FROM INSIDE THE CAGE TO OUTSIDE THE BOX

Natural Resources as a Platform for Nonhuman Animal Personhood in the U.S. and Australia

by Randall S Abate* and Jonathan Crowe**

Abstract

Nonhuman animals are currently treated as property under U.S. and Australian law, leaving them open to various kinds of exploitation. There has been a gradual evolution away from this property paradigm in both countries, but significant work remains to ensure that nonhuman animals are afforded adequate legal protections. This article considers the legal avenues available to protect nonhuman animals in the U.S. and Australia, focusing particularly on the attribution of legal personhood. Section 2 of the article reviews attempts by the Nonhuman Rights Project (NhRP) to establish legal personhood protections for nonhuman animals through writ of habeas corpus petitions under U.S. common law. Section 3 surveys the options for recognition of animal personhood under Australian law, discussing issues of standing, habeas corpus, and guardianship models. Section 4 discusses the growing movement to assign legal personhood rights to natural resources. The article proposes that to the extent that natural resources have received legal personhood protection to recognize their inherent value, similar protections should be afforded to animals. In the meantime, habeas corpus, standing, and guardianship theories provide valuable procedural platforms for incremental progress toward protecting nonhuman animals in both the U.S. and Australia.

* Associate Dean for Academic Affairs and Professor of Law, Florida A&M University College of Law, Orlando, Florida. Professor Abate gratefully acknowledges valuable research assistance from Mackenzie Landa, Esq. and Karina Valencia, Esq.
** Professor of Law, Faculty of Law, Bond University, Queensland, Australia.

1. Introduction

> [T]he mental faculties of man and lower animals do not differ in kind, but immensely in degree. A difference in degree, however great, does not justify us in placing man in a distinct kingdom ….[1]

The law governing the protection of nonhuman animals in the U.S. and Australia is ripe for transformation. Nonhuman animals are currently treated as property under U.S.[2] and Australian[3] law, which has enabled widespread exploitation of nonhuman animals in multiple contexts including medical experimentation, food production, and entertainment.[4] Fortunately, there has been a gradual and long-overdue evolution away from this property paradigm in the past decade in the U.S., with many ground-breaking victories to promote animal welfare[5] that offer hope for the future. Australian law has also shown signs of moving away from the property paradigm. Nevertheless, significant work remains to ensure that adequate legal protections are implemented for nonhuman animals.

Seeking legal personhood status for nonhuman animals is a recent and valuable effort underway to secure enhanced protection for nonhuman animals in the U.S.[6] and Australia.[7] Although the term

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[1] CHARLES DARWIN, THE DESCENT OF MAN, AND SELECTION IN RELATION TO SEX 186 (1871).

[2] *See generally* Gary L. Francione, *Animals as Property*, 2 ANIMAL L. 1 (1998) (arguing that U.S. law's treatment of nonhuman animals needs to evolve from personal property status to something resembling personhood to ensure adequate protection); David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021 (2010) (proposing modification of traditional rules of property law to provide a distinct set of protections for animals as a unique category of property).

[3] *See generally* Geeta Shyam, *The Legal Status of Animals: The World Rethinks its Position*, 40 ALT. L.J. 266 (2015) (discussing how animals are classified as property in Australia and how dialogue must be initiated to consider adoption of legal strategies from other countries to enhance animal protection in Australia).

[4] Taimie L. Bryant, *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, 248 (2008).

[5] *See, e.g.*, Karen Brulliard, *How Eggs Became a Victory for the Animal Welfare Movement*, WASH. POST, Aug. 6, 2016, https://www.washingtonpost.com/news/animalia/wp/2016/08/06/how-eggs-became-a-victory-for-the-animal-welfare-movement-if-not-necessarily-for-hens/ (discussing how ballot measures and other public awareness campaigns helped secure victories to ensure production of cage-free eggs to promote welfare of hens in factory farms); Rachel E. Gross, Can SeaWorld Redeem Itself?, Slate, Apr. 14, 2016, http://www.slate.com/articles/health_and_science/science/2016/04/seaworld_s_end_to_captive_breeding_gives_it_the_chance_to_make_amends.html (discussing how public outcry in the wake of the documentary, Blackfish, prompted SeaWorld to discontinue its captive breeding program for orcas due to animal welfare concerns associated with using orcas for entertainment); Faith Karimi, *Ringling Bros. Elephants Perform Last Show*, CNN.COM, May 2, 2016, http://www.cnn.com/2016/05/01/us/ringling-bros-elephants-last-show/ (discussing the discontinuation of elephants in circus performances in response to long-standing allegations of animal welfare concerns in the treatment of circus elephants).

[6] *See* Jane C. Hu, *When Is an Animal a Legal Person?*, PACIFIC STANDARD, Apr. 28, 2015, https://psmag.com/when-is-an-animal-a-legal-person-4564779bbd18.

[7] *See* Ruth Hatten, *Legal Personhood for Animals: Can It be Achieved in Australia?*, 11 AUS. ANIMAL PROTECTION L.J. 35 (2015).

"person" is generally understood to be limited to "human beings," legal personhood is a more inclusive concept that covers all individuals or entities "who count [ ] for the purpose of law."[8] Although different in form and foundation, the U.S. and Australian Constitutions share a common silence on the recognition of rights for nonhuman animals. In the U.S., the Nonhuman Rights Project (NhRP) is seeking to establish legal personhood protections for nonhuman animals through writ of habeas corpus petitions under the common law. No similar cases have been attempted in Australia as of this writing. Nevertheless, the prospect of recognition of legal personhood for nonhuman animals in Australia is similarly ripe for consideration in Australian courts given Australia's common law heritage and the availability of habeas corpus actions.

This article considers the legal avenues available to recognize legal personhood for nonhuman animals and addresses the procedural and substantive legal obstacles on the path to securing such protection. For example, the doctrine of standing has posed significant procedural challenges for humans seeking to assert rights on behalf of nonhuman animals because the nonhuman animals are treated as property rather than as persons under the law. Moreover, the U.S. Endangered Species Act[9] does not include nonhuman animals in the definition of "person" for purposes of who may sue under the Act to seek recourse for failure to fulfill a procedural or substantive duty to protect a listed species. Substantively, advocates face the quandary of ascertaining which nonhuman animals deserve protection and what type of personhood protections should be afforded. The NhRP cases have focused on freedom from confinement for chimpanzees as the initial step in this process.

Section 2 of this article reviews the NhRP cases and how habeas corpus can be a valuable leverage point to secure recognition of limited legal personhood protections for nonhuman animals in the U.S. Section 3 discusses the less developed and more challenging option to rely on habeas corpus petitions for legal personhood protection for animals in Australia. Acknowledging the narrower habeas corpus opportunity for relief in Australia, it also discusses the promising opportunities to build on broad standing access and guardianship theories for enhanced protection of animals in the Australian context.

Section 4 discusses the growing movement to assign legal personhood rights to natural resources. The article proposes that to the extent that natural resources have received legal personhood protection

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[8] Jeffrey S. Kerr, et al., *A Slave by Any Other Name Is Still a Slave: The Tilikum Case and Application of the Thirteenth Amendment to Nonhuman Animals*, 19 ANIMAL L. 221, 225 (2013) (citing Note, *What We Talk About When We Talk About Persons*, 114 HARV. L. REV. 1745, 1746 (2001)).
[9] 15 U.S.C. §§ 1531–1544 (2012).

to protect their inherent value, similar protections should be afforded to animals. This evolution will take time, however, so the article further argues that habeas corpus, standing, and guardianship theories provide valuable procedural platforms for incremental progress toward the ultimate goal of legislative recognition of legal personhood rights for nonhuman animals in both the U.S. and Australia.

2. Habeas corpus and the Nonhuman Rights Project cases

Habeas corpus as a mechanism for animal protection is a new and creative development in the law. Habeas corpus is a proceeding to obtain a court order to produce a detained person so the legality of their custody can be determined. It is one of the oldest and most important common law writs.[10] Importantly, for the purposes of this article, the writ can potentially be brought on behalf of the prisoner by a third party.[11] This creates the prospect that the writ could be used by animal welfare groups to challenge the imprisonment of animals where it is unauthorized or contrary to law. Although not involving "prisoners" in the traditional sense, the Nonhuman Rights Project (NhRP) has relied on this legal mechanism to seek to compel the release of nonhuman animals in captivity.

In 2013, the NhRP filed three habeas corpus petitions alleging unlawful detainment of chimpanzees. In the first case, *People ex. rel. Nonhuman Rights Project, Inc. v. Lavery*,[12] the issue before the court was whether Tommy, a chimpanzee, is a "person" entitled to the rights and protections afforded by the writ of habeas corpus.[13] The NhRP alleged that although respondents, who cared for Tommy in their home, were in compliance with state and federal statutes, the statutes themselves were inappropriate.[14] The NhRP requested that the Court enlarge the common law definition of "person" in order to afford legal rights to an animal.[15] The Court declined to do so and held that a chimpanzee was not a person entitled to rights afforded by writ of habeas corpus.[16] It reasoned that the liberty rights protected by writ of habeas corpus have been connected with the imposition of societal obligations and

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[10] *See, e.g.*, JUDITH FARBEY & R. J. SHARPE, THE LAW OF HABEAS CORPUS 1 (3d ed. 2011); RAYNER THWAITES, THE LIBERTY OF NON-CITIZENS: INDEFINITE DETENTION IN COMMONWEALTH COUNTRIES 44 (2014); Michael Lobban, *Habeas Corpus, Imperial Rendition, and the Rule of Law*, 68 CURRENT LEGAL PROBLEMS 27, 27–28 (2015).
[11] FARBEY & SHARPE, *supra* note 10, at 237.
[12] 124 A.D.3d 148 (3d Dept. 2014).
[13] *Id.* at 149.
[14] *Id.* at 150.
[15] *Id.*
[16] *Id.*

duties.[17] Society extends rights in exchange for an implied or express agreement from its members to submit to social responsibilities.[18] The Court further reasoned that unlike human beings, chimpanzees could not bear any legal duties, be held legally accountable for their actions, or submit to societal responsibilities.[19] Thus, in the Court's view, it was this incapability to bear any legal responsibilities and societal duties that rendered it inappropriate to give chimpanzees the legal rights that have been given to human beings, such as the right to liberty protected by the writ of habeas corpus.[20]

In the second proceeding, *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*,[21] the NhRP filed a writ of habeas corpus proceeding on behalf of Kiko, another chimpanzee.[22] The petition alleged that Kiko was illegally confined because he was kept in unsuitable conditions, and it sought to have Kiko transferred to a different facility selected by the North American Primate Sanctuary Alliance.[23] The Court concluded that Supreme Court properly dismissed the petition.[24] It reasoned that a habeas corpus proceeding "must be dismissed where the subject of the petition is not entitled to immediate release from custody," and in this case, the NhRP did not seek Kiko's immediate release, but instead sought to have Kiko placed in a different facility that the NhRP deemed more appropriate.[25] In addition, the Court concluded that even if it had agreed with the NhRP that Kiko should have been deemed a person, the matter was governed by "the line of cases standing for the proposition that habeas corpus does not lie where a petitioner seeks only to change the conditions of confinement rather than the confinement itself."[26]

In the third proceeding, *Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley*,[27] the NhRP sought a writ of habeas corpus for Hercules and Leo, two young adult male chimpanzees who, since November 2010, had been held at the State University of New York at Stony Brook and used as

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[17] *Id.* at 151.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 152.
[21] 124 A.D.3d 1334 (4th Dept. 2015).
[22] *Id.* at 1334–1335.
[23] *Id.* at 1335.
[24] *Id.*
[25] *Id.* For criticism of the reasoning in the *Kiko* case, see Erica R. Tatoian, *Animals in the Law: Occupying a Space between Legal Personhood and Personal Property*, 31 J. ENVTL. L. & LITIG. 147, 156–57 (2015) (expressing concern that the lower court dismissed the case without addressing whether Kiko could be declared a legal person).
[26] 124 A.D.3d at 1335.
[27] 16 N.Y.S. 3d 898 (Sup. Ct. 2015).

research subjects in studies on the locomotion of chimpanzees and other primates.[28] The sole issue that the NhRP raised was whether Hercules and Leo could be legally detained at all.[29] NhRP offered research findings to support its assertion that chimpanzees are autonomous and self-determining beings entitled to such fundamental rights as bodily liberty and equality, and sought the issuance of a writ and a determination that Hercules and Leo were being unlawfully deprived of their liberty.[30]

The substance of the petition required a finding as to whether a chimpanzee is a legal person entitled to bring a writ of habeas corpus.[31] The NhRP argued that "chimpanzees should be accorded rights consonant with their abilities, and that their autonomy and self-determination merit the right to be free from illegal detention, and to that extent, the status of legal personhood."[32] The Court denied the petition for a writ of habeas corpus and dismissed the case.[33] In response to the NhRP's assertion that the court in *Lavery*[34] "failed to recognize that the determination of whether a chimpanzee is a legal person is a policy question, not a biological one,"[35] the court held that petitioner failed to establish that common law relief in the nature of habeas corpus was appropriate and determined that the legislature was the appropriate forum for obtaining additional protections.[36] The Court concluded that even if it were not bound by the Third Department in *Lavery*, the issue of a chimpanzee's right to invoke the writ of habeas corpus is best decided by the Court of Appeals, given its role in setting state policy.[37]

While this line of NhRP cases has yet to produce a favorable outcome, the appellate division of the Supreme Court of the State of New York in Manhattan heard oral arguments in NhRP's appeal of the

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[28] *Id.* at 900.
[29] *Id.*
[30] *Id.* at 902. For more information on the nature of the "immunity" rights at issue in this litigation, see Steven M. Wise, *Animal Rights: One Step at a Time*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 27 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) ("Such immunities as freedom from slavery and torture are the most basic kind of legal rights. It's these to which nonhuman animals, like human beings, are most strongly entitled, and immunity rights are likely to be achieved first.").
[31] *Id.* at 911.
[32] *Id.* at 914.
[33] *Id.* at 918.
[34] *Supra* note 12.
[35] 16 N.Y.S. 3d at 916.
[36] *Id.* at 916–17.
[37] *Id.* at 917. For a proposal to advance animal protection without the need to seek legal personhood recognition for nonhumans, see Richard L. Cupp, Jr., *Focusing on Human Responsibility Rather Than Legal Personhood for Nonhuman Animals*, 33 PACE ENVTL. L. REV. 517, 522 (2016) (discussing problems with the NhRP lawsuits and calling for a focus on the "evolving standards of human responsibility for animals' welfare as a means of protecting animals rather than granting legal personhood to animals").

Lavery case on March 17, 2017,[38] but has yet to issue a decision as of this writing. In addition, actions have been filed in courts on similar grounds in other countries, one of which was successful in Argentina in 2016.[39] Several legal personhood-related legislative initiatives also have been pursued for nonhuman animals.[40]

3. Theories for expanding animal personhood protection in Australia

The Australian legal system, like the U.S., has traditionally treated non-human animals as property, not persons.[41] Any damage or injury caused to animals was treated as damage to property and could therefore infringe the rights of the owner, but not the animal itself.[42] This approach continues to guide many criminal offenses dealing with injury to animals.[43] The Australian common law adopted the United Kingdom classification of animals as *mansuetae naturae*, meaning of tame disposition, or *ferae naturae*, meaning wild.[44] This distinction was used to determine the degrees of liability people have in tort for damage caused by animals under their control.[45]

This traditional view of animals as items of property has weakened to some extent over time. Animal welfare laws now exist in all Australian states and territories.[46] These laws do not prohibit the exploitation of animals outright, but seek to limit it by proscribing especially cruel treatment.

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[38] *See New York Court to Determine if Chimp Is Legally a Person*, USNEWS.COM, Mar. 16, 2017, https://www.usnews.com/news/offbeat/articles/2017-03-16/ny-court-asked-to-determine-if-chimp-is-legally-a-person.

[39] *See* Saskia Stucki, *Toward Hominid and Other Humanoid Rights: Are We Witnessing a Legal Revolution?*, VERFASSUNGSBLOG, Dec. 30, 2016, http://verfassungsblog.de/toward-hominid-and-other-humanoid-rights-are-we-witnessing-a-legal-revolution/ (court in Argentina granted habeas corpus petition for an orangutan named Cecilia); *but see* Gareth Davies, *Death of 'the World's Saddest Polar Bear': Arturo, Who Prompted a Worldwide Campaign to Free Him From Argentinian Zoo After Falling Into Depression When His Partner Passed Away, Dies Two Years Later*, DAILY MAIL, July 5, 2016, http://www.dailymail.co.uk/news/article-3675024/Death-world-s-saddest-polar-bear-Arturo-prompted-worldwide-campaign-free-Argentinian-zoo-falling-depression-partner-passed-away-dies-three-years-later.html (attorneys' petition to relocate polar bear named Arturo from Argentinian zoo to Canada was denied).

[40] Michael Mountain, *Updates on Legal Rights for Nonhuman Animals*, EARTH IN TRANSITION, Mar. 6, 2014, http://www.earthintransition.org/2014/03/updates-on-legal-rights-for-nonhuman-animals/ (describing proposed legislation in Romania that would recognize dolphins as "nonhuman persons").

[41] *See generally* DEBORAH CAO, KATRINA SHARMAN & STEVEN WHITE, ANIMAL LAW IN AUSTRALIA AND NEW ZEALAND 63 (2010); Paula Hallam, *Dogs and Divorce: Chattels or Children?*, 17 S. CROSS U. L. REV. 97 (2015).

[42] *See, e.g.*, Katrina Sharman, *Farm Animals and Welfare Law: An Unhappy Union*, *in* ANIMAL LAW IN AUSTRALASIA 63 (Peter Sankoff, Steven White & Celeste Black, 2d ed. 2013).

[43] *See, e.g., Criminal Code 1899* (Qld) s 468.

[44] *See, e.g., Manton v Brocklebank* [1923] 1 KB 406; *Searle v Wallbank* [1947] AC 341. For discussion of the distinction in the Australian context, see John Toohey, *Liability for Straying Stock*, 7 U. W. AUSTL. L. REV. 490 (1966).

[45] *See generally* CAO, SHARMAN & WHITE, *supra* note 41, at 67–76.

[46] *Animal Welfare Act 1992* (ACT); *Prevention of Cruelty to Animals Act 1979* (NSW); *Animal Welfare Act 1999* (NT); *Animal Care and Protection Act 2001* (Qld); *Animal Welfare Act 1985* (SA); *Animal Welfare Act 1993* (Tas); *Prevention of Cruelty to Animals Act 1986* (Vic); *Animal Welfare Act 2002* (WA).

Furthermore, all species of animals do not receive equal application of the laws, since domestic animals receive protections not extended to work animals or animals raised for food. Farm animals are generally excluded from Australian animal welfare legislation.[47]

The Australian legal system is a long way from recognizing animal personhood. Animals continue to be treated primarily as property and, at best, are afforded highly conditional guarantees against cruel treatment. Nonetheless, some potential avenues exist for expanding recognition of animal personhood under Australian law. This section explores three such possibilities, focusing on the availability of standing to raise animal interests before the courts; the prospects of using the writ of habeas corpus to protect animals against unlawful or unreasonable imprisonment or ill treatment; and the prospect of expanding existing guardianship provisions to serve as a vehicle for protecting animal interests.

Standing

The issue of standing concerns the ability of a party to demonstrate sufficient connection to or harm from a breach of law to bring the issue before a court.[48] Standing is a precondition for effectively enforcing legal rights. As the American legal theorist Wesley Newcomb Hohfeld famously observed, it is one thing to possess a claim right under the law and another thing to have the power to enforce that right.[49] In addition to enabling the enforcement of existing rights, standing can also serve as a vehicle for the recognition of new or expanded rights, because it enables courts to consider novel applications or extensions of existing rules.

Animals do not enjoy standing in their own right under Australian law because they are not recognized as legal persons. However, the prospect remains for individuals or corporate entities to bring a lawsuit in which breaches of animal rights are asserted. This depends on the individual or entity in question having standing to enforce the rights. Usually, people have standing based only where they have a personal stake in the outcome and not to protect the interests of others.[50] However, a person may have

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[47] *See, e.g.*, *Prevention of Cruelty to Animals Act 1979* (NSW) s 9; *Prevention of Cruelty to Animals Act 1986* (Vic) s 6.
[48] *See, e.g.*, *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 526–528 (Gibbs J), 538–39 (Stephen J).
[49] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). For further discussion, see JONATHAN CROWE, LEGAL THEORY 141–51 (2d ed. 2014).
[50] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 526 (Gibbs J); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, [79] (McHugh J).

standing to enforce rights in the public interest where the interference with the public or third party right also interferes with the person's private rights or the person has a "special interest" in enforcing the right.[51]

Early cases on the "special interest" requirement for standing were not encouraging for animal welfare litigation. The case of *Australian Conservation Foundation v Commonwealth*[52] concerned environmental protection litigation brought by the Australian Conservation Foundation (ACF). The ACF sued the Commonwealth and some of its Ministers to challenge the validity of a proposal by a company to establish and operate a resort and tourist area on the central Queensland coastline.[53] The ACF claimed that the area contained both private and public lands over which members of the public, including members of the ACF, had rights of access and use that would be damaged by the project.[54]

The Commonwealth sought to dismiss the action on the ground that the ACF lacked standing.[55] The High Court by majority agreed with this argument and dismissed the claim. The Court held that, in order to have standing, the ACF must show that it has a real or substantial interest in the action above and beyond a member of the general public.[56] There is no general entitlement by members of the public to bring a lawsuit alleging a breach of public rights or duties. As Gibbs J observed, "It is quite clear that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty."[57]

Standing can only be established to enforce public rights or duties where the party has suffered a breach of their private rights or has suffered some "special damage."[58] This burden was not discharged in the case at hand. According to Gibbs J, "a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual

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[51] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 527-528 (Gibbs J); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, [96] (McHugh J).
[52] (1980) 146 CLR 493.
[53] *Id.* at 496–97.
[54] *Id.* at 498.
[55] *Id.* at 496.
[56] *Id.* at 526 (Gibbs J), 538–539 (Stephen J).
[57] *Id.* at 526.
[58] *Id.* at 527.

or emotional concern."[59] The ACF failed to show that its interest went beyond an intellectual or emotional attachment.

The sole dissenting judge was Murphy J, who would have granted standing based on a much more liberal standard. His Honour noted that "[i]n the United States, the fact that access and use by members of the body whose standing is challenged would be detrimentally affected by implementation of the proposals has been held to be a sufficient basis for standing."[60] This consideration, combined with the fact that the ACF "is a well-known and reputable conservation organization", was sufficient for Murphy J to establish standing.[61] However, the other judges took a far narrower view.

The decision in *Australian Conservation Foundation v Commonwealth* had a significant chilling effect on public interest litigation in Australia. This effect extended to animal rights litigation, as can be seen from the case of *Animal Liberation v Department of Environment and Conservation.*[62] Animal Liberation, an animal welfare organization, sought to restrain a proposed aerial shooting of wild goats and pigs on an interlocutory basis, claiming the shooting involved breaches of the *Prevention of Cruelty to Animals Act 1979* (NSW). The organization argued that acts of cruelty were likely to occur because shooting from the air carried a greater risk that animals may be wounded and die a lingering death than if they were shot from the ground.

An interlocutory injunction restraining the conduct of aerial shooting had been granted in the earlier case of *Animal Liberation v National Parks and Wildlife Service*, but in that case there was no challenge to standing.[63] The Supreme Court of New South Wales had granted the injunction in that case based on compelling expert evidence showing the likelihood of cruelty to animals. In *Animal Liberation v Department of Environment and Conservation*, by contrast, standing was raised as an issue,[64] which caused the application to be dismissed. Hamilton J applied the test for standing stated by Gibbs J in *Australian Conservation Foundation v Commonwealth*: '[a] private citizen who has no special interest is incapable of bringing proceedings …, unless, of course, he is permitted by statute to do so.'[65]

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[59] *Id.* at 530.
[60] *Id.* at 556.
[61] *Id.* at 553–554.
[62] [2007] NSWSC 221.
[63] [2003] NSWSC 457.
[64] [2007] NSWSC 221, [5].
[65] *Id.* at [5], citing (1980) 146 CLR 493, 526.

The special interest claimed by Animal Liberation was "[t]he interest of the community that animals who do not have a voice of their own should be able to be protected through the actions of concerned citizens."[66] However, the court found this interest to be insufficient, based on Gibbs J's observation that "a mere intellectual or emotional concern" is not enough.[67] Hamilton J also concluded that even if the applicant had standing, the evidence in this case failed to show a sufficient likelihood of cruelty to animals to justify the grant of injunctive relief.[68] The application was therefore dismissed.

The cases discussed above illustrate the difficulties arising in relation to standing to enforce animal interests under Australian law. However, the recent case of *Animals' Angels v Secretary, Department of Agriculture*[69] paints a more positive picture and gives hope for a more flexible approach in the future. The Federal Court of Australia in that case awarded a German animal welfare group standing to seek review of executive decisions in relation to the live export trade. Standing was granted on the basis that the "government department has recognised the appellant's particular status in the area of live animal export" and the group, although headquartered overseas, had a long history of involvement in Australia.[70]

The central issue in the case was whether the Animals' Angels association, based in Germany and operating internationally with no members residing in Australia, had a sufficient special interest in relation to the export of livestock from Australia and the regulation of that export to confer standing.[71] The association argued that it was irrelevant whether it had Australian members, but it was relevant that it operated in Australia, including by investigating and lobbying, having an Australian representative, and employing Australian investigators.[72]

The Federal Court held that the purposes of the association and its activities in Australia over eight years were sufficient to establish standing. Particular weight was based on the fact that the relevant Australian government department had recognized the association's status in the area of live animal export.[73] It was accepted that the association had a sufficient presence in Australia, had been recognized

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[66] *Id.* at [6].
[67] *Id.* at [6], citing (1980) 146 CLR 493, 530.
[68] *Id.* at [9].
[69] [2014] FCAFC 173.
[70] *Id.* at [119].
[71] *Id.* at [111].
[72] *Id.* at [104].
[73] *Id.* at [119].

in Australia by the relevant Commonwealth department, and had devoted sufficient financial resources to Australian animal welfare. The group's purposes intersected directly with the subject matter of the lawsuit, while the global nature of the group's purposes did not detract from its engagement in Australia.[74]

The *Animals' Angels* case holds open the prospect that animal welfare organizations may be granted standing to enforce animal rights and interests in appropriate cases. Well established groups with a consistent track record in the issues raised by the lawsuit will be in a particularly strong position. However, as the *Animal Liberation* cases show, it will be important for the litigants to establish sufficient evidence to support their claims. Moreover, in the *Animals' Angels* case, the court placed significant emphasis on government recognition of the group in question. This raises the troubling prospect that the government, by withholding recognition of activist groups, could reduce the chances of those groups obtaining standing to challenge government actions in court.

Habeas corpus

The writ of habeas corpus, as noted previously in this article, allows unlawful detention or imprisonment to be challenged in court by requiring the production of the detained person. Habeas corpus actions on behalf of nonhuman animals have been initiated by animal rights activists in the U.S.[75] This raises the question of whether similar actions could potentially succeed in Australia. There are, however, two important barriers to the use of habeas corpus to protect animal interests under Australian law. The first is that it would have to be shown that animals are legal persons entitled to habeas corpus protections. The second is that it would have to be shown that the imprisonment of the animals in question is unlawful. Each of these conditions would be difficult to meet in Australia, given the traditional paradigm of animals as property. This paradigm implies both that animal rights to liberty are not recognized under the common law, because animals are not persons, and that restraining animals is not unlawful per se, because the animals' owners are entitled to secure their property.

[74] *Id.* at [120].
[75] For a discussion of the NhRP's cases alleging habeas corpus grounds to mandate that chimpanzees be released from confinement and placed in sanctuaries, see Section 2, *supra*.

The writ of habeas corpus has not been commonly used in Australian courts.[76] However, recent years have seen a spate of habeas corpus cases, mainly relating to claims by asylum seekers detained indefinitely without charge in Australia or offshore. This increasing use of habeas corpus was prompted in significant part by the Federal Court decision of *Ruddock v Vadarlis* (often called the *Tampa Case*).[77] The case concerned the Australian government's detainment of a Norwegian ship (the MV Tampa) carrying asylum seekers rescued at sea. The Federal Court dismissed the claim, but found that it had jurisdiction to grant an order in the nature of habeas corpus to persons detained unlawfully by the government.[78]

The case concerned an incident where a Norwegian container ship, the MV Tampa, rescued 433 people from a rickety fishing boat sinking in the Indian Ocean about 140 km north of Christmas Island (an Australian territory).[79] Australian troops subsequently boarded the vessel at sea in order to prevent the rescuees from reaching Christmas Island and seeking asylum.[80] Following unsuccessful attempts to communicate with the rescuees on the ship, a solicitor and the Victorian Council for Civil Liberties filed separate proceedings against the Commonwealth and some of its Ministers seeking, among other things, orders in the nature of habeas corpus. [81] The primary judge held that the rescuees were detained aboard the vessel by the government's actions without lawful authority and made orders for their release onto the Australian mainland. The government respondents appealed.[82]

The appeal raised two main issues.[83] The first was whether the executive power of the Commonwealth authorized and supported the expulsion of the rescuees and their detention for that purpose. The second was whether, if there was no such executive power, the rescuees were subject to a restraint on their liberty attributable to the Commonwealth and amenable to habeas corpus. A majority of the Federal Court held that the interception of the asylum seekers was authorized by the executive power of the Commonwealth to prevent the entry of non-citizens to Australia and that this power was

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[76] David Clark, *Jurisdiction and Power: Habeas Corpus and the Federal Court*, 32 MONASH U. L. REV. 275, 275 (2006).
[77] (2001) 110 FCA 1329.
[78] Beaumont J distinguished between a writ of habeas corpus and an order in the nature of habeas corpus: *id.* at [104]–[107]. The distinction has been adopted by the Federal Court in later cases: *see, e.g., Asalih* (2004) 136 FCR 29, [41]–[42]. However, some commentators have argued the distinction is unnecessary. *See, e.g.*, Clark, *supra* note 76.
[79] (2001) 110 FCA 1329, [131].
[80] *Id.* at [136].
[81] *Id.* at [96], [129].
[82] *Id.* at [148]–[149].
[83] *Id.* at [162].

not extinguished by statute. The restraint was lawful, so habeas corpus was not available.[84] Black CJ dissented, concluding that the detention was unlawful and the order should be granted.[85]

Importantly, the Federal Court judges were prepared to accept that an order in the nature of habeas corpus could potentially be granted to asylum seekers detained by the government if their imprisonment was not authorized by law. Furthermore, the order could be sought on the detainees' behalf by third parties. The potential application of habeas corpus to asylum seekers was tested in a series of subsequent cases in various Australian jurisdictions. The Northern Territory case of *Cox v Minister for Immigration and Multicultural and Indigenous Affairs*,[86] for example, concerned an application for habeas corpus for several asylum seekers brought after the plaintiff read about their plight in a newspaper.

The plaintiff in *Cox* was the Director of the Northern Territory Legal Aid Commission. She read in the *Northern Territory News* about a group of asylum seekers who had arrived on Melville Island and were taken into custody.[87] The Commonwealth gave evasive replies to requests for information from the plaintiff and her staff, established an exclusion zone around the island, and closed its airport.[88] On the day of the asylum seekers' arrival, a Special Gazette was published by the Commonwealth, giving effect to a regulation declaring all Northern Territory islands, including Melville Island, to be an "excised offshore place" for the purposes of section 5(1) of the *Migration Act 1958* (Cth).[89] This meant that asylum seekers arriving in those places could not validly apply for temporary protection visas.[90]

The Supreme Court of the Northern Territory held that the plaintiff had standing to seek habeas corpus in respect of alleged detainees whose names she did not know, but who were apparently detained by the Commonwealth government.[91] Habeas corpus lies to secure the release of those unlawfully detained.[92] It is generally accepted that the Supreme Courts of the Australian states and territories, as superior courts of record, have inherited jurisdiction to grant such a remedy.[93] Nonetheless, in this case, the Supreme Court declined to hold that the detention was unlawful. This is because the asylum seekers

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[84] French J further held that "habeas corpus did not lie as the rescuees were not detained," but merely prevented from entering Australia*: id.* at [206].
[85] *Id.* at [90]–[91].
[86] [2003] NTSC 111.
[87] *Id.* at [4].
[88] *Id.* at [10].
[89] *Id.* at [29].
[90] *Migration Act 1958* (Cth) s 46A(1).
[91] [2003] NTSC 111, [42]–[43].
[92] *Id.* at [43].
[93] Clark, *supra* note 76, at 278–79.

could not claim a right of entry to Australia and, if they were to enter the country, they would be placed in immigration detention.[94] A writ to order their release could therefore not be granted.

A related set of issues was considered by the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*.[95] The respondent, a Palestinian from the Gaza Strip, had arrived in Australia without authorization. His application for a protection visa was rejected. He then completed and signed a written request to the Minister for Immigration and Multicultural Affairs to be returned to the Gaza Strip.[96] Over a period of months, the Department of Immigration and Multicultural and Indigenous Affairs made a number of attempts to arrange for the respondent's return, but these attempts were unsuccessful. The respondent therefore remained in indefinite detention in Australia.[97]

The trial judge found that although the Minister had taken all reasonable steps to remove the respondent, there was no real likelihood or prospect of the respondent's removal in the reasonably foreseeable future.[98] The trial judge concluded that the Minister's power to detain was limited to such time as the Minister needed to take all reasonable steps to secure the person's removal from Australia as soon as was reasonably practicable, but this only extended to circumstances where there was a real and reasonably foreseeable likelihood or prospect of resettlement.[99] The trial judge therefore made orders for the respondent's release. The Minister appealed from that ruling, but the decision was upheld.

The remedy granted by the Federal Court in *Al Masri* was an order in the nature of habeas corpus that the respondent be released from detention.[100] The High Court of Australia subsequently held in *A1 Kateb v Godwin* that the detention of unauthorized immigrants in Australia until they can be removed from the country is lawful even if the detention is for an indefinite period.[101] This reduced the frequency of lawsuits by detained immigrants seeking habeas corpus, since it became more difficult to show that their detention was unlawful. Nonetheless, these decisions show that the writ of habeas corpus or equivalent orders for release from detention remain available to the Australian courts in appropriate cases.

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[94] [2003] NTSC 111, [45]–[46].
[95] [2003] FCAFC 70.
[96] *Id.* at [4]–[5].
[97] *Id.* at [7]–[9].
[98] *Id.* at [16].
[99] *Id.* at [11].
[100] *Id.* at [170].
[101] (2004) 219 CLR 562.

It is unlikely, though not impossible, that habeas corpus could be used in Australia on behalf of animals detained unlawfully or inhumanely. However, those seeking such orders on behalf of asylum seekers have often faced difficulties in showing that the detention is unauthorized. Animals, like asylum seekers, are likely to face difficulties in accessing remedies for detention due to their marginal status in the Australian legal system. Nonetheless, an animal who was detained under conditions that breached animal welfare legislation could potentially be the subject of an application alleging unlawful detention. It would then be a matter for the court as to whether habeas corpus or an equivalent order could be an appropriate remedy, given that traditionally animals have not been regarded as legal persons.

Guardianship

A third potential avenue for expanding animal personhood under Australian law concerns the potential use of guardianship arrangements to designate particular humans as responsible for safeguarding animal welfare or advocating animal interests. This could take the form of provisions placing positive duties on custodians of animals to ensure their welfare, supported by appropriate remedies. A model for this kind of approach exists in the Australian state of Queensland in section 17 of the *Animal Care and Protection Act 2001* (Qld).[102] The provision states that a person in charge of an animal owes a duty of care to provide basic welfare needs.[103] Breaches can be investigated by animal welfare inspectors or the police.[104]

Section 17(2) of the *Animal Care and Protection Act* makes it an offense for a person in charge of an animal not to fulfil their duty of care by providing for its basic welfare needs. This duty of care includes providing the animal with suitable living conditions, sufficient water and food, as well as treatment for injury or disease. It also includes handling the animal appropriately and allowing it to engage in normal behaviour.[105] Importantly, no mens rea is required for breach of duty; thus, negligent breaches can constitute an offense.[106] The focus is on the animal's welfare rather than the intentions or actions of the custodian.[107]

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[102] A similar, but less detailed, provision appears in the *Animal Welfare Act 1993* (Tas) s 6.
[103] *Animal Care and Protection Act 2001* (Qld) s 17(1).
[104] *Id.* s 115.
[105] *Id.* s 17(3).
[106] *Id.*
[107] For further discussion, see George Seymour, *Animals and the Law: Towards a Guardianship Model*, 29 ALT. L. J. 183, 186–87 (2004).

The guardianship model of the *Animal Care and Protection Act* goes one step further than standard animal cruelty laws by designating particular people as responsible for ensuring animal welfare. It puts the custodians of animals on notice of their positive responsibilities and puts in place mechanisms for holding them accountable. This model offers one way of holding humans answerable for how animals are treated. However, it falls well short of acknowledging animals as persons in their own right. Much also depends on how robustly the legislation is enforced by inspectors, police, and courts. The enforcement record of the Queensland law appears mixed. Although several cases have been prosecuted, the courts have not imposed maximum penalties even for very serious breaches.[108]

Another form of guardianship might involve appointing humans to advocate for animals in court and other processes. There is no direct precedent for this approach to animal welfare in Australia, but examples can be drawn from other fields involving vulnerable groups. The *Family Law Act 1975* (Cth), for example, allows for a lawyer to be appointed to represent children's interests in parenting and other matters.[109] This provides a practical way of promoting the focus of Australian family law on the best interests of the child.[110] Public guardians also have general powers to advocate for impaired adults and children in state care.[111]

A possible application of this model to animals might involve appointing a public animal guardian with responsibility for promoting the best interests of animals through advocacy and litigation.[112] Provisions could be put in place to ensure that the animal guardian has standing to appear in court on behalf of animals and seek remedies including, if appropriate, orders in the nature of habeas corpus. The effectiveness of such a body would evidently depend on the powers it is given and the strength of the legal limits on cruelty to animals and positive guarantees of animal welfare and dignity contained in supporting legislation.

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[108] *Id.* at 187.
[109] *Family Law Act 1975* (Cth) s 68L.
[110] *See, e.g., id.* ss 60CA, 65AA. For critical discussion, see Jonathan Crowe & Lisa Toohey, *From Good Intentions to Ethical Outcomes: The Paramountcy of Children's Interests in the Family Law Act*, 33 MELB. U. L. REV. 391 (2009).
[111] *See, e.g., Guardianship Act 1987* (NSW); *Public Guardian Act 2014* (Qld). Similarly, U.S. courts recognize that the best interests of children in custody disputes can be asserted by a guardian ad litem who is appointed to assert the best interests of the child in the proceeding. Such guardians also could be appointed to help overcome standing barriers and represent the interests of nonhuman animals in litigation after personhood rights for nonhuman animals have been established. *See generally* Joanna Wymyslo, *Standing for Endangered Species: Justiciability Beyond Humanity*, 15 U. BALT. J. ENVTL. L. 45 (2007).
[112] A precedent for this approach can be found in Zurich, which appointed a specialist animal advocate from 1991 until 2010. *See* Vanessa Gerritsen, *Animal Welfare in Switzerland: Constitutional Aim, Social Commitment, and a Major Challenge*, 1 GLOBAL J. ANIMAL L. 1, 13–14 (2013).

The various options discussed above all offer some promise in counteracting the vulnerability of animals to human exploitation. Animals are made vulnerable by the fact that they cannot advocate politically or legally on their own behalf. They rely on others to advocate for them. Mechanisms such as standing, habeas corpus, and guardianship models are therefore essential in enabling practical protection of animal rights and interests. None of these avenues is sufficient on its own, but when combined they hold significant promise in giving animals a voice and ensuring that those with control over them can be held legally accountable.

4. Natural resources as a platform for animal legal personhood

The strategies discussed in Sections 2 and 3 of this article for enhanced protection of nonhuman animals in the U.S. and Australia are effective leverage points that will lead to future gains in the development of animal law in both countries. However, the approaches discussed above are merely procedural strategies that can produce incremental gains at best. Scholars have offered compelling arguments drawing on science, moral philosophy, and law to support the assignment of personhood protections and rights for nonhuman animals.[113] But these arguments are most compelling when considered in light of pre-existing legal personhood protections for entities in "the community of the voiceless," especially natural resources.[114]

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[113] For an excellent discussion of arguments based on science, morality, and law to support conferring fundamental rights to primates, see generally Raffael N. Fasel et al, *Fundamental Rights for Primates, Sentience Politics Policy Paper*, May 2016, https://sentience-politics.org/files/2016-05-v1-Fundamental-Rights-for-Primates-EN.pdf; Steven M. Wise, *Animal Rights: One Step at a Time*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 19-50 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

[114] "The community of the voiceless" refers to subjects of legal personhood protection that cannot assert and vindicate their interests without legal personhood recognition and "guardians" to act on their behalf. Categories within the community of the voiceless for purposes of this article include natural resources, future generations, and artificial intelligence. Future generations and artificial intelligence, like natural resources, have been afforded or considered for legal personhood protections. These categories can support the extension of legal personhood to nonhuman animals, but they are not as compelling as the analogy to natural resources and, therefore, are beyond the scope of this article. For a discussion of the rights of future generations, see Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 455 (July 8) (dissenting opinion of Judge Weeramantry) (noting that the ICJ, "as the principal judicial organ of the United Nations, empowered to state and apply international law with an authority matched by no other tribunal, must, in its jurisprudence, pay due recognition to the *rights* of future generations.") (emphasis added); *Declaration on the Responsibilities of Present Generations Towards Future Generations*, General Conference of the United Nations Educational, Scientific, and Cultural Organization, Oct. 21 to Nov. 12, 1997, art. 1 (1997) (noting that the present generation must ensure that "the needs and interests of present and future generations are fully safeguarded"). For a discussion of rights of artificial intelligence, see European Parliament, Committee on Legal Affairs, Draft Report with Recommendations to the Commission on Civil Law Rules on Robotics, 2015/2013 (INL), May 31, 2016, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML%2BCOMPARL%2BPE-582.443%2B01%2BDOC%2BPDF%2BV0//EN (addressing European

This section of the article offers a simple proposition to advance the assignment of legal personhood rights for nonhuman animals: to the extent that natural resources have been afforded legal personhood status, then nonhuman animals—many of which are sentient and experience emotions like humans—should be similarly entitled to such protections.[115] It focuses on various physical and legal contexts in which legal personhood rights have been recognized or proposed for natural resources in five countries: the U.S., Australia, New Zealand, India, and Ecuador. The article will conclude by responding to criticisms of the legal personhood recognition efforts for nonhuman animals.

In the U.S., legal personhood protection for natural resources has occurred at the local level. In June 2014, elected officials in Grant Township, Pennsylvania passed a "Community Bill of Rights Ordinance," which incorporated the "Rights of Nature."[116] In part, it allowed the township to "bring [legal] action in the name of [an] ecosystem,"[117] which confers a kind of "personhood" to the ecosystem for the purposes of litigation.[118] The Pennsylvania General Energy Company (PGE) responded by filing a federal lawsuit[119] claiming that the town's prohibition of an underground injection industrial waste site amounted to an "impermissible exercise of police power."[120] The Little Mahoning Creek filed a motion to intervene, claiming the environment has a "major stake in the case" and is "entitled to legal standing

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Parliament's proposal to draft regulations governing the use and creation of robots and artificial intelligence, including a form of "electronic personhood" to ensure rights and responsibilities for the most capable forms of artificial intelligence); Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1284 (1992) (noting that artificial intelligence research "might give us insight into the claim that groups have rights that are not reducible to those of individuals.").

[115] Another point of comparison between nonhuman animals and natural resources that supports similar legal personhood protections is that both lack the ability to protect themselves under the law and both areas of the law are moving toward intrinsic value recognition—the notion that natural resources and nonhuman animals have value in their own right regardless of human will to appropriate them for a particular purpose. *See generally* Joan E. Schaffner, *Valuing Nature in Environmental Law: Lessons for Animal Law and the Valuation of Animals, in* WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW? 243–65 (Randall S. Abate ed., 2015).

[116] "Rights of nature" were first proposed by Christopher D. Stone in his article, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972) (arguing that nature should have standing through the use of existing guardianship laws to enable nature to have redress for harms done to it); *see also* Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 ECOLOGY L.Q. 1 (2016); Mihnea Tanasescu, *The Rights of Nature: Theory and Practice*, in POLITICAL ANIMALS AND ANIMAL POLITICS 150–163 (Marcel Wissenburg & David Schlosberg eds., 2014) (discussing the Little Mahoning Watershed case and the Ecuadorian Constitution as examples of rights of nature contexts).

[117] *See* Melissa Troutman, *Pennsylvania Ecosystem Fights Corporation for Rights in Landmark Fracking Lawsuit*, PUBLIC HERALD, Dec. 10, 2014, http://publicherald.org/grant-township-speaks-for-the-trees-in-landmark-fracking-lawsuit/.

[118] *Id.*

[119] Pennsylvania General Energy Co, LLC v. Grant Twp., C.A. No. 14-209ERIE, (W.D. Pa., Oct. 14, 2015), http://cases.justia.com/federal/district-courts/pennsylvania/pawdce/1:2014cv00209/217973/113/0.pdf?ts=1444922832.

[120] *Id*; *see also* Grant Township, Indiana County, Pennsylvania Community Bill of Rights Ordinance, Section 2(b) Right to Clean Air, Water and Soil ("All residents of Grant Township, along with natural communities and ecosystems within the Township, possess the right to clean air, water, and soil, which shall include the right to be free from activities which may pose potential risks to clean air, water, and soil within the Township, including the depositing of waste from oil and gas extraction.").

independent of the township."[121] This case marks the first time in the United States that an ecosystem has attempted to defend itself in a lawsuit.[122]

Although Pennsylvania's state constitution already guarantees the rights to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic value of the environment," those rights are granted to people, and not to the environment itself.[123] PGE opposed the motion to intervene by attacking the validity of the Watershed's status as a person.[124] In its decision, the Court declined to address the issue of the Watershed's standing.[125] Relying instead on the presumption of adequacy of representation by the defendant, the Court found that the Defendant Township and the Watershed's interests aligned precisely.[126] Therefore, intervention by the Watershed was not necessary to ensure that its rights were adequately protected.[127] The United States Court of Appeals for the Third Circuit agreed and upheld the decision.[128]

Unlike the U.S., legal personhood recognition for natural resources occurred at the national level in New Zealand. On March 15, 2017, the New Zealand parliament granted legal personhood to the Whanganui River that recognized it as a living entity, ending a 170-year battle for this recognition.[129] In 2011, under a Treaty called "The Record of Understanding in Relation to Whanganui River Settlement,"

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[121] Ellen M. Gilmer, *Speaking for the Trees, Lawyer Pushes Unconventional Doctrine*, ENERGYWIRE, Jan. 7, 2015, http://www.eenews.net/stories/1060011209.

[122] Although this is the first case in the U.S. where an ecosystem is named as a defendant, it is not the first time a local ordinance recognizes the rights of nature. That distinction goes to the Tamaqua Borough of Pennsylvania whose town council passed the first ordinance in the world declaring the rights of "natural communities." Jason Mark, *From Rural Pennsylvania to South America, a Global Alliance is Promoting the Idea that Ecosystems Have Intrinsic Rights*, EARTH ISLAND J. (2012), http://www.earthisland.org/journal/index.php/eij/article/natural_law/.

[123] Troutman, *supra* note 117.

[124] *See* Gilmer, *supra* note 121.

[125] The "presumption of adequacy of representation," is a legal bar that an intervening party must meet in order to be allowed standing in a case. Here, the court determined that the Township's representation in the case would protect Little Mahoning Creek's interest because both parties sought the same relief. Pennsylvania General Energy Co., LLC, v. Grant Twp., C.A. No. 14-209ERIE, (W.D. Pa. Oct.14, 2015), *supra* note 119.

[126] *Id.*

[127] *Id.*

[128] Pennsylvania General Energy Co., LLC v. Grant Twp., C.A No. 14-209ERIE (3d Cir. July 27, 2016), http://cases.justia.com/federal/district-courts/pennsylvania/pawdce/1:2014cv00209/217973/222/0.pdf?ts=1475356734 ("The plain language of Rule 17 does not permit an ecosystem such as the Little Mahoning Watershed to sue anyone or be sued by anyone, and for that reason alone we have misgivings with the Watershed being listed as a party in this litigation. But, because this particular issue was not pursued on appeal, and given the nonprecedential nature of this opinion, we make no specific holding on the question.").

[129] *New Zealand's Whanganui River Granted Legal Status as a Person After 170-Year Battle*, ABC.NET, Mar. 15, 2017, http://www.abc.net.au/news/2017-03-16/nz-whanganui-river-gets-legal-status-as-person-after-170-years/8358434.

the Whanganui River was recognized as "a single indivisible and living entity."[130] The stated goal of the treaty is "to promote the health of the Whanganui River and its ecosystem."[131] Recognizing the "inextricable relationship" of the Whanganui Iwi people with the river was crucial to granting the river rights.[132] Equally important was the Whanganui Iwi concept of "Te Awa Tupua" or perceiving the river as "an integrated, living, whole."[133] The agreement was signed in 2012 between the Crown and the Whanganui River Iwi, who are the local Maori, Indigenous people.[134]

Two "guardians" have been appointed to protect the river's rights and interests: one by the Iwi, and one by the Crown.[135] Given that the guardians must protect the "indigenous property value associated with the river," they must do more than promote the physical and ecological rights of the Whanganui – they must also promote the river's spiritual and cultural rights.[136]

A mere four days after the groundbreaking development in New Zealand, India responded with legal personhood rights for natural resources in its country. Like New Zealand, India also was struggling to win a long battle to protect cherished rivers, which have similarly deep cultural and spiritual value for the people of India. On March 20, 2017, the high court in the North Indian state of Uttarakhand ruled that both the Ganges and Yunama Rivers have legal personhood rights.[137] More ambitious still, just

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[130] Zachary Dorn, *Recognizing Ecosystems as People Promotes Sustainability: Quasi-Sovereignty as a Tool for Promoting Sustainability*, Sustainability Law at Lewis & Clark Law School (Nov. 26, 2012), http://sustainabilityandlaw.com/2012/11/26/recognizing-ecosystems-as-people-promotes-sustainability-quasi-sovereignty-as-a-tool-for-promoting-sustainability-by-zachery-dorn/ (noting that recognition was largely based on the relationship between the Whanganui Iwi people, who have a tradition of living near the river).

[131] *Id.*

[132] Stephen Messenger, *New Zealand Grants a River the Rights of Personhood*, TREEHUGGER, Sept. 6, 2012, http://www.treehugger.com/environmental-policy/river-new-zealand-granted-legal-rights-person.html.

[133] *Id.*

[134] Sandra Postel, *A River in New Zealand Gets a Legal Voice*, NAT'L GEOGRAPHIC, Sept. 4, 2012, http://voices.nationalgeographic.com/2012/09/04/a-river-in-new-zealand-gets-a-legal-voice/.

[135] Eleanor Ainge Roy, *New Zealand River Granted Same Legal Rights as Human Being*, THE GUARDIAN, Mar. 16, 2017, https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being.

[136] Brendan Kennedy, *I am the River and the River is Me: The Implications of a River Receiving Personhood Status*, CULTURAL SURVIVAL, Dec. 2012, https://www.culturalsurvival.org/publications/cultural-survival-quarterly/i-am-river-and-river-me-implications-river-receiving. One Maori elder, Niko Tangaroa, spoke of the interdependent relationship Indigenous people have with the Whanganui: "The river and the land and its people are inseparable. As so if one is affected the other is affected also. The river is the heartbeat, the pulse of our people …. [If the river] dies, we die as a people." *Id.*

[137] Shyam Krishnakumar, *Could Making the Ganges a 'Person' Save India's Holiest River?*, BBC.COM, Apr. 5, 2017, http://www.bbc.com/news/world-asia-india-39488527; s*ee generally* Salim v. State of Uttarakhand, No. 126 of 2014, High Court of Uttarakhand, Mar. 20, 2017, http://lobis.nic.in/ddir/uhc/RS/orders/22-03-2017/RS20032017WPPIL1262014.pdf. In rendering its decision, the court referenced the legislative victory protecting the Whanganui River in New Zealand as a source of inspiration. Vikram Doctor, *River Sutra: Being Human in Legal Parlance*, THE ECONOMIC TIMES, Mar. 25, 2017, http://epaperbeta.timesofindia.com/Article.aspx?eid=31818&articlexml=River-Sutra-Being-Human-in-Legal-Parlance-25032017001084.

weeks later, the same court also granted legal personhood status to the glaciers that are the source of these rivers to help enhance the protection of these rivers.[138] The court ordered the government to form a "Ganges Administration Board" and criticized the national and Uttarakhand state governments for inadequate efforts to protect the river.[139] Important questions remain in the wake of this landmark ruling, however, such as the scope of the enforceability of the order beyond the state of Uttarakhand and what types of interference with the free flow of the river will be considered "harm" to trigger an enforcement action.[140]

Like New Zealand and India, legal personhood for natural resources also has occurred at the national level in Ecuador. Unlike New Zealand and India, however, Ecuador's protections have been enshrined in its Constitution. National constitutions have become a common and powerful means to address environmental protection, including protecting rights of nature.[141] In response to the crises of the oil and mining corporations, Ecuador became the first country in the world in 2008 to recognize rights of its mountains, rivers, and land.[142] Ecuador's Constitution was rewritten to include a "Rights of Nature" framework to reflect these changes, and to give humans the ability to sue on behalf of nature.[143] Included in the new document was Chapter Seven, titled Rights of Nature, which contains four Articles legitimizing, protecting, and enforcing those rights.[144]

The law faced its first legal test in 2011, when suit was brought against a local government which had allowed debris from a road expansion to enter the watershed and cause extensive flooding.[145] In a six-page opinion, the Ecuadorian Court "wholehearted[ly] embrace[d] the right of nature."[146] Furthermore, the Court recognized that "injuries to Nature are generational damages whose repercussions

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[138] David Iaconangelo, *A High Court in India Took Drastic Measures to Protect 2 Vanishing Glaciers*, BUSINESS INSIDER, Apr. 7, 2017, http://www.businessinsider.com/rights-of-nature-movement-india-glacier-2017-4.
[139] *After New Zealand, India's Ganges Gains Legal Status of a Person*, DHAKA TRIBUNE, Mar. 20, 2017, http://www.dhakatribune.com/world/south-asia/2017/03/20/new-zeland-indias-ganga-gains-legal-status-person/.
[140] Krishnakumar, *supra* note 137.
[141] For helpful background discussion of these developments, see generally DINAH SHELTON, NATURE AS A LEGAL PERSON (2014) (discussing how constitutional provisions are beginning to give rise to enforcement litigation based on the legal personality of nature and how various countries recognize nature as a legal person); JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2015).
[142] *Constitution of the Republic of Ecuador*, POLITICAL DATABASE OF THE AMERICAS, Jan. 31, 2011, http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.
[143] *Id.*
[144] *Id.*
[145] Erin Daly, *Ecuadorian Court Recognizes Constitutional Right to Nature*, WIDENER ENVIRONMENTAL LAW CENTER, July 12, 2011, http://blogs.law.widener.edu/envirolawblog/2011/07/12/ecuadorian-court-recognizes-constitutional-right-to-nature/.
[146] *Id.*

will impact future generations."[147] The Court also addressed the issue of standing, where the plaintiffs were asserting not their rights but those of Nature, by relaxing traditional formalities.[148] The Court further ruled that environmental damages should be based on probability and possibility, rather than certainty.[149] Lastly, the Court ruled that the burden lies with the defendant to show a lack of damages, reversing the traditional burden on the plaintiff to show an injury in fact.[150] The Court also concluded that in any "conflict of constitutional right," Nature's rights would supersede the defendant's right "because a healthy environment is more important and affects more people."[151]

All of the abovementioned legal personhood protections for natural resources are groundbreaking and are spreading rapidly throughout the world. These developments provide a potentially valuable foothold to secure similar substantive protections for nonhuman animals in the U.S. and Australia.[152] In the U.S., constitutional environmentalism is starting to take hold, as reflected in the pending atmospheric trust litigation in federal district court in the *Juliana* case.[153] If successful, this litigation could send a mandate to Congress to regulate climate change, a mandate that the executive and legislative branches failed to deliver. The *Juliana* litigation underscores the powerful role of the courts in interpreting the law, as is similarly evident in the legal personhood for natural resources developments in Ecuador and India. In Australia, recent efforts to seek legal personhood for the Great Barrier Reef to protect it from

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[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id. See also* Erin Daly, *Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights***,** 21 REV. OF EUROPEAN COMMUNITY & INT'L ENVTL. L. 63-66 (2012) (discussing the *Wheeler c. Director de la Procuraduria General Del Estado de Loja* filed against the local government in the southern region of Vilcabamba, which was the first case in history to vindicate the Ecuadoran "rights of nature" constitutional provisions).
[152] The movement to assign legal personhood rights for nature has its critics, however. *See, e.g.,* Andrew Travis, *New Zealand: Rivers Are People, Too*, THE DAILY SIGNAL, Oct. 25, 2012, http://dailysignal.com/2012/10/25/new-zealand-rivers-are-people-too/ ("[e]xercising the rights of personhood to nature does nothing more than strip personhood of any real meaning and make a mockery of the concept of rights. If we want to protect the environment for the long term, stewardship, not personhood, is the wisest path.").
[153] For a description of the context of the *Juliana v. Trump* case, see generally *The 11-Year-Old Suing Trump Over Climate Change*, THE ATLANTIC, Feb. 9, 2017, https://www.theatlantic.com/science/archive/2017/02/trump-climate-lawsuit/516054/. For a discussion of the legal and conceptual foundations of atmospheric trust litigation in the U.S., see generally Randall S. Abate, *Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?*, *in* CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES 543-69 (Randall S. Abate ed., 2016).

further decimation from ocean acidification provides a potential platform for subsequent legislative recognition of legal personhood for nonhuman animals.[154]

In assessing the opportunity to build on these developments in the natural resources context and apply these protections to nonhuman animals, this article concludes by addressing arguments that oppose extending legal personhood protections to nonhuman animals. The first argument opposing the extension of legal personhood protections to nonhuman animals is that animals lack the ability to fulfill responsibilities in society in addition to enjoying the protection of legal personhood rights. This argument is not compelling because it applies equally to all categories of entities in the community of the voiceless and should not artificially exclude nonhuman animals. The human duty of stewardship applies equally to natural resources and animals as critical components of our ecosystem and as entities that hold deep cultural, spiritual, and emotional value in our lives.[155]

A second criticism of assigning legal personhood protections to nonhuman animals is that nonhuman animals would require representation in court by guardians and that this need could pose a challenge to judicial economy by opening the floodgates of litigation.[156] However, there is widespread precedent for such guardianship roles, such as the use of court-appointed guardians to represent the interests of children in family law disputes in the U.S. and Australia.[157]

Richard Cupp, Jr. advocates for "stewardship" as a less radical alternative to fully fledged personhood protections for nonhuman animals.[158] However, this argument is misplaced because stewardship and legal personhood should work together in advancing the protection of nonhuman animals and are not mutually exclusive.[159] Relying exclusively on stewardship as a model to protect nonhuman animals would provide too much discretion to humans to be motivated by the requisite political will to provide adequate legal protections to the voiceless. Cupp's argument further suggests

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[154] *See generally* Friends of the Earth Australia, *Legal Personality for Great Barrier Reef,* Mar. 2013, http://www.foe.org.au/legal-personality-great-barrier-reef (referencing legal personhood developments for natural resources in New Zealand as a potential platform for similar protections for the Great Barrier Reef).

[155] For further criticism of the argument that nonhuman animals should not be afforded legal protections because they lack corresponding responsibilities, see Jonathan Crowe, *Levinasian Ethics and Animal Rights*, 26 WINDSOR YB. OF ACCESS TO JUSTICE 313 (2008).

[156] Babcock, *supra* note 116, at 45, 49.

[157] *See* Part II, *supra*.

[158] *See generally* Richard L. Cupp, Jr., *Human Responsibility, Not Legal Personhood, For Nonhuman Animals*, 16 ENGAGE 29 (2015).

[159] *See, e.g.*, Andrew Jensen Kerr, *Writing about Nonpersons*, 164 U. PA. L. REV. ONLINE 77, 85 (2016) (arguing that Congress should confer standing to animals is certain contexts and that humans should be able to stand in for animals).

that autonomy is a necessary condition for assertion of legal rights. If this claim were true, then mentally disabled persons, persons in a coma, and fetuses would not be eligible to benefit from the protection of legal rights because they lack the independent capacity to assert such rights.[160]

5. Conclusion

This article has surveyed a number of possible avenues for protecting nonhuman animals under U.S. and Australian law, including habeas corpus petitions, principles of standing, and guardianship models. Like standing and guardianship, the NhRP's habeas corpus proceedings—and those that may follow in Australia seeking to compel the release of nonhuman animals in captivity—are merely procedural leverage points to promote legal personhood protections for nonhuman animals. To be most effective, these legal personhood protections should be instituted legislatively at the national or subnational levels in the U.S. and Australia, similar to the recent developments in New Zealand, India, and Ecuador for natural resources.[161] Perhaps most tellingly, New Zealand—one of the pioneers of legal personhood rights for natural resources—also recently declared animals as sentient beings.[162]

There is a growing international movement to assign legal personhood rights to natural resources. Strong principled reasons exist for extending similar protections to nonhuman animals. Indeed, animals would seem to be more clearly deserving of such protections than the natural environment, given their sentience and capacity for suffering. The main arguments against extending such protection to nonhuman animals are not compelling and, in any case, apply equally to other entities in the community of the voiceless. Nonetheless, until animals are afforded full legal personhood, more incremental protections continue to be needed. Habeas corpus, standing, and guardianship models provide promising foundations for such incremental legal recognition in both the U.S. and Australia.

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[160] For further discussion, *see* Crowe, *supra* note 155.

[161] In the past two years, legislative initiatives of this nature have already been implemented in several countries to enshrine varying degrees on legal personhood in nonhuman animals. For example, France amended its Civil Code to recognize animals as "living sentient beings" as opposed to the mere property of its owner, *Animals in France Finally Recognized as 'Living, Sentient Beings,'* RT, Nov. 11, 2015, https://www.rt.com/news/227431-animals-sentient-furniture-parliament/, and Spain passed landmark legislation to confer human rights on great apes; Lee Glendinning, *Spanish Parliament Approves 'Human Rights' for Apes*, THE GUARDIAN, Nov. 4, 2015, http://www.theguardian.com/world/2008/jun/26/humanrights.animalwelfare.

[162] Sophie McIntyre, *Animals Are Now Legally Recognised as 'Sentient' Beings in New Zealand*, INDEPENDENT, Nov. 11, 2015, http://www.independent.co.uk/news/world/australasia/animals-are-now-legally-recognised-as-sentient-beings-in-new-zealand-10256006.html.