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## When it Comes to Standing, Two Legs are Better than Four

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# When it Comes to Standing, Two Legs are Better than Four

Kelsey Kobil\*

## Abstract

Animal rights activists are currently filing lawsuits naming animals as plaintiffs hoping that courts will grant animals legal personhood status and standing to file lawsuits on their own behalf. Currently, animals are designated as property in the United States. If courts grant animals legal personhood status, animals would no longer be classified as property, but instead would hold the same legal rights as humans.

Several courts have grappled with the issue of granting animals standing to file lawsuits, and—other than a Ninth Circuit decision that was later explicitly dismissed as dicta by the same circuit—all have declined to do so. Congress has likewise chosen not to grant animals legal rights. Additionally, although there are numerous statutory protections afforded to animals, these safeguards fall short of granting animals complete personhood rights.

This Comment will examine animals' historical classification as property and the standing doctrine as it relates to animals, arguing that the common law's treatment of animals should not change. Numerous negative consequences will result from granting animals standing to file lawsuits. Animals should not have rights, and adapting and expanding the existing legal protection afforded to animals can better protect animal welfare. A guardianship model could be implemented to expand standing and enable humans to file suit on behalf of animals.

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## I. INTRODUCTION

An animal is not a person. An animal cannot walk into a courthouse, pay a fee, and file a complaint that the animal prepared by and for itself.<sup>1</sup> Despite this seemingly obvious and mundane observation, the Nonhuman Rights Project ("NRP"), along with several other animal

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1. While some humans also cannot physically walk into a courthouse, afford a filing fee, or possess the necessary education to prepare a complaint, this example is used to convey animals' complete lack of ability to participate in any portion of their potential lawsuit.

rights organizations, believe that an animal should be allowed to file a lawsuit on its own behalf.<sup>2</sup>

Before exploring animals' treatment under the law, it is important to note that a philosophical difference exists between animal rights activists and animal welfare activists.<sup>3</sup> Animal welfare activists believe that animals should be treated humanely, with respect and dignity.<sup>4</sup> In contrast, animal rights activists believe that animals possess inherent, legal rights that are equal to humans' legal rights.<sup>5</sup> Animal rights activists reject the notion that animals can be owned or used, and, most importantly, animal rights activists do not believe that animals should ever be treated as property.<sup>6</sup>

The NRP is an organization composed of animal rights activists who seek to obtain legal personhood status for animals.<sup>7</sup> Legal personhood status<sup>8</sup> would provide animals with fundamental rights that are equal to humans' fundamental rights.<sup>9</sup> Although the NRP publicly states that only *some* animals should be granted legal personhood status,<sup>10</sup> that claim may not accurately depict the activists' true ideological goals.<sup>11</sup> Steven Wise, the NRP's President, admits that he intends to pursue legal personhood for all animals that have the capacity to suffer.<sup>12</sup>

In an effort to gain public and judicial acceptance, Wise began by seeking rights for chimpanzees, and he intends to extend his pursuit to

2. *About the Project*, NRP, <http://www.nonhumanrightsproject.org/about-the-project-2/> (last visited Oct. 4, 2014). The NRP is an animal rights organization that is attempting to use channels of the common law to change the status of animals to persons under the law. *Id.*

3. Megan A. Senatori, *The Second Revolution: the Diverging Paths of Animal Activism and Environmental Law*, 8 WIS. ENVTL. L.J. 31, 40 (2002).

4. WESLEY J. SMITH, *A RAT IS A PIG IS A DOG IS A BOY: THE HUMAN COST OF THE ANIMAL RIGHTS MOVEMENT* 15 (2012).

5. *Id.* at 16.

6. *Id.*

7. *About the Project*, *supra* note 2.

8. Animal rights activists do not agree on what the definition is for the "legal personhood" they so desperately seek. *Id.* A broad version would attribute to animals all rights that humans possess, and a narrow version would only allow standing to file a lawsuit. Taimie L. Bryant, *Living on the Edge: the Margins of Legal Personhood: Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 RUTGERS L.J. 247, 253-54 (2008).

9. *Why We Work Through the Common Law*, NRP, <http://www.nonhumanrightsproject.org/why-we-work-through-the-common-law/> (last visited Oct. 5, 2014).

10. *Id.*

11. STEVEN M. WISE, *DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS* 34 (2002).

12. *Id.* If Wise's vision is realized, countless animals would be granted legal personhood, as even an animal as simple as a goldfish has the capacity to suffer. See *infra* note 139.

the entire animal kingdom.<sup>13</sup> Wise fears that moving too quickly in advocating for animal personhood status will result in backlash.<sup>14</sup> Consequently, Wise advocates for modest steps, comparing his plan of action to President Lincoln's "minimum anti-slavery position."<sup>15</sup> Wise furthered his analogy to President Lincoln's anti-slavery movement when he compared a chimpanzee's detention to human slavery before three New York Supreme Court Appellate Division Justices in October 2014, and at least one justice was deeply troubled by this analogy.<sup>16</sup>

Wise is currently advocating for four chimpanzees in New York.<sup>17</sup> Tommy, Kiko, Hercules, and Leo are four privately owned chimpanzees that are at the center of three lawsuits in New York.<sup>18</sup> Tommy is owned by a private citizen,<sup>19</sup> Kiko lives at a primate sanctuary,<sup>20</sup> and Hercules and Leo are owned by the New Iberia Research Center.<sup>21</sup> In three separate lawsuits, Wise and the NRP demanded that the New York Supreme Court issue a writ of habeas corpus<sup>22</sup> on behalf of the four animals.<sup>23</sup>

13. *Id.* at 240.

14. *Id.*

15. *Id.* at 235. President Lincoln's strategy was to always take the smallest possible step in his fight against slavery to reduce backlash from the public. *Id.* Wise prefers this analogy because he believes that an animal's status as property is akin to slavery. *Id.* at 11–17. Wise is not the only animal rights activist to unsympathetically compare animals' present property classification to African Americans' exploitation and enslavement. ASSOCIATED PRESS, *PETA Rethinks Slavery Analogy*, L.A. TIMES, Aug. 14, 2005, <http://articles.latimes.com/2005/aug/14/nation/na-peta>.

16. *Judges Voice Doubt at Landmark Trial to Give Chimps 'Human' Rights*, DAILY MAIL ONLINE, <http://www.dailymail.co.uk/wires/reuters/article-2785653/NY-court-questions-lawyers-novel-bid-win-rights-chimps.html> (last visited Nov. 12, 2014). The Justice suggested that Wise instead focus his attentions towards lawmakers and encourage them to protect chimpanzees from unlawful detention by private owners. *Id.*

17. *Legal Whac-a-Mole*, NRP (Jan. 3, 2015), <http://www.nonhumanrightsproject.org/2015/01/03/legal-whac-a-mole/>.

18. *Update on Appeals for Tommy, Kiko, Hercules and Leo*, NRP (June 3, 2014), <http://www.nonhumanrightsproject.org/2014/06/03/update-on-appeals-for-tommy-kiko-hercules-and-leo/>.

19. *Bios on the Chimpanzees in New York Lawsuits*, NRP (Nov. 30, 2013), <http://www.nonhumanrightsproject.org/2013/11/30/bios-on-the-chimpanzees-in-new-york-lawsuits/>.

20. *Id.* Hercules and Leo currently reside at a research laboratory at Stony Brook University. *Id.*

21. *Primates*, THE PRIMATE SANCTUARY, <http://thepriimate-sanctuary.com/profile.html> (last visited Jan. 3, 2015). Interestingly, Kiko is deaf and was rescued from abuse by the Primate Sanctuary ten years ago when the organization learned that a deaf chimpanzee was for sale in Ohio. *Id.* Kiko suffers from motion sickness as a result of the abuse inflicted from his previous owners. *Id.* The Primate Sanctuary provides Kiko with Dramamine to help relieve his symptoms. *Id.*

22. A writ of habeas corpus is a method to safeguard humans from imprisonment in violation of the law. *Harrington v. Richter*, 131 U.S. 770, 781 (2011). Habeas corpus translates to "you have the body". BLACK'S LAW DICTIONARY (9th ed. 2009). According

Recently, all three trial courts ruled against Wise and the NRP, and three intermediate appellate courts affirmed the lower courts' decisions.<sup>24</sup> Although the three appellate courts based their rulings on different grounds,<sup>25</sup> all three were unwilling to grant the chimpanzees standing to sue.<sup>26</sup> Despite this stark defeat, Wise intends to appeal the cases, and he will continue filing new cases in court until he reaches the outcome that he desires.<sup>27</sup>

Wise has already refiled a petition for Hercules and Leo.<sup>28</sup> Although the Judge, Barbara Jaffe, initially granted Wise's petition for habeas corpus, she modified it the next day to clarify that she was not recognizing chimpanzees as legal persons.<sup>29</sup> Judge Jaffe heard oral arguments on the case, but she has yet to render a decision.<sup>30</sup>

This Comment will analyze the animal activist movement that endeavors to grant animals legal personhood status, specifically the activists' efforts to achieve standing for animals that would allow the animals to file lawsuits in court.<sup>31</sup> Part II will discuss how the common law historically classified and currently classifies animals.<sup>32</sup> Part II provides an overview of the standing requirement for filing lawsuits and will explore how the law has reacted to attempts by animal rights activists to grant animals standing.<sup>33</sup>

Part III of this Comment will argue that animals should not be granted standing to file lawsuits.<sup>34</sup> Most courts have refused to grant an-

to a New York appellate court, that "body" is limited to the human body and does not include animals. *NRP Inc., v. Lavery*, No.518336, slip op. at 2-3 (N.Y. App. Div. Dec. 4, 2014).

23. *Update on Appeals for Tommy, Kiko, Hercules and Leo*, NRP (June 3, 2014), <http://www.nonhumanrightsproject.org/2014/06/03/update-on-appeals-for-tommy-kiko-hercules-and-leo/>.

24. *Legal Whac-a-Mole*, *supra* note 17.

25. *Id.* The Third Department held that a chimpanzee is not a person, the Fourth Department held that habeas corpus does not apply when a petitioner seeks to change the means of confinement rather than the confinement itself, and the Second Department threw out the appeal, stating that Wise and the NRP lacked the grounds to appeal. *Id.*

26. *Id.*

27. *Id.*

28. *Media Coverage: Hercules and Leo's Court Hearing*, NRP (May 29, 2015), <http://www.nonhumanrightsproject.org/2015/05/29/media-coverage-hercules-and-leos-court-hearing/>.

29. *Update on Hercules and Leo Order to Show Cause*, NRP (Apr. 21, 2015), <http://www.nonhumanrightsproject.org/2015/04/21/update-on-hercules-and-leo-order-to-show-cause/>.

30. *Media Coverage*, *supra* note 28.

31. *See infra* Part II.

32. *See infra* Part II.B.I.

33. *See infra* Parts II.B-C.

34. *See infra* Part III.

imals standing to sue,<sup>35</sup> and this precedent should remain unaltered. Part III will also discuss several of the harmful consequences that would result from granting animals standing to sue.<sup>36</sup> Part IV will conclude with a summation of the issues explored in this Comment.<sup>37</sup>

## II. THE LAW'S CLASSIFICATION OF ANIMALS AS PROPERTY AND AN OVERVIEW OF STANDING AS IT RELATES TO ANIMALS' "ABILITY" TO FILE LAWSUITS

### A. Modern Law Views Animals as Quasi-Property

Animals are not human beings and therefore are not treated by the law as such.<sup>38</sup> Under the common law, animals are their owners' property.<sup>39</sup> Courts and lawmakers alike have long recognized that animals should be treated as property in accordance with the law.<sup>40</sup> Humans are not only granted property rights over their pets,<sup>41</sup> but humans also have dominion over any wild animal subject to<sup>42</sup> a person's control.<sup>43</sup> In the law's eyes, animals have monetary value, and therefore they can be bought, sold, gifted, donated, or bartered for like inanimate objects.<sup>44</sup>

#### 1. Some Courts Recognize That Animals Can Be Treated as Something More Than Property

Although the longstanding recognition that animals are property is continually reaffirmed,<sup>45</sup> recently, some courts have categorized certain animals as "quasi-property"<sup>46</sup> to enable their owners to collect increased

35. See *infra* Part III.A.

36. See *infra* Parts III.B-C.

37. See *infra* Part IV.

38. *Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex. App. 1981).

39. Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 534 (1998).

40. *Arrington*, 613 S.W.2d at 569.

41. *Graham v. Notti*, 196 P.3d 1070, 1073 (Wash. Ct. App. 2008).

42. *Graves v. Dunlap*, 152 P. 523, 651 (Wash. 1915). An animal is subjected to a person's control when the animal is claimed by a human's "art and power." *Id.* This is true even when the animal is not tamed or domesticated, so long as the animal is kept confined and contained under the person's control. *Id.*

43. See *generally id.* (finding that a captured wild animal becomes a person's property so long as the animal is confined within that person's control).

44. Christopher D. Seps, *Animals Law Evolution: Treating Pets as Persons in Tort and Custody Disputes*, 2010 U. ILL. L. REV. 1339, 1342 (2010).

45. See *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000); see *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1123 (Ohio Ct. App. 2003); see *Rabideau v. City of Racine*, 627 N.W.2d 795, 797 (Wis. 2001).

46. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918). The term "quasi-property" first appeared in Justice Pitney's opinion. *Id.* Although Justice Pitney

damages in court cases.<sup>47</sup> Additionally, some courts have gone further by finding that pets inhabit “a special place somewhere in between a person and a piece of personal property” to permit pet owners to claim special value for their animals in order to seek increased damages when their pets are harmed.<sup>48</sup> Furthermore, several courts have allowed emotional distress claims when an animal is tortiously injured or killed.<sup>49</sup>

In addition to classifying animals as quasi-property to allow their owners to collect increased damages, many states grant certain limited legal protections to animals that more closely resemble the legal protections granted to humans. In some states, animals can be designated as the beneficiaries of trusts,<sup>50</sup> though the methods for doing so vary widely from state to state.<sup>51</sup> Animal cruelty statutes further exemplify animals’ enhanced protection under the law as compared to inanimate forms of property.<sup>52</sup> Although the increased protection that animals enjoy in many states may give the appearance that animals are no longer strictly classified as property, a closer examination reveals that animals’ status and apparent legal rights have striking limitations.

## 2. States that Recognize Animals as More Than Property Still Limit Animals’ Legal Protections

In a variety of areas, animals’ legal protection is not as comprehensive as it first appears. For example, although creating trusts for animals

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intended for this term to be limited to the facts of the case in which it was first uttered, Justice Pitney’s intended narrow definition has largely been ignored. Shyamkrishna Balganes, *Quasi-Property: Like, But Not Quite Property*, 160 U. PA. L. REV. 1889, 1891 (2012). Instead, the term quasi-property has come to represent the concept that some situations exist where law recognizes property-like entitlements, while simultaneously understanding them to be more than mere property. *Id.* at 1890–91.

47. Seps, *supra* note 44, at 1344–46.

48. *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979).

49. Kelch, *supra* note 39, at 538.

50. N.Y. EST. POWERS & TRUSTS LAW § 7-6.1 (LexisNexis 2014); 760 ILL. COMP. STAT. ANN. 5/15.2 (LexisNexis 2014) (setting guidelines for establishing a trust for a domestic or pet animal); Seps, *supra* note 44, at 1342–43. In 2007, hotel heiress Leona Helmsley left \$12 million to care for her pet Maltese, Trouble, upon Helmsley’s death. *Leona Helmsley’s Little Rich Dog Trouble Dies in Luxury*, ABC NEWS (June 10, 2011), <http://abcnews.go.com/US/leona-helmsleys-dog-trouble-richest-world-dies-12/story?id=13810168>. A judge reduced this amount to \$2 million. *Id.* The inheritance provided for the dog’s food, grooming, guardian, and full time security detail. *Id.*

51. See generally Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000).

52. *Anti-Cruelty: Related Statutes*, Animal Legal & Historical Center, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW, <http://www.animallaw.info/statutes/topicstatutes/sttoac.htm> (last visited Sept. 7, 2014).



is protected by statute, judges have the ability to reduce the amount of money left for the animal if the trust's amount substantially exceeds its intended use.<sup>53</sup> While an animal's welfare undoubtedly benefits from a trust, the exact benefit the animal receives is ultimately left to the court's discretion.<sup>54</sup>

Estate law is not the only area where animals' legal protection is more limited than it first appears. Surprisingly, animal cruelty statutes do not contain language that recognizes animals as beings that possess rights, but rather as "beings toward which humans have responsibilities."<sup>55</sup> These narrowly construed statutes exemplify the legislatures' reluctance to grant animals unlimited rights.<sup>56</sup> Furthermore, some courts have held that humans cannot claim large damages for tortiously killed or injured animals, which reiterates the limitations already imposed by legislatures.<sup>57</sup> Although some courts have been willing to extend animal protection into the realm of quasi-property, the expansion is not uniform in all states, and the protections offered are far from absolute.<sup>58</sup>

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53. See 760 ILL. COMP. STAT. 5/15.2(b)(5); ALASKA STAT. § 13.12.907(c)(6) (LexisNexis 2013); ARK. CODE ANN. § 14-2907(c)(6) (LexisNexis 2014).

54. IN ILLINOIS'S, ALASKA'S, AND ARKANSAS' PET TRUST STATUTES, AN ANIMAL HAS GREATER PROTECTION IN A TRUST THAN IN A WILL, WHERE THE TESTATOR ONLY DETERMINES WHO WILL CARE FOR HIS OR HER PET, BECAUSE THE MONEY FOLLOWS THE PET REGARDLESS OF WHOM ULTIMATELY CARES FOR THE ANIMAL. 760 ILL. Comp. Stat. 5/15.2(b)(6); Alaska Stat. § 13.12.907(c)(7); Ark. Code Ann. § 14-2907(c)(7). THIS PROVIDES GREATER PROTECTION FOR THE ANIMAL BECAUSE IF THE PERSON WHO THE TESTATOR SELECTED TO CARE FOR HIS OR HER ANIMAL IS UNAVAILABLE (OR IF THE TESTATOR NEVER SELECTED A CAREGIVER), THE COURT WILL APPOINT A QUALIFIED CAREGIVER FOR THE ANIMAL. *Id.* DESPITE THIS PROTECTION, UNDER ALL THREE STATUTES THE ANIMAL WILL ONLY RECEIVE THE AMOUNT OF THE FUNDS THE COURT DEEMS "NECESSARY" TO FULFILL THE PURPOSE OF THE TRUST. 760 ILL. Comp. Stat. 5/15.2(b)(5); Alaska Stat. § 13.12.907(c)(6); Ark. Code Ann. § 14-2907(c)(6). IN THE CASE OF LEONA HELMSLEY'S DOG, THE JUDGE REDUCED THE DOG'S INHERITANCE BY \$10 MILLION. SEE *SUPRA* NOTE 50.

55. David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. L. REV. 747, 763 (1995).

56. *Id.* at 14.

57. See *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000); *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1123 (Ohio Ct. App. 2003); *Rabideau v. City of Racine*, 627 N.W.2d 795, 797 (Wis. 2001).

58. See 760 ILL. COMP. STAT. 5/15.2(b)(5); ALASKA STAT. § 13.12.907(c)(6); ARK. CODE ANN. § 14-2907(c)(6). Although these statutes offer protection to an animal after the death of its owner, the legislation falls short of absolute protection for the animals. 760 ILL. COMP. STAT. 5/15.2(b)(5); ALASKA STAT. § 13.12.907(c)(6); ARK. CODE ANN. § 14-2907(c)(6).

### B. An Overview of Standing

The standing requirement<sup>59</sup> is a concept derived directly from Article III of the Constitution.<sup>60</sup> While there are several justifications for stringent standing requirements, the most important<sup>61</sup> was articulated and reaffirmed by the U.S. Supreme Court in *Summers v. Earth Island Institute*.<sup>62</sup> There, the Court stated that standing promotes the separation of powers by limiting the judicial branch to its proper role.<sup>63</sup>

Standing to file a lawsuit requires three elements: (1) the person filing suit must have suffered an injury-in-fact; (2) there must be a causal connection between the alleged injury and the conduct in question; and (3) the alleged injury must be likely to be capable of redress by a judicial remedy.<sup>64</sup> The burden of proof rests on the plaintiff to demonstrate that he or she has met each element of the standing requirement.<sup>65</sup> Although the absence of an injury-in-fact does not automatically eliminate a third party from filing a lawsuit on the injured party's behalf, lacking an injury makes it "substantially more difficult" to meet Article III's requirements.<sup>66</sup>

Because animals are largely considered property in the law's eyes, animals do not have interests that are protected by the law.<sup>67</sup> Although federal statutes protect animals from maltreatment, animal rights activists face great difficulty when they attempt to enforce these statutes.<sup>68</sup> Courts are reluctant to grant animal rights activists standing to file suit on an an-

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59. U.S. CONST. art. III, § 2, cl. 1; *See also* *Allen v. Wright*, 468 U.S. 737, 751–52 (1984). Although Article III of the Constitution does not specifically set forth standing requirements, the modern Supreme Court has interpreted and explained the standing doctrine. Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons From Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 3 (2010).

60. U.S. CONST. art. III, § 2, cl. 1.

61. Pushaw, *supra* note 59, at 3. Other justifications include increasing the quality of judicial decisions by guaranteeing that the parties involved in the case have more than a mere intellectual or ideological interest in the outcome of the case and promoting judicial efficiency by ensuring that limited resources are devoted to the most important cases. *Id.*

62. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009).

63. *Id.*

64. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see* *Kelch, supra* note 39, at 535.

65. *Lujan*, 504 U.S. at 561.

66. *Id.* at 562 (citing *Warth v. Seldin*, 422 U.S. 490, 505 (1975)).

67. *Kelch, supra* note 39, at 535.

68. Marguerite Hogan, *Standing for Nonhuman Animals: Developing a Guardianship Model from the Dissents in Sierra Club v. Morton*, 95 CALIF. L. REV. 513, 515 (2007).

imal's behalf because it is difficult for humans to fully satisfy the injury-in-fact requirement as a third party for an animal plaintiff.<sup>69</sup>

The standing doctrine presents animal rights activists with a nearly insurmountable challenge in their goal to have courts award rights to animals.<sup>70</sup> Many animal rights activists would solve the standing dilemma<sup>71</sup> by granting animals legal personhood status.<sup>72</sup> Legal personhood status would enable the animal to have the necessary standing to file a lawsuit on its own behalf.<sup>73</sup> Despite animal rights activists' zealous crusade, the legislature and the judiciary are reluctant to radically transform the legal system by granting animals the legal personhood status that would enable them to file lawsuits.

### *C. Animals Have Not Been Consistently Granted Standing By Courts or the Legislature*

#### 1. State Animal Welfare Statutes Do Not Grant Animals Standing To File Lawsuits

State animal welfare statutes protect animals from wantonly cruel and malicious treatment.<sup>74</sup> Despite the protection afforded to animals under these statutes, animals' security and welfare often rests on the position that animals are property.<sup>75</sup> Therefore, the monetary penalties assigned for violating the cruelty statutes reflect the animals' status as property.<sup>76</sup>

Furthermore, animal welfare is continually disregarded when that welfare conflicts with humans' rights. For example, in Alabama, the same provision that protects animals from inhumane treatment also provides a defense for "destroying" an animal that trespasses onto growing crops.<sup>77</sup> Many states view farming, fishing, and hunting as valuable to

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69. *Id.*

70. Schmahmann & Polacheck, *supra* note 55, at 773.

71. *Id.* at 773-75.

72. *Q&A About the NRP*, NRP, <http://www.nonhumanrightsproject.org/qa-about-the-nonhuman-rights-project/> (last visited, Nov. 8, 2014).

73. *About the Project*, *supra* note 2.

74. 18 PA. CONS. STAT. § 5511 (2014); ALA. CODE § 3-1-10 (2014).

75. *Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex. App. 1981).

76. ALA. CODE § 3-1-10 (2014).

77. *Id.* Similarly, other state statutes value one animal's life over another. In Oklahoma, service animals are protected from willful harm, and a violation of this provision can result in imprisonment. OKLA. STAT. ANN. tit. 21, § 649.3 (LexisNexis 2013). The law assigns different protection to different animals, indicating that services animals and livestock should be afforded greater protection than "regular" cats or dogs. *Id.* Further-

humanity, and likewise exempt these activities from prosecution under animal cruelty statutes.<sup>78</sup> In some states, these statutes go as far as requiring a cat or dog owner to pay a livestock owner for all damages the cat or dog caused to the livestock, even if the livestock owner ultimately killed that cat or dog.<sup>79</sup> Most importantly, although these statutes afford limited protection for animals, none of these statutes include provisions that grant animals standing to file a lawsuit on their own behalf.

## 2. Congress Has Not Granted Animals Standing to File Lawsuits

Animal rights statutes were not passed with the sole purpose of protecting animals.<sup>80</sup> The federal legislature passed the Endangered Species Act<sup>81</sup> (“ESA”) and the Marine Mammal Protection Act<sup>82</sup> (“MMPA”) to help avoid the extinction of animal species because the absence of certain animal species would disadvantage mankind.<sup>83</sup> These two acts’ legislative histories further reveal that Congress did not intend for the animals protected under either act to have rights themselves, but rather recognized that certain animals have specific value to humans.<sup>84</sup> Although these statutes were passed with the goal of maintaining diversity among nature, both statutes place humans’ needs above animals’ needs.<sup>85</sup> Neither statute provides animals with any enforceable claim against humans or the government.<sup>86</sup>

Likewise, Congress stated that animals should be protected because they are potential resources, and “it is in the best interest of mankind to minimize the losses of genetic variations.”<sup>87</sup> Additionally, neither the ESA nor the MMPA contain any language that would be consistent with a concern for animal safety, harm, or welfare.<sup>88</sup> Under both statutes, animals are protected purely for the resulting benefit to humans.

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more, in Iowa, the animal abuse statute allows for destroying an unconfined animal that is causing damage to property. IOWA CODE § 717B.2(9) (2013).

78. OKLA. STAT. ANN. tit. 4, § 41(LexisNexis 2013); Schmahmann & Polacheck, *supra* note 55, at 762.

79. OKLA. STAT. ANN. tit. 4, § 41(b)(LexisNexis 2013).

80. Schmahmann & Polacheck, *supra* note 55, at 769.

81. 16 U.S.C. § 1531 (2012).

82. 16 U.S.C. § 1361 (2012).

83. 16 U.S.C. § 1361(2)(2012); 16 U.S.C. § 1531(b) (2012).

84. Schmahmann & Polacheck, *supra* note 55, at 768–69.

85. *Id.* at 769. Both the ESA and the MMP protect animals for their potential benefit to mankind in the future, not for the sake of the animals’ health or wellbeing. *Id.* at 768–69.

86. *Id.* at 768.

87. H.R. REP. NO. 93-412 (1973), as quoted in *Bays’ Legal Fund v. Browner*, 828 F. Supp. 102, 105 (D. Mass. 1993).

88. Schmahmann & Polacheck, *supra* note 55, at 769.

Although the Animal Welfare Act<sup>89</sup> (“AWA”) protects countless animals from harm and abuse, the AWA also explicitly provides for the regulation and use of animals in research.<sup>90</sup> Furthermore, the AWA plainly permits animal suffering for necessary research, as long as this suffering is minimized.<sup>91</sup> Much like state animal cruelty statutes, the ESA, the MMPA, and the AWA were never intended to place animal welfare on equal footing with human rights.<sup>92</sup> Consequently, the AWA contains no language that explicitly grants animals standing to file lawsuits by claiming a violation of the Act.<sup>93</sup> Because the ESA, the MMPA, and the AWA were passed with human interests in mind, animal rights activists have been largely unsuccessful in filing lawsuits under these statutes.<sup>94</sup>

### 3. State Courts Are Reluctant to Broadly Interpret Animal Cruelty Statutes, Even When the Issue of Standing Is Not Raised

One area where courts have narrowly interpreted the afforded protection in animal cruelty statutes is the scientific research field. Although some state legislatures have explicitly exempted scientific research from generic animal cruelty statutes,<sup>95</sup> courts in other states have read this exemption into generally worded animal cruelty statutes.<sup>96</sup> In *New Jersey Society for Prevention of Cruelty to Animals v. Board of Education*,<sup>97</sup> the court found that activities with educational and scientific purposes, such as research for a high school science fair, possessed “redeeming qualities,” and therefore would not be classified as wantonly cruel acts under the state’s animal cruelty statute.<sup>98</sup> Courts’ interpretations of state animal cruelty statutes demonstrate that courts often refuse to place animals’ welfare above human needs and scientific progress, and

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89. 7 U.S.C. § 2131 (2012).

90. 7 U.S.C. § 2131.

91. 7 U.S.C. § 2143(a)(3)(1) (2012). This section of the statute goes on to state that tranquilizers, anesthesia, analgesia, and euthanasia can be withheld when “scientifically necessary.” 7 U.S.C. § 2134(a)(3)(c)(v) (2012).

92. Schmahmann & Polacheck, *supra* note 55, at 761.

93. *See* 7 U.S.C. § 2131.

94. Schmahmann & Polacheck, *supra* note 55, at 767.

95. CAL. HEALTH & SAFETY CODE § 1650 (2014)(noting that public health and welfare require the use of animals for the advancement of science, although the statute does mandate that these animals should be treated humanely).

96. N.J. Soc’y for Prevention of Cruelty to Animals v. Bd. of Educ., 219 A.2d 200, 208 (N.J. Cnty. Ct. 1966).

97. N.J. Soc’y for Prevention of Cruelty to Animals v. Bd. of Educ., 219 A.2d 200, 208 (N.J. Cnty. Ct. 1966).

98. *Id.* at 208–09.

importantly, none of the abovementioned statutes contain explicit provisions granting animals standing.

#### 4. Federal Courts Are Reluctant to Enforce Legislation When Animals Are Named as Plaintiffs

In federal legislation such as the ESA, specific statutory provisions allow for private citizens to file lawsuits based on ESA violations in a “citizen suit.”<sup>99</sup> Despite this seemingly straightforward statutory permission to file lawsuits on an animal’s behalf, citizens have still been denied standing to do so.<sup>100</sup> Courts often express that humans have difficulty meeting standing’s injury-in-fact requirement in citizen suits.<sup>101</sup> Animal rights activists hail two recent court cases as triumphs for the animal personhood movement.<sup>102</sup> While at first glance these cases seem to be massive victories for animal rights activists, both cases are shallow successes at best.

In *Palila v. Hawaii Dep’t of Land & Natural Resources*,<sup>103</sup> the Ninth Circuit appeared to grant a bird legal status to file suit under the ESA,<sup>104</sup> and in *Mount Graham Red Squirrel v. Madigan*,<sup>105</sup> the Ninth Circuit allowed a lawsuit under the ESA on a squirrel’s behalf.<sup>106</sup> Neither case specifically addressed the standing issue, presumably because the issue was not raised.<sup>107</sup> In *Mount Graham Squirrel*, animal rights activists filed the claim under no pretense that a squirrel was filing the suit.<sup>108</sup> In *Palila*, the Ninth Circuit stated that a finch-billed bird had legal standing to file a lawsuit, yet the court provided no justification for its departure from precedent.<sup>109</sup>

99. 16 U.S.C § 1540(g)(2012).

100. See *Citizens to End Animal Suffering & Exploitation v. New England Aquarium*, 836 F. Supp. 45, 46 (D. Mass. 1993). *Contra Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1171 (9th Cir. 2004).

101. Hogan, *supra* note 68, at 515. Hogan suggests that even if plaintiffs were able to satisfy standing’s injury-in-fact requirement, many claims would still fail under the “zone of interests” test, which aims at ensuring that the challenges to a statute further, rather than frustrate, the goals of the statute. *Id.* at 521.

102. See generally *Palila v. Hawaii Dep’t. of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 2004); *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441 (9th Cir. 1992).

103. *Palila v. Hawaii Dep’t of Land & Natural Resources*, 639 F.2d 495 (9th Cir. 1992).

104. *Id.* at 496. The court’s statement that the bird was granted standing was later explicitly found to be mere dicta by the same circuit. *Cetacean Cmty.*, 386 F.3d at 1179.

105. *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441 (9th Cir. 1992).

106. *Id.* at 1448.

107. See generally *Palila*, 639 F.2d 495; *Mount Graham*, 954 F.2d 1441.

108. *Mount Graham*, 954 F.2d at 1448.

109. *Palila*, 852 F.2d at 1107.

Despite these two successes for animal rights activists, the Ninth Circuit's most recent decision on this issue had the opposite outcome. In *Cetacean Community v. Bush*,<sup>110</sup> the Ninth Circuit dismissed an attempt by the entire population of the world's whales, dolphins, and porpoises to bring a claim in federal court.<sup>111</sup> The Ninth Circuit held that the statements in *Palila* about standing were "nonbinding dicta," and that the bird's standing was never at issue in that case.<sup>112</sup> The court determined that the *Palila* court's statement that the bird "wing[ed] its way into federal court as a plaintiff in its own right," was unnecessary and little more than "rhetorical flourishes."<sup>113</sup>

The Ninth Circuit further examined the standing issue in *Cetacean Community*. The court noted that it is "obvious that an animal cannot function as plaintiff in the same manner as a juridically competent human being."<sup>114</sup> The Ninth Circuit stated that Congress may pass legislation that authorizes an animal to sue on its own behalf, but after analyzing the ESA, the MMPA, and the National Environmental Policy Act,<sup>115</sup> the Ninth Circuit determined that Congress has not yet granted animals the ability to sue in their own name.<sup>116</sup> Ultimately, the Ninth Circuit agreed with the First Circuit, stating that if Congress and the President desire to take the "extraordinary" step of permitting animals to file a lawsuit, they should do so explicitly and clearly.<sup>117</sup>

In addition to *Mt. Graham Red Squirrel*, *Palila*, and *Cetacean Community*, two additional courts have refused to grant animals standing to file lawsuits under the MMPA and the ESA. In *Citizens to End Animal Suffering & Exploitation v. New England Aquarium*,<sup>118</sup> the court held that the MMPA does not authorize suits to be brought on animals' behalf.<sup>119</sup> The court refused to permit an animal standing to file a lawsuit

110. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1171, 1179 (9th Cir. 2004).

111. *Id.*

112. *Id.* at 1173.

113. *Id.* at 1773-74.

114. *Id.* at 1775.

115. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970). The National Environmental Policy Act was created with the purpose of creating a national policy to encourage harmony between humans and the environment. *Id.* The Ninth Circuit included this Act with the ESA and MMPA when searching for any evidence that Congress intended animals to have standing to sue.

116. *Cetacean Cmty.*, 386 F.3d at 1169, 1176, 1179.

117. *Id.* at 1179 (quoting *Citizens to End Animal Suffering & Exploitation v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993)). In *New England Aquarium*, the First Circuit dismissed an action filed by animal rights activists and a dolphin alleging a violation of the MMPA. *New England Aquarium*, 836 F. Supp. at 49-50.

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

119. *Id.* at 49.

in the absence of a clear statutory statement.<sup>120</sup> Similarly, in *Hawaiian Crow v. Lujan*,<sup>121</sup> the court found that the ESA authorized suits brought by any person.<sup>122</sup> Animal rights activists had attempted to name a species of bird as plaintiff, and the court ordered the bird's name to be removed from the complaint.<sup>123</sup> The standing doctrine has consistently proven to be the largest impediment facing animal rights activists.<sup>124</sup>

#### 5. International Courts Have Not Granted Animals Standing to File Lawsuits

Although court decisions from other nations may not directly impact legal judgments in the United States, evaluating trends and verdicts from abroad can provide insight into legal issues at home. Recently, a court in Argentina was presented with a habeas corpus petition on an orangutan's behalf.<sup>125</sup> The decision was inaccurately reported in the media as having granted basic legal rights to the orangutan.<sup>126</sup> Even though Wise and the NRP initially applauded the Argentine decision,<sup>127</sup> upon closer review they realized, and admitted, that the opinion did not grant animals the rights that the media had initially purported.<sup>128</sup> In actuality, the case was simply remanded to a different court that lacks the power to issue writs of habeas corpus, and that court will view the case through an animal cruelty lens.<sup>129</sup> Furthermore, it is likely that the opinion's animal rights language was merely dicta.<sup>130</sup> Accordingly, animal rights activists will have difficulty using the Argentine case to further their quest to grant animals legal personhood status.

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120. *Id.*

121. *Hawaiian Crow v. Lujan*, 906 F. Supp. 549, 551-552 (D. Haw. 1991).

122. *Id.* at 551.

123. *Id.* at 552.

124. Schmahmann & Polacheck, *supra* note 55, at 773.

125. *Court in Argentina Grants Basic Rights to Orangutan*, BBC NEWS (Dec. 21, 2014), <http://www.bbc.com/news/world-latin-america-30571577>.

126. *Id.*

127. *Id.*

128. *Id.* Wise himself stated that the translated version of the Argentine decision contains none of the quotations or language that were reported by media. *Id.* Wise and the Nonhuman Rights Department can only benefit from a court, even in another country, ruling that animals have rights, yet he was willing to admit that this decision did not appear to advance the movement. *Id.*

129. *Id.*

130. *Id.*



### III. COURTS AND LEGISLATURES SHOULD NOT GRANT ANIMALS STANDING TO FILE LAWSUITS

#### A. *The Common Law Treatment of Animals Should Not Be Drastically Altered By a Rogue Court*

The courts and the legislature consistently reiterate that animals do not have standing to sue.<sup>131</sup> Although in *Palila* the Ninth Circuit granted a bird the ability to file suit on its own behalf,<sup>132</sup> in *Cetacean Community*, the same circuit later unequivocally rejected and criticized *Palila's* dicta that purported to grant animals standing.<sup>133</sup> While there is a third Ninth Circuit case falling in between *Palila* and *Cetacean Community* that allowed a successful ESA claim on a squirrel's behalf, the animal was not named as a plaintiff, and the standing issue was never raised.<sup>134</sup> The animal rights movement, particularly the animal personhood movement, is a liberal movement within Western tradition.<sup>135</sup> Therefore, if the Ninth Circuit, a widely regarded liberal circuit,<sup>136</sup> refuses to grant animals standing to file suit, other courts should follow the Ninth Circuit's lead.

Additionally, the current cases in New York provide future courts with three different precedents to follow.<sup>137</sup> When Wise and the NRP filed suit on behalf of chimpanzees in New York, the three cases were filed in different departments, and each court reached a decision on distinctive grounds.<sup>138</sup> Although all three courts denied the petitions for habeas corpus, the most crushing blow<sup>139</sup> to the animal personhood movement was delivered by the New York Supreme Court, Appellate Division, Third Judicial Department ("Third Judicial Department").<sup>140</sup>

131. *Citizens to End Animal Suffering & Exploitation v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993); *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1973-74 (9th Cir. 2004); *Hawaiian Crow v. Lujan*, 906 F. Supp. 549, 552 (D. Haw. 1991).

132. *Palila v. Hawaii Dep't of Land & Natural Resources*, 639 F.2d 495, 1441 (9th Cir. 1992)

133. *Cetacean Cmty.*, 386 F.3d at 1973-74.

134. *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1448 (9th Cir. 1992).

135. ROBERT GARNER, *ANIMAL RIGHTS, POLITICAL THEORY AND THE LIBERAL TRADITION*, 8:1 *CONTEMPORARY POLITICS* 7, 15 (2002).

136. John Schwartz, *'Liberal' Reputation Precedes Ninth Circuit Court*, N.Y. TIMES (Apr. 24, 2010), [http://www.nytimes.com/2010/04/25/us/25sfninth.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/04/25/us/25sfninth.html?pagewanted=all&_r=0).

137. *Legal Whac-a-Mole*, *supra* note 17.

138. *Id.*

139. *Id.* One appellate court decided that habeas corpus did not apply in the context of changing a chimpanzee's confinement from one location to another, and the second appellate court threw out the appeal. *Id.* Wise himself admitted that the Third Judicial Department's decision was the most damaging. *Id.*

140. *NRP Inc., v. Lavery*, No.518336, slip op. at 2-3 (N.Y. App. Div. Dec. 4, 2014).

The Third Judicial Department explicitly declined to declare that animals are persons, stating “a chimpanzee is not a ‘person’ entitled to the rights and protections afforded by the writ of habeas corpus.”<sup>141</sup> Importantly, the court looked to animals’ treatment in the history and tradition of the common law and determined that “animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered persons or entities capable of asserting rights for the purpose of state or federal law.”<sup>142</sup> The Third Judicial Department not only recognized that animals are not persons in the framework of habeas corpus relief, but also that animals are not persons capable of possessing or asserting rights in any legal context.<sup>143</sup>

Future courts should find the Third Judicial Department’s decision persuasive when deciding whether to grant animals legal personhood status, particularly because the decision clearly addresses and holds that animals cannot possess rights. Furthermore, courts should recognize that no animal welfare statute currently grants animals standing to sue,<sup>144</sup> and extensive case law exists where courts have deferred to long-standing legislative and public policy guidelines maintaining that animals are property.<sup>145</sup> Likewise, courts and legislatures have continually reaffirmed that animals do not have standing to sue.<sup>146</sup> If state courts, the Ninth Circuit, and the federal government are unwilling to extend the standing doctrine to animals, future courts faced with this issue should also refuse to grant standing to animals. To do otherwise would be a drastic departure from law and precedent.

### *B. Significant Negative Consequences Will Result From Granting Animals Legal Personhood Status*

Professor Richard Epstein<sup>147</sup> stated that “[t]here would be nothing left of human society if we treated animals not as property, but as inde-

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141. *Id.*

142. *Id.* at 3.

143. *Id.*

144. *See supra* notes 87 and 94 and accompanying text.

145. *See Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000); *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1123 (Ohio Ct. App. 2003); *Rabideau v. City of Racine*, 627 N.W.2d 795, 797 (Wis. 2001).

146. *Citizens to End Animal Suffering v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993); *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1973-74 (9th Cir. 2004).

147. Richard Epstein is a law professor at New York University School of Law and is a noted researcher and scholar who studies, teaches, and writes about property law. *Richard Epstein*, NYU LAW, <https://its.law.nyu.edu/facultyprofiles/profile.cfm?section=bio&personID=26355> (last visited Jan. 3, 2015).

pendent holders of rights.”<sup>148</sup> In *Rabideau v. City of Racine*,<sup>149</sup> Judge Bablitch considered whether animals were properly classified as property.<sup>150</sup> Judge Bablitch reiterated Epstein’s concern.<sup>151</sup> Judge Bablitch expressed his sympathy for humans who form deep bonds and “devoted friendship[s]” with dogs, and likewise expressed his disdain for classifying dogs as property.<sup>152</sup> Despite this sympathy, Judge Bablitch recognized that removing the property classification from dogs would result in eventually removing the property distinction from all animals.<sup>153</sup>

Professor Epstein and Judge Bablitch envisioned the chaos that would result from granting legal rights to animals, and this chaos will begin if animals are granted standing to sue. Hundreds or even thousands of cases would clog the court dockets if animal rights activists could file suit with animals as the plaintiffs, with these “plaintiffs” ranging from cattle on farms, to monkeys in laboratories, to domesticated cats and dogs in households.<sup>154</sup> Furthermore, courts would be tasked with handling claims and regulating industries that Congress intended to be controlled entirely by administrative agencies.<sup>155</sup>

Additionally, the chaos caused by granting animals standing to sue would extend beyond court congestion. The medical research field is largely dependent on animal testing.<sup>156</sup> Although there is admittedly some excessive and unnecessary testing present in the medical research industry, using animals in medical research is a conflict that cannot be avoided.<sup>157</sup> Furthermore, Congress explicitly chose to exempt birds, rats, and mice that are bred for research from the AWA.<sup>158</sup> Animal rights activists argue, however, that human advancement, even when directly related to human health, can never justify animal suffering.<sup>159</sup>

148. Richard A. Epstein, *The Next Rights Revolution?*, 51 NAT’L. REV., 44, 45 (1999).

149. *Rabideau v. City of Racine*, 627 N.W.2d 795, 797 (Wis. 2001).

150. *Id.* at 798–89.

151. *Id.*

152. *Id.* at 798.

153. *Id.* at 798–99.

154. Smith, *supra* note 4, at 69.

155. Schmahmann & Polacheck, *supra* note 55, at 768 (citing Int’l Primate Prot. League v. Inst. for Behavioral Research, Inc., 799 F.2d 934, 940 (4th Cir. 1986)). Congress did not intend for courts to be burdened with regulating the industries governed by the AWA. *Id.*

156. Smith, *supra* note 4, at 176–180, 190, 191. For example, animal research has produced profound results in the treatment of AIDS in addition to enabling drug and toxicology testing. *Id.*

157. Schmahmann & Polacheck, *supra* note 55, at 755–56.

158. 7 U.S.C. § 2143(a)(g)(1)(2012).

159. Schmahmann & Polacheck, *supra* note 55, at 757.

Similarly, the meat and dairy industries directly depend on humans consuming animals. Congress actively supports these industries, and the Agriculture Act<sup>160</sup> provides for an estimated \$956 billion to support the programs protected under the act.<sup>161</sup> The Agriculture Act provides subsidies for crop insurance, rural development, research, and commodities.<sup>162</sup> Interestingly, although the Agriculture Act does not directly subsidize farmers who raise animals for human consumption, estimates suggest that roughly two-thirds of the budget for subsidizing commodity crops actually subsidizes crops that are used as animal feed.<sup>163</sup> Congress has explicitly<sup>164</sup> and implicitly authorized using animals in the medical<sup>165</sup> and meat industries. If Congress grants animals standing to file suit in court, it will destroy the same industries that it actively supports.

Wise admits that if the animals enabling the medical and meat industries to flourish are granted rights, the industries will be “severely affected[.]”<sup>166</sup> “Severely affected” is an understatement. How can the meat and dairy industries continue to function if cows, pigs, and chickens are permitted to sue their owners for the bodily injury and harm that directly results from human consumption? If animals are granted legal personhood status, the medical, meat, and dairy industries will be irrevocably harmed.

### *C. If Animals Are Granted Standing, Where Will it End?*

#### 1. Animal Rights Activists Desire to Extend Rights Beyond “Intelligent” Animals

There is no consensus among animal rights activists as to which animals should be granted standing.<sup>167</sup> The NRP suggests a gradual ap-

160. Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014).

161. *H.R. 2642, Agricultural Act of 2014*, CONGRESSIONAL BUDGET OFFICE (Jan. 28, 2014), <http://www.cbo.gov/publication/45049>.

162. *Id.*

163. Arthur Allen, *U.S. Touts Fruit and Vegetables While Subsidizing Animals that Become Meat*, WASHINGTON POST (Oct. 3, 2011), [http://www.washingtonpost.com/national/health-science/us-touts-fruit-and-vegetables-while-subsidizing-animals-that-become-meat/2011/08/22/gIATFG5IL\\_story.html](http://www.washingtonpost.com/national/health-science/us-touts-fruit-and-vegetables-while-subsidizing-animals-that-become-meat/2011/08/22/gIATFG5IL_story.html).

164. 7 U.S.C. § 2131 (2012). Congress wanted to ensure “that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment.” *Id.*

165. *Id.*

166. Wise, *supra* note 11, at 11.

167. There is also disagreement among animal rights activists as to what exactly is meant by “legal rights”. Senatori, *supra* note 3, at 39.

proach to granting animals legal rights.<sup>168</sup> The organization states that they will *begin* with animals that exhibit “complex cognitive abilities such as self-awareness and autonomy.”<sup>169</sup> Intentional behavior, linguistic ability,<sup>170</sup> emotional capability, and personality traits are additional defining characteristics suggested as guidance to determine if an animal should possess legal personhood status.<sup>171</sup> Some animal rights activists reject the notion that there should be a distinction between different types of animals; they say if it is an animal, it should possess the same rights as humans.<sup>172</sup>

Looking to the NRP, Wise desires to extend legal rights to all animals with the capacity to suffer.<sup>173</sup> Under Wise’s definition, almost every single animal will be capable of having a lawsuit filed in its name. For example, a goldfish<sup>174</sup> could conceivably bring a claim of false imprisonment for being held in a tank in a child’s bedroom.

## 2. Environmental Rights Activists Are Pursuing Similar Goals for the Environment

Although animal rights activists argue that animals should be granted legal personhood status and standing to sue based on the animals’ ability to reason, feel pain, and suffer,<sup>175</sup> those limitations on expanding legal personhood may not be in place for long. In 1972, Christopher Stone<sup>176</sup> first<sup>177</sup> articulated the argument that the environment should possess rights, particularly the standing to file suit on its own behalf.<sup>178</sup> Both movements have since shared similar characteristics and followed

168. *Q&A about the NRP*, *supra* note 72.

169. *Id.* The NRP wants to begin with great apes, dolphins, and elephants, but notes that these are their only “plaintiffs” for the time being. *Id.*

170. There is no scientific agreement on what, if any, animals possess linguistic abilities. Kelch, *supra* note 39, at 23.

171. Seps, *supra* note 44, at 1354–57.

172. Bryant, *supra* note 8, at 271.

173. Wise, *supra* note 11, at 34.

174. See Jackie Nordgreen et al., *Thermonociception in fish: Effects of two different doses of morphine on thermal threshold and post-test behaviour in goldfish (Carassius auratus)*, 119 *APPLIED ANIMAL BEHAVIOUR SCIENCE*, 101, 101 (2009) (finding that goldfish are capable of experiencing pain).

175. Seps, *supra* note 44, at 1354–55.

176. UNIV. OF SOUTHERN CALIFORNIA, GOULD SCHOOL OF LAW, *Christopher D. Stone*, <http://weblaw.usc.edu/contact/contactInfo.cfm?detailID=372> (last visited Feb. 4, 2015). Christopher Stone is an influential scholar who focuses much of his research on environmental law and ethics. *Id.*

177. Senatori, *supra* note 3, at 35. Similar to animal rights activists, environmental right activists file lawsuits in court and demand standing for the environment. *Id.*

178. Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 *S. CAL. L. REV.* 3, 17 (1972).

common legal strategies.<sup>179</sup> It is no stretch to believe that if animals are granted standing to sue, trees and lakes will not be far behind.

*D. Animal Welfare Should Be Protected by a Guardianship Model  
Instead of Granting Animals Legal Personhood Status*

Although animal rights activists have thus far had extremely limited success filing suits under the ESA and MMPA,<sup>180</sup> granting animals standing to file law suits on their own behalf is not the proper solution for enabling greater enforcement of these acts. One viable method that would allow increased enforcement of the ESA and MMPA is to permit non-profit organizations with a demonstrated dedication to animals and legal proficiency to serve as a guardian *ad litem*<sup>181</sup> to file suit under these acts.<sup>182</sup> This guardianship model is already utilized in Italian law to allow environmental groups greater access to the justice system.<sup>183</sup>

If courts permit a slight modification of the traditional standing requirement for animal welfare cases, the ESA and MMPA could be enforced without granting animals standing to file suit on their own behalf. If courts broaden the standing requirement in these cases, empathetic humans with proper legal training could easily file suit for an animal to protect the animal's welfare.<sup>184</sup> A lawsuit filed to protect an animal will have the same outcome regardless of whether an animal or a nonprofit organization is the named plaintiff.<sup>185</sup> Even proponents who ardently support granting animals legal personhood status recognize that the outcomes will not differ.<sup>186</sup>

#### IV. CONCLUSION

As the three New York appellate courts have demonstrated, animals do not, and should not, possess the same legal rights as humans. Although animals should be treated humanely, there is a stark difference between promoting animal welfare and advocating for animal rights. Furthermore, as the Third Judicial Department noted, nowhere in Wise's

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179. Senatori, *supra* note 3, at 41.

180. *Supra* notes 101 and 102.

181. A guardian *ad litem* is an attorney who is appointed by the court to represent a minor or incompetent person. BLACK'S LAW DICTIONARY (9th ed. 2009). A guardian *ad litem* is charged with pursuing what is in his or her client's best interests. *Id.*

182. Hogan, *supra* note 68, at 518.

183. *Id.* Italian law allows certain, selected environmental organizations to intervene on environmental matters. *Id.* at 533.

184. Bryant, *supra* note 8, at 276.

185. *Id.*

186. *Id.*

arguments did Wise purport that Tommy the chimpanzee was mistreated or desire to improve the animal's welfare.<sup>187</sup> Instead, Wise and the NRP object to the mere idea that animals can be confined and used for mankind's own purposes.<sup>188</sup>

If Wise were to see his goals realized, the consequences would be drastic. Any industry that used animals in any way would be affected. The medical research, meat, dairy, and pet industries would face sweeping and severe changes. Courts would be confronted with congestion and confusion and would be forced to decide whether a pet parrot could be confined to a cage. Furthermore, as is already in progress, courts would ultimately face lawsuits from activists claiming that trees possess these same rights as well.

The Ninth Circuit and the New York appellate courts correctly recognized that animals do not have the same rights as people. These courts accurately acknowledged that the legislature has consciously chosen not to grant rights to animals. Most importantly, these courts accepted what mankind has long understood: animals, though worthy of dignity and respect, do not possess, and cannot assert, the same legal rights as humans.

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187. NRP Inc., v. Lavery, No.518336, slip op. at 2 (N.Y. App. Div. Dec. 4, 2014).

188. *Q&A about the NRP*, *supra* note 72.