

Nonhuman Personhood: Recognizing Liberty Interests for Highly Sentient Animals

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INTRODUCTION

In 2003, relatives of a deceased elephant were seen pushing and pulling her body for nearly a week following her death.¹ In 2016, footage captured a group of elephants standing over the dead body of an elephant they knew, seemingly mourning her.² In fact, elephants, known for their complex social bonds and familial relationships, have been observed grieving their dead in numerous instances.³ For example, researchers have seen elephants scattering their family members' bones, raising a foot over and lightly touching an elephant body with their trunks, and lingering near an elephant carcass for prolonged periods of time.⁴ Indeed, elephants, having the largest relative cerebellum size of all mammals,⁵ possess intelligence comparable to chimpanzees⁶ and have complex social behaviors.⁷

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1. Laura Parker, *Rare Video Shows Elephants 'Mourning' Matriarch's Death*, NAT'L GEOGRAPHIC (Aug. 31, 2016), <https://www.nationalgeographic.com/animals/article/elephants-mourning-video-animal-grief> [<https://perma.cc/ML4L-QJAB>].

2. *Id.*

3. See Iain Douglas-Hamilton, *Behavioural Reactions of Elephants Towards a Dying and Deceased Matriarch*, 100 SCI. DIRECT 87 (2006), <http://savetheelephants.org/wp-content/uploads/2015/05/2006DeathofMatriarch.pdf> [<https://perma.cc/26NF-YFMZ>].

4. Parker, *supra* note 1.

5. Busisiwe Maseko, et al., *Elephants Have Relatively the Largest Cerebellum Size of Mammals*, 295 AM. ASS'N FOR ANATOMY 661 (2012), <https://anatomypubs.onlinelibrary.wiley.com/doi/full/10.1002/ar.22425> [<https://perma.cc/FBM7-95XP>].

6. See Joshua Plotnik, et al., *Elephants Know When They Need a Helping Trunk in a Cooperative Task*, PROCEEDINGS NAT'L ACAD. SCI. (March 7, 2011), <https://www.pnas.org/doi/full/10.1073/pnas.1101765108> [<https://perma.cc/SRZ5-NPET>].

7. Allison Jeffrey, *Social Behavior and Personality Patterns of Captive African Elephants*, UNIV. N.H. (2017), <https://www.unh.edu/inquiryjournal/spring-2017/social-behavior-and-personality-patterns-captive-african-elephants> [<https://perma.cc/4RUQ-NTGT>].

Even so, more than fifteen thousand elephants are currently kept in captivity around the world, with nearly one in three Asian elephants living in zoos, research facilities, or private facilities.⁸ Many of these elephants have lived alone for decades without an elephant companion.⁹ Studies show that such captivity is incredibly detrimental to the health of highly sentient animals, including elephants.¹⁰ The abundance of elephants in captivity captures just the tip of the proverbial iceberg: Today, wildlife makes up just four percent of the world's mammals, while livestock makes up sixty-two percent.¹¹ In fact, “[w]ild mammal biomass has declined by 85% since the rise of human civilizations.”¹²

While the United States has evolved significantly in its recognition of animal sentience,¹³ our laws fall far short of preventing animals from suffering. In fact, some of the most monumental animal legislation in U.S. history is shadowed by numerous exceptions, significant loopholes, and a lack of enforcement.¹⁴ The United States, consequently, is grossly deficient in protecting animals in captivity from inhumane conditions. These deficiencies are exacerbated with highly sentient animals in captivity.¹⁵

In light of legislative failures, animal rights advocates are filing habeas corpus petitions on behalf of numerous chimpanzees and elephants in an attempt to have them removed from zoos and placed into sanctuaries.¹⁶ To be successful, advocates have to convince courts that nonhuman animals qualify as legal persons for purposes of habeas corpus.¹⁷ In the absence of explicit legislative intent, however, U.S. courts have not acknowledged such rights, reasoning that legal personhood is contingent on one's ability to have legal

8. Ahimsa Campos-Arceiz, *What Should We Do About the 15,000 Asian Elephants Still in Captivity?*, THE CONVERSATION (Aug. 16, 2016), <https://theconversation.com/what-should-we-do-about-the-15-000-asian-elephants-still-in-captivity-64620> [<https://perma.cc/JVG6-AQD6>].

9. Rachel Fobar, ‘Nothing To Do, Nowhere To Go’: *What Happens When Elephants Live Alone*, NAT’L GEOGRAPHIC (Jan. 31, 2022), <https://www.nationalgeographic.com/animals/article/what-happens-when-captive-us-elephants-live-alone> [<https://perma.cc/S87W-Q7TF>].

10. See *infra* notes 97–111 and accompanying text.

11. HANNAH RITCHIE ET AL., BIODIVERSITY, OUR WORLD IN DATA (2021), <https://ourworldindata.org/mammals#wild-mammal-biomass-has-declined-by-85-since-the-rise-of-humans-but-there-is-a-possible-future-where-they-flourish> [<https://perma.cc/3EXJ-3CBW>].

12. *Id.*

13. See *infra* Section II.A.

14. See *infra* Section III.A.

15. See *infra* Section II.A.

16. See *Our Story*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/our-story> [<https://perma.cc/QCF3-8AWS>].

17. See, e.g., *In re Nonhum. Rts. Project, Inc. v. Breheny*, 38 N.Y.3d 555, 571 (N.Y. 2022).

duties and responsibilities.¹⁸ Still, courts have recognized that such rights would be legal under Article III of the Constitution if Congress explicitly granted them.¹⁹

Contrastingly, other countries have recognized legal personhood and liberty interests of certain animals by emphasizing humanity's duty to acknowledge animal sentience.²⁰ Courts in Argentina, Columbia, Pakistan, and India, for example, have recognized certain nonhuman animals' rights to autonomy and liberty.²¹ Indigenous communities around the world have also recognized similar rights.²² Hence, confronted with ethical and legal dilemmas, there is an ongoing international debate over whether nonhuman animals can have rights to legal personhood.

This article will proceed in five parts. Part I provides a background on the evolution of animal rights in common law, legislation, and standing. Part II presents modern jurisprudence in the United States and abroad of the use of habeas corpus to free highly sentient animals from tourism and exhibition. Part III argues that U.S. legislation and common law are grossly inadequate in protecting animals from suffering in captivity. Part IV asserts that the U.S. legal system should recognize nonhuman personhood of certain animals and provides a mechanism for such action. Part V concludes.

18. *Id.* at 572.

19. *Naruto v. Slater*, 888 F.3d 418, 425 (9th Cir. 2018).

20. *See, e.g.*, Tercer Juzgado de Garantías [J.G.Men.] [Third Court of Guarantees], 3/11/2016, "Presented by AFADA About the Chimpanzee 'Cecilia' - Nonhuman Individual," P.72.254/15 (Arg.), https://www.nonhumanrights.org/wp-content/uploads/Chimpanzee-Cecilia_translation-FINAL-for-website-2.pdf [<https://perma.cc/FU6N-SFK9>].

21. *See id.*; Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ. July 26, 2017, M.P: L. Villabona, AHC4806-2017, (Colom.), <https://www.nonhumanrights.org/content/uploads/Translation-Chucho-Decision-Translation-Javier-Salcedo.pdf> [<https://perma.cc/N76P-SHAL>]; Islamabad Wildlife Mgmt. Bd. v. Metro. Corp. Islamabad, W.P. No. 1155/2019 (Islamabad High Ct.) (May 21, 2020) (Pak.), <https://aldf.org/wp-content/uploads/2021/01/Islamabad-Wildlife-Management-Board-v-MCI-WP-No-1155-of-2019.pdf> [<https://perma.cc/B9Z9-69RH>]; Animal Welfare Bd. of India v. A. Nagaraja, (2014) 7 SCC 547 ¶ 62 (India), <https://www.nonhumanrights.org/content/uploads/Animal-Welfare-Board-v-A.-Nagaraja-7.5.2014.pdf> [<https://perma.cc/DJ2K-Q6GG>].

22. *See generally* Gleb Raygorodetsky, *Indigenous Peoples Defend Earth's Biodiversity— but They're in Danger*, NAT'L GEOGRAPHIC (Nov. 16, 2018), <https://www.nationalgeographic.com/environment/article/can-indigenous-land-stewardship-protect-biodiversity-> [<https://perma.cc/DB5J-7KB4>] (discussing biodiversity conservation efforts by indigenous communities); *infra* Section II.C.

I. THE EVOLUTION OF ANIMAL LAW

Approximately ten thousand years ago, humans, with largely anthropocentric incentives, began to domesticate animals to assist with activities such as plowing, transportation, and hunting.²³ Over several thousand years, however, human relationships with animals have evolved significantly,²⁴ and so too have our laws.²⁵

A. Common Law

Originally, one could only legally challenge the treatment of animals through the common law. One option was to bring a public nuisance claim.²⁶ Essentially, this meant animal abuse was only legally actionable if it consequentially harmed humans.²⁷ In 1788, for example, the Pennsylvania Supreme Court upheld a conviction for “maliciously, wilfully, and wickedly killing a horse” due to the “public wrong.”²⁸ Another option was to bring a claim of malicious mischief. There, the “wicked” or “malicious” killing of an animal was criminalized as “injury to private property.”²⁹

23. *Domestication*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/domestication> [https://perma.cc/5QJ4-6UZS].

24. See, e.g., Alejandra Canales, *Sociologist’s Research Shows How Pets Have Become Part of the Family*, CHI. TRIB. (Aug. 19, 2021), <https://www.chicagotribune.com/pets/sns-pets-are-part-of-family-research-20210819-phfik52ov5aphdewxnfxt466a-story.html> [https://perma.cc/T34K-QXPR] (research indicating that “dogs and cats[] can fill in for the child role in a family where there are no human children present”); Cassidy McCants, *Millennials Prefer Pets to Children (Survey)*, CONSUMER AFF. (May 17, 2022), <https://nypost.com/2022/05/25/millennials-love-pets-more-than-family-partners-study/> [https://perma.cc/T9ZP-MSHW] (survey finding that 57% of millennials love their pets more than their siblings, 50% love their pets more than their moms, and 30% love their pets more than their partner).

25. See *The History of Human-Animal Interaction*, ENCYCLOPEDIA, <https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/history-human-animal-interaction> [https://perma.cc/R9UY-6LBX].

26. Claire Priest, *Enforcing Sympathy: Animal Cruelty Doctrine After the Civil War*, 44 L. & SOC. INQUIRY 136, 143–44.

27. *Id.*

28. *Republica v. Teischer*, 1 U.S. 335, 338 (Pa. 1788).

29. Priest, *supra* note 26, at 145.

B. Legislation

Following the Civil War, many antebellum abolitionists pushed for a movement toward recognizing animal rights.³⁰ They “treated animal welfare as a barometer for human morality” and “believed that creaturely kindness was a marker of advanced civilization, which could rectify a fractured nation and world.”³¹ Their activism led twenty states to pass animal anticruelty laws by 1865.³² Almost a century later, Congress passed the first federal law regulating the treatment of animals, the Humane Slaughter Act of 1958 (“HSA”), in response to significant public demand.³³

In the 1960s, concern over missing pets being used in laboratories³⁴ led to the passing of the Animal Welfare Act (“AWA”).³⁵ The AWA is the first and main federal law in the United States that regulates the treatment of animals in research and exhibition.³⁶ Since its passage, the act has been amended several times to expand its reach.³⁷ Today, it is the only federal law protecting the welfare of individual zoo animals.³⁸ Under the act, dealers and exhibitors of animals are required to obtain licenses that display compliance with standards promulgated by the Secretary of Agriculture.³⁹ Critics argue, however, that the AWA has done more harm than good.⁴⁰ Such critics emphasize that the act does not adequately regulate the treatment of

30. See Janet M. Davis, *The History of Animal Protection in the United States*, AM. HISTORIAN, <https://www.oah.org/tah/issues/2015/november/the-history-of-animal-protection-in-the-united-states/> [<https://perma.cc/9U4P-ALWX>].

31. *Id.*

32. Priest, *supra* note 26, at 146; see, e.g., N.Y. REV. STAT. tit. 6, § 26 (1829) (“Every person who shall maliciously kill, maim or wound any horse, ox or other cattle, or any sheep, belonging to another, or shall maliciously and cruelly beat or torture any such animal, whether belonging to himself or another, shall, upon conviction, be adjudged guilty of a misdemeanor.”).

33. LAWRENCE W. BAKER, ANIMAL RIGHTS AND WELFARE 118 (2015). When asked about the act, President Dwight D. Eisenhower responded, “[I]f I went by mail, I’d think no one was interested in anything but humane slaughter.” *Id.*

34. Coles Phinizy, *The Lost Pets That Stray to the Labs*, VAULT (Nov. 29, 1965), <https://vault.si.com/vault/1965/11/29/the-lost-pets-that-stray-to-the-labs> [<https://perma.cc/5P9T-6QDQ>].

35. 7 U.S.C. §§ 2131–2159; 18 U.S.C. § 49.

36. 7 U.S.C. § 2131; see *Animal Welfare Act Timeline*, U.S. DEP’T OF AGRIC., <https://www.nal.usda.gov/collections/exhibits/awahistory/list> [<https://perma.cc/WH78-PVQP>].

37. See *Animal Welfare Act Timeline*, *supra* note 36.

38. See Nat’l Agric. Libr., *Animal Welfare Act*, U.S. DEP’T OF AGRIC., [https://www.nal.usda.gov/animal-health-and-welfare/animal-welfare-act#:~:text=The%20Animal%20Welfare%20Act%20\(AWA,USDA%20%2C%20APHIS%20%2C%20Animal%20Care](https://www.nal.usda.gov/animal-health-and-welfare/animal-welfare-act#:~:text=The%20Animal%20Welfare%20Act%20(AWA,USDA%20%2C%20APHIS%20%2C%20Animal%20Care) [<https://perma.cc/7RED-FCB7>].

39. 7 U.S.C. § 2133.

40. Justin Marceau, *How the Animal Welfare Act Harms Animals*, 69 HASTINGS L.J. 925, 926–27 (2018).

animals,⁴¹ and instead acts as a way for animal industries to quell public concern and avoid public accountability.⁴²

The 1970s, nicknamed the “environmental decade,” involved an unprecedented social movement of millions of Americans concerned over environmental degradation.⁴³ Consequently, this decade led to the passing of some of the most impactful and comprehensive environmental legislation in effect today.⁴⁴ These laws include the Marine Mammal Protection Act of 1972 (“MMPA”)⁴⁵ and the Endangered Species Act of 1973 (“ESA”).⁴⁶

The MMPA is the first federal act to take an ecocentric approach to wildlife conservation.⁴⁷ The act establishes a national policy to prevent marine mammal species and population stocks from diminishing “beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part.”⁴⁸ Furthermore, the act prohibits “the taking and importation of marine mammals and marine mammal products.”⁴⁹ The government may grant exceptions to this moratorium by issuing permits for circumstances including “public display.”⁵⁰ While the government has not granted a permit for public display since 1989, breeding within facilities avoids the “taking” provision and maintains captive populations of marine mammals.⁵¹ Today, the continued presence of orcas and dolphins in captivity is increasingly

41. See, e.g., *id.* at 927–28; Emily A. Beverage, *Abuse Under the Big Top: Seeking Legal Protection for Circus Elephants After ASPCA v. Ringling Brothers*, 13 VAND. J. ENT. & TECH. L. 155, 165–67 (2010); Henry Cohen, *The Animal Welfare Act*, 2 J. ANIMAL L. 13, 25 (2006); Katharine M. Swanson, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937, 949–62 (2002).

42. Marceau, *supra* note 40, at 927–28.

43. See Gaylord Nelson, *Earth Day '70: What It Meant*, ENV'T PROT. AGENCY (Apr. 1980), <https://www.epa.gov/archive/epa/aboutepa/earth-day-70-what-it-meant.html> [<https://perma.cc/6BGA-MHAG>].

44. See generally National Environmental Policy Act, 42 U.S.C. §§ 4321–4370m-12; Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675; Clean Air Act, 42 U.S.C. § 7401 *et seq.*; Clean Water Act, 33 U.S.C. §§ 1251–1389.

45. 16 U.S.C. §§ 1361–1423h.

46. 16 U.S.C. §§ 1531–1544.

47. See *id.* § 1361.

48. *Id.* § 1361(2).

49. *Id.* § 1371(a).

50. *Id.* § 1371(a)(1).

51. See Lauren Tierney, *Overview of Laws Concerning Orcas in Captivity*, ANIMAL LEGAL & HIST. CTR. (2010), <https://www.animallaw.info/article/overview-laws-concerning-orcas-captivity> [<https://perma.cc/Y4UW-7YT2>] (“The United States captive orca population has been maintained by successful captive breeding by the facilities. In fact, 50 percent of the world’s 41 captive orcas were born in captivity.”).

controversial⁵² due to the mammals' complex cognitive abilities⁵³ and high mortality rates in captivity.⁵⁴

The ESA provides a framework to conserve and protect endangered and threatened species. The act prohibits the taking or importation of endangered species⁵⁵ and requires federal agencies to ensure that their actions are not “likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of the critical habitat of such species.⁵⁶ Critics argue, however, that the ESA insufficiently protects endangered species.⁵⁷ For example, elephants, most of which are endangered or critically endangered,⁵⁸ die up to seven years sooner and reproduce poorly when captured and placed in human captivity.⁵⁹ Even so, tens of thousands of elephants remain in captivity around the world.⁶⁰

In response to statutory shortcomings, modern animal rights activists criticize highly sentient animals held within zoos and aquariums. One of the most notable examples is the 2013 documentary “Blackfish,” which exposes SeaWorld’s treatment of orcas that led to multiple human deaths.⁶¹ Additionally, in 2019, the aquarium Dolphinaris, in Scottsdale, Arizona,

52. See Laura Thomas-Walters & Diogo Verissimo, *Blackfish: How Captive Killer Whale Documentary Ended SeaWorld’s Orca Breeding Programme*, THE CONVERSATION (June 21, 2021), <https://theconversation.com/blackfish-how-captive-killer-whale-documentary-ended-seaworlds-orca-breeding-programme-161775> [<https://perma.cc/28PR-MQYQ>].

53. See Lori Marino et al., *Cetaceans Have Complex Brains for Complex Cognition*, 5 PLOS BIOLOGY 966 (2007), <https://journals.plos.org/plosbiology/article?id=10.1371/journal.pbio.005013> [<https://perma.cc/WA39-PGQ9>].

54. *Fate of Orcas in Captivity*, WHALE & DOLPHIN CONSERVATION, <https://us.whales.org/our-4-goals/end-captivity/orca-captivity/> [<https://perma.cc/3CRB-MPAW>] (presenting that 177 orcas have died in captivity, and 133 of the 166 orcas that have been taken into captivity are now dead).

55. 16 U.S.C. § 1538. The term “take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19).

56. *Id.* § 1536(a)(2).

57. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1029–36 (8th ed. 2018).

58. See *Species Directory*, WORLD WILDLIFE FUND, https://www.worldwildlife.org/species/directory?direction=desc&sort=extinction_status [<https://perma.cc/K6Z5-A268>].

59. Meilan Solly, *Captured Elephants Die Up to Seven Years Sooner than Those Bred in Captivity*, SMITHSONIAN MAG. (Aug. 8, 2018), <https://www.smithsonianmag.com/smart-news/captured-elephants-die-seven-years-sooner-those-bred-captivity-180969943/> [<https://perma.cc/2UNJ-S79Y>].

60. Campos-Arceiz, *supra* note 8.

61. BLACKFISH (Manny O Productions & CNN Films 2013).

closed following public outrage.⁶² The backlash arose out of the fact that, just two years after opening, four out of the eight dolphins at Dolphinaris were dead.⁶³ Notably, between 2016 and 2018, the United States Department of Agriculture (“USDA”), the agency that monitors compliance with the AWA, inspected Dolphinaris four times and found no violations of the AWA.⁶⁴

Most recently, controversy over the keeping of an elephant, Happy, in the Bronx Zoo has garnered national attention.⁶⁵ Critics express extreme concern over the psychological effects of Happy’s decades in captivity.⁶⁶ Yet, amongst growing public outrage, legislatures are not responding. Modern animal rights activists, consequently, are fighting for animal rights through litigation, which requires a showing that these animals have standing.

C. Statutory & Constitutional Standing

Following the enactment of animal legislation, animal rights groups have attempted to bring actions on behalf of nonhuman animals, with the animals as parties to the lawsuit.⁶⁷ In the United States, such attempts have been mostly unsuccessful.⁶⁸

In *Palila v. Hawaii Department of Land and Natural Resources*, the Ninth Circuit recognized the first nonhuman plaintiff in American history.⁶⁹ There,

62. Josh Frigerio, *One Year Later: How Are the Dolphinaris Arizona Dolphins Doing and What’s Next for the Attraction?*, ABC 15 ARIZ. (Feb. 20, 2020), <https://www.abc15.com/entertainment/events/checking-in-on-the-dolphinaris-arizona-dolphins-and-the-companys-next-plan> [https://perma.cc/5YSC-PFH8].

63. *Id.*

64. Jamie Warren & Josh Frigerio, *Documents: USDA Inspected Dolphinaris Arizona 4 Times, No ‘Critical’ Violations Found*, ABC 15 ARIZ. (Feb. 4, 2019), <https://www.abc15.com/news/region-northeast-valley/scottsdale/documents-usda-inspected-dolphinaris-arizona-4-times-no-critical-violations-found> [https://perma.cc/REH6-7EAT].

65. See, e.g., Holly Honderich, *Happy the Elephant Is Not a Person*, *New York Court Rules*, BBC (June 14, 2022), <https://www.bbc.com/news/world-us-canada-61803958> [https://perma.cc/MUV2-KFCV]; Ed Shanahan, *Happy the Elephant Isn’t Legally a Person*, *Top New York Court Rules*, N.Y. TIMES (June 14, 2022), <https://www.nytimes.com/2022/06/14/nyregion/happy-elephant-animal-rights.html>.

66. See Jill Lepore, *The Elephant Who Could Be a Person*, ATLANTIC (Nov. 16, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/happy-elephant-bronx-zoo-nhrp-lawsuit/620672/>.

67. See, e.g., *Palila v. Haw. Dep’t of Land & Nat. Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988).

68. See, e.g., *Animal Legal Defense Fund Will Seek Justice for Abused Horse in Oregon’s Highest Court*, ANIMAL LEGAL DEF. FUND (Sept. 1, 2022), <https://aldf.org/article/animal-legal-defense-fund-will-seek-justice-for-abused-horse-in-oregons-highest-court/> [https://perma.cc/SXY2-QCR2] (appealing to the Oregon Supreme Court following the dismissal of a case brought on behalf of a horse, Justice, for damages resulting from criminal neglect).

69. See *Palila*, 852 F.2d at 1107.

the palila, an endangered species of bird, was represented by the Sierra Club in an action brought under the ESA.⁷⁰ In acknowledging the animals' right to standing, the court held that the palila "has legal status and wings its way into federal court as a plaintiff in its own right."⁷¹ In subsequent cases, other nonhuman animals were also recognized as plaintiffs in actions under the ESA.⁷²

In *Citizens To End Animal Suffering & Exploitation v. New England Aquarium*, however, a Massachusetts District Court held that a dolphin had no standing to bring an action under the MMPA.⁷³ The court explained that defendants in previous cases with animal plaintiffs, such as *Palila*, had not challenged the standing of such animals.⁷⁴ The court clarified that the act only "authorizes suits brought by persons, not animals."⁷⁵

Moreover, in *Cetacean Community v. Bush*, the Cetacean Community, representative of all the world's whales, porpoises, and dolphins, sued the U.S. Navy for the use of Sonar equipment.⁷⁶ In holding that cetaceans have no standing under the ESA, the Ninth Circuit found *Palila*'s statements about animal standing to be "nonbinding dicta."⁷⁷ But the court noted that Article III of the Constitution would allow standing for an animal if Congress explicitly indicated such standing in a statute.⁷⁸ The court reasoned:

70. *Id.*

71. *Id.*

72. See *Mount Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991); *N. Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991); *N. Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988); *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1346 (N.D. Cal. 1995); *Loggerhead Turtle v. Cnty. Council of Volusia*, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995).

73. *Citizens to End Animal Suffering & Exploitation v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993).

74. *Id.*

75. *Id.*

76. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1171 (9th Cir. 2004).

77. *Id.* at 1171–74 ("Because the standing of most of the other parties was undisputed . . . no jurisdictional concerns obliged us to consider whether the Palila had standing."); see also *Lewis v. Burger King*, 344 F. App'x 470 (10th Cir. 2009) (holding that dogs have no standing under the Americans with Disabilities Act).

78. *Cetacean Cmty.*, 386 F.3d at 1175. Article III standing requires a plaintiff to show:

- (1) 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000).

[W]e see no reason why Article III [of the Constitution] prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.⁷⁹

In *Naruto v. Slater*, the Ninth Circuit again held that an animal could have Article III standing.⁸⁰ There, a crested macaque monkey, Naruto, took pictures of himself with a wildlife photographer's camera.⁸¹ The wildlife photographer, David Slater, subsequently published the photos, and People for the Ethical Treatment of Animals ("PETA") sued on behalf of Naruto for copyright infringement.⁸² While the Ninth Circuit found that Naruto had standing under Article III of the Constitution,⁸³ the court found that Naruto lacked standing under the Copyright Act.⁸⁴ In line with *Cetacean Community*, the court held that "if an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing."⁸⁵

Organizations have argued for animal standing in other areas of the Constitution as well. In *Tilikum v. Sea World Parks & Entertainment*, PETA filed a lawsuit on behalf of five orca whales in SeaWorld.⁸⁶ PETA argued that SeaWorld was violating the orcas' rights under the Thirteenth Amendment because their captivity amounted to slavery and involuntary servitude.⁸⁷ In holding that orcas have no standing under the Thirteenth Amendment, however, the Southern District of California explained that "historic and contemporary sources reveal that the terms 'slavery' and 'involuntary servitude' refer only to persons."⁸⁸ While other constitutional principles have

79. *Cetacean Cmty.*, 386 F.3d at 1176; see also Cass Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1359 (2000) ("[T]he question of whether animals have standing depends on the content of positive law. If Congress has not given standing to animals, the issue is at an end.").

80. *Naruto v. Slater*, 888 F.3d 418, 424 (9th Cir. 2018).

81. *Id.* at 420.

82. *Id.*

83. *Id.* at 424.

84. *Id.* at 426.

85. *Id.*

86. *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Ent., Inc.*, 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012).

87. *Id.* at 1261.

88. *Id.* at 1263. Constitutional amendments are not always limited in application to humans. See generally *Citizens United v. FEC*, 558 U.S. 310 (2010) (holding that corporations have right to free speech equal to that of individuals).

evolved with changing societal and cultural beliefs,⁸⁹ the court explained that “[t]he [Thirteenth] Amendment’s language and meaning is clear, concise, and not subject to the vagaries of conceptual interpretation.”⁹⁰

II. HABEAS CORPUS STANDING FOR HIGHLY SENTIENT ANIMALS

Due to statutory and constitutional standing issues under subject-matter specific statutes, animal rights advocates are now using habeas corpus as a mechanism to attempt to free highly sentient animals from captivity.

A. Sentience in Highly Cognitive Animals

In recent years, overwhelming scientific consensus provides that a handful of animals have complex sentience and cognitive abilities. These animals generally include cetaceans, elephants, and apes.⁹¹ Recent research on cetaceans is instructive.

Cetaceans are known for being some of the most intelligent species on Earth. Orcas, for example, have cerebral folding that is more impressive than a human brain.⁹² Further, whales have the most complex insular cortex in the world, which is the part of the brain that processes feelings such as consciousness, self-awareness, empathy, and compassion.⁹³ In fact, bottlenose dolphins can recognize themselves in a mirror when they are as

89. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (separate but equal doctrine); *Miranda v. Arizona*, 384 U.S. 436 (1966) (protections for criminal defendants).

90. *Tilikum*, 842 F. Supp. 2d at 1264.

91. See Gerald Roth, *Convergent Evolution of Complex Brains and High Intelligence*, 370 PHIL. TRANSACTIONS ROYAL SOC’Y B: BIOLOGICAL SCIS., Dec. 2015, at 1, <https://royalsocietypublishing.org/doi/10.1098/rstb.2015.0049>; Marino et al., *supra* note 53, at 967. “Cetaceans” refers to whales, dolphins, and porpoises. “Elephants” refers to Asian and African elephants. “Apes” refers to gorillas, orangutans, bonobos, chimpanzees, and gibbons.

92. See Lori Marino et al., *Neuroanatomy of the Killer Whale (Orcinus Oca) from Magnetic Resonance Images*, 281A ANATOMICAL RECORD PART A: DISCOVERIES MOLECULAR CELLULAR & EVOLUTIONARY BIOLOGY 1256, 1262 (2004), <https://anatomypubs.onlinelibrary.wiley.com/doi/10.1002/ar.a.20075>; K.E. Garcia et al., *Mechanics of Cortical Folding: Stress, Growth and Stability*, 373 PHIL. TRANSACTIONS ROYAL SOC’Y B: BIOLOGICAL SCIS., Nov. 2018, at 1, <https://royalsocietypublishing.org/doi/10.1098/rstb.2017.0321>.

93. Marino et al., *supra* note 92; *How the Insular Cortex Works: 7 Functions of the Insular Cortex*, MASTERCLASS (Jun. 7, 2021), <https://www.masterclass.com/articles/insular-cortex-explained>.

young as seven months old.⁹⁴ Comparatively, it takes human babies eighteen months to do so.⁹⁵ Whales are also known to show familial connections similar to those of humans: One orca whale made headlines when she was observed carrying her dead calf's body in the Pacific Ocean for seventeen days.⁹⁶

Furthermore, whales have complex vocal communications. Bottlenose dolphins, for example, use unique vocal labels to address each other.⁹⁷ Additionally, a recent study found that humpback whales sing songs spread across the entirety of the Pacific Ocean as they are passed along from population to population.⁹⁸ Researchers have found “a complex, language-like structure in these songs.”⁹⁹

While each species is unique, elephants¹⁰⁰ and monkeys¹⁰¹ display comparable cognitive, social, and intellectual capabilities to cetaceans. Due to their complex cognitive abilities, captivity has shown to be extremely

94. See generally Diana Reiss & Lori Marino, *Mirror Self-Recognition in the Bottlenose Dolphin: A Case of Cognitive Convergence*, 98 PROCS. NAT'L ACAD. SCI. 5937 (2001).

95. *Id.*

96. Lori Cuthbert & Douglas Main, *Orca Mother Drops Calf, After Unprecedented 17 Days of Mourning*, NAT'L GEOGRAPHIC (Aug. 13, 2018), <https://www.nationalgeographic.com/animals/article/orca-mourning-calf-killer-whale-northwest-news> [https://perma.cc/N6GZ-B3X5].

97. Stephanie L. King & Vincent M. Janik, *Bottlenose Dolphins Can Use Learned Vocal Labels To Address Each Other*, 110 PROCS. NAT'L ACAD. SCI. 13216, 13216 (2013).

98. Josephine N. Schulze et al., *Humpback Whale Song Revolutions Continue To Spread from the Central to the Eastern South Pacific*, 9 ROYAL SOC'Y OPEN SCI., Aug. 31, 2022, at 1–2.

99. Carl Zimmer, *Humpback Whales Pass Their Songs Across Oceans*, N.Y. TIMES (Sept. 4, 2022), <https://www.nytimes.com/2022/08/30/science/humpback-whale-songs-cultural-evolution.html> (“The whales combine short sounds, which scientists call units, into phrases. They then combine the phrases into themes. And each song is made of several themes.”).

100. See, e.g., Preston Foerder et al., *Insightful Problem Solving in an Asian Elephant*, NAT'L LIBR. MED. (Aug. 18, 2011), <https://pubmed.ncbi.nlm.nih.gov/21876741/#:~:text=Abstract,been%20referred%20to%20as%20insight> [https://perma.cc/56KB-97YX].

101. See, e.g., *Social Cognition in Monkeys*, CMTY. RSCH. DEV. INFO. SERVS. (July 17, 2017), <https://cordis.europa.eu/article/id/201332-social-cognition-in-monkeys> [https://perma.cc/6K9B-AG2U]; *Monkeys Outperform Humans When It Comes to Cognitive Flexibility*, SCI. DAILY (Oct. 15, 2019), <https://www.sciencedaily.com/releases/2019/10/191015115356.htm> [https://perma.cc/ZB24-DKQZ].

detrimental to the psychological health of highly sentient animals, including orcas,¹⁰² elephants,¹⁰³ and chimpanzees.¹⁰⁴

Signs of mental illness are prominent in highly sentient animals in captivity. Orcas, for example, show aggressive behavior towards humans with whom they have previously established close bonds.¹⁰⁵ Such aggression was shown in the infamous incident where an orca at SeaWorld dragged its trainer underwater and shook her violently, eventually killing her.¹⁰⁶ Studies have also found chimpanzees in captivity to display behaviors that suggest mental illness.¹⁰⁷ Under one study, observed behaviors included “self-mutilation, repetitive rocking, and consumption of feces.”¹⁰⁸ Notably, these behaviors were present even though the chimpanzees were kept in “the best captive conditions.”¹⁰⁹

Furthermore, holding elephants in exhibitions without other elephants is comparable to the psychological torture that a human would feel in solitary confinement:

Decades of research indicates that anyone who spends more than 10 days in involuntary solitude suffers at least some emotional, cognitive, social, and physical health effects, ranging from trouble sleeping to panic attacks and hallucinations . . . “From everything we know about the brain, there’s no reason to think that an

102. Lori Marino et al., *The Harmful Effects of Captivity and Chronic Stress on the Well-Being of Orcas (Orcainus Orca)*, 35 J. VETERINARY BEHAV. 69 (2020), <https://www.sciencedirect.com/science/article/abs/pii/S1558787819300164> [<https://perma.cc/6QK6-FGXP>].

103. Brian J. Greco et al., *The Days and Nights of Zoo Elephants: Using Epidemiology To Better Understand Stereotypic Behavior of African Elephants (Loxodonta Africana) and Asian Elephants (Elephas Maximus) in North American Zoos*, PLOS ONE (July 14, 2016), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0144276> [<https://perma.cc/9MDQ-LGZA>].

104. Lucy P. Birkett & Nicholas E. Newton-Fisher, *How Abnormal Is the Behavior of Captive, Zoo-Living Chimpanzees?*, NAT’L LIBR. MED. (June 16, 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3116814/> [<https://perma.cc/NE5E-DWE2>].

105. Robert Anderson et al., *Orca Behavior and Subsequent Aggression Associated with Oceanarium Confinement*, NAT’L LIBR. MED. (Aug. 18, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4997274/> [<https://perma.cc/G56K-GCKF>].

106. John Couwels & Brian Todd, *SeaWorld Trainer Killed by Killer Whale*, CNN (Feb. 25, 2010), <http://www.cnn.com/2010/US/02/24/killer.whale.trainer.death/index.html> [<https://perma.cc/3YXG-UZ5B>].

107. Jennifer Viegas, *Captivity Affects Zoo Chimps’ Mental Health*, NBC NEWS (July 5, 2011), <https://www.nbcnews.com/id/wbna43641745> [<https://perma.cc/W8U2-2JB3>].

108. *Id.*

109. *Id.* (explaining that the chimpanzees were “socially housed, fed a varied diet according to a varied schedule, [and] provided with environmental enrichment”).

elephant brain would react any differently to solitary confinement than a human brain”¹¹⁰

Elephants are extremely social creatures that get most of their brain stimulation from interacting with other elephants.¹¹¹ Consequently, studies have found captivity to alter elephants’ brains.¹¹² For example, “lack of stimulation caused by long-term isolation can trigger pacing, head bobbing, rocking, or swaying, among other repetitive behaviors.”¹¹³ Currently, there are at least nine elephants held in zoos without other elephant companions.¹¹⁴

In response to the scientific consensus of complex cognition in certain animals, animal rights advocates have begun to file habeas corpus petitions on behalf of such animals in captivity.

B. U.S. Habeas Corpus Standing

A writ of habeas corpus, nicknamed the “Great Writ,” is designed to relieve persons from oppressive confinement by requiring that their custodians produce them before the issuing court and establish a lawful basis for continued custody.¹¹⁵ Originating in English common law, habeas corpus was introduced in the United States through the Suspension Clause of the Constitution, which states, “The Privileges of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹¹⁶ While the Constitution does not explicitly create a right to habeas corpus relief, subsequent federal¹¹⁷ and state¹¹⁸ statutes have done so.

Federal and state statutes refer to petitioners of habeas corpus as “persons.” Under the federal statute, “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”¹¹⁹ The statute goes on to describe

110. Fobar, *supra* note 9.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* Asha, a female elephant, has been confined mostly alone for over thirty years at the Natural Bridge Zoo. *Id.*

115. *See generally* Carbo v. United States, 364 U.S. 611, 618 (1961).

116. U.S. CONST. art. I, § 9, cl. 2.

117. *See* 28 U.S.C. §§ 2241–2256.

118. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-4121 to -4147.

119. 28 U.S.C. § 2241(a).

the procedural process for “persons” filing such petitions.¹²⁰ State statutes also refer to petitioners as “persons.” For example, Arizona’s statute reads, “[a] *person* unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may petition for and prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint.”¹²¹

The history of habeas corpus jurisprudence demonstrates evolution in the doctrine. While habeas corpus applies to “persons,” throughout history, it has also been used to free individuals who, at the time, were not considered to be persons but property.¹²² In fact, courts’ recognition of the legal personhood of slaves with respect to habeas corpus was largely attributable to evolving social norms and explicit disapproval of the lack of rights granted to African Americans.¹²³

In an attempt to extend habeas corpus further, contemporary animal rights activists have filed various writs of habeas corpus on behalf of animals in captivity.¹²⁴ Multiple state courts have considered the ability of an animal to file a writ of habeas corpus, and all of them have found that nonhuman animals do not qualify as “persons” under the doctrine.¹²⁵ The consensus, as is reflected by the most recent case coming from the New York Court of Appeals, is that animals cannot be legal persons because they do not bear any legal duties, do not submit to societal responsibilities, and cannot be held legally accountable for their actions.¹²⁶

120. *See, e.g., id.* § 2242 (“Application for a writ of habeas corpus shall be in writing signed and verified by the *person* for whose relief it is intended or by someone acting in his behalf.” (emphasis added)).

121. ARIZ. REV. STAT. ANN. § 13-4121 (emphasis added). For information on differences between state and federal habeas corpus, see Christopher E. Smith & Darwin L. Burke, *Judges’ Views on Habeas Corpus: A Comparison of State and Federal Judges*, 22 OKLA. CITY U.L. REV. 1125, 1125–42 (1997).

122. *See, e.g.,* Christine Buckley, *A Judgment on Behalf of Humanity*, UCONN TODAY (Mar. 28, 2016), <https://today.uconn.edu/2016/03/a-judgment-on-behalf-of-humanity/> [https://perma.cc/L6G6-NXVN] (habeas corpus used to free a slave); United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 700–01 (C.C.D. Neb. 1879) (No. 14,891) (habeas corpus used to free Native Americans); PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 46–47 (2010) (use of habeas corpus to free women and children).

123. *See, e.g.,* Lemmon v. People, 20 N.Y. 562, 617 (N.Y. 1860). In the granting of a habeas corpus petition on behalf of eight slaves, the Court reasoned, “slavery is repugnant to natural justice and right, has no support in any principle of international law, and is antagonistic to the genius and spirit of republican government.” *Id.*

124. *See Challenging the Rightlessness of Nonhuman Animals*, NONHUMAN RTS. PROJECT, <https://www.nonhumanrights.org/litigation/> [https://perma.cc/2X32-U3VR].

125. *See, e.g.,* In re Nonhuman Rts. Project, Inc. v. Breheny, 38 N.Y.3d 555, 570–71 (2022).

126. *Id.* at 572.

Still, this has not stopped the Nonhuman Rights Project (“NhRP”) from continuing to file petitions for habeas corpus.¹²⁷ The NhRP, founded in 1995 by Steven Wise, aims to establish fundamental rights for certain animals “for whom there is robust, abundant scientific evidence of self-awareness and autonomy.”¹²⁸ While its current clients are chimpanzees and elephants, potential clients include orangutans, gorillas, bonobos, dolphins, and whales.¹²⁹

Throughout the 2010s, the NhRP filed writs of habeas corpus in New York on behalf of four chimpanzees in captivity in *Lavery I* and *Lavery II*.¹³⁰ The NhRP alleged that one of the chimpanzees, Tommy, was kept in a warehouse.¹³¹ Another chimpanzee, Kiko, was alleged to be “in a cage in a cement storefront in a crowded residential area.”¹³² Lastly, two chimpanzees, Hercules and Leo, were alleged to be confined at the State University of New York for research purposes.¹³³ While not disputing the highly cognitive and social capabilities of chimpanzees, the courts found that chimpanzees do not meet the definition of “person” in the habeas corpus statutes, even though “person” is not defined in such statutes.¹³⁴ Emphasizing originalism, the courts found that there is no evidence that the legislature intended for the Constitution to apply to nonhuman animals.¹³⁵ Moreover, the Third Department of the New York Supreme Court maintained that granting rights to animals who cannot have legal duties and responsibilities is inconsistent with social contract theory.¹³⁶

In a case that garnered national attention, *Nonhuman Rights Project, Inc. v. Breheny*, the NhRP filed a petition for habeas corpus on behalf of Happy, an Asian elephant.¹³⁷ Happy has been held at the Bronx Zoo for the past forty-five years.¹³⁸ For close to twenty years, Happy has been confined in an

127. See *Challenging the Rightlessness of Nonhuman Animals*, *supra* note 124.

128. *Frequently Asked Questions*, NONHUMAN RTS. PROJECT, <https://www.nonhumanrights.org/frequently-asked-questions/> [<https://perma.cc/8P6J-4GHK>].

129. *Id.*; see *Our Clients*, NONHUMAN RTS. PROJECT, <https://www.nonhumanrights.org/our-clients/> [<https://perma.cc/K6VV-92HS>].

130. *People ex rel. Nonhuman Rts. Project, Inc. v. Lavery (Lavery I)*, 998 N.Y.S.2d 248, 250 (N.Y. App. Div. 2014); *Nonhuman Rts. Project, Inc. ex rel. Tommy v. Lavery (Lavery II)*, 54 N.Y.S.3d 392, 394 (N.Y. App. Div. 2017).

131. *Lavery II*, 54 N.Y.S.3d at 394.

132. *Id.*

133. *Id.*

134. See, e.g., *id.* at 395.

135. See *id.* at 396.

136. See *Lavery I*, 998 N.Y.S.2d 248, 250 (N.Y. App. Div. 2014).

137. *In re Nonhuman Rts. Project, Inc. v. Breheny*, 38 N.Y.3d 555, 556 (2022).

138. *Id.* at 567.

enclosure without an elephant companion.¹³⁹ In arguing for her transfer to an elephant sanctuary, the NhRP presented extensive evidence of elephant intelligence and the need for socialization.¹⁴⁰ Moreover, the NhRP pointed to an experiment where Happy was able to recognize herself in a mirror—a capability that displays self-awareness.¹⁴¹

Happy's case made it to the highest court of New York, where the court held that Happy had no standing to bring a writ of habeas corpus due to an animal's inability to have legal duties or responsibilities.¹⁴² The court explained:

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.¹⁴³

In a passionate dissent, Justice Wilson argued that Happy qualified as a person for purposes of habeas corpus.¹⁴⁴ He explained that one is not required to have legal duties to have rights, as is exemplified by rights that society grants to children, mentally handicapped persons, and animals.¹⁴⁵ Moreover, Justice Wilson argued that habeas corpus has evolved and must continue to evolve with society's changing norms.¹⁴⁶ He emphasized the historic evolution of the use of habeas corpus to free persons considered as property, such as slaves, women, and children.¹⁴⁷ Today, Justice Wilson argued, society is evolving to recognize rights of animals in certain circumstances.¹⁴⁸

In response to the lack of habeas corpus jurisprudence to free animals, Justice Wilson posited:

The novelty of an issue does not doom it to failure . . . The majority's argument—"this has never been done before"—is an argument against all progress, one that flies in the face of legal history. The correct approach is not to say, "this has never been

139. *Id.* at 618 (Wilson, J., dissenting).

140. *Id.* at 634–37.

141. *Id.* at 619.

142. *Id.* at 565 (majority opinion).

143. *Id.* at 571.

144. *Id.* at 626 (Wilson, J., dissenting).

145. *Id.* at 587–88.

146. *Id.* at 613.

147. *Id.* at 588–89.

148. *Id.* at 603; *see id.* at 576 (majority opinion) (describing the use of court hearings to determine the best interests of animals in divorces and the use of trusts for animals).

done” and then quit, but to ask, “should this now be done even though it hasn't before, and why?”¹⁴⁹

Other states have also considered habeas corpus standing for elephants. In *Rowley v. City of New Bedford*, for example, the Massachusetts Court of Appeals denied standing for two elephants, Ruth and Emily, holding that the term “persons” is synonymous with “human beings” with respect to habeas corpus petitions.¹⁵⁰ Today, legal personhood for highly cognitive animals in habeas corpus proceedings is a continuing issue presented in courts across the country. In fact, the NhRP is currently appealing the denial of a habeas corpus petition filed in California on behalf of three elephants named Nolwazi, Amahle, and Mabu.¹⁵¹ Most recently, the NhRP filed petitions for habeas corpus in June and October of 2023 on behalf of elephants held in Colorado and Hawaii zoos.¹⁵²

C. Animal Rights in Foreign Nations

While the United States has not recognized legal personhood and liberty interests of nonhuman animals, other nations have.

Native tribes have long recognized rights of not only animals, but nature. Many indigenous societies treat animals as having equal status to humans,¹⁵³ and some indigenous hunters consider animals as their “kin.”¹⁵⁴ Such hunters

149. *Id.* at 584 (Wilson, J., dissenting).

150. *Rowley v. City of New Bedford*, 159 N.E.3d 1085 (Mass. App. Ct. 2020) (unpublished table decision); *see also* Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc., 216 A.3d 839, 845–47 (Conn. App. Ct. 2019) (holding that three elephants at the Commerford Zoo had no standing to bring a writ of habeas corpus).

151. *See Amahle, Nolwazi, and Mabu: Denied Family and Freedom*, NONHUMAN RTS. PROJECT, <https://www.nonhumanrights.org/clients-nolwazi-amahle-vusmusi/> [<https://perma.cc/2K68-9J52>].

152. *Jambo, Kimba, LouLou, Lucky, and Missy: Five Female African Elephants Separated from Their Herds as Babies*, NONHUMAN RTS. PROJECT, <https://www.nonhumanrights.org/client/cheyenne-mt-zoo-elephants/> [<https://perma.cc/83EM-8GAN>]; *Mari and Vaigai: Two Female Asian Elephants Who Were Taken from the Wild and Shipped to the Honolulu Zoo as ‘Gifts’ from the Indian Government*, NONHUMAN RTS. PROJECT, <https://www.nonhumanrights.org/client/mari-and-vaigai/> [<https://perma.cc/RNA2-B2PN>].

153. Roger Boyd, *The Indigenous and Modern Relationship Between People and Animals*, RESILIENCE (Jan. 17, 2014), <https://www.resilience.org/stories/2014-01-17/the-indigenous-and-modern-relationship-between-people-and-animals/> [<https://perma.cc/A3J3-PSB9>]. For example, the Alaskan Yup'ik Eskimo tribe describe animals as “non-human persons” and emphasize the similarities between humans and animals rather than the differences. *Id.*

154. Larry Moore, *Ancestral Teachings Keep Hunters Connected to the Land*, U.S. DEP'T OF AGRIC. (July 29, 2021), <https://www.usda.gov/media/blog/2019/11/21/ancestral-teachings-keep-hunters-connected-land> [<https://perma.cc/AN68-WQW7>].

emphasize the importance of not allowing the animals to suffer as well as using every part of an animal killed.¹⁵⁵ While tribal laws vary, some “appear to advance the standing of animals by defining animals as living sentient beings, rather than as the personal property of a tribal member.”¹⁵⁶

The Rights of Nature, a legal doctrine recognizing the presence of fundamental rights in ecosystems, has roots in indigenous traditions.¹⁵⁷ Such traditions “have always treated humans as part of nature, rather than distinct from it.”¹⁵⁸ Today, these beliefs have transformed into Native legislation recognizing rights of nature. The Navajo Nation’s code, for example, includes a law stating, “All creation, from Mother Earth and Father Sky to the animals, those who live in water, those who fly and plant life have their own laws and have rights and freedoms to exist”¹⁵⁹ Other nations, including Ecuador and Bolivia, have recognized rights of nature through constitutional provisions and legislation.¹⁶⁰

Several countries have recognized constitutional protections for animals. Animals are protected in the constitutions of Switzerland, India, Brazil, Slovenia, Germany, Luxembourg, Austria, Egypt, and Russia.¹⁶¹ Notably, in 2014, the India Supreme Court held that the Indian Constitution’s due process clause applies to all species.¹⁶² Additionally, the court interpreted the *parens patriae* doctrine as requiring the court “to take care of the rights of animals, since they are unable to take care of themselves as against human beings.”¹⁶³

Some countries have also granted writs of habeas corpus on behalf of animals. In 2016, an Argentinian court granted a habeas petition brought on

155. *Id.* (“After the hunt, [the Nez Perce Indian hunters] would pray or sing a song to thank the animal for giving its life for them. They would also use every part of the animal, partly out of utility, but mostly out of respect.”).

156. Rob Roy Smith, *At a Complex Crossroads: Animal Law in Indian Country*, 14 *ANIMAL L.* 109, 116 (2007).

157. Kristen Stilt, *Rights of Nature, Rights of Animals*, 134 *HARV. L. REV. F.* 276, 279 (2021).

158. *Id.* at 278.

159. NAVAJO NATION CODE ANN., tit. I, § 205(C) (2023); see also Jessica Douglas, *Wild Rice Sues To Stop Oil Pipeline*, *HIGH COUNTRY NEWS* (Sept. 2, 2021), <https://www.hcn.org/articles/latest-justice-wild-rice-sues-to-stop-oil-pipeline> [<https://perma.cc/68KN-RHJ6>] (“In 2018, the White Earth Band of Ojibwe and the 1855 Treaty Authority, an organization that upholds treaty rights for Chippewa bands, enacted legal personhood for manoomin—wild rice.”).

160. Stilt, *supra* note 157, at 279. Notably, Columbia, Ecuador, India, New Zealand, Bangladesh, and the United States have all granted legal personhood to certain rivers. *Id.* at 281.

161. *Id.* at 277.

162. *Animal Welfare Bd. of India v. A. Nagaraja*, 7 SCC 547 ¶ 62 (2014) (India).

163. *Id.* ¶ 26.

behalf of a chimpanzee named Cecilia.¹⁶⁴ There, the court ordered Cecilia to be transferred from the zoo she was confined in and into a sanctuary in Brazil.¹⁶⁵ The court emphasized the need for the law to evolve as “societies evolve in their moral conducts, thoughts, and values.”¹⁶⁶ The court explained:

At present, we can see an awareness of situations and realities that although are [sic] have been happening since unmemorable times, they were not recognized by social figures. That is the case of gender violence, marriage equality, equal voting rights, etc. There is an identical situation with the awareness of animal rights.¹⁶⁷

Furthermore, the court acknowledged that animals were not to be considered the same as humans but as “non human legal persons” with “the inherent rights of sentient beings.”¹⁶⁸

In 2017, the Supreme Court of Columbia granted a habeas corpus petition brought on behalf of a bear named Chucho.¹⁶⁹ There, the Court ordered Chucho to be transferred to a more suitable habitat, preferably the Río Blanco Natural Reserve.¹⁷⁰ Taking an anthropocentric approach, the court emphasized that humanity must make nature resilient for the collective good and to preserve it as a habitat for human survival “instead of barbarically destroying it.”¹⁷¹ In contrast to previous Columbian law, the court held that animals are not “things” but instead “sentient subjects of rights.”¹⁷² In recognizing nonhuman legal personhood, the court explained that animals would not bear the same rights as humans, but “rather those which correspond to, or are fitting to or suit their species, rank and group.”¹⁷³ This decision was subsequently nullified, however, by the Colombian Constitutional Court on

164. Tercer Juzgado de Garantías [Third Court of Guarantees], 3/11/2016, “Presented by AFADA About the Chimpanzee ‘Cecilia’ Nonhuman Individual,” File No. P.72.254/15, 32 (Arg.), https://www.nonhumanrights.org/wp-content/uploads/Chimpanzee-Cecilia_translation-FINAL-for-website-2.pdf [<https://perma.cc/FU6N-SFK9>].

165. *Id.*

166. *Id.* at 19.

167. *Id.* at 20.

168. *Id.* at 24, 28.

169. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Civil Cassation Chamber, julio 26, 2017, AHC4806-2017, 16 (Colom.), <https://www.animallaw.info/sites/default/files/Colombia%20Spectacled%20Bear%20Case%20English%20Translation%20AHC%204806-2017.pdf> [<https://perma.cc/9U66-78PV>].

170. *Id.* at 16–17.

171. *Id.* at 6.

172. *Id.* at 9.

173. *Id.* at 7.

due process grounds.¹⁷⁴ In invalidating the decision, the Magistrate emphasized that the question of animals in captivity should be left to broad, deliberative processes within the public, not the judiciary.¹⁷⁵

In 2020, a Pakistani court ordered the transfer of an elephant named Kaavan from the Islamabad Zoo into a sanctuary.¹⁷⁶ In light of the ongoing COVID-19 pandemic, the court posited:

Has nature forced the human race to go into ‘captivity’ so as make it realize its dependence for survival on other beings possessed with a similar gift i.e [sic] life? Is it an opportunity for humans to introspect and relate to the pain and distress suffered by other living beings, animal species, when they are subjugated and kept in captivity and denied the conditions and habitats created for their survival by the Creator, merely for momentary entertainment?¹⁷⁷

Recognizing an animal’s ability to feel “pain or joy,” the Pakistani court held that animals are sentient beings with “natural rights” to live in an environment that meets their “behavioral, social and physiological needs.”¹⁷⁸ Furthermore, recognizing anthropocentric ideals, the court found that habitat degradation, cruel treatment, and neglect of animals “violates the fundamental right to life of a human.”¹⁷⁹

As discussed above, many nations have evolved substantially in recent years to advance their understandings of animal rights. Comparable modern animal rights in the United States are nonexistent.

III. INADEQUACIES OF U.S. ANIMAL LAW

Both U.S. legislation and common law are inadequate in protecting nonhuman animals from suffering in captivity. U.S. legislation has significant flaws in its administration and is outdated in light of modern understandings of animal sentience. Moreover, the inability of highly cognitive animals to have habeas corpus standing exacerbates the shortcomings of such legislation.

174. See generally Corte Constitucional [C.C.] [Constitutional Court], enero 23, 2020, Sentencia SU016/20 (Colom.), <https://www.nonhumanrights.org/wp-content/uploads/Chucho-decision-translated.pdf> [<https://perma.cc/7RUZ-C3RM>].

175. *Id.* at 30.

176. Islamabad Wildlife Mgmt. Bd. v. Metro. Corp. Islamabad, W.P. No. 1155/2019 (Islamabad High Ct.) (May 21, 2020) (Pak.).

177. *Id.* at 3.

178. *Id.* at 59–60.

179. *Id.* at 56, 61.

A. Legislation

The AWA, the MMPA, and the ESA do not protect captive animals from suffering. While these acts provide important protections for animals, they remain grossly deficient.

The AWA, the sole law regulating the treatment of animals in captivity, in practice acts as a deflection mechanism. The Act is supposed to protect the welfare of animals that are subjects of research and exhibition by requiring dealers and exhibitors to obtain certain licenses.¹⁸⁰ But compliance with the AWA is frequently used to thwart public outrage over the problematic treatment of animals in captivity.¹⁸¹ Zoos frequently deploy their AWA compliance “as an argument against providing transparency in their animal handling practices, as a sound bite in the media to quell public concern, and even as a basis for defamation actions and related litigation against animal protection groups who criticize the treatment of confined animals.”¹⁸² In fact, the New York Court of Appeals emphasized the Bronx Zoo’s compliance with the AWA when denying Happy’s petition for habeas corpus.¹⁸³

But compliance with the AWA does not indicate the protection of animals in the way that the public may think. Indeed, the USDA, the agency charged with enforcing the AWA, is known to prioritize business interests over animal welfare.¹⁸⁴ In a 2017 inspection of Monterey Zoo, for example, federal officials found:

[A] squirrel monkey, kept alone in a cage, with a chain dangling from its waist. An elderly kangaroo was “exhibiting tremors and vision loss[.]” . . . A rodent died after several days of declining health, without receiving veterinary care. . . . Nearly all the zoo’s medications had expired; elephants had an itchy, painful skin condition; and a muntjac, or barking deer, had overgrown hooves that hadn’t been tended.¹⁸⁵

Even so, the memorandum of the inspection included no mention of infractions and noted that all pictures from the inspection were discarded.¹⁸⁶

180. 7 U.S.C. § 2133.

181. Marceau, *supra* note 40, at 928.

182. *Id.* at 928.

183. *In re Nonhuman Rts. Project, Inc. v. Breheny*, 38 N.Y.3d 555, 567 (2022).

184. Rachel Fobar, *USDA Accused of Ignoring Animal Welfare Violations in Favor of Business Interests*, NAT’L GEOGRAPHIC (Oct. 13, 2021), <https://www.nationalgeographic.com/animals/article/usda-accused-of-ignoring-animal-welfare-for-business-interests> [https://perma.cc/3U5F-SCXP].

185. *Id.*

186. *Id.*

When questioned on the conditions of the zoo, the founding director of the zoo emphasized that the zoo had been given a clean report.¹⁸⁷ Notably, enforcement actions brought by the USDA against animal facilities fell by ninety percent from 2015 to 2020.¹⁸⁸

Moreover, the MMPA and ESA do not adequately protect animals in captivity. Both of these statutes were passed with an intent to prevent certain species from diminishing below crucial levels.¹⁸⁹ But research shows that whales and elephants, both endangered species,¹⁹⁰ die at substantially higher rates when they live in captivity compared to in the wild.¹⁹¹ Even so, the Fish and Wildlife Service (“FWS”) offers permits for zoological use of threatened species.¹⁹² Additionally, in response to the “take” provisions in the ESA and MMPA,¹⁹³ zoos and aquariums have implemented captive breeding programs to maintain their captive collection without having to “take” animals from the wild.¹⁹⁴ The FWS, approving of this practice, claims that permits for captive-bred endangered species are not intended to be used to breed animals as pets, but are instead aimed “at conservation of the species and recovery of wild populations.”¹⁹⁵

Captive breeding programs, however, often do not lead to effective reintroduction into the wild. For example, of the fifty-three orcas currently in

187. *Id.*

188. *Id.*

189. 16 U.S.C. §§ 1361, 1531.

190. See Dinah V. Pulver, ‘Things Are Grim for the Species’: Endangered Right Whales Continue To Decline in Atlantic, USA TODAY (Oct. 25, 2022), <https://www.usatoday.com/story/news/nation/2022/10/25/endangered-right-whale-population-declines-atlantic/10588097002/> [<https://perma.cc/P2BN-5EAH>]; *Species Directory*, *supra* note 58.

191. Madison Coleman, *Mistreatment of Wild Animals in Captivity*, BALLARD BRIEF (Apr. 2021), <https://ballardbrief.byu.edu/issue-briefs/mistreatment-of-wild-animals-in-captivity> [<https://perma.cc/9KTB-ARVE>]; Todd R. Robeck et al., *Comparisons of Life-History Parameters Between Free-Ranging and Captive Killer Whale (Orcinus Orca) Populations for Application Toward Species Management*, NAT’L LIBR. OF MED. (Sept. 29, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4668992/> [<https://perma.cc/M4RG-6BK9>]; Mirkka Lahdenperä et al., *Differences in Age-Specific Mortality Between Wild-Caught and Captive-Born Asian Elephants*, 9 NATURE COMM’NS 1 (2018).

192. *Endangered Species Permits: Frequently Asked Questions*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/node/267045#:~:text=Captive%2Dbred%20wildlife%20permits%20are,and%20recovery%20of%20wild%20populations> [<https://perma.cc/9JH6-HPC5>].

193. 16 U.S.C. §§ 1538, 1371(a); see also § 1532(19).

194. Isabella Langone, *Changing Tides for Captive Marine Mammals: What the Future Holds for Captive Care Requirements*, 68 HASTINGS L.J. 419, 420 (2017).

195. *Endangered Species Permits: Frequently Asked Questions*, *supra* note 192.

captivity, thirty-one were born in captivity.¹⁹⁶ While public outrage has led aquariums such as SeaWorld to end their captive breeding program, there are still no plans to introduce the orcas into the wild (or alternatively, a sanctuary).¹⁹⁷ Loopholes in the ESA have also led to a crisis concerning captive tigers in the United States.¹⁹⁸ Over the past century, the population of tigers, an endangered species, has declined by ninety-seven percent.¹⁹⁹ While the number of wild tigers has decreased substantially, the number of tigers kept in captivity has skyrocketed.²⁰⁰ Due to captive breeding, there are now more captive tigers held in private facilities than there are tigers in the wild.²⁰¹ After a closer look, captive breeding appears to be a method for economic gain masked in a façade of conservation. The use of captive breeding in zoos to maintain a supply of animal entertainment, therefore, is inconsistent with the purpose of the ESA and the MMPA.²⁰²

Finally, the inability for animals to have standing under these acts further diminishes their purpose. Without animal standing, enforcement of legislation is left to humans seeking redress under citizen suit provisions²⁰³ or the Administrative Procedures Act (“APA”).²⁰⁴ These mechanisms for standing focus on injury to individual humans instead of animals and thereby preclude rightful litigation where a “clear, particularized link” does not exist “between the harm done and the human plaintiff.”²⁰⁵

B. Common Law

The inability of highly cognitive animals to have habeas corpus standing exacerbates the shortcomings of animal legislation in the United States. Captivity is shown to be extremely detrimental to the psychological health of

196. *Fate of Orcas in Captivity*, *supra* note 54.

197. J. Freedom du Lac & Lindsey Bever, *SeaWorld Ends Captive Breeding Program, Says Current Batch of Killer Whales ‘Will Be the Last,’* WASH. POST (Mar. 17, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/03/17/seaworld-says-its-current-generation-of-killer-whales-will-be-the-last/> [https://perma.cc/Z92F-4G3U].

198. Carney Anne Nasser, *Welcome to the Jungle: How Loopholes in the Federal Endangered Species Act and Animal Welfare Act Are Feeding a Tiger Crisis in America*, 9 ALB. GOV’T L. REV. 194, 198 (2016).

199. *Id.* at 195.

200. *Id.* at 196–97.

201. *See id.*

202. *See, e.g.*, Langone, *supra* note 194, at 422.

203. *See, e.g.*, 16 U.S.C. § 1540(g) (citizen suit provision of the ESA).

204. 5 U.S.C. § 702.

205. Katherine A. Burke, *Can We Stand for It? Amending the Endangered Species Act with an Animal-Suit Provision*, 75 U. COLO. L. REV. 633, 656 (2004).

highly sentient animals, including orcas,²⁰⁶ elephants,²⁰⁷ and chimpanzees.²⁰⁸ Moreover, even if the government were to enforce existing U.S. legislation appropriately, it would not fully redress the issue. As explained above, highly sentient animals in captivity display signs of mental illness even where they are kept in “the best captive conditions.”²⁰⁹ Accordingly, highly sentient animals are simply incompatible with captivity, and the common law must evolve to recognize their liberty interests.

The legal status of highly sentient animals does not reflect modern science or ethics. While contemporary studies conclusively support complex cognitive abilities of certain animals,²¹⁰ U.S. courts continue to hold that a nonhuman animal cannot have liberty interests.²¹¹ The contrast in scientific recognition of animal sentience and the legal thinghood of animals “denies and denigrates the human capacity for understanding, empathy and compassion.”²¹² As Justice Wilson put it, “[T]he rights we confer on others define who we are as a society.”²¹³ Because the suffering of animals in captivity is at the hands of humans, humans are morally required “to take care of the rights of animals, since they are unable to take care of themselves as against human beings.”²¹⁴

Additionally, the legal status of highly sentient animals does not reflect contemporary public sentiment. For example, just one year after the 2013 documentary “Blackfish” made headlines, a national survey found that half of Americans were against holding orcas in captivity for public display.²¹⁵ More recently, Happy’s case at the New York Court of Appeals garnered national attention, leading to protests outside the Bronx Zoo.²¹⁶ In fact, the majority in *Breheny* addressed the public, stating:

[T]his 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

206. Marino et al., *supra* note 102.

207. Greco et al., *supra* note 103.

208. Birkett & Newton-Fisher, *supra* note 104.

209. Viegas, *supra* note 107.

210. *See supra* Section II.A.

211. *See, e.g.*, *In re Nonhuman Rts. Project, Inc. v. Breheny*, 38 N.Y.3d 555, 577 (N.Y. 2022).

212. *Id.* at 626 (Wilson, J., dissenting).

213. *Id.*

214. *Animal Welfare Bd. of India v. A. Nagaraja*, (2014) 7 SCC 547, ¶ 26 (India).

215. EDGE RSCH., FINDINGS FROM 2014 US NATIONAL SURVEY ON ORCA CAPTIVITY 2 (2014), <https://awionline.org/sites/default/files/press-release/ML-AWI-WDC-OrcaPoll-2014.pdf> [<https://perma.cc/PUH7-7F2G>].

216. Kristina Narizhnaya, *Bronx Zoo Protestors Demand Release of Happy the Elephant*, N.Y. POST (June 1, 2019), <https://nypost.com/2019/06/01/bronx-zoo-protesters-demand-release-of-happy-the-elephant/> [<https://perma.cc/A2N7-DMVH>].

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.²¹⁷

The public protests in these cases and changing public opinion show that society has evolved to recognize the liberty interests of highly sentient animals. Thus, while animal law historically evolved alongside societal values,²¹⁸ it must now catch up.

IV. GRANTING NONHUMAN PERSONHOOD & LIBERTY INTERESTS

As science, and with it, society, evolved to recognize complex sentience in certain nonhuman animals, anthropocentrism became outdated. To address the suffering of highly cognitive animals in captivity, our legal system should adopt a sentiocentric approach and acknowledge nonhuman personhood. In doing so, the law must grant animals with scientific consensus of complex sentience—namely, cetaceans, elephants, and apes—rights to liberty. This may be accomplished though habeas corpus, or, more ideally, legislation.

A. Habeas Corpus Standing

In the absence of adequate legislation, courts should recognize the right of animals with scientific consensus of complex sentience to bring habeas corpus actions. Specifically, courts must (1) acknowledge animals as legal persons instead of legal things,²¹⁹ (2) reject the notion that legal personhood is contingent upon legal duties and responsibilities; and (3) recognize liberty interests of highly sentient animals. Each is discussed in turn.

1. Legal Personhood

Habeas corpus standing is not contingent on humanity but instead on legal personhood. State and Federal habeas corpus statutes grant standing to “persons”—not “humans.”²²⁰ This distinction is relevant because here “person” does not refer to its colloquial meaning “human.” Instead, it is a

217. *In re Breheny*, 38 N.Y.3d at 577.

218. *See supra* Sections I.A–B.

219. *See In re Nonhuman Rts. Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1059 (N.Y. 2018) (“While it may be arguable that a chimpanzee is not a ‘person,’ there is no doubt that it is not merely a thing.”).

220. *See, e.g.*, 28 U.S.C. § 2242; ARIZ. REV. STAT. ANN. § 13-4121.

legal term-of-art which refers to *legal* personhood. For example, our legal system assigns personhood to non-human entities that do not have sentience, such as corporations,²²¹ boats,²²² and rivers.²²³ U.S. courts, therefore, are incorrectly denying habeas corpus standing to animals by claiming that “persons” is synonymous with “human beings.”²²⁴ Stated simply, “nonhuman personhood” is not an oxymoron. Rather, it refers to a legal status which acknowledges certain unique rights to nonhuman animals.

Moreover, legal personhood does not equate animals to humans. Nor does it equate all nonhuman animals. Instead, as the Third Court of Guarantees in Argentina explained, legal personhood of animals recognizes them as “non human legal persons” with “inherent rights of sentient beings.”²²⁵ As many Native American tribes have recognized, legal personhood of animals recognizes them as living, *sentient beings*, instead of merely property.²²⁶ Thus, the legal personhood of animals does not grant them identical rights as humans (or, for that matter, other nonhuman animals) because their inherent rights are derived from their unique ability to suffer. Among animals with high scientific consensus of complex sentience and social structures, these rights include freedom from captivity.

Importantly, the historical thinghood of animals does not prevent the common law from evolving to recognize certain animals as legal persons. U.S. courts’ reliance on originalism in interpreting habeas corpus ignores the living, ever-evolving nature of habeas corpus. The Great Writ evolved throughout history to recognize the legal personhood of people who were, at the time, considered property. This includes the use of the habeas corpus to

221. Ciara Torres-Spelliscy, *The History of Corporate Personhood*, BRENNAN CTR. FOR JUST. (Apr. 8, 2014), <https://www.brennancenter.org/our-work/analysis-opinion/history-corporate-personhood#:~:text=Generally%2C%20corporate%20personhood%20allows%20companies,a%20child%2C%20or%20to%20vote> [<https://perma.cc/5C2C-S5WF>].

222. RENISA MAWANI, *The Ship as Legal Person*, in *ACROSS OCEANS OF LAW* 73 (Duke Univ. Press 2018).

223. Stilt, *supra* note 157, at 281.

224. *Rowley v. City of New Bedford*, No. 20-P-257, 2020 WL 7690259, at *1, *2 (Mass. App. Ct. Dec. 28, 2020).

225. Tercer Juzgado de Garantías [J.G.Men.] [Third Court of Guarantees of Mendoza], 3/11/2016, “Presented by A.F.A.D.A. About the Chimpanzee ‘Cecilia’ - Non Human Individual,” P-72.254/15 (Arg.), https://www.nonhumanrights.org/wp-content/uploads/Chimpanzee-Cecilia_translation-FINAL-for-website-2.pdf [<https://perma.cc/FU6N-SFK9>].

226. Smith, *supra* note 156, at 116 (emphasis added).

free slaves,²²⁷ Native Americans,²²⁸ women,²²⁹ and children.²³⁰ In doing so, the courts emphasized the need for social change as society's morals evolved.²³¹

While some legal principles may not be subject to evolving interpretation,²³² habeas corpus is intrinsically intertwined with evolving societal norms. Indeed, “[t]he Great Writ’s use, as a case-by-case tool to probe whether the law may need to adapt, is part of the fundamental role of a common-law court to adapt the law as society evolves.”²³³ Today, as public outrage continues to heighten concerning holding highly sentient animals in captivity, the common law again must adapt to acknowledge such ideals.

In response to calls for common law evolution, the New York Court of Appeals expressed concern over the consequences of granting habeas corpus standing to animals. Specifically, the court expressed fear that such standing could put ownership of pets at risk.²³⁴ But this fear is misplaced because the nature of habeas corpus allows courts to consider the breadth of rights in individual contexts. The court also argued that extending habeas corpus to animals is too big a step that will have a destabilizing impact on society.²³⁵ But don’t all social movements have a destabilizing impact, and isn’t that the point? The way in which highly sentient animals are treated today is patently wrong. To fix this wrong and to destabilize society are, thus, synonymous.

2. Legal Duties and Responsibilities

The requirement that animals have legal duties and responsibilities in order to have legal personhood is inconsistent with law, literature, and social contract theory.

227. Buckley, *supra* note 122.

228. United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 700–01 (C.C.D. Neb. 1879) (No. 14,891) (habeas corpus used to free Native Americans).

229. HALLIDAY, *supra* note 122, at 46–47.

230. Lehman v. Lycoming Cnty. Child.’s Servs. Agency, 458 U.S. 502, 517 (1982) (Black, J., dissenting).

231. *See, e.g.*, Lemmon v. People, 20 N.Y. 562 (N.Y. 1860). In the granting of a habeas corpus petition on behalf of eight slaves, the Court reasoned, “[S]lavery is repugnant to natural justice and right, has no support in any principle of international law, and is antagonistic to the genius and spirit of republican government.” *Id.* at 617.

232. Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Ent., Inc., 842 F. Supp. 2d 1259, 1264 (S.D. Cal. 2012).

233. *In re* Nonhuman Rts. Project, Inc. v. Breheny, 38 N.Y.3d 555, 617 (N.Y. 2022) (Wilson, J., dissenting).

234. *Id.* at 573–74 (majority opinion).

235. *Id.* at 573.

Requiring that animals have legal duties and responsibilities to have rights is inconsistent with other areas of the law. As Justice Wilson explained in *Breheny*, this brings into question groups that are widely considered to have rights and personhood, even though they do not have legal duties and responsibilities.²³⁶ Such groups include children, mentally handicapped people, and elderly people.²³⁷ In fact, the overturning of *Roe v. Wade*²³⁸ and subsequent acknowledgment of personhood to fetuses and embryos in some states²³⁹ is inconsistent with and should further invalidate the idea that one must be able to have legal duties and responsibilities in order to have rights. In sum, “being a ‘moral agent’ who can freely choose to act as morality requires is not a necessary condition of being a ‘moral patient’ who can be wronged and may have the right to redress wrongs.”²⁴⁰

While some argue that legal duties and responsibilities as a prerequisite to rights is consistent with social contract theory,²⁴¹ the opposite is true. Historical and contemporary understandings of social contract theory do not support such a “quid pro quo notion.”²⁴² Instead, philosophers Thomas Hobbes, John Locke, and Jean-Jacques Rousseau each “maintain that all persons have ‘natural rights’ that they possess independently of their willingness or ability to take on social responsibilities.”²⁴³ Thus, the requirement of legal duties and responsibilities “confuses who can confer rights with who can hold rights. [Nonhuman animals] cannot confer rights on

236. *Id.* at 587 (Wilson, J., dissenting).

237. *Id.*

238. *See generally* Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022).

239. *See, e.g.,* ARIZ. REV. STAT. ANN. § 1-219 (2023) (“The laws of this state shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state”); *see also* Tara Carlin, *Why the Legal Classification of Cryogenically Preserved Pre-Embryos Matter*, 17 RUTGERS J.L. & PUB. POL’Y 312, 335–36 (2020) (under Louisiana law, embryos are legal persons and can “sue or be sued just as if they are citizens of the United States”).

240. *In re* Nonhuman Rts. Project, Inc. v. Lavery, 31 N.Y.3d 1054, 1057 (N.Y. 2018) (Fahey, J., concurring).

241. Lavery I, 998 N.Y.S.2d 248, 250 (App. Div. 2014) (“Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government.”).

242. Petition for a Common Law Writ of Habeas Corpus at 111, Nonhuman Rts. Project, Inc. v. Fresno’s Chaffee Zoo Corp., No. F085722 (Cal. App. Dep’t Super. Ct. May 3, 2022) (citing Brief for Philosophers as Amici Curiae Supporting Appellant at 13, *In re* Nonhuman Rts. Project, Inc. v. Breheny, 38 N.Y.3d 555 (N.Y. 2022) (No. 2020-02581)), <https://www.nonhumanrights.org/content/uploads/CA-Petition-Final-Stamped-5.3.22.pdf> [<https://perma.cc/39NT-RDS2>].

243. Brief for Philosophers as Amici Curiae Supporting Appellant at 12, *In re* Nonhuman Rts. Project, Inc. v. Breheny, 38 N.Y.3d 555 (N.Y. 2022) (No. 2020-02581).

humans, but humans can—and do—confer rights on animals in abundance.”²⁴⁴

Additionally, U.S. courts’ reliance on the definition of “persons” being those subject to legal duties and responsibilities is erroneous as misstating literature.²⁴⁵ *Lavery I* notes that *Black’s Law Dictionary* quotes John Salmond’s *Jurisprudence* for the proposition that “[s]o far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties.”²⁴⁶ But, as the NhRP explained in a recent habeas petition,²⁴⁷ Salmond actually wrote “rights or duties,” not “rights and duties.”²⁴⁸ Importantly, Salmond went on to state that “[a]ny being that is so capable [of rights or duties] is a person, whether a human being or not.”²⁴⁹ Thus, the proper reading of Professor Salmond’s *Jurisprudence* is that a nonhuman animal is a legal person if they are capable of rights. Undoubtedly, such a metric is met.

3. Liberty Interests

Instead of determining legal personhood based on an animal’s ability to have legal duties and responsibilities, personhood should be granted based on “whether [the individual animal] has the right to liberty protected by habeas corpus.”²⁵⁰ With respect to cetaceans, elephants, and apes, this right to liberty is established by their complex sentience. By disregarding the legal duties and responsibilities analysis, courts can carry out the true purpose of habeas corpus: To grant fundamental liberty interests to those who are unjustly confined irrespective of quid pro quo.

U.S. courts argue that the use of habeas corpus to transfer animals into sanctuaries is incompatible with the Great Writ’s purpose—namely, granting liberty.²⁵¹ Admittedly, there are instances in which animals cannot be reintroduced into the wild and must be put into a sanctuary. Habeas corpus, however, is intended to remove persons from *illegal* confinement, not

244. *In re Breheny*, 38 N.Y.3d at 585 (Wilson, J., dissenting).

245. See Petition for a Common Law Writ of Habeas Corpus at 108, Nonhuman Rts. Project, Inc. v. Fresno’s Chaffee Zoo Corp., No. F085722 (Cal. App. Dep’t Super. Ct. 2022), CPF 22-517751.

246. *Lavery I*, 998 N.Y.S.2d 250 (emphasis added).

247. Petition for a Common Law Writ of Habeas Corpus at 108, *Fresno’s Chaffee Zoo Corp.*, No. F085722.

248. JOHN SALMOND, *JURISPRUDENCE* 329 (7th ed. 1924) (emphasis added).

249. *Id.*

250. *In re Nonhuman Rts. Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1057 (N.Y. 2018) (Fahey, J., concurring).

251. *In re Nonhuman Rts. Project, Inc. v. Breheny*, 38 N.Y.3d 555, 597–99 (N.Y. 2022) (Wilson, J., dissenting).

confinement in general.²⁵² In fact, habeas corpus jurisprudence demonstrates flexibility in its remedy—instead of releasing from captivity altogether, habeas corpus has been used to transfer children in child custody cases.²⁵³ Moreover, habeas corpus was historically used to transfer custody of women from their abusive husbands to their parents.²⁵⁴

Albeit an imperfect remedy, courts must grant these animals standing for habeas corpus until Congress acts. While an important step towards recognizing nonhuman rights in highly cognitive animals, the use of habeas corpus is admittedly both insufficient and inefficient. Under habeas corpus, animals must sue for their freedom on an individual basis. Considering the high numbers of cetaceans, elephants, and apes currently held in zoos and aquariums, this will, and has, lead to lengthy and costly litigation. Still, in the absence of meaningful legislation, habeas corpus is the only option that animals have. An expensive and lengthy option is better than none at all.

B. Legislative Standing

Similar to the leadup to the passage of the HSA, AWA, ESA, and MMPA, public outrage concerning the treatment of animals has reached a point that Congress can no longer ignore. Congress should, therefore, break its fifty-year hiatus and pass new, comprehensive animal legislation addressing highly sentient animals in captivity.

To adequately address nonhuman liberty interests, Congress must pass an act illegalizing the keeping of certain animals in captivity for tourism and exhibition. Congress should explicitly grant legal personhood to cetaceans, elephants, and apes and give them statutory standing under this act. As discussed above, modern jurisprudence unequivocally acknowledges that Article III of the Constitution allows Congress to pass legislation granting nonhuman standing,²⁵⁵ albeit they must do so explicitly.²⁵⁶ Notably, these animals should be comprehensively listed to create a clear rule based on scientific consensus of complex sentience. While the statute may expand to

252. See, e.g., ARIZ. REV. STAT. ANN. § 13-4121 (2023) (“A person *unlawfully* committed, detained, confined or restrained of his liberty, under any pretense whatever, may petition for and prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint.” (emphasis added)).

253. *Breheny*, 38 N.Y.3d at 597–99 (Wilson, J., dissenting).

254. *Id.* at 599–600.

255. *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018).

256. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004).

include other species as scientific understandings evolve, the addition of other animals is beyond the scope of this article.

The explicit recognition of the right to standing is essential to recognize the animals' autonomy and fully enforce the provisions of the act. As society has grown to acknowledge animal sentience, it is important that the law reinforce the animals' autonomy by considering the injury to be to the animal and not an associated human. Moreover, while environmental statutes may be enforced through citizen suit provisions or the APA, these mechanisms will fail to fully carry out the purpose of legislation by barring actions concerning real injury to animals when there is not an adequate injury to a human.²⁵⁷ Alternatively, explicitly granting standing to specific animals through an animal-suit provision²⁵⁸ creates an unambiguous right to standing and an unwavering right to redress the injury.

The statute should not illegalize all confinement. Because the act would only illegalize the holding of such animals for tourism and exhibition, animal sanctuaries would be a valid alternative to place animals when they can no longer be released into the wild. Furthermore, while sanctuaries are greatly preferred, if there was no possibility for release or transfer to a sanctuary, facilities could increase their standard of confinement to accommodate the individual physical and psychological needs of the animal.

Adopting legislation would also be beneficial to humans. Indeed, wildlife in captivity is an ongoing contributor to the impeding environmental crisis. For example, humans are more at risk from diseases as biodiversity disappears.²⁵⁹ Furthermore, human food sources are greatly limited due to the impact of extinctions on food webs.²⁶⁰ As the Supreme Court of Columbia explained, preserving nature preserves our own habitat for human survival "instead of barbarically destroying it."²⁶¹

Legislation would also avoid the ongoing, costly legislation currently surrounding animal rights in captivity. Legislation addressing this issue, consequently, would clear up valuable resources in the legal system for other important causes.

257. Burke, *supra* note 205, at 656.

258. The specifics of implementing an animal-suit provision are beyond the scope of this article. To learn how this would work in practice, see generally *id.*

259. John Platt, *Humans Are More at Risk from Diseases as Biodiversity Disappears*, SCI. AM. (Dec. 7, 2010), <https://blogs.scientificamerican.com/extinction-countdown/humans-are-more-at-risk-from-diseases-as-biodiversity-disappears/> [<https://perma.cc/4K72-FVUD>].

260. See Navjot Sodhi et al., *Causes and Consequences of Species Extinctions*, in THE PRINCETON GUIDE TO ECOLOGY 514, 514–15 (Simon A. Levin ed., 2009).

261. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ. julio 26, 2017, M.P. L. Villabona, AHC 4806-2017, (p. 6) (Colom.).

V. CONCLUSION

Throughout history, our laws evolved alongside society's evolving view of animals. But, while society's view of animals has changed significantly since the 1970s, our laws have remained largely stagnant. Animal legislation, consequently, is grossly deficient in protecting captive animals from suffering. To address this discrepancy, Congress must adopt new legislation to enhance the welfare of animals held for tourism and exhibition. Until then, courts should recognize the legal personhood of highly sentient animals for purposes of habeas corpus. As Edwin Way Teale said, "Those who wish to pet and baby wild animals, 'love' them. But those who respect their natures and wish to let them live normal lives, love them more."²⁶²

262. EDWIN WAY TEALE, *CIRCLE OF THE SEASONS* 71 (1953).