, enlarge their perspective, and expand their horizons'.[5]

Although Stone expressly limited his discussion in 'Trees' to 'non-animal' objects, he noted that his analysis could also be relevant to the conferral of rights on other presently 'rightless' objects, including non-human animals.[6] Interestingly, four decades later, it is arguably within the animal advocacy movement that the influence of 'Trees' manifests most clearly – in Stone's 2010 reflections on the legacy of 'Trees', the majority of cases he discusses pursued standing for non-human animals rather than natural objects.[7] Yet, while 'Trees' may have inspired such cases, their practical impact in pushing the boundaries of the law has been modest. Stone observes that 'the sum of cases [brought on behalf of a non-human] is insubstantial and the substance unclear'.[8] With limited exceptions, no court has recognized the legal personhood of any creature and the categorization of animals as property remains firmly entrenched.[9] As Naffine notes, 'a human measure of legal value and legal interests' persists.[10]

This legal status quo has a profound impact on the well-being of animals: their exclusion from the category of 'legal person' significantly limits the availability of legal redress where their interests are harmed. For example, animal advocates in the United States (US) are required to construct highly artificial arguments to demonstrate the harm they personally have suffered as a result of an animal being harmed, for

2 Ibid., pp. 453–4.

3 P. Sands, 'On Being 40: A Celebration of "Should Trees Having Standing?"' (2012) 3 *Journal of Human Rights and the Environment*, pp. 2–3, at 2.

4 Stone, n. 1 above, pp. 463, 473–4. This is also true in international law: Sands notes that '[h]uman rights courts have taken important steps to protect the environment, but always so as to protect the rights of the human': Sands, ibid., p. 3. However, at the time of writing this article, legal rights had just been granted to the Whanganui River in New Zealand and to the Ganges and Yamuna rivers in India: M. Safi, 'Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings', *The Guardian*, 21 Mar. 2017, available at: https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings.

5 N. Naffine, 'Legal Personality and the Natural World: On the Persistence of the Human Measure of Value' (2012) 3 *Journal of Human Rights and the Environment*, pp. 68–83, at 70.

6 Stone, n. 1 above, p. 456, fn. 26. This article uses the terms 'animal' and 'non-human animal' interchangeably to mean 'non-human animal'.

7 C.D. Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (Oxford University Press, 2010). In the Introduction to the text, Stone lists a number of post-'Trees' cases in which lawsuits were brought in the name of natural objects, including a brook, a marsh and a beach: p. xvi. However, Stone's substantive discussion of case law developments post-'Trees' deals mostly with cases that pursued standing for non-human animals: pp. 160–4.

8 Ibid., p. 165.

9 N. Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart, 2009), p. 122; C. Korsgaard, 'Kantian Ethics, Animals and the Law' (2013) 33(4) *Oxford Journal of Legal Studies*, pp. 629–48, at 629.

10 Naffine, n. 5 above, p. 68.

injury to the animal itself is not the primary concern of the law. Similarly, in Germany, public interest claims that do not require the plaintiff organization to demonstrate harm to its own interests are available in only seven states.[11] Yet, such an anthropocentric approach increasingly jars with growing awareness of animals' interests and a desire to respect and protect those interests as an end in itself. In this context, animal advocates have turned in recent years to strategic litigation to make a renewed push for the re-examination of the legal categorization of animals.

This article examines some of these cases in the US and Europe, reflecting on the quest to establish standing for non-human animals since the publication of 'Trees'. It identifies the barriers that have so far undermined this project and offers reflections on its future prospects of success. Section 2 of this article provides an overview of the doctrine of standing (focusing on US federal law but with reference to other jurisdictions) and considers why standing for animals might matter, both in the US and generally. Section 3 examines three case studies that illustrate how standing for animals has recently been pursued in, and received by, different courts and jurisdictions. Section 4 examines the reasons why these cases failed and the barriers that have so far prevented animals from establishing standing. Section 5 then considers the implications of these barriers for the quest for legal personhood for non-human animals. The fundamental question that the article seeks to answer is whether – in light of such limited success to date and the nature of existing barriers – standing for animals should still be pursued as a legal and political project. The article argues that despite their lack of success to date, cases that seek to establish legal personhood for animals should continue to be pursued for two key reasons. Firstly, societal views about the value of animals' lives are progressively changing such that future cases may be successful. Secondly, even where unsuccessful, these cases help to create a normative environment that is receptive to a fundamental redefinition of the human–animal divide.

2. THE LAW OF STANDING VIS-À-VIS NON-HUMAN ANIMALS

2.1. *What is Standing?*

The doctrine of standing operates as a gateway to the legal system. Warnock describes it in lay terms as 'permission to appear as a plaintiff in some public forum, usually a civil court, and face a defendant whom you allege has injured you in some specific way'.[12] The US Supreme Court defined standing in *Sierra Club* v. *Morton* as having 'a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy'.[13] However, standing not only places limitations on would-be plaintiffs, but also on the courts themselves. By restricting the types of case

11 Albert Schweitzer Stiftung für Unsere Mitwelt, 'Verbandsklagerecht im Tierschutz', available at: https://albert-schweitzer-stiftung.de/themen/verbandsklagerecht (in German).

12 M. Warnock, 'Should Trees Have Standing?' (2012) 3 *Journal of Human Rights and the Environment*, pp. 56–67, at 56.

13 405 U.S. 727 (1972), p. 731 (*Sierra Club*).

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a court may accept, standing prevents any encroachment on the legislative function and maintains the separation of powers.[14]

What a plaintiff must prove to establish standing necessarily differs across jurisdictions. The present discussion focuses on the doctrine of standing as it has developed under US federal law, as this provides a clear example of how standing requirements can frustrate attempts to protect animals' interests through litigation. Indeed, Francione argues that through the US federal doctrine of standing, 'the legal system has done everything possible to ensure that matters involving animal interests are never brought into the courtroom'.[15]

Standing to sue in a US federal court is circumscribed by Article III of the US Constitution, which limits the jurisdiction of federal courts to 'cases' and 'controversies'.[16] Case law has given content to this constitutional limitation, requiring a plaintiff to satisfy that: (i) it has suffered an 'injury in fact' that is (a) 'concrete and particularized' and (b) 'actual or imminent'; (ii) the injury is 'fairly traceable' to the challenged action of the defendant; and (iii) it is likely that the injury will be redressed by a favourable decision.[17]

If these elements are satisfied, 'constitutional standing' is established. If not, the case will fail on the ground of lack of subject matter jurisdiction.[18] In certain cases, a plaintiff may also have to establish 'prudential standing'.[19] This includes whether the interest the plaintiff seeks to protect falls within the 'zone of interests' protected by the relevant statute and whether the claim is sufficiently individualized, rather than a 'generalized grievance' shared by many.[20] Furthermore, where the plaintiff is an organization, there is yet another layer of standing requirements that must be satisfied, including that the claim is consistent with the organization's mission.[21] The particular difficulties posed by these standing requirements for plaintiffs seeking to protect the interests of animals in court are discussed further below.

However, it would be inaccurate to view standing as purely a matter of procedure comprising only the types of admissibility criteria discussed above. This is because the capacity to bear rights (i.e. legal personhood) is also a necessary precondition for any grant of standing.[22] In other words, the question of who or what is a candidate for

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14 See A. Scalia, 'The Doctrine of Standing as an Essential Element of the Separation of Powers' (1983) 17 *Suffolk University Law Review*, pp. 881–99.

15 G.L. Francione, *Animals, Property, and the Law* (Temple University Press, 1995), p. 65.

16 Constitution of the United States of America, Art. III § 2.

17 *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), pp. 560–1.

18 See, e.g., *Tilikum et al., ex rel. People for the Ethical Treatment of Animals Inc.* v. *Sea World Parks & Entertainment Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012) (*Tilikum* v. *Sea World*).

19 B. Boyle, 'Free Tilly? Legal Personhood for Animals and the Intersectionality of the Civil and Animal Rights Movements' (2016) 4(2) *Indiana Journal of Law and Social Equality*, pp. 169–92, at 179.

20 Ibid., citing *Warth* v. *Seldin*, 422 U.S. 490 (1975), p. 499.

21 S. Gordon, 'The Legal Rights of All Living Things: How Animal Law Can Extend the Environmental Movement's Quest for Legal Standing for Non-Human Animals', in R.S. Abate (ed.), *What Can Animal Law Learn from Environmental Law?* (Environmental Law Institute, 2015), pp. 211–41, at 226–8.

22 S.M. Wise, 'Nonhuman Rights to Personhood' (2013) 30(3) *Pace Environmental Law Review*, pp. 1278–90, at 1280–1.

rights is central to determining which claims to rights are justiciable, and therefore to the doctrine of standing. It is thus difficult to draw a clear distinction between standing as a matter of procedural law and the question of having rights (and what those rights might be) as a matter of substantive law. The complex relationship between standing, rights and legal personhood is discussed further in Section 2.3.

2.2. *Do Animals Have Standing?*

Animals have so far been unsuccessful in establishing standing, with limited exceptions.[23] For example, US courts have allowed animal species (though not individual animals) to be named as plaintiffs in a number of cases.[24] In one such case, the Ninth Circuit stated that the palila bird 'has legal status and wings its way into federal court as a plaintiff in its own right'.[25] However, such cases are misleading because the question of standing was uncontested and the plaintiff animals were listed jointly with human plaintiffs.[26] Furthermore, the statements made in *Palila* were subsequently described in *Cetacean Community* v. *Bush* as 'nonbinding dicta'.[27] The Court further noted that '[i]t is obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being'.[28]

Animals' lack of standing is not unique to the US. For example, animals in Germany do not have standing (*Klagebefugnis*) to pursue cases in their own name and animal rights groups can only bring a *Verbandklage* (a public interest claim that does not require the plaintiff to demonstrate that its own rights have been violated) in a limited number of German states.[29] Animal rights groups are currently seeking to extend the availability of such claims throughout Germany.[30] In France, animals were accorded a new legal status in 2015 and are now recognized under the *Code Civil* as 'living beings' rather than 'movable property'.[31] However, the *Code Civil* also states that the property regime continues to apply to animals, and therefore what appears to

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23 Stone, n. 7 above, pp. 160–4; S. Ito, 'Beyond Standing: A Search for a New Solution in Animal Welfare' (2006) 46(2) *Santa Clara Law Review*, pp. 377–418, at 401–2.

24 See, e.g., *Marbled Murrelet* v. *Pacific Lumber Co.*, 880 F. Supp. 1343 (N.D. Cal., 1995), p. 1346; *Mount Graham Red Squirrel* v. *Yeutter*, 930 F. 2d 703 (9th Cir., 1991). See also C.R. Sunstein, 'Can Animals Sue?', in C.R. Sunstein & M.C. Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004), pp. 251–62, at 259–60.

25 *Palila* v. *Hawaii Department of Land & Natural Resources*, 852 F. 2d 1106, 1107 (9th Cir., 1988) (*Palila*).

26 *Hawaiian Crow* v. *Lujan*, 906 F. Supp. 549 (D. Haw., 1991), p. 552. In the subsequent case of *Loggerhead Turtle* v. *County Council of Volusia County, Fla.*, 896 F. Supp. 1170 (M.D. Fla., 1995), where standing for the turtles was contested, the Court nevertheless held that the turtles' claim was sufficient to establish standing, independently of the human plaintiffs' claims. However, Stone argues such a case is but a curiosity: C.D. Stone, 'Response to Commentators' (2012) 3 *Journal of Human Rights and the Environment*, pp. 100–20, at 113–14.

27 386 F. 3d 1169 (9th Cir., 2004), p. 1173.

28 Ibid., p. 1176.

29 Albert Schweitzer Stiftung für Unsere Mitwelt, n. 11 above.

30 Ibid.

31 New Art. 515-14 of the *Code Civil* was adopted by the National Assembly on 28 Jan. 2015: 'Les Animaux sont Désormais Officiellement « Doués de Sensibilité »', *Le Monde*, 28 Jan. 2015, available at: http://www.lemonde.fr/planete/article/2015/01/28/les-animaux-sont-desormais-officiellement-doues-de-sensibilite_4565410_3244.html (in French).

be a significant change in legal categorization may be merely symbolic and of limited practical effect.[32] In any event, the reform has not resulted in legal personhood or standing for animals.[33]

2.3. *Why Might Standing for Animals Matter?*

Standing for animals would enable more suits to be brought

Because they do not have standing to pursue matters in their own name, animals – like the environment – rely on the existence of residual human injury before any harm to them can be legally redressed.[34] An injured human must bring the case and satisfy the relevant standing requirements. This has forced animal advocates and environmental groups to craft highly artificial arguments regarding the 'injury' they have suffered, even where the case is clearly motivated solely by harm to the animal or the environment.[35] Such arguments are often unsuccessful.[36]

A clear example of the difficulty faced by plaintiffs in this regard is the US Supreme Court case of *Sierra Club* v. *Morton*.[37] Sierra Club, an environmental non-governmental organization (NGO), challenged the development by Walt Disney of a ski resort in the Mineral King Valley, which would cause damage to the valley's 'aesthetic and ecological balance'.[38] In one respect, the case represented a victory for environmental organizations because, in considering the question of Sierra Club's standing, the majority accepted that 'injury' should be construed broadly to include 'aesthetic injury', stating that '[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society'.[39] Sierra Club nevertheless failed to establish standing because, although the construction of the resort would affect the forest's aesthetics, none of Sierra Club's members used the area or would be personally affected.[40] Justice Douglas's famous dissent endorsed the argument made in 'Trees' and stated that '[t]he critical question of "standing" would be simplified and also put neatly into focus if we … allowed environmental issues to be litigated … in the name of the inanimate object about to be despoiled, defaced, or invaded'.[41]

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32 N. Roux, 'Le Nouveau Statut Juridique de l'Animal: Une Idée Audacieuse pour une Réforme Ineffective', *Le Petit Juriste*, 17 July 2015, available at: https://www.lepetitjuriste.fr/droit-civil/le-nouveau-statut-juridique-de-lanimal-une-idee-audacieuse-pour-une-reforme-ineffective (in French). For a discussion of the legal categorization of animals in France, see M. Falaise, 'Pour une Approche Juridique de la Protection Animale', Colloque National de la Recherche dans les IUT, Université de Lyon I (2008).

33 Roux, Ibid.

34 Gordon, n. 21 above, pp. 214, 240. Cf. the recent legal developments granting rights to rivers in New Zealand and India, described in Safi, n. 4 above.

35 Hogan provides a number of examples of this: M. Hogan, 'Standing for Nonhuman Animals: Developing a Guardianship Model from the Dissents in *Sierra Club* v. *Morton*' (2007) 95(2) *California Law Review*, pp. 513–34, at 525–7.

36 Ibid., p. 525.

37 *Sierra Club*, n. 13 above.

38 Stone, n. 7 above, p. xiii.

39 *Sierra Club*, n. 13 above, p. 734.

40 Ibid., p. 735.

41 Ibid., p. 741–2.

In contrast, in the case of *Animal Legal Defense Fund* v. *Glickman*, human plaintiffs did succeed in establishing standing on the basis of 'aesthetic injury': the Court accepted that a member of the organization suffered 'aesthetic injury' after visiting primates at an animal park over the course of a year and witnessing their inhumane living conditions.[42] However, such successes are few and far between and most suffer the same fate as *Sierra Club* v. *Morton*.[43] As Gordon notes, what constitutes an 'aesthetic injury' is highly subjective and it is unclear in precisely which circumstances it will be established.[44]

Furthermore, standing requirements may completely frustrate cases in which the animals are not visible to the public.[45] In *Animal Lovers Volunteer Association* v. *Weinberger*, for example, the plaintiff sought to prevent the destruction of a colony of wild goats living on a military enclave that was not publicly accessible.[46] However, the plaintiff was unable to establish standing because no individual member of the organization could prove that the death of the goats would result in 'direct sensory impact' to the member's physical environment.[47]

In a purely procedural sense, then, standing for animals could enable suits to be brought that may currently be prevented from ever reaching the courts.[48] Animals would still need to satisfy extant standing requirements, but one of the greatest obstacles currently faced by human plaintiffs in pursuing animal protection cases – proof of human injury – would be circumvented. Furthermore, even where human plaintiffs are able to satisfy standing rules in animal protection cases (as in *Glickman*), standing for animals would arguably lend greater coherence to the law. As Bryant notes, linking the alleged harm to the primary victim (the animal) and avoiding the need to establish human injury would do less 'conceptual violence' to the principle of standing.[49] It would also enable the law to develop in a more transparent manner by allowing clearer articulation of the interests at stake in animal protection cases and the extent to which courts will protect such interests. As Stone notes, 'pitching such cases in anthropocentric terms distorts what we are really doing, discouraging the development of a more accurate and noble discourse'.[50]

Standing for animals could establish them as rights holders

The doctrine of standing ostensibly comprises a mere set of procedural requirements. Yet, standing is closely associated with the concept of legal personhood and the

42 154 F. 3d 426 (D.C. App., 1998), p. 429 (*Glickman*).

43 Hogan, n. 35 above, p. 525.

44 Gordon, n. 21 above, p. 215; G.L. Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia University Press, 2008), p. 91.

45 Stone, n. 7 above, p. 172.

46 765 F. 2d 937 (9th Cir., 1985).

47 Ibid., p. 938.

48 P. Sankoff, 'Opportunity Lost: The Supreme Court Misses a Historic Chance to Consider Question of Public Interest Standing for Animal Interests' (2012) 30(2) *Windsor Yearbook of Access to Justice*, pp. 129–36, at 134.

49 T. Bryant, 'Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans' (2008) 39 *Rutgers Law Journal*, pp. 247–330, at 276.

50 Stone, n. 26 above, p. 109.

capacity to bear rights.[51] As such, it is possible that standing for animals would not only improve the justiciability of their legal interests but could also transform them into rights holders. Animal advocate and lawyer Steven Wise explains the connection between standing, legal personhood and rights through his 'animal rights pyramid'.[52] Wise argues that there are, in fact, four requirements that an animal must satisfy before it can pursue a legal right in its own name.[53] Firstly, the animal must have the capacity to possess a legal right – if it does, then the animal is a 'legal person'.[54] Secondly, the rights to which the animal is entitled must be determined.[55] Thirdly, the animal must have 'a private right to assert [a] cause of action' to vindicate that right (for example, the common law writ of habeas corpus); and, finally, the animal must satisfy standing requirements.[56] As such, according to Wise, legal personhood is a necessary precondition to standing. Without recognition of an animal's legal personhood (i.e., its capacity to possess a right), the question of standing never arises – a non-person simply cannot be a candidate for standing.

If one accepts Wise's analysis, standing for animals would necessarily involve transforming animals into rights holders, even if precisely which rights they possess and whether or when such rights are justiciable would remain unclear.[57] Some commentators and jurists argue that animals already have rights. In *Tilikum* v. *Sea World*, for example, the court denied the orca whales' claim to the constitutional right to be free from slavery but stated that this 'is not to say that animals have no legal rights; as there are many state and federal statutes affording redress'.[58] Similarly, Sunstein has described American animal welfare legislation as constituting an 'incipient bill of rights' for animals because '[r]ights can include substantive safeguards without independent authority to initiate litigation'.[59] However, other commentators reject this analysis and argue that it is meaningless to speak of one having a right unless one can enforce it in one's own name.[60]

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51 Francione, n. 15 above, p. 67; S. Tudor, 'Some Implications for Legal Personhood of Extending Legal Rights to Non-Human Animals' (2010) 35 *Australian Journal of Legal Philosophy*, pp. 134–9, at 135.

52 Wise, n. 22 above, p. 1280.

53 Ibid., pp. 1280–1.

54 Ibid. Wise argues that one's capacity to possess a right stems from one's interests. For example, humans have a fundamental interest in bodily integrity and bodily liberty and these interests are protected by relevant rights. Wise argues that such interests and rights are possessed by all beings who have 'practical autonomy' – in other words, those animals who are 'cognitively complex enough to want something' and whose sense of self is sufficiently complex that 'it matters whether one achieves one's own goals': ibid., pp. 1282–3. See also S.M. Wise, *Rattling the Cage: Towards Legal Rights for Animals* (M2 Communications Ltd, 2000). Establishing (certain) animals' legal personhood is the focus of Wise's Nonhuman Rights Project, discussed in Section 3 below.

55 Wise, n. 22 above, p. 1281.

56 Ibid.

57 Cf. Kolber, who argues that standing for great apes 'does not require us to accept arguments about ape personhood but merely requires recognition of certain obligations to protect animal interests': A. Kolber, 'Standing Upright: The Moral and Legal Standing of Humans and Other Apes' (2001) 54(1) *Stanford Law Review*, pp. 163–204, at 167.

58 *Tilikum* v. *Sea World*, n. 18 above, p. 1264. This case is discussed in detail in Section 3 below.

59 C.R. Sunstein, 'Standing for Animals (with Notes on Animal Rights)' (2000) 47 *UCLA Law Review*, pp. 1333–68, at 1363. See also C.R. Sunstein, 'The Rights of Animals' (2003) 70(1) *University of Chicago Law Review*, pp. 387–401, at 389.

60 See, e.g., Francione, n. 15 above, p. 65. See also A. Peters, 'Liberté, Egalité, Animalité: Human–Animal Comparisons in Law' (2016) 5(1) *Transnational Environmental Law*, pp. 25–53, at 47.

Standing for animals could therefore be a revolutionary development, catapulting animals into the rights-bearing community from which they have been historically excluded.

This would be a significant development, not just for legal but also for political reasons. As Peters notes, the 'justiciability' of rights is not the only way in which they are powerful: '[r]ights may be practical in a hands-on sense; they may be theoretical; or their utility may lie more in the realm of emotions, expression and symbolism'.[61] As such, regardless of whether standing for animals would result in a greater number of favourable outcomes in court, the very fact that animals could claim rights would have great symbolic power. Rights are empowering, 'if not judicially then at least politically'.[62]

For those seeking to dismantle the human–animal divide and bring an end to the categorization of animals as property ('abolitionists'), this would be a positive development.[63] Conversely, some commentators express concern that granting rights to animals would diminish the rights of humans.[64] Others wish to improve the lives of animals but argue in favour of strengthening animal welfare laws and the enforcement of such laws ('welfarists').[65] For example, Binder argues that abandoning regulatory reform in favour of rights-based approaches would result in those 'animals living in the present [being] forgotten for merely purist reasons or utopian visions'.[66] Radford similarly argues that it would be 'fanciful' to expect animal exploitation to end, as this is an 'inevitable consequence' of the 'social interdependence' between humans and animals.[67] He argues in favour of welfare laws as a means to regulate 'the nature of the exploitation'.[68] However, the failure of animal welfare regulations to protect animals adequately has been widely documented, in both Europe and America, and the value of continuing to pursue welfarist approaches is questionable.[69] A rights-based approach could offer a promising alternative.

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61 Peters, ibid., p. 47.

62 Ibid., p. 48.

63 See, e.g., Francione, n. 15 above.

64 E.g., Naffine argues that it may be important to maintain the link between legal persons and human beings because it allows judges to 'employ a moral language of human sanctity': Naffine, n. 9 above, p. 180. Conversely, Wise notes that rights are not a 'zero sum game': S.M. Wise, 'Hardly a Revolution: The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy' (1998) 22 *Vermont Law Review*, pp. 793–915, at 796.

65 See R. Garner, 'A Defense of a Broad Animal Protectionism', in G.L. Francione & R. Garner, *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010) pp. 103–74.

66 R. Binder, 'Animal Welfare Regulation: Shortcomings, Requirements, Perspectives. The Case for Regulating the Human-Animal Relationship', in A. Peters, S. Stucki & L. Boscardin (eds), *Animal Law: Reform or Revolution?* (Schulthess, 2015), pp. 67–85, at 83.

67 M. Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001), p. 10. See also R. Garner, *Animals, Politics and Morality* (Manchester University Press, 2004) and I.A. Robertson, *Animal Welfare and the Law: Fundamental Principles for Critical Assessment* (Routledge, 2015), pp. 107–8, who argues that discussion regarding the legal categorization of animals is 'a distraction to the real issue of practical animal protection'.

68 Radford, ibid., p. 10.

69 See, e.g., M. Michel, 'Law and Animals: An Introduction to Current European Animal Protection Legislation', in Peters, Stucki & Boscardin (eds), n. 66 above, pp. 87–116, at 110; Francione, n. 44 above, p. 72.

However, not all conceptions of standing and legal personhood would transform animals into rights holders in the way that Wise imagines. Some commentators argue that legal personhood for animals could be pursued in a 'narrow', purely procedural sense by granting standing to animals only to enforce existing forms of legislative protection under animal welfare statutes.[70] While this might improve the historically poor enforcement of these statutes and could also have some symbolic significance, such reforms would not attempt any fundamental overhaul of the extant human–animal divide.[71] The legal categorization of animals as property – upon which animal welfare statutes are premised – would remain unchallenged.[72]

The following three case studies – common law habeas corpus suits in the state of New York; a constitutional claim under US federal law; and an Austrian civil law case – represent the most ambitious attempts to establish standing for non-human animals. Rather than simply pursuing standing for animals in a 'narrow' procedural sense, they start at the bottom of Wise's pyramid and seek to transform animals into legal persons and therefore rights holders. These cases pursue legal personhood for animals in what Bryant describes as the 'broad' sense, claiming that animals' entitlement to legal personhood is a corollary of their moral personhood, which it is argued stems from certain traits they share with humans, such as intelligence or autonomy.[73] In so demanding the inclusion of certain animals within the category of personhood, these cases strike at the heart of the anthropocentrism of law and their potential impact extends well beyond the immediate dispute: the precedent they seek to establish could eventually lead to 'the full recognition of non-human beings as subjects of rights'.[74]

3. CASE STUDIES: THE QUEST FOR LEGAL PERSONHOOD FOR NON-HUMAN ANIMALS

3.1. *Habeas Corpus Claims for Chimpanzees*

Steven Wise founded the Nonhuman Rights Project (NhRP) in the US in 2007.[75] The NhRP aims to 'transform' certain animals from things to persons via a 'long-term multi-state strategic litigation campaign',[76] a process that Wise likens to the

70 Bryant, n. 49 above, pp. 253–4. See also T. Totten, 'Should Elephants Have Standing?' (2015) 6(1) *Western Journal of Legal Studies*, pp. 1–16.

71 Naffine, n. 9 above, p. 131. As Peters notes, animal welfare laws seek 'to mitigate animal suffering while preserving their economic use by humans': A. Peters, 'Global Animal Law: What It Is and Why We Need It' (2016) 5(1) *Transnational Environmental Law*, pp. 9–23, at 11. Francione argues that such 'improvements' to the regulatory framework not only maintain the status of animals as property but can actively reinforce it: Francione, n. 44 above, p. 112.

72 Some commentators have called for the establishment of such 'narrow' standing via the insertion of animal-suit provisions into animal welfare legislation: see, e.g., Sunstein (2000), n. 59 above, p. 1336.

73 Bryant, n. 49 above, p. 253.

74 C.B. Bevilaqua, 'Chimpanzees in Court: What Difference Does It Make?', in Y. Otomo & E. Mussawir (eds), *Law and the Question of the Animal: A Critical Jurisprudence* (Routledge, 2013), pp. 71–88, at 75.

75 S.M. Wise, 'Legal Personhood and the Nonhuman Rights Project' (2010) 17 *Animal Law*, pp. 1–11.

76 Ibid., p. 2; NhRP, 'Statement Re: NY Court of Appeals Decision to Deny Motion for Leave to Appeal in Tommy's and Kiko's Cases', 1 Sept. 2015, available at: http://www.nonhumanrightsproject.org/2015/09/01/statement-re-ny-court-of-appeals-decision-to-deny-motion-for-leave-to-appeal-in-tommys-and-kikos-cases.

'legal transubstantiation' of slaves.[77] In 2013, the NhRP filed its first three cases on behalf of four privately owned chimpanzees in the state of New York, seeking to secure their liberty via the common law writ of habeas corpus.[78] Two of the chimpanzees, Tommy and Kiko, were caged on their respective owners' private properties, while Hercules and Leo were held at a research centre for use in locomotion experiments.[79]

The writ of habeas corpus, if granted by a court, demands proof that a detainee is being held on lawful grounds.[80] As the writ is available only to legal persons, the applications necessarily asked the courts to recognize the chimpanzees' legal personhood. The NhRP argued that 'genetic, cognitive, physiological, evolutionary and taxonomic evidence' clearly establishes chimpanzees' self-awareness and autonomy, and that these traits entitle them to recognition 'as "legal persons" with certain fundamental rights', including the right to bodily liberty.[81] The NhRP therefore requested the court to order that the chimpanzees be removed from their present captivity and delivered to a wildlife sanctuary.

The NhRP cases have been largely unsuccessful, with all three failing at first instance. In December 2014, the New York Supreme Court dismissed Tommy's appeal.[82] The Court acknowledged the scientific evidence attesting to Tommy's cognitive abilities but ultimately declined 'to enlarge the common law definition of "person" in order to afford legal rights to an animal'.[83] The Court held that the right to liberty 'has historically been connected with the imposition of societal obligations and duties' and further noted that 'legal personhood has consistently been defined in terms of both rights *and duties*'.[84] This was fatal for Tommy's claim. The Court held that it was chimpanzees' 'incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees … legal rights'.[85]

The NhRP refiled Tommy's case in December 2015, along with 60 pages of supporting evidence 'from leading chimpanzee cognition experts from around the

77 Wise, n. 75 above, pp. 1–2.

78 NhRP, 'Press Release re NhRP Lawsuit', 2 Dec. 2013, available at: http://www.nonhumanrights project.org/2013/11/30/press-release-re-nhrp-lawsuit-dec-2nd-2013. Habeas corpus claims on behalf of chimpanzees have also been pursued in Brazil, with unclear results: Bevilaqua, n. 74 above, pp. 72–3, 75–7; J. Maher, 'Legal Technology Confronts Speciesism or We Have Met the Enemy and He Is Us', in P. MacCormack (ed.), *The Animal Catalyst: Towards Ahuman Theory* (Bloomsbury Institute, 2014), pp. 45–62, at 57–8. In 2014, it was reported that a habeas corpus claim made on behalf of an orangutan in Argentina had succeeded: 'Court in Argentina Grants Basic Rights to Orangutan', *BBC News*, 21 Dec. 2014, available at: http://www.bbc.co.uk/news/world-latin-america-30571577. However, the reported success of this case was subsequently questioned: NhRP, 'Reviewing the Case of Sandra the Orangutan in Argentina', 24 Dec. 2014, available at: http://www.nonhumanrightsproject.org/2014/12/24/reviewing-the-case-of-sandra-the-orangutan-in-argentine.

79 NhRP, 'Press Release re NhRP Lawsuit', ibid.

80 New York Consolidated Laws, CVP – Civil Practice Law & Rules (2013) § 7002, cited in Peters, n. 60 above, p. 45, fn. 97.

81 NhRP (2013), n. 78 above.

82 *The Nonhuman Rights Project Inc., on behalf of Tommy* v. *Patrick C. Lavery*, N.Y Supp. Ct., Appellate Division, Third Judicial Dept, 4 Dec. 2014 (*Tommy* v. *Lavery*).

83 Ibid., p. 2.

84 Ibid., p. 4 (emphasis in original).

85 Ibid., p. 6.

world' to demonstrate that chimpanzees do in fact 'assume duties and responsibilities'.[86] The case was again dismissed, this time on the basis that the legality of Tommy's detention had already been determined and no new facts had arisen since then.[87]

Kiko's appeal also failed, although the Court avoided any consideration of Kiko's personhood by finding that the writ of habeas corpus applies only where the plaintiff is challenging his or her detention *per se*, not the conditions of detention (as Kiko would still be detained at the sanctuary to which the application requested he be delivered).[88] Whether Tommy's and Kiko's cases will proceed any further remains unclear.[89] The third case, relating to Hercules and Leo, also failed, as the judge considered herself bound by the ruling in Tommy's case.[90]

3.2. *The Claim for the Constitutional Right of Orca Whales to Freedom from Slavery*

In the US context, an alternative approach to the NhRP's habeas corpus suits is to seek to establish that animals are protected by relevant constitutional rights.[91] In 2012, People for the Ethical Treatment of Animals (PETA) filed a claim in the District Court for the Southern District of California on behalf of five orca whales kept in captivity at Sea World, arguing that the orcas were entitled to the protection of the Thirteenth Amendment, which prohibits slavery.[92] PETA provided evidence that the orcas' confinement at Sea World negatively impacted on their well-being in numerous ways, including by suppressing their 'cultural traditions', depriving them of the 'environmental enrichment' they required to flourish and thereby significantly shortening their life expectancies.[93] PETA argued that such confinement constituted slavery.[94]

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86 NhRP, 'Press Release: Nonhuman Rights Project Continues Legal Battle to Free Tommy the Chimpanzee', 3 Dec. 2015, available at: http://www.nonhumanrightsproject.org/wp-content/uploads/2015/12/NhRPTommyRefileRelease12-3-15.pdf.

87 NhRP , 'New York Trial Court Denies Tommy's Second Bid for Freedom', 7 Jan. 2016, available at: http://www.nonhumanrightsproject.org/2016/01/07/new-york-court-denies-tommys-bid-for-freedom.

88 NhRP, 'Appellate Decision in the Case of Kiko', 2 Jan. 2015, available at: http://www.nonhumanrightsproject.org/2015/01/02/appellate-decision-in-the-case-of-kiko.

89 In July 2016, the NhRP reported that Tommy's whereabouts are presently unknown, with reports that he has been transferred to a Michigan zoo: NhRP , 'Interview with Kevin Schneider re: Tommy, Kiko, Hercules & Leo', 15 Jun. 2016, available at: http://www.nonhumanrightsproject.org/2016/06/15/interview-with-kevin-schneider-re-tommy-kiko-hercules-leo. It is unclear whether Kiko's case can be subject to any further appeal: NhRP, 'Documents Filed in Kiko's Appeal', 6 Jun. 2016, available at: http://www.nonhumanrightsproject.org/2016/06/06/documents-filed-in-kikos-appeal.

90 *The Nonhuman Rights Project Inc. on behalf of Hercules and Leo* v. *Samuel Stanley and Stony Brook University*, State of New York, Appellate Division, First Judicial Department, 30 Jul. 2015, at p. 31 (*Hercules and Leo* v. *Stanley*). In May 2016, with an appeal still pending, the research institute agreed to transfer Leo and Hercules to a sanctuary: NhRP, 'Nonhuman Rights Project Chimpanzee Clients Hercules and Leo To Be Sent to Sanctuary', 3 May 2016, available at: http://www.nonhumanrightsproject.org/2016/05/03/nonhuman-rights-project-chimpanzee-clients-hercules-and-leo-to-be-sent-to-sanctuary.

91 See E. Maddux, 'Time to Stand: Exploring the Past, Present and Future of Nonhuman Animal Standing' (2013) 47(5) *Wake Forest Law Review*, pp. 1243–67, at 1261.

92 *Tilikum* v. *Sea World*, n. 18 above. The Thirteenth Amendment provides that '[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction': United States Constitutional Amendment XIII.

93 *Tilikum* v. *Sea World*, n. 18 above, pp. 1259–60.

94 Ibid., p. 1260.

PETA accepted that the Thirteenth Amendment applies only to persons but argued that this did not prevent the right from being extended to orcas, given the flexible nature of constitutional principles.[95] As such, Gordon argues that the case did not directly seek to establish the orcas' legal personhood.[96] However, according to Wise's 'animal rights pyramid' discussed above, recognizing an animal's entitlement to a constitutional right would necessarily involve recognition of the animal as a legal person because legal personhood is a corollary of being a rights bearer.[97]

Standing requirements under US federal law require a plaintiff to demonstrate that the alleged injury is capable of redress by a favourable outcome in court.[98] The Court held that the orcas' claim failed this redressability limb because the Thirteenth Amendment applies to humans only.[99] The Court stated that '[a]s "slavery" and "involuntary servitude" are uniquely human activities, as those terms have been historically and contemporaneously applied, there is simply no basis to construe the Thirteenth Amendment as applying to non-humans'.[100] Standing was therefore denied on procedural grounds on the basis that the action could not lead to any legal redress. However, in so ruling, the Court effectively disposed of the substance of the claim as well.

3.3. *The Claim for a Chimpanzee's Legal Personhood under Austrian Law*

In 2007, the Association Against Animal Factories (the Association)[101] commenced proceedings in the Mödling District Court in Austria, seeking the appointment of a legal guardian for Matthew 'Hiasl' Pan, a chimpanzee.[102] For a guardian to be appointed, the Court would have to recognize Hiasl as a legal person. Hiasl had been illegally captured in Sierra Leone and brought to Vienna, where he was seized at the airport and eventually placed in an animal sanctuary.[103] The sanctuary subsequently faced closure as a result of bankruptcy and Hiasl's future became uncertain.[104] As a 'thing', Hiasl would count as one of the sanctuary's assets and could be sold to researchers.[105] However, if he was recognized as a legal person, a guardian could be appointed and he could receive donations and claim damages to fund the ongoing costs of his care.[106]

95 Ibid., p. 1264.

96 Gordon, n. 21 above, p. 238, fn. 197.

97 Wise, n. 22 above, pp. 1280–1. See also Maddux, n. 91 above, p. 1263.

98 See *Lujan* v. *Defenders of Wildlife*, n. 17 above, pp. 560–1

99 *Tilikum* v. *Sea World*, n. 18 above, p. 1264.

100 Ibid.

101 In German, the Association is called the *Verein Gegen Tierfabriken*: see https://www.vgt.at.

102 M. Balluch & E. Theurer, 'Trial on Personhood for Chimp "Hiasl"', *Verein Gegen Tierfabriken*, available at: https://www.vgt.at/publikationen/texte/artikel/20080118Hiasl.htm; Bevilaqua, n. 74 above, p. 74.

103 Balluch & Theurer, ibid.

104 Bevilaqua, n. 74 above, p. 74.

105 Bevilaqua, ibid.; Balluch & Theurer, n. 102 above.

106 Balluch & Theurer, ibid.

Hiasl's case relied heavily on 'rational argument and scientific facts'.[107] The Association argued that because of the genetic similarity between humans and chimpanzees, both belong to the same biological family (the 'family of great apes') and chimpanzees should therefore be considered 'human' under Austrian law.[108] The Association describes the legal argument as follows:

> Section §16 of the civil law code [*Allegemeines Bürgerliches Gesetzbuch* (ABGB)] declares all humans to be persons: 'Every human is born … with rights and therefore has to be considered a person'. What, however, is meant with the term 'human'? The definition of 'human' in §16 ABGB has to be interpreted biologically.[109]

The Association also examined the philosophical underpinnings of the ABGB. It argued that because the ABGB has its genesis in enlightenment ideals, 'the ability to reason ... must be isolated as the defining factor for personhood'.[110] Submitting evidence that chimpanzees have a 'theory of mind', the Association argued that Hiasl (and chimpanzees generally) also qualified for personhood on this basis.[111]

The Court rejected Hiasl's case on technical grounds and avoided a substantive ruling on the question of Hiasl's personhood.[112] It held that Hiasl did not satisfy the threshold requirements under Austrian law for the appointment of a guardian, as he neither had a mental handicap, nor did he face an imminent threat.[113] Attempts to appeal against the decision were unsuccessful.[114] The Association subsequently filed a claim with the European Court of Human Rights (ECtHR), arguing that because the Austrian courts had refused to determine the substantive matters in the case, Hiasl had been denied a fair trial.[115] The ECtHR declined to hear the matter on the ground of lack of subject matter jurisdiction.[116]

4. REFLECTIONS ON THE CASE STUDIES

The case studies demonstrate the variety of ways in which animal advocates have attempted – largely unsuccessfully – to push the boundaries of the law to break down the 'high, thick legal wall [that] separates all humans from all nonhumans' and pursue Stone's vision in 'Trees'.[117] While each case played out in a unique jurisdictional and constitutional context, certain commonalities between them can be observed, both in terms of how the legal arguments were framed and how the courts received those arguments.

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107 Ibid.
108 Ibid.
109 Ibid.; Allegemeines Bürgerliches Gesetzbuch (ABGB 1811), Fassung vom 12/201.
110 Balluch & Theurer, n. 102 above.
111 Ibid.; Bevilaqua, n. 74 above, p. 77.
112 Maher, n. 78 above, pp. 54–5.
113 Bevilaqua, n. 74 above, p. 78; ABGB, n. 109 above, § 273.
114 Maher, n. 78 above, p. 55.
115 *Stibbe* v. *Austria*, App. No. 26188/08, lodged 6 May 2008; Maher, n. 78 above, p. 55.
116 Peters, n. 60 above, p. 44.
117 Wise, n. 75 above, p. 5.

4.1. *How the Legal Arguments Were Framed*

Two key observations can be made about how the cases were argued. Firstly, the cases relied heavily on scientific evidence and placed great faith in the ability of such evidence to convince the courts that legal boundaries should be shifted. The genetic similarity between chimpanzees and humans was central to Hiasl's claim – the plaintiffs argued that this evidence proved that Hiasl was a human for the purposes of the law.[118] In the NhRP cases, the chimpanzees' asserted right to bodily liberty was similarly grounded in evidence of their cognitive abilities. When Tommy's case failed on appeal, further evidence was gathered to counter the judge's ruling that chimpanzees do not assume responsibilities and duties. Similarly, in *Tilikum* v. *Sea World*, PETA relied on evidence regarding the detrimental impact of captivity on the orcas' well-being to argue that such captivity amounted to slavery.

Secondly, the plaintiffs all sought to rely on the abstract, 'ecumenical' nature of legal categories such as 'legal person' or 'rights holder' and argued that there was no legal obstacle to expanding such categories to include animals.[119] The cases all emphasized that there are no 'logical or formal limits' to the concept of legal personhood which preclude any entity from being declared a rights holder.[120] This point was also central to Stone's thesis in 'Trees': he noted that '[t]he world of the lawyer is peopled with inanimate right-holders: trusts, corporations, joint ventures, municipalities …' and argued that therefore no legal impediment existed to extending rights to the natural world.[121]

4.2. *How the Courts Received the Arguments*

In all three case studies, relying on scientific evidence and emphasizing the neutral nature of relevant legal categories failed to achieve a favourable outcome. The cases all asked the courts to consider a fundamental question: 'who are the living beings that can be considered subjects of rights, and why?'[122] The courts responded to this question in two ways. In some instances, they avoided any engagement with the substantive issue and dismissed the claim on procedural or technical grounds. This was most evident in Hiasl's case, where the Court held that regardless of whether Hiasl was a person, he simply did not meet the threshold requirements for the appointment of a guardian. Rather than engaging with the Association's scientific evidence and its relevance to the question of Hiasl's personhood, '[t]he Austrian courts … (re)located the discussion onto a strictly legal terrain, thus making it more and more difficult for the applicants to return to the biologizing rhetoric of the initial petition'.[123] In this sense, Bevilaqua argues that the Court effectively

118 Bevilaqua, n. 74 above, p. 75.

119 Naffine, n. 9 above, pp. 7–8.

120 Ibid., p. 7. Similarly, Sunstein notes that there is no constitutional impediment to Congress granting standing to non-human animals: Sunstein (2000), n. 59 above, p. 1360. This was acknowledged in *Cetacean Community* v. *Bush*, n. 27 above, p. 1171.

121 Stone, n. 1 above, p. 452.

122 Bevilaqua, n. 74 above, p. 77.

123 Ibid., p. 78.

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'decided not to decide'.[124] This also occurred in Kiko's case, where the Court dismissed the appeal on technical grounds, holding that the writ of habeas corpus is available only where the applicant challenges detention *per se*.

Where the courts did engage with the substantive arguments, they consistently demonstrated a stubborn unwillingness to expand legal categories and relied on unconvincing legal arguments to mask the fact that they simply did not want to recognize the legal rights and personhood of animals. In *Tilikum* v. *Sea World*, the Court declared that it would not recognize the Thirteenth Amendment as applicable to orcas because '"slavery" and "involuntary servitude" are uniquely human activities'.[125] Yet, as Maddux observes, 'Courts have long recognized the malleability of constitutional application' and there was no legal obstacle to the Court extending constitutional protection to the orcas if it had been inclined to do so.[126]

Similarly, in Tommy's case, the Court's reasoning was unconvincing. It found that there must be symmetry between rights and duties, yet, as Peters notes, this 'misses the current legal reality' by ignoring the fact that children and mentally incapacitated individuals are afforded rights while owing no (or limited) legal responsibilities.[127] In a footnote, the Court acknowledged that certain humans were 'less able to bear legal duties' but simply stated that this did not alter the Court's analysis.[128] Without explaining why, the Court simply deemed it 'undeniable that, collectively, human beings possess the unique ability to bear legal responsibility'.[129]

What accounts for the judicial reluctance in these cases to recognize animals' rights and legal personhood even in the face of strong scientific evidence and no clear legal impediment? Naffine suggests that the reliance by animal advocates on scientific evidence and the abstract nature of legal categories may be misguided because such an approach wrongly assumes that animals' 'inherent nature … necessarily dictates to law and its conception of the person'.[130] In fact, the law 'plays a critical and creative role' in making legal persons and will expand the category of personhood only to the extent that this reflects societal understandings of 'who is of value and why'.[131] Regarding Hiasl's case, the Association claims it 'only argue[d] that [Hiasl] is a person and not a thing according to today's Austrian civil law. This is not a political decision'.[132] Yet, it would seem that the Association is mistaken here: in reality, the declaration of legal personhood is a deeply political matter.[133] As Boyle notes, although legal personhood is an 'artificial and juridical construct', it nevertheless furthers a 'larger collective and political goal'.[134]

124 Ibid., p. 79.
125 *Tilikum* v. *Sea World*, n. 18 above, p. 1264.
126 Maddux, n. 91 above, p. 1264.
127 Peters, n. 60 above, pp. 45–6.
128 *Tommy* v. *Lavery*, n. 82 above, p. 5 fn. 3.
129 Ibid.
130 Naffine, n. 9 above, p. 8.
131 Ibid., pp. 9, 11.
132 Balluch & Theurer, n. 102 above.
133 Naffine, n. 5 above, p. 82.
134 Boyle, n. 19 above, p. 186.

Justice Jaffe's statements in Hercules' and Leo's unsuccessful appeal appear to acknowledge this. Although the judge dismissed the appeal, she acknowledged that legal personhood is 'not necessarily synonymous with being human' and stated:

> The parameters of legal personhood have been and will continue to be discussed and debated by legal theorists, commentators and courts, and *will not be focused on semantics or biology, or even philosophy, but on the proper allocation of rights under the law, asking, in effect, who counts under our law*.[135]

As such, the unsuccessful outcomes in the above cases are likely to be attributable to the simple fact that society is not yet ready to abandon the human–animal divide. Commentators have offered various theories as to why this is the case. Some attribute the unwillingness to recognize animals as legal persons to the human desire to protect their vested interests in selling and consuming animals and animal products.[136] As Francione notes, recognizing animals as persons would not mean that their interests would always trump human interests but it would imply that we would be morally obliged to no longer use them for food, experiments, clothing or entertainment.[137] Others argue that humans define themselves in opposition to animals and that surrendering the human–animal divide would therefore threaten human identity.[138] As Spiegel notes, comparing the suffering of animals with that of humans can be 'insulting' because historically humans have defended their own rights and worth by placing animals beneath them in a hierarchy of species.[139] Stone suggests a less sinister explanation: a 'general [disconnect] between the ideas that we hold and the things that we do'[140] – the 'historically familiar lag between the idea and the action'.[141] In any event, what is clear is that the reluctance to recognize animals as legal persons 'run[s] much deeper than linguistic or legal technicalities'.[142] What does this then mean for the pursuit of standing for animals? Are the barriers to achieving it (currently) insurmountable, such that the quest for legal personhood for animals should be abandoned, at least for now?

5. THE FUTURE OF STANDING FOR ANIMALS

Ostensibly, the cases discussed above have achieved little and their lack of success might suggest that animals are still quite some distance from achieving legal personhood.[143] The value in pursuing such cases any further, at least for now, may

135 *Hercules and Leo* v. *Stanley*, n. 90 above, pp. 21, 23 (emphasis added).

136 See Bryant, n. 49 above, p. 274.

137 Francione, n. 44 above, p. 62.

138 Bryant, n. 49 above, p. 264.

139 M. Spiegel, *The Dreaded Comparison: Human and Animal Slavery* (Mirror Books, 1988), pp. 14, 16. See also Peters, n. 60 above, pp. 35–9.

140 Stone, n. 26 above, p. 116.

141 Ibid. Abate observes that only after four decades of being 'mainstreamed' has the concept of environmental 'rights' gained broader acceptance: R.S. Abate, 'Introduction', in R.S. Abate (ed.), *What Can Animal Law Learn from Environmental Law?* (Environmental Law Institute, 2015) pp. xxiii–xxxi, at xxxi.

142 K. Burke, 'Can We Stand For It? Amending the Endangered Species Act with an Animal-Suit Provision' (2004) 75 *University of Colorado Law Review*, pp. 633–66, at 654.

143 Boyle, n. 19 above, p. 192.

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seem questionable. This is certainly the view expressed by some commentators. Lovvorn doubts that Stone's vision 'will be the future for animal law',[144] while O'Sullivan argues that because the notion of human exceptionality is so firmly entrenched, alternative approaches should be pursued which address unequal treatment *within* species rather than between species.[145] Bryant is more tempered in her reservations. She acknowledges that cases pursuing legal personhood for animals can 'slowly and laboriously shift the contours of the relations between humans and animals', but argues this is the case only where 'there is already sufficient sociocultural "space" in the conceptual boundary between humans and animals'.[146] Where there is no such 'space' – as these cases suggest – pursuing standing for animals is futile because such initiatives will not of themselves influence the normative environment regarding animal rights.[147]

However, such views overlook the subtler contributions that these cases make to the animal advocacy movement and the fact that societal views about the value of animals' lives are continually changing. Indeed, there are two key reasons why cases that seek to establish legal personhood for animals should continue to be pursued notwithstanding their lack of success to date. Firstly, there is clear evidence that the 'sociocultural space' identified by Bryant as necessary for the success of these cases is slowly developing and expanding such that future cases might soon succeed. Secondly, contrary to Bryant's view, even when unsuccessful, these cases help to reshape societal views regarding animal rights and welfare, paving the way for future cases and strengthening the animal advocacy movement more generally.

5.1. *Changing Societal Views*

Examples abound of national and international legal developments that indicate increasing concern and respect for animals. The Preamble to the United Nations World Charter for Nature states that '[e]very form of life is unique, warranting respect regardless of its worth to man';[148] forms of protection for animals are included in the respective constitutions of Germany and Switzerland;[149] and there has

144 J. Lovvorn, quoted in D. Cassuto, J. Lovvorn & K. Meyer, 'Legal Standing for Animals and Advocates' (2006) 13 *Animal Law*, pp. 61–86, at 79.

145 O'Sullivan terms this the 'internal inconsistency' – namely, the fact that animals of the same species are treated differently depending on their public visibility: S. O'Sullivan, *Animals, Equality and Democracy* (Palgrave MacMillan, 2011), p. 23.

146 Bryant, n. 49 above, p. 300.

147 Ibid.

148 UNGA Resolution A/RES/37/7, 18 Oct. 1982, available at: http://www.un.org/documents/ga/res/37/a37r007.htm.

149 The Swiss Constitution provides that '[t]he Confederation shall legislate on the protection of animals', including by regulating 'the use of animals' and 'the killing of animals': Art. 80, Federal Constitution of the Swiss Confederation, 18 Apr. 1999, available at: https://www.admin.ch/opc/en/classified-compilation/19995395/201601010000/101.pdf (official translation). The German Constitution provides that '[m]indful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action': Art 20a, Basic Law for the Federal Republic of Germany, 23 May 1949, available at: https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf (official translation). See also K. Connolly, 'German Animals Given Legal Rights', *The Guardian*, 22 June 2002, available at: https://www.theguardian.com/world/2002/jun/22/germany.animalwelfare;

been a recent proliferation of animal parties in national politics.[150] It is clear that the categorization of animals as property is becoming increasingly unpalatable to modern-day conceptions of morality.[151] As Sunstein notes, 'a growing public commitment to animal welfare is an unmistakable part of modern public law'.[152]

The definite language used by the courts to date – 'there is simply no basis to construe the Thirteenth Amendment as applying to non-humans'[153] – should not be discouraging; similarly strong and unyielding statements were made by courts during the quest to secure fundamental rights for other oppressed groups. Stone, for example, reminds us that in 1854 California's highest court categorically described Chinese people as 'a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point'.[154]

5.2. *Pursuing Legal Personhood for Animals Can Reshape Societal Views*

Even where unsuccessful, cases that pursue legal personhood for animals can contribute to creating the 'sociocultural space' that is necessary for any shift in the human–animal divide to occur. These cases, therefore, may lay the foundations for future successful cases and strengthen the animal advocacy movement more broadly. This can occur in three key ways. Firstly and most obviously, these cases publicize the animal rights cause. For example, Boyle notes that the *Tilikum* v. *Sea World* case may have 'garner[ed] increased attention and concern for the whales'.[155] Secondly, encouraging comments made by courts, even when dismissing a case, may also lend legitimacy to the movement. In *Tilikum* v. *Sea World*, the Court described PETA's efforts to assist the orcas as 'laudable'.[156] Thirdly, the simple act of initiating a case that seeks to establish legal personhood for animals can be powerful. It forces the legal system to engage with the matter, if not substantively, then at the very least administratively or procedurally, via the standard machinery of court processes.

This can have both legitimizing and humanizing effects. Bevilaqua identifies a number of ways in which the passage of Hiasl's case through the legal system had such effects, lending credence to the cause while also humanizing Hiasl and chimpanzees generally. Firstly, Bevilaqua notes that even the simple act of naming an

G.L. Francione & A.E. Charlton, 'Animal Law: A Proposal for a New Direction', in Peters, Stucki & Boscardin (eds), n. 66 above, pp. 33–65, at 41.

150 M. Wissenburg & D. Schlosberg, 'Introduction', in M. Wissenburg & D. Schlosberg (eds), *Political Animals and Animal Politics* (Palgrave MacMillan, 2014), p. 9. See also Borràs, who describes the recent increase in environmental laws which reject anthropocentrism and 'recognize our interconnectedness with the natural world': S. Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) *Transnational Environmental Law*, pp. 113–43, at 113.

151 See, e.g., N. Cornell, 'In Defense of Animals' (2015) 2(2) *Penn Undergraduate Law Journal*, pp. 1–11, at 1.

152 Sunstein (2000), n. 59 above, p. 1336. See also Peters, n. 71 above, pp. 11–13.

153 *Tilikum* v. *Sea World*, n. 18 above, p. 1264.

154 *People* v. *Hall*, 4 Cal. 399, 405 (1854), cited in Stone, n. 1 above, p. 454.

155 Boyle, n. 19 above, p. 183.

156 *Tilikum* v. *Sea World*, n. 18 above, p. 1264.

animal as a plaintiff can be humanizing.[157] Secondly, she describes how, at the hearing, the judge's first step 'was to demand legal proof of [Hiasl's] identity', just as would have occurred had the guardianship application been made on behalf of a human.[158] Thirdly, the Court applied the same threshold criteria for guardianship to Hiasl that are applied to human applicants – i.e. the Court considered whether Hiasl was handicapped and whether he faced imminent threat – and no mention was made of the fact that he was a chimpanzee and unable to have a guardian appointed for that reason.[159] Finally, although the ECtHR refused to hear Hiasl's claim, it nevertheless acknowledged the application, thereby indirectly lending it legitimacy.[160]

Engagement with the justice system similarly gave legitimacy to the chimpanzees' plight in the NhRP cases, irrespective of the fact that all three cases failed. For example, when at one stage Tommy's owner threatened to remove him from the state of New York, thereby frustrating his case, the Court granted an injunction to prevent his removal.[161] As the NhRP noted, this process suggested that the Court was 'open to deciding the case on the merits of the personhood issues that are involved', regardless of the ultimate outcome.[162] The legitimizing effect of legal processes will, of course, be stronger still where the courts actually engage with the substantive arguments. Boyle suggests that in *Tilikum* v. *Sea World*, simply by considering whether or not the Thirteenth Amendment applied to orcas, the Court may have 'implicitly acknowledged … underlying legal personhood'.[163] While these legitimizing and humanizing effects are subtle and indirect, they are nevertheless powerful.

It should be noted, however, that cases seeking to establish legal personhood for animals can also have negative effects. Failed cases may establish legal precedents that entrench the status quo and 'undermine organizing momentum'.[164] Furthermore, in light of prevailing tensions between the welfarist and rights-based approaches, these cases could be criticized for 'atomiz[ing] struggles, dividing and separating rather than uniting those who desire social change'.[165] However, a study of animal rights cases in the US revealed that overall such cases do have 'educational effects' and help in advancing reform goals.[166] The study also revealed that lawyers involved in the cases were aware of the limitations of litigation and that even a successful case could not have a transformative effect without 'well-coordinated political actions'.[167]

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157 Bevilaqua, n. 74 above, p. 79.

158 Ibid., p. 80.

159 Ibid.

160 Ibid.

161 NhRP, 'Appellate Court Enters Two Orders re Tommy Lawsuit', 16 Jul. 2014, available at: http://www.nonhumanrightsproject.org/2014/07/16/appellate-court-enters-two-orders-re-tommy-lawsuit.

162 Ibid.

163 Boyle, n. 19 above, p. 185.

164 M. McCann & H. Silverstein, 'Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States', in A. Sarat & S. Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press, 1998), pp. 261–92, at 270–1.

165 Ibid., p. 263.

166 Ibid., pp. 261, 270.

167 Ibid., p. 270.

5.3. *Consciously Pursuing Legal Personhood for Non-Human Animals*

For the above two reasons, cases seeking to establish legal personhood for non-human animals should continue to be pursued. However, it is necessary to pursue such cases consciously, locating a litigation strategy within a broader political project and acknowledging any criticism associated with such a project. Abolitionists who seek to dismantle the property status of animals may view these cases as consistent with their political project and would therefore support them.[168] However, as discussed above, not all commentators support the quest for legal personhood for animals, as envisioned by these cases. Some fear that the pursuit of rights for animals could undermine human rights, while others argue that welfarist approaches are more likely to improve the lives of animals in the short term. Even if critiques such as these are ultimately rejected and a rights-based approach is favoured, the concerns and arguments raised by these commentators should be considered and addressed.

Furthermore, although the cases discussed above purportedly seek to break down the human–animal divide, pursuing legal personhood only for certain animals may conflict with this goal. In fact, this approach could reinforce the existing hierarchy between 'us' and 'them' by inviting certain animals across the divide and excluding those who do not possess relevant human traits.[169] As Bevilaqua notes, 'transposing [chimpanzees] from one extreme to the other of the traditional legal dualism … does not affect the person/thing overarching scheme'.[170] It simply transports some animals across the divide while leaving that divide very much intact. In so doing, it 'reassert[s] the "real" human person as the exemplary model of the legal subject'.[171]

In addition, Bryant argues that pursing personhood only for certain animals disregards 'the "web of life"' within which *all* species are situated'.[172] Similarly, Steiner challenges the criteria for personhood that these cases establish and argues that capacity for subjective awareness should not be what qualifies one for the endowment of legal rights.[173] He discusses the 'purposive' nature of bees and how they also struggle to survive, noting that '[t]hey can fare well or ill, regardless of whether they are "subjectively aware" of their fortunes, and regardless of how much their awareness (if they have any) resembles our own'.[174] Steiner therefore proposes a 'biocentric kinship' model as an alternative approach, which would recognize 'all beings that struggle for life and well-being'.[175]

However, while this criticism is valid, it may be necessary for strategic purposes initially to pursue legal personhood for a limited number of species only. The lack of

168 Maher, n. 78 above, pp. 53, 59–60.

169 D. Bourke, 'The Use and Misuse of "Rights Talk" by the Animal Rights Movement', in P. Sankoff & S. White (eds), *Animal Law in Australasia: A New Dialogue* (The Federation Press, 2009), pp. 128–50, at 149.

170 Bevilaqua, n. 74 above, pp. 83–4.

171 Ibid., p. 84.

172 Bryant, n. 49 above, p. 266 (emphasis in original).

173 G. Steiner, *Anthropocentrism and its Discontents* (University of Pittsburgh Press, 2005).

174 Ibid., pp. 249–50.

175 Ibid., p. 250.

success to date suggests that a more ambitious project would be unrealistic and may risk alienating the animal advocacy movement. An incremental approach, initially focused on securing personhood for certain species, may be more viable, both legally and politically.[176] As Maher notes, if these cases 'succeed in even a limited redrawing of the line, such a victory will no doubt raise consciousness concerning speciesism among jurists and [the] public alike, opening the door to legal challenges by other species'.[177]

Ultimately, litigation is 'another cog in the campaign engine' – it does not provide all the answers, nor does it have the capacity to effect a utopian vision for all human/animal relations.[178] Francione argues that full recognition of animal rights will ultimately require a 'paradigm shift' that can be driven only via a political and social movement.[179] Nevertheless, this does not mean that the law, and attempts to develop the law in a manner favourable to animals, have no role to play. We should continue to pursue these cases, being ever mindful of their limitations.

6. CONCLUSION

Since the publication of 'Trees', the pursuit of standing for non-human animals has become a key strategy for animal advocates seeking to strengthen animal protection under the law.[180] For advocates favouring a rights-based approach, the pursuit of standing has encompassed the broader aim of establishing animals as legal persons and rights bearers, in an attempt to break down extant barriers between humans and animals and fundamentally redefine our relationship with other living beings. However, attempts to establish standing for animals have so far been unsuccessful, even in a 'narrow', purely procedural sense. As the case studies demonstrate, there remains 'profound legal resistance to the idea that law is for (non-human) animals and that animals should be rights holders and therefore legal persons'.[181] This resistance reflects the fact that the question of standing for animals extends far beyond matters of science or legal technicality and touches upon fundamental, and ultimately political, questions regarding human identity and who counts in the eyes of society, and therefore the law.

The lack of success to date might suggest that further attempts to establish animals' legal personhood in a 'broad' sense would be futile. However, this article has argued that cases seeking to establish the legal personhood of non-human animals should continue to be pursued. The courts are a barometer of public consciousness and, so far, they have indicated that society is not yet ready to recognize animals as legal persons. However, there are clear signs that societal views are shifting and that concern for the lives of animals is becoming a key feature of contemporary notions of morality. Furthermore, even where unsuccessful, cases seeking to establish legal

176 Bourke, n. 169 above, p. 147.
177 Maher, n. 78 above, p. 53.
178 Boyle, n. 19 above, p. 184.
179 Francione, n. 44 above, p. 109.
180 Bevilaqua, n. 74 above, p. 75.
181 Naffine, n. 9 above, p. 8.

personhood for animals help to create a normative environment that allows for a fundamental redefinition of our relationship with animals to occur. Stone noted in 'Trees' that '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 value it for itself until we can bring ourselves to give it "rights"'.[182] Ultimately, cases that seek to establish legal personhood for animals ask the courts to declare whether we are yet ready to 'bring ourselves' to recognize the rights of animals. The answer so far has been 'no', but it is important to keep asking the question. The courts' responses to date are not the final word and the very act of asking can be transformative.

182 Stone, n. 1 above, p. 456.

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