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Writs of Habeas Corpus for Nonhuman Primates in the United States and the Nonhuman Rights Project: Legal Processes and Arguments Used to Secure Nonhuman Animal Rights

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Abstract

Questions concerning (nonhuman) animal rights have been increasingly addressed within the criminological literature due to growing interest in green criminology. Often within criminology, animal rights issues have been primarily addressed from philosophical standpoints, which omit how animal rights are addressed in more concrete terms through the legal system. This philosophical orientation toward animal rights, while important, has led to a neglect of the ways in which animal rights might be promoted through legal means. This article addresses that latter point by exploring the use of writs of habeas corpus for animals promoted by Steven Wise and the Nonhuman Rights Project (NhRP) in the US. Much of the NhRP's efforts have been devoted to nonhuman primates, and consistent with that approach, this assessment focuses attention on legal efforts to protect nonhuman primates' rights. In addition to NhRP efforts, other possibilities for using the law to obtain rights for animals in the US are examined. While this article focuses on circumstances in the US, several nations employ such writs or similar legal mechanisms.

Keywords: Green Criminology; animal rights; writs of habeas for animals; Nonhuman Animal Rights Project; Steven Wise.

Introduction

> ***[Legally], humans possess rights and nonhumans do not. However, this is an arbitrary division that can be shifted.***
> (Rice 2013: 1126)

This article explores the use of writs of habeas corpus (WHC) to extend the rights of nonhuman primates in the US. Primarily, these legal challenges have been undertaken by the Nonhuman Rights Project (NhRP) headed by Steven Wise. This discussion begins with a review of NhRP efforts to establish the legal standing of nonhuman primates as persons under the law required to allow the use of habeas corpus.

Although NhRP sometimes offers a philosophical rationale to justify nonhuman animals' legal rights, typically NhRP's legal challenges focus on the narrower issue of the ***legal*** rights of nonhuman primates. This requires attending to the legal question of personhood. Consequently, this manuscript does not review broader moral/philosophical animal rights arguments (i.e., the

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ethics of animal treatment, or the nature of animal rights), or more general arguments concerning how species justice might be designed, since those concerns exist outside the discussion of legal theory and avenues for securing nonhuman animals' rights in the legal system as it currently operates. Moral/philosophical arguments concerning animal rights can be found elsewhere in the green criminological literature (Brisman and South 2019; Gacek 2018; Gacek and Jochelson 2020; Goyes and Sollund 2018; Taylor and Fitzgerald 2018), and can also be interpreted as involving the grounded historical approaches that inform the work of Beirne (1999, 2002, 2009b). As others note, the extant green criminological literature has not addressed the actual *legal rights* of nonhuman animals to a significant degree (Gacek and Jochelson 2020). Indeed, as Gacek and Jochelson (2020: 124) argue, the potential for green criminology to analyze and contribute to the legal reform of animal rights has not been fruitfully leveraged.

Based on the above, this manuscript primarily examines legal method for establishing nonhuman animal legal rights for primates in the US and sidesteps larger philosophical and moral elaborations of those rights, since those concerns cannot also be adequately addressed here. This is not to suggest that philosophical and moral discussions of animal rights are unimportant. Rather, here the point is exploring how legal activists attempt to activate the law to secure rights for nonhuman animals. Given that this article addresses a mechanism specific to the US, it draws on US legal theory rather than approaches that may be open for use in other countries.

To examine use of the legal system to address nonhuman animal rights, this article proceeds as follows. First, a brief history of NhRP and its position on animal rights is reviewed. Next, a more detailed view of the NhRP habeas corpus approach is undertaken. This is followed by a discussion of the legal basis for nonhuman animal rights and how courts can be employed to take up this issue. In the US, using the courts to obtain rights for nonhuman animals demands the following legal principles that require animals to be seen as more than property—as holding "personhood." Two sections are devoted to those issues. In US legal challenges, one approach is to use a specific animal as an example, and then to build the case from the rights of an individual animal to the class—class being a legal term here—of animal. Not all US legal scholars agree with Wise's approach, and alternatives to Wise's arguments are reviewed. The discussion tries to make sense of these legal arguments while also linking to some moral/philosophical positions concerning animal rights.

Before proceeding, it should be noted that it is not the purpose of this article to solve or attempt to solve the debate concerning whether WHC should be applicable to specific nonhuman animals. Rather, the purpose of this study is to promote awareness of how the law might play a role in obtaining (and limiting) nonhuman animal rights. This discussion raises questions that may not—legally or philosophically—have any definitive answers at this moment in time and, therefore, requires further attention from the criminological community. Further, it should be noted that while this article focuses on US law, many other nations employ WHC or similar legal challenges, and that the habeas corpus writ argument has also been employed at the international level drawing on provisions in the Universal Declaration of Human Rights (Article 3). As discussed below, animal rights attorneys argue that these principles can apply to nonhuman entities or beings when they are recognized as holding personhood by the courts. Finally, it bears mention that one purpose of this work is to motivate green criminologists to think in unique ways about how law might be employed to secure rights for nonhuman animals.

The Nonhuman Rights Project: Background

NhRP, founded in 1996 by attorney Steven M. Wise, bills itself as the "only civil rights organization in the United States dedicated solely to securing rights for nonhuman animals" (Nonhuman Rights Project website, 2023a). The emphasis in this quotation from the NhRP website is significant, as it illustrates that there are limited efforts to secure nonhuman animals' rights through the use of legal challenges and the legal system. It should also be noted that NhRP specifically states that its "mission is to change the legal status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal right, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them" (Nonhuman Rights 2018). The importance of this quotation is the focus it places on changing the status of nonhuman animals from things/property to "legal persons," or entities with "personhood." It should be noted that in the US, an entity with personhood is considered to have the rights of "persons," even though the lawsuit subject is not a person (see discussion below).

NhRP's legal approach indicates that animals derive legal rights by being recognized as persons in the law. In the law, a "person" has certain de jure rights—that is, rights created and recognized by the legal system. Thus, legal arguments seeking to obtain rights for a person do not need to focus on what rights the subject of the lawsuit *could/should/or might have* philosophically. Rather, legal suits instead establish that the lawsuit's subject has rights as a result of being legally classified as a person. In taking that approach to animal rights, the attempt is to prove to or persuade someone with legal authority that an animal should be considered a person under the law. In making this argument, NhRP points out that historically law has not

always treated all human beings as persons and at some points has treated some people (i.e., as NhRP states, this category included "slaves, women, children, Jews, and fetuses") *as property*. Thus, to obtain rights, if people in that class can establish that they possess personhood, this precluded the more difficult legal challenge involved with establishing the philosophical or moral basis of a right (Posner 1990). As an example, under the law, the rights of a fetus do not have to be independently proven if it can be shown that a fetus is a person and, as a result, has certain rights related to personhood. This legal argument that NhRP desires to establish also applies to nonhuman animals.

Beginning in 2013, NhRP began filing WHC on behalf of chimpanzees held in captivity in various "facilities" in the State of New York (details below). This effort includes arguments made by NhRP and related legal commentary made by the courts, legal scholars, scientists, and other academics concerning the use of WHC to free "appropriate nonhuman animals." That argument requires establishing that nonhuman primates are more than "mere 'things'," that they should be considered persons, and that as persons, they have a right to be free from unjust confinement. In addition, materials below examine other potentially useful legal challenges that might be employed to facilitate legal rights for animals. Those alternatives address whether animals have certain mental capacities (i.e., undertake conscious actions freely), which would also help create nonhuman animal rights under the provisions of existing legal rules and procedures in the US.

Nonhuman Animal Rights and Green Criminology

As noted, one goal of this manuscript is to review the use of WHC as a mechanism for securing rights for some nonhuman animals in the US. Green criminologists have addressed nonhuman animal rights from a variety of approaches, but, as noted, have not addressed the use of legal theory and procedures as the basis for those rights. A connection to a legalistic approach has been generated in a handful of green criminological studies that address the legal concept of personhood (see Beirne 1995, 2018, 2021; Flynn and Hall 2017; Nurse 2016a, 2016b). That connection is important to the extent that it can form the basis for engagement in legal activism, and for exploring the connection between green criminology, legal activism and obtaining rights for nonhuman animals. This intersection provides an alternative to more common efforts to obtain rights for nonhuman animals aligned solely with animal rights social movements (for a discussion see Silverstein 2009).

Further, WHC for primates has relevance to the study of criminology and criminal justice in two different ways. First, generally, NhRP's arguments challenge the scope of WHC, which traditionally only applied to the rights of humans to be free from illegal detention. Within criminology, WHC discussions address the illegal detention of criminals and have been limited by the anthropogenic orientation of law and the discipline of criminology. Although historically WHC challenges illegal detention, it is a civil and not a criminal proceeding, and its application has not been restricted to cases where inmates seek freedom from illegal detention. WHC have also been used outside the US to secure rights for "apes and a bear" in Argentina and Colombia (Peters 2020). In 2018, a New York State judge issued a habeas corpus order on behalf of a Bronx Zoo elephant named Happy. The habeas corpus basis of that suit was recently (June 2022) rejected by the New York State's Court of Appeals.
Second, it should also be noted that some green criminological literature, drawing on the scholarship of Piers Beirne (1999, 2002, 2009b), challenged a speciesist criminology that restricted its subject matter to harms and injustice affecting human animals alone (see also Cazaux 1998). In nonspeciesist criminology, nonhuman animals have rights originating in nature, meaning that animals' rights are not restricted to the rights that human legal codes constructed on behalf of animals. These "natural rights" could be seen as taking precedence—philosophically and morally—over anthropocentric/legal animal rights.

Below, NhRP's WHC claims for nonhuman animal rights are reviewed in more detail. Next examined is commentary by legal scholars and scientists related to WHC claims and alternative legally grounded nonhuman animal approaches. To round out the discussion, we conclude with some observations derived from the emergence of a multispecies justice perspective on nonhuman animal rights.

Nonhuman Rights Project Habeas Corpus and Nonhuman Animal Rights Claims

The NhRP's efforts to employ WHC to free specific, nonhuman animals from confinement are hinged on four arguments. The first is justifying the claim that specific nonhuman animals have a right to recognition in the law. In a habeas corpus proceeding, this requires establishing that an individual is a "prisoner" who is detained unlawfully, and that the petitioner is entitled to "freedom." When applied to primates, this claim has generated several commentaries by legal scholars and judges (reviewed in more detail below).

Second, as noted, demonstrating that specified animals have legal standings requires establishing "personhood" status. Personhood is not the same as being recognized as a person or human being. For example, NhRP notes that entities/nonpersons such as corporations or governments are granted personhood under the law—they are juristic persons. Thus, under law, a person

need not be a living, breathing or corporeal *human* being. In a WHC claim, NhRP endeavors to establish that a being with complex thinking capabilities should be considered to possess personhood under the law. However, as NhRP asserts, this is not the same as claiming that chimpanzees or other animals are human persons, but that like corporations or juveniles, they can be considered to have person-relevant rights that the court should recognize and protect.

Third, founding a right to a WRC and personhood also requires establishing that the specified nonhuman has a right to identification as a "being with dignity and autonomy." To establish this fact for nonhuman animals, NhRP relies on the use of scientific research. It is notable that Jane Goodall not only provides this kind of documentation to NhRP for its legal cases, but also is a member of the NhRP's Board of Directors.

Fourth, NhRP recognizes "technical" legal issues in efforts to apply WHC to nonhuman animals. In the common law and in practice, with the exception of juveniles and those with certain mental/physical differential (dis)abilities, WHC is designed to free illegally confined petitioners. However, in its filing, NhRP is endeavoring to have the specified nonhuman animal transferred to another type of confinement better suited to promote its mental and physical well-being. NhRP recognizes that this type of claim poses significant difficulties because the petitioner is not being "freed." However, NhRP points out that some (human) petitioners who use WHC are not completely freed. For example, juveniles and those with mental health issues can be transferred to another form of confinement rather than being released. An additional concern in NhRP claims is establishing whether WHC applies to the kinds of "private detention" experienced by some nonhuman animals in a WHC claim.

In the first suit of this kind (December 3, 2013) NhRP filed a WHC on behalf of Tommy, a chimpanzee.[1] In that petition, filed in New York, NhRP argued that Tommy is a thinking being and an "autonomous legal person with the fundamental legal right not to be imprisoned." The petition stated that Tommy was detained in less than favorable conditions and unlawfully. They argued that this confinement established conditions the court could remedy by providing for Tommy's immediate release and transfer to an environment more suitable for primates (i.e., a primate sanctuary).

Wise and NhRP's Habeas Corpus Argument

This section examines specific aspects of Steven Wise's/NhRP's habeas corpus argument. Wise (2006, 2010) notes that the first problem is speaking to legal assumptions that define nonhuman animals (including primates) as property and, thus, lacking rights. From the perspective of green criminology, this is an interesting issue that begins and ends with the human-constructed legal system, and makes no appeals to potential rights outside the anthropogenic legal structure (i.e., no appeal to, for instance, natural law). The legal system redefines nonhuman animals and nature from an anthropogenic position, including the relationship of nonhuman animals to humans. In this way, socially constructed human law ignores conditions that existed long before humans emerged in the Earth's history. Earth is about 4.54 billion years old. Complex ecosystems emerged on Earth about one billion years ago, and the first animals about 800 million years ago. In contrast, humans have existed for only seven million years—or for 0.15% of Earth's history and for only 0.875% of the time animals occupied Earth. In historical/ecobiological precedence terms, then, humans stand at the bottom of the biocentric hierarchy. Before humans imposed their own (anthropocentric) legal restrictions on nature and animals, the relationships between animals and nature were guided by "natural laws," which are not codified, but simply exist as a reflection of how relationships emerge within a natural state absent of human interference.

In Wise's (2006: 200) view, chimpanzees should be "entitled to the substantive fundamental common law rights of bodily liberty and bodily integrity" (see also Goodall and Wise 1997; Wise 1996, 1997). Obtaining those rights means that in the law, chimpanzees are recognized as "persons" (have personhood) and not merely as human property. To accomplish this end, a WHC legal case must make substantive claims the court accepts concerning personhood, establishing that nonhuman primates are more than property but rather are independent beings with interests the law should protect (for an alternative view of animals as property see Francione 2008, who argues that the legal view of animals as property ought to be challenged and an animal liberationist view adopted). The personhood claim can be accepted by the court on two grounds. First, by definition, the nonhuman animal possesses qualities (e.g., mental capacities) that satisfy prevailing legal standards. Second, the court could accept a challenge to the definition of personhood, and in doing so, revise the legal definition of personhood to include nonhuman animals identified in the petition.

Wise's legal arguments also revolve around making the claim that the conditions under which chimpanzees are held by humans constitute enslavement, and that their enslavement deprives them of "bodily liberty." These restrictions on bodily liberty, Wise (2006) argues, suggest that "chimpanzees should be entitled to use the common law writs of *habeas corpus* and *de homine replegiando* and to bring their common law claims to bodily liberty before courts" (221).

Currently, common law does not extend to chimpanzees because of how it defines personhood. Wise argues that the legal concept of personhood is "a basic value" of the common law, and that given this feature of the common law, claims about chimpanzees' personhood status should be allowed to proceed in the courts on the merit of this claim. Moreover, Wise notes that because the common law is historically flexible and is continually revised to reflect emergent social conditions, legal arguments that seek changes in the definition of personhood should be accepted by the court for reevaluation.

Animals as Individuals Representing a Group

Wise's legal cases identify a specific chimpanzee as their focal point. Here, the idea is to build a case for the class of animal by establishing the rights of individual members of that group. Speaking to that approach, Wise referred to the Great Ape Project—an international organization that endeavors to convince the United Nations to issue a "Declaration of the Rights of Great Apes." That declaration is designed to recognize great apes' right to life and individual liberties, and to be protected from torture. It is estimated that approximately 3100 great apes are in captivity in the US, with 1280 in research facilities and the remainder in zoos, parks and other attractions. If it could be established that one individual chimpanzee has legal personhood, and a successful claim to liberty could be made, these claims could potentially be extended to other individual great apes, and then to the entire class of great apes, eventually requiring the "freeing" of all great apes. But, because the law does not currently recognize the personhood of chimpanzees, and the law moves slowly, it could take an extended period of time before this claim is legally accepted.

NhRP has filed habeas corpus writs for chimpanzees in three cases, all in New York: Tommy (privately owned, living in a cage in a shed; Nonhuman Rights Project, 2023b), Kiko (privately owned; Nonhuman Rights Project, 2023c), and Hercules and Leo (originally located at Stony Brook State University when the case began and now owned by the New Iberia Research Center; Nonhuman Rights Project, 2023d). These cases were initially filed in December 2013. Each case was rejected by the New York courts, some on original submission and hearing and one on appeal. Hercules'/Leo's case was refiled in March 2015 and was scheduled for rehearing in March 2017. To this point, none of NhRP's legal arguments have been accepted by the court, though some have been accepted in commentary by Judge Fahey (see below).

NhRP also filed WHC for four elephants. One case involves Happy, an elephant from the Bronx Zoo, who was ruled to not possess personhood by the New York courts in June 2022. The other involves Beulah, Karen, and Minnie, who became the property of various commercial and petting zoos. These cases involve a long history of petitions and appeals beyond the scope of the current focus on chimpanzees and apes (see ongoing NhRP cases, Nonhuman Rights Project, 2023, b, c, d).

Understanding and Establishing the Legal Basis for Animal Rights Using Court Challenges

The preceding materials outlined issues involved in efforts to secure rights for some nonhuman animals using court challenges to conditions of confinement in the US. This section examines in some detail alternative legal arguments posed by Rice (2013). As Rice noted, animal rights proponents have long endeavored to protect animals from harm by pushing for new or by modifying existing legislation, and by promoting enhanced enforcement of existing legislation. These efforts have generated some positive results: animal protection laws have changed significantly over time; new laws that extend certain protections to animals have been created; and there are now enforcement efforts where none previously existed. At the same time, these modifications have not extensively expanded the scope of legally recognized animal rights. Rice notes significant opposition and backlash against animal rights efforts in the US. This opposition derives from an assumption that granting any legal right for nonhuman animals will cascade, promoting an ever-increasing number of animal rights. Often, opposition comes from industries that use animals for production or as commodities. Rice also noted that while there is an enforcement mechanism to address animal rights, limited headway has been made to improve enforcement. In short, improved, existing animal protection statutes are under-enforced and fail to sufficiently promote animal welfare (Lynch and Genco 2021).

Given the above, animal rights proponents have sought alternative mechanisms for enforcing animal protection statutes. One alternative is employing legal challenges that request the courts intervene and grant non-statutory rights to animals to protect them from abuse. However, redressing animal rights through the courts is no easy task and requires establishing that (1) animals have rights and (2) that the legal system should recognize those rights. By taking up cases that define the parameters of animals' rights, the legal system demonstrates its willingness to enforce those rights. Moreover, motivating the courts to do so requires establishing that animals have specific legal rights or "a cause of action" that "assert[s] their [animals'] interests" to activate the law. In other words, those who wish to take animal rights issues to the court must be able to convince the court that court action is needed, and that animals and their advocates have appropriate legal standing to allow such actions to proceed.

Rice (2013: 1014) states that in the US, one hurdle to such a claim involves addressing how granting rights to animals might interfere with economic activity. Courts must avoid producing ramifications for the economic system when creating animal rights. Recognizing this problem, green criminologists have observed that the treatment of animals is tied to their political economic significance (Stretesky, Long and Lynch 2013). Because of this connection, Rice (2013) suggests "it would not currently be feasible to extend a wide spectrum of rights to all sentient animals, mainly for economic reasons" (1129). In green criminological terms, we would say that the court's willingness to grant animals rights is tied to the political economic utility of animals, because the law is structured by and reflects political economic interests tied to the treadmill of production (Lynch, Stretesky and Long 2020). As a result, the courts will be careful not to create legal rulings that interfere with existing political economic arrangements, power structures, and hierarchies, or that adversely impact the status quo of property rights that allow ownership of animals and the ability of owners to determine the fate of animals. Political economic green criminology posits that the political economic organization of society will affect not only how animals are defined (i.e., as property), but also the ability of animal rights proponents to access the law and the courts. Moreover, the courts will consider political economic relationships an important interest that requires protection, and will not, as a result, grant rights to animals when those rights interfere with economic development. Consequently, legal challenges that endeavor to broaden the rights of animals face a tremendous hurdle that requires confronting historically anchored legal relations that recognize human property rights over the rights of animals (Doss 2018). In Rice's view, this means that animal rights cases, including those anchored in WHC, must demonstrate that granting animals rights does not cause economic hardship. Failure to convince the court on this point will impede the ability to employ the court as a mechanism for redressing animal rights. Consistent with this political economic view, Torres (2007) noted that "the state will use whatever means at its disposal to protect the interests of animal exploiters as property owners" (75).

However, it should be noted that the courts' attitudes toward animal rights currently embedded within law and legal precedent may be changing. In the NhRP WHC for two chimpanzees, Tommy and Kiko, Judge Fahey from the State of New York Court of Appeals (2018) wrote the following: "To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others" (5). Citing Tom Regan's (2004) philosophical case for human rights, Judge Fahey continued: "Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect." In addition, Fahey stated:

> I continue to question whether the Court was right to deny leave in the first instance. … Whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing. (State of New York Court of Appeals 2018: 6–7)

Although recognizing the WHC rights of Tommy and Kiko in principle, Judge Fahey rejected reversing the lower court, allowing animal rights to be guided by existing precedent as influenced by human interests.

Rice (2013: 1129) argues courts also heed other "balancing" concerns, since enlarging animals' rights creates conflicts with other existing rights. In sum, granting animals a set of new rights could potentially impair other rights by, for instance, altering the ways in which we currently use animals as property. However, this additional point seems to be an extension of the economic consideration argument offered above, and appears to reinforce its relevance.

Animals: More than Property

If a legal brief can overcome the above, it must address other reasons the court should protect nonhuman animals. For Rice, this includes establishing that animals possess characteristics or qualities that demonstrate their legal capacity to be identified as rights holders. One such approach involves employing scientific research that relates to the capabilities, capacities, and qualities of animals. This can include an extensive array of scientific research concerning the appearance of specific characteristics in primates (e.g., Gallup 1979; Schultz 1936; Weiss 2017) indicating that the identified animal ought to be protected from suffering (Rice 2013: 1004). This would include evidence of the following: (1) advanced cognitive functioning; (2) skills similar to those possessed by humans (e.g., "reasoning powers;" "ability to "teach" and use "deception," and to create and use "tools"); (3) complex mental processes such as reasoning skills and problem-solving abilities; (4) the development of self-consciousness; (5) the use of mathematical knowledge and logical skills (e.g., some primates have learned approximately 3000 human words); and so on, using evidence that equates the capacities of primates with those of humans (Rice 2013: 1106–1110; Varki and Gagneux 2017).

Posing this type of argument limits the use of court-based remedies to certain species of animals, and not all animal species qualify for this remedy (Rice 2013: 1126). Moreover, drawing attention to specific animals requires animal rights proponents to demonstrate that the animal(s) in question are both dissimilar from other animals and "similar to humans" (for a philosophical critique of this argument see Francione 2008). In theory, that argument makes it irrational to exclude animals from sharing basic legal rights. This style of argument can include claims that some animals function at higher levels than some human groups that have legal rights (e.g., "infants and incompetent adults, or those in comas": Rice 2013: 1127). This claim "demonstrates the arbitrariness and potential unfairness of a sharp line drawn between human and nonhuman" (1127). Opponents of this approach argue that nonliving entities have a legal right "to protect the rights of the human efforts behind them, and are distinguishable from granting rights to animals on their own accord" (1127).

Personhood

Legally speaking, efforts to establish the qualities and capacities possessed by primates address the legal issue of "personhood." As noted earlier, legally, personhood is not the same as being a person, but rather involves identification of an entity or being with "Constitutional personhood," or Constitutional rights status. This status has been granted by the courts to nonliving entities (i.e., corporations and governments) and to humans with legal "impairments," such as juveniles. Thus, not being a person in itself is not an impediment to establishing personhood for nonhuman animals, though US courts have not been willing to take that step.

One way to attach personhood to legal standing is through precedence. For instance, federal laws such as the *Animal Welfare Act* (AWA), passed in 1966, extend some dimension of personhood to animals (Bilchitz 2009), though this may not be full personhood, and a court challenge would, therefore, need to be convincing that these laws indeed create personhood for animals. Here, we can say that the AWA established some fundamental level of minimal animal "rights." However, the AWA was carefully worded and avoids use of the term "animal rights," so the law itself does not technically recognize animals as having legal rights. Yet, the intention of the wording in this law can be questioned. Although the AWA does not explicitly imply that animals have rights or personhood, it does protect animals from certain harms caused by humans in various settings and, thus, recognizes animals as valid subjects that should be afforded legal protection by the law, and hence the courts. This may allow certain animals standing in the courts as valid petitioners.

In the US, one alternative to WHC claims is to make a Thirteenth Amendment claim (Rice 2013). This was the basis of the People for the Ethical Treatment of Animals' case (2011) filed against Sea World to protect orcas. In these cases, a Thirteenth Amendment claim that Sea World's orcas were subject to slavery/involuntary servitude was made, without attempting to establish that orcas held personhood (Rice 2013: 1124). However, the Southern District Court of California ruled that the Thirteenth Amendment only applied to humans.

Drawing on social contract theory, the courts' responses to animal rights suits suggest that the concept of rights also connotes the existence of a set of responsibilities; that is, entities/beings with rights must also be shown to have certain social responsibilities and moral capacities (Rice 2013: 1128). Thus, legal arguments that reject animal rights posit that animals do not have a sense of "moral capacity" or state of mind required to satisfy (human) social responsibility demands. In response, some note that certain people with personhood do not have moral capacity (e.g., juveniles, persons with mental impairments, persons in comas). Further, others argue that it may be plausible to employ scientific evidence to demonstrate that within their own social groups, animals act like humans to the extent that they are "governed by moral codes," and if they "consciously exhibit morals in their interactions with humans, it could be argued that humans should have a duty to reciprocate" (Rice 2013: 1129).

Alternatives to the Writ of Habeas Corpus Actions

WHC strategies may fail because they make legal claims that are too broad for the courts to accept (see above). In response, Rice suggests more limited animal rights claims that may be more acceptable to the court because they are less socially burdensome and do not pose "future" rights conflicts. For example, Rice (2013) noted that "granting an animal an affirmative right could result in difficult decisions later if that animal's rights conflict with important human interests. For example … a subsequent scientific need for the use of an ape in an invasive experiment that is likely to save millions of human lives, many people would assert that the human interest should outweigh the ape's interest" (1131). The limitation in this approach is foreseeing or predicting how human and animal rights might come into conflict at some point in the future. Numerous scenarios could be created where these rights might conflict, and some attention ought to be paid to the probability of a given outcome. For example, it could be argued—and here we purposefully posit an extreme example—that in the future, aliens might land on Earth, spread a disease that humans but not primates contract, and that it is necessary to experiment on primates to discover a

vaccination for the disease. Should the rights of primates to be free from unjust imprisonment/servitude/slavery, say for the next thousand years, be denied in favor of this potential possibility? One would hope that the courts reach more rational decisions than in this example.

Favre (2005) offers another alternative to habeas corpus claims. He noted that pain and suffering or cognitive ability animal rights challenges ought to take a "non-comparative approach" (334). This is accomplished using a tort claim he calls "intentional interference with a fundamental interest of an animal" (334). Favre posits that Wise's WHC approach poses a balancing question that relies on being able to interpret animal rights relative to human rights, and that Wise's argument does not suggest how that balancing act should be achieved (336). This approach inherently values humans above animals (336). Further, Favre argues that since animals are currently viewed as property within the legal system, perceiving them as other than property requires a revolution in legal thought and society. He views that revolution as unlikely, and instead argues that claims supporting animals' legal rights should not challenge status as property. Rather, these cases should be based on the interest of the animal in, for example, avoiding harmful outcomes, which can be articulated scientifically.

In addition, drawing from Roscoe Pound, Favre (2005) argues that animal rights cases should identify conflicting interests that force the law to act "as referee" (339). Here, the question is whether the conflict is significant enough to require legal intervention. In part, making that decision legally hinges on determining whether the conflict interferes with the right to liberty of one of the parties, and the interests of animals to be free from pain (341). These interests, Favre suggests, are already incorporated in the laws of all fifty states through state-level animal anti-cruelty laws (341).

In terms of precedent, Favre argues that US law recognizes certain animal rights under the *Endangered Species Act*. This includes an "interest in continued biological (and ecological) existence and seeks to protect that interest from human intrusion through conservation of the species" (Favre 2005: 342). Here, "a species's interests, like a corporation's interests, are derivative of the members of which it is composed. A species has no moral claim upon us; rather it is the interests of individual animals that assert their claim upon us" (343). The weight of this argument is not harm caused to an individual animal, but a larger issue of, for example, species extinction (343). Favre argues that in the *Endangered Species Act*, species conservation exceeds human interests "including economic, religious, sport hunting and food gathering" (343), addressing the economic conflict issues described earlier.

Favre also noted that historically, environmental law allowed living and nonliving entities to be grouped together to facilitate their standing in the courts. This precedent created plaintiff classes such as rivers and streams that acquired standing in the courts. Animals have also been able to achieve this form of standing in the courts (Favre 2005: 345–352) without affecting their property status, meaning that the property status of animals does not preclude them from obtaining protection in the legal system.

Favre (2005: 352) argues that torts provide a more appropriate legal mechanism to establish animal rights by asserting that an animal's primary interests have been impinged. This is accomplished by establishing the fundamental importance of an interest to an animal plaintiff and demonstrating that the animal's interests outweigh the human defendant's interests (353). Favre cautions that while it can be argued that animal interests and human interests are equal philosophically, this is not possible legally, which is why he prefers a tort approach to animal rights (359).

Rice (2013) also supports a tort approach called "wrongful abuse of an animal" (1137). This tactic draws on anti-animal cruelty statutes focused on physical harm, torture and neglect to establish the wrongful abuse of an animal in a specific condition or circumstance. Such a suit establishes the basis for "injunctive relief" from cruelty and requires establishing the existence of feasible alternatives for the reduction of animal cruelty, suffering, and pain.

Discussion and Conclusion

The case for animal rights has long been made. The first known animal rights Act, "An Act against Plowing by the Tayle, and Pulling the Wooll off Living Sheep," passed in Ireland in 1635 (Beirne 2009a). Several years later (1641), the first general anti-animal cruelty Act was passed in the American British colonies (Lane 2011). Nearly 200 years later (1824), the first Royal Society for the Prevention of Cruelty to Animals was founded in the UK and was followed by the first *Cruelty to Animals Act* (1835). Thirty years later this movement came to the US with the founding of the American Society for the Prevention of Cruelty to Animals. Before this was established, New York became the first US state to pass an animal cruelty statute (1828; Beers 2006). While there have been numerous discussions of animal cruelty and rights during the hundreds of years (1635–2020) since passage of the first animal protection laws (Quinlan 1894), and the law has been set into motion on many occasions in an effort to obtain rights for animals, animal rights remain limited for a variety of reasons attached to the nature of principle

of law in the US (Bendor and Dancig-Rosenburg 2018). In reviewing the legal challenges supporting primates' rights in the US, this article endeavors to expose how the legal system in the US could potentially be used to support animal rights claims.

As noted, NhRP has attempted to obtain legal rights for animals and to overcome the legal, social, and economic rationale for limiting animals' rights in the US. NhRP has done so using WHC. Several of these cases are ongoing, and no conclusion has been reached legally. Others argued that there is a need to go beyond WHC in efforts to secure legal rights for animals (Favre 2005; Maddux 2012; Rice 2013).

What is interesting in this animal rights battle is the very slow pace at which the law has moved. As Davis (2015) noted, early laws protecting animals were limited, and the people committed to securing rights for animals were different than those involved in the movement today. He noted that many early animal rights advocates "ate meat" or "believed in euthanasia as a humane end to creaturely suffering," supported animals rights "through biblical ideas of gentle stewardship," and "accepted animal labor." He argued that in contrast, "contemporary animal rights activists … believe that animals possess the right to exist free from human use and consumption." He also argued that early animal rights activists tended to view the protection of animals in the same way that they viewed the protection of children. He reminds us that the protection of animals was tied to other rights-based and harms-based movements historically including antislavery and temperance movements.

However, during the twentieth century, the animal rights movement expanded as anti-vivisection movements and rights for farm animals, and rights for pet movements have developed. The unification of these various movements followed publication of Tom Regan's influential work *The Case for Animal Rights* in the 1980s. Those movements advanced animals' rights to be protected from harm, but the expansion of animal rights has slowed in recent years (Francione 2008). This is nowhere more evident than in efforts to obtain legal rights for animals, such as habeas corpus, a right historically reserved for humans. Currently, the animal rights movement has somewhat stalled despite efforts by people such as Tom Regan, Steven Wise and Jane Goodall, among others, because perhaps we are at the last of the large hurdles. WHC claims would give animals rights as legal persons, and the law does not appear ready to accept that level of protection for animals at this juncture in history. It is beyond the scope of this review to suggest when that might happen.

Some comment should be made about the relevance of this work compared to the approaches typically taken toward (nonhuman) animal rights within green criminology. That is no small task given the volume and variety of that work (Gacek and Jochelson 2020; Sollund 2020; Stephens-Griffin 2022), and it is beyond the scope of this discussion to make a full argument here. Of concern to green criminology is establishing the moral/philosophical basis for animal rights. Those arguments are well known and draw from, for example, the work of Peter Singer and Tom Regan, among others. More specific analyses of animal rights and the interests of those rights and animal harms have been well examined in the green criminological literature in various ways by Piers Beirne. Beirne's view is noteworthy for its historical illumination of harms against nonhuman animals and the history of laws protecting nonhuman animals from harms, which weaves together legal principles and orientations with the social history of animal rights.

Here, the focus was on the use of the legal system in the US as one mechanism for securing the legal rights of nonhuman animals. Green criminologists have often overlooked how the legal system can be employed to secure animals rights. Part of the point of taking up this argument was to illustrate that while important, philosophical arguments about animal rights have limited utility legally in the US given the way that system works. This is indeed the reason Wise selects a much different habeas corpus approach. The elements of that strategy are already incorporated into the long history of the US legal system, and hence make sense legally.

However, this is not to imply that use of the legal system is the only or even the best way to obtain rights for nonhuman animals. As illustrated, part of the problem with this approach is contained within the structure of law and its understanding or classification of animals as property. More generally, we should also recognize that in the US there has been little movement concerning the granting of rights to nonhuman animals over the past three decades. Resistance to recognition of those rights has stood up against both social and legal movements concerned with broadening the rights of animals. In other words, while green criminologists have become more concerned with animals' rights from a philosophical and legal perspective, and similar social interest continues to be evident, the laws related to animal rights have changed very little in the US.

In closing, remember that Judge Fahey, building on the case made by NhRP, may have established the basis for addressing animals' rights through legal challenges. Specifically, he noted that:

> whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a "person," there is no doubt that it is not merely a thing. (State of New York Court of Appeals 2018: 6)

In essence, Fahey announced that at some point, the issue of animal rights will have to be addressed legally in the US, and that Wise's legal challenge has brought to light a "fundamental" concern about the right to liberty and whether that right applies to nonhuman animals.

It should also be noted that the emergence of a new approach to species justice—the multispecies justice approach—may change how the rights of all species are understood, examined, and recognized. This perspective rejects centering questions about species justice around anthropocentric philosophies and legal boundaries. The goal is to view all species as having rights in relation to one another as part of a larger system of interrelationships (Tschakert et al. 2021). The legal ramifications of this unfolding alternative are unclear, but they hold out the promise of expanding the rights of nonhuman species through new forms of understanding those rights (Westerlaken 2021).

It is unclear at this juncture in history how this story will unfold or how long it might take before animals' rights are recognized legally in the US, and to what extent this may happen. It is doubtful anyone can offer a legitimate guess about that future, or when animals' rights might be recognized and their status as property put to rest. But, this is, in my view, unlikely to occur in a nation where economic interest in property is paramount.

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[1] NhRP documents suggest that Tommy, previously known as Willie, appeared as "Goliath" in the 1987 movie *Project X*, starring Matthew Broderick and Helen Hunt. Nine other chimpanzees appeared in the film (film name; actual name from film credits): Goofy (Okko), Goliath (Karanja), Bluebeard (Luke), Ginger (Harry), Winston (Arthur), Spike (Clafu), Razzberry (Lucy), Ethel (Lulu), and the "new recruit" (Mousie). The chimpanzees, according to the movie's credits, were the property of Primary Primates (PP) of San Antonio, Texas, which still appears to be in existence (primarilyprimates.org) and now identifies itself as a primate sanctuary. PP's website states that Willie is still living at the sanctuary. A second chimpanzee from the movie, Okko, also lives at PP. In 2006, PP was accused of animal neglect and, thus, reorganized by the courts (Smith 2007).

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