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FREE TILLY?: LEGAL PERSONHOOD FOR ANIMALS AND THE INTERSECTIONALITY OF THE CIVIL & ANIMAL RIGHTS MOVEMENTS

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INTRODUCTION

In February 2012, the District Court for the Southern District of California heard *Tilikum v. Sea World*, a landmark case for animal legal defense.[1] The organization People for the Ethical Treatment of Animals (PETA) filed a suit as next friends[2] of five orca whales demanding their freedom from the marine wildlife entertainment park known as SeaWorld.[3] The plaintiffs—Tilikum, Katina, Corky, Kasatka, and Ulises—were wild born and captured to perform at SeaWorld's Shamu Stadium.[4] They sought declaratory and injunctive relief for being held by SeaWorld in violation of slavery and involuntary servitude provisions of the Thirteenth Amendment.[5] It was the first court in U.S. history to consider arguments that slavery does not apply exclusively to humans.[6] The court held that as a matter of first impression, the Thirteenth Amendment prohibition on slavery and involuntary servitude applied only to humans, and thus whales lacked Article III standing under the U.S. Constitution to bring action against Sea World under the Thirteenth Amendment.[7]

1 *See* Jennifer O'Connor, *The Case Forever Known as Tilikum v. SeaWorld*, PEOPLE FOR ETHICAL TREATMENT ANIMALS (Feb. 9, 2012), http://www.peta.org/blog/case-forever-known-tilikum-v-seaworld/#ixzz3Ib8EORe8/.

2 Since the orcas' rights could not be effectively vindicated except through an appropriate human representative, PETA and several individuals brought this action on behalf of the animals as "Next Friends" pursuant to FED. R. CIV. P. 17(b), (c), which states that a next friend appears in court in place of another who is not competent to do so, usually because they are a minor or are considered incompetent.

3 PETA brought suit as next friends under rule 17, which allows a third party to sue on behalf of the interests of the real party in interest. FED. R. CIV. P. 17(a)(1), (c)(2). This meant that the five orcas were the only plaintiffs, not PETA—a revolutionary move for animal legal defense at the time. *See* O'Connor, *supra* note 1.

4 *See* Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012).

5 *Id.*

6 *See* O'Connor, *supra* note 1.

7 *See Tilikum*, 842 F. Supp. 2d at 1264.

With this holding, the court added the following caveat: "[it] is not to say that animals have no legal rights; as there are many state and federal statutes affording redress to Plaintiffs, including, in some instances, criminal statutes that 'punish those who violate statutory duties that protect animals.'"[8] This caveat indicates law that understands and recognizes a place for animals is a rising trend in the United States; in fact, federal courts have seen a surge in animal law cases.[9] Competing ideologies of welfarism and liberation structure the debate and the implications of litigation of animal rights: welfarists are those who seek to minimize the needless suffering of animals, but who ultimately sanction the use of animals for human use, while liberationists seek to expand full legal rights to animals and find it unacceptable for humans to use animals like property.[10] Thus, claims span from recovery for emotional distress for lost pets in tort[11] to arguing for legal personhood of animals under the law.[12]

The movement towards rights for animals has relied upon borrowed language from other contemporaneous movements, namely the cause for abolition of slaves and, later, for civil rights. Other movements have sought to mobilize human empathy and concern for those oppressed and marginalized by systematic violence in order to correct society-wide ignorance, suffering, and injustice. Framing Tilikum and Company's captivity as that of an enslaved being sought to awaken both the law and society to his capacity to suffer and to his entitlement to be free from suffering—much like the abolitionist movements sought to deconstruct the brutalization of slaves and sinful practice of slavery.[13] However, this reliance becomes problematic when considering the implications: the animal rights movement seems to "humanize" animals, while the abolitionist movement and its legacy aimed to humanize humans. The thought that some animals deserve the humanization that has been denied to other minorities raises the risk of perpetuating dehumanizing strategies against minorities, namely former black slaves for whom the abolitionist discourse was initially developed. In other words, if a former slave and a donkey may be entitled to the same kinds of legal protection under the law, does that elevate the status of the donkey, demote the status of the person, both, or neither? The pains of both groups may be deplorable and relatable, but the legal mechanics of alleviating these issues cannot

8 *Id.*

9 *See generally* Animal Legal & Historical Ctr., *Animal Legal & Historical Center*, MICH. ST. U.C.L., http://animallaw.info/#cases (last visited May 16, 2016) (chronicling many animal law cases).

10 *See* Brittany J. Mouzourakis, *Tilikum's Splash: Lessons Learned from Animal Rights-Based Litigation Strategies*, 10 J. ANIMAL & NAT. RESOURCE L. 223, 223–24 (2014).

11 *See Damages for Death or Injury of an Animal*, ANIMAL LEGAL DEF. FUND, http://aldf.org/resources/when-your-companion-animal-has-been-harmed/damages-for-death-or-injury-of-an-animal/ (last visited May. 16, 2016).

12 *See* 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, 247–48 (2008).

13 *See generally* David W. Blight, *Perceptions of Southern Intransigence and the Rise of Radical Antislavery Thought, 1816–1830*, 3 J. EARLY REPUBLIC 139 (1983).

be the same without potentially undoing a lot of the work done to advance the rights of humans formerly denied their humanity.

This Note examines this flashpoint of the animal legal defense movement, the *Tilikum* case, including where it can be seen, how, and why anthropocentric strategies in liberating animals may fail. The animal litigation movement, while deeply embedded in other human-centered social movements like that of civil rights, has to carve out a novel approach to nonhuman legal protection that recognizes their unique role in society. I will begin with the history of the animal rights movement and its linkages to anthropocentric movements, then analyze the legal development and outcome of *Tilikum*. I will describe what is left in *Tilikum*'s wake and propose some ideas on innovative nonhuman legal recognition today.

I. BACKGROUND: THE ANIMAL RIGHTS MOVEMENT

Prior to the 18th century, animals were considered automatons without the capacity for cognition or feeling.[14] Understanding of the suffering of animals expanded in the 18th century.[15] The animal rights movement fully began in early 19th Century England, "where it grew alongside the humanitarian current that advanced human rights, including the anti-slavery movement and later the movement for women's suffrage."[16] In 1824, an act was passed to prevent cruelty to animals like horses and cattle, and the Royal Society for the Prevention of Cruelty to Animals (RSPCA) was founded to enforce it.[17] In 1866, an American Society for the Prevention of Cruelty to Animals (ASPCA) was formed in New York, at first as a shelter for horses and livestock, then later for dogs, cats, and other smaller animals.[18] Around the country, other groups followed suit in opening shelters and seeking to enforce animal cruelty laws.[19] These organizations were often spurred on by abolitionists, and provided protective services for both animals and children.[20] In the 1890s, the anti-vivisection movement began in England and the U.S. and was a campaign that sought to regulate the use of animals in scientific research and experimentation in Great Britain, as

14 This was the infamous understanding of Descartes; his and others' indirect theories of animal ethics denied animals moral status or equal consideration with humans due to a lack of consciousness, reason, or autonomy; however, these theories still might have required not harming animals, but only because doing so caused harm to a human being's morality. *See* Scott D. Wilson, *Animals and Ethics,* INTERNET ENCYCLOPEDIA PHIL., http://www.iep.utm.edu/anim-eth/ (last visited Nov. 16, 2014).

15 Jeremy Bentham, in particular, first asserted the rights of animals with authority and persistence: "The right question for animals is not 'Can they reason?' or 'Can they talk?', but [rather,]'can they suffer?' These questions provide the fundamental concepts for animal welfare." *History of the Movement*, WORLD ANIMAL NET, http://www.worldanimal.net/documents/3_Movement_History.pdf (last visited Nov. 16, 2014).

16 David Walls, *Animal Rights Movement*, SONOMA ST. U., http://www.sonoma.edu/users/w/wallsd/animal-rights-movement.shtml (last updated Nov. 9, 2014).

17 *See id.*

18 *ASPCA Policy and Position Statements: History,* ASPCA, http://www.aspca.org/about-us/aspca-policy-and-position-statements/history (last visited May 16, 2016).

19 *See* Walls, *supra* note 16; *id*.

20 Walls, *supra* note 16.

medical institutions often relied on animals for experiments that were lethal, painful, and cruel.[21] The movement eventually sought prohibition of animal experimentation by advocating legislation, education and public awareness, and alternative research methods.[22] Although efforts to protect animals continued during this time, as seen with the passage of legislation like the Cruelty to Animals Act, this movement was quickly obscured by the rising prestige of modern medicine.[23] However, concern for animals for the most part shifted instead to preserving wildlife.[24]

The end of World War II substantially altered the social fabric of America. One of the results of this shift was the rise in companion animals and pet keeping;[25] the ideological controversy that developed caused a split between the American Humane Association (AHA) and the Humane Society of the United States (HSUS) in the '50s and '60s.[26] It was at this time that the groups managed a boom in legislation favorable to animals, including the Humane Slaughter Act and the Laboratory Animal Welfare Act.[27]

At this point in the animal rights movement, there was a shift away from the indirect ethical theories like "sentimentalism" and utilitarianism that had promoted animal rights.[28] These motivations were still anthropocentric, where human moral value and agency remained superior to that of animals. Peter Singer's *Animal Liberation* mobilized the "new animal rights movement," popularizing the concept of "speciesism" as a parallel to racism and sexism.[29] Just as it is unacceptable for humans of a certain intelligence, race, or sex to abuse or use human beings of lesser intelligence, a different race or sex, it is unacceptable

21 *Our History*, AM. ANTI-VIVISECTION SOC'Y, http://aavs.org/about/history/ (last visited May 16, 2016).

22 *See id.*

23 Walls, *supra* note 16.

24 *See id.*

25 *See id.*

26 *See id.*

27 *See id*. "The Society for Animal Protective Legislation (SAPL) was established in 1955 to lobby for the first federal Humane Slaughter Act (passed in 1958); together with the Animal Welfare Institute also under the direction of Christine Stevens, SAPL has lobbied for every important piece of animal legislation since, including the Laboratory Animal Welfare Act (1966), the Endangered Species Act (1969), the Horse Protection Act (1970), the Marine Mammal Protection Act (1972) and their various subsequent extensions and strengthening amendments." *Id.*

28 "Sentimentalism refers to a philosophy grounded in emotional concern to act in moral fashion; in other words, individuals rely on their emotions to inform their motivations and moral decisions. On the other hand, utilitarianism determines the moral rightness or wrongness of an act by whether or not it maximizes preference satisfaction or, in other words, the satisfaction of interests. If the value of an act outweighs the evil of the act, then its moral rightness can be justified without consideration of emotion." *See* Monica L. Gerrek, Normative Sentimentalism and Animal Ethics (Dec. 7, 2007) (unpublished Ph.D. dissertation, University of Kansas), https://kuscholarworks.ku.edu/bitstream/handle/1808/3984/umi-ku-2289_1.pdf;jsessionid=A976870A253437662oE08D4C6423C1A3?sequence=1.

29 The "speciesism objection" forwarded by Singer responded to the utilitarian idea that animals do not deserve equal consideration because they are not humans and, thus, they and their interests are inferior, so humans have a right to treat them as they please. *Id.* at 5. Singer likens our treatment of animals "in virtue of the fact that they are of a different species to the treatment of non-whites and females because they are not white or male." He argues against "speciesism" as a prejudice or attitude of bias in favor of the interests of one's own species and against those of members of other species. *Id.* at 153–54.

for humans to abuse or use members of other species.[30] Singer's point is that if intelligence, race, or sex is not a good enough reason to permit harm to members of our own species, then species is likewise an insufficient reason to harm members of other species.[31] Tom Regan took the work of Singer even further, moving beyond the idea of animal welfare to argue the case for animal rights in the natural rights tradition.[32] Instead of simply avoiding harm to animals because it is morally repugnant or because it is an imbalance of utilities, Regan advocated that animals, like humans, have rights and that the possession of these rights by animals ought to dictate our actions toward them.[33] Public demonstrations, protests, and petitions were organized in the wake of this evolving literature.[34] Additionally, releasing and removing animals from laboratories, zoos, or factory farms; sabotaging of hunting, laboratories, and breed establishments; and other demonstrations have continued controversially since the 1970s.[35]

Similar to many movements of the era, the nonhuman animal rights movement began to professionalize and adopt other organizational models.[36] For example, in 1979, Joyce Tischler founded the Animal Legal Defense Fund (ALDF), using Thurgood Marshall's Legal Defense Fund of the NAACP as a model.[37] In order for groups like the ALDF to increase their political influence and mobilize strength, they began to moderate tactics and goals.[38] By the 1990s, most nonhuman animal rights organizations seemed to resemble one another in structure and repertoire,[39] and welfare reform became standard protocol. Organizations found themselves pushing for regulations that promised to improve efficiency and productivity for exploitative industries without radically ending or altering them—considerable trade-offs that troubled many advocates.[40]

The welfare reform movement does seem to maintain the status quo, more or less. Under the current laws, animals are considered property, and as such, they are afforded no legal rights in American society.[41] Although there have been a few unique instances in

30 *Id.* at 153–54.
31 *Id.*
32 Walls, *supra* note 16.
33 Gerreck, *supra* note 28, at 141.
34 *History of the Movement*, *supra* note 15, at 4.
35 *See* Walls, *supra* note 16, at 4.
36 Corey Lee Wrenn, *Abolition Then and Now: Tactical Comparisons Between the Human Rights Movement and the Modern Nonhuman Animal Rights Movement in the United States*, 26 J. AGRIC. & ENVTL. ETHICS 3, 4 (2013).
37 Jeff Pierce, *ALDF's Animal Law Institute Looks Back Across Four Years of Strategic Efforts*, ANIMAL LEGAL DEF. FUND: BLOG (Nov. 5, 2014), http://aldf.org/blog/aldfs-animal-law-institute-looks-back-across-four-years-of-strategic-efforts/.
38 Wrenn, *supra* note 36, at 4.
39 *Id.*
40 *Id; see also The Case for Controlled-Atmosphere Killing,* PEOPLE FOR ETHICAL TREATMENT ANIMALS, http://www.peta.org/features/case-controlled-atmosphere-killing/ (last visited May 16, 2016) (exemplifying the welfarist approach to animal rights that still perpetuates slaughter).
41 *See, e.g.*, Sentell v. New Orleans & C.R. Co., 166 U.S. 698, 701 (1897) (holding that domestic animals are perfect property and wild animals are property upon capture).

which animals have sued in their own name and right,[42] the majority of litigation surrounding the animal advocacy movement involves animal advocacy organizations suing to enforce animal protective statutes that enhance the welfare of animals.[43] Generally, these lawsuits are brought under the citizen suit provision of the Endangered Species Act (ESA)[44] or under the Animal Welfare Act (AWA)[45] through Section 702[46] of the Administrative Procedure Act (APA).[47] That is not to say that these acts were great examples of legislative progress for animal welfare, though. The ESA is one of the most extensive and restrictive regulations for the preservation of national and global species, imposing strict penalties for the killing and harassment of protected animals and their habitats.[48] The AWA mandates various regulations to improve the living conditions of captive animals.[49] Congress enacted the AWA "to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment."[50] The statute tasks the Secretary of the U.S. Department of Agriculture (USDA) with promulgating rules, regulations, and orders necessary to carry out the provisions of the AWA.[51] The regulations promulgated under the AWA that are most relevant to this Note are those regulations that deal with humane living conditions for exhibition animals.[52]

Like the Civil Rights Movement, the animal rights movement experienced a splintering into factions by the early 2000s as activists became frustrated with the political stagnancy by moderation. Gary Francione spearheaded the formation of what he called the "abolitionist approach to animal rights."[53] His writings criticized the shortcomings of the

42 *See, e.g.*, Palila v. Haw. Dep't. of Land & Natural Res., 852 F.2d 1106, 1107 (9th Cir. 1988) (explaining in dicta that "the [Palila, a type of bird,] . . . has legal status . . . as a plaintiff in its own right").

43 *See, e.g.*, Am. Soc'y for Prev. of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus, 317 F.3d 334, 335 (D.C. Cir. 2003); Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 428 (D.C. Cir. 1998).

44 *See generally* 16 U.S.C. §§ 1531–1534 (2012). Addressing the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g), is outside the scope of this Article because the orca species, *as a whole*, is not classified as an endangered or threatened species according to 50 C.F.R. § 17.11 (2015).

45 7 U.S.C. §§ 2131–2159 (2012).

46 *See generally* 5 U.S.C. § 702 (2012) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

47 For a deeper discussion on welfare-based animal litigation strategies, see, for example, Karina L. Schrengohst, *Animal Law—Cultivating Compassionate Law: Unlocking the Laboratory Door and Shining Light on the Inadequacies & Contradictions of the Animal Welfare Act*, 33 W. NEW ENG. L. REV. 855 (2011).

48 *See* Zygmunt J.B. Plater, *Endangered Species Act Lessons Over 30 Years, and the Legacy of the Snail Darter, a Small Fish in a Porkbarrel*, 34 ENVTL. L. 289, 290–91 (2004).

49 *See* 7 U.S.C. § 2131.

50 *Id.* § 2131(1).

51 *See id.* § 2151.

52 Animals in captivity must be provided with sufficient space for "adequate freedom of movement." 9 C.F.R. § 3.128 (2016). Inadequate living space can be evidenced by stress or abnormal behavioral patterns. *See id.* There is no citizen suit provision of the AWA; however, litigants can enforce provisions of the AWA by bringing suit under the Administrative Procedure Act. *See* 5 U.S.C. § 702 (2012); *see also, e.g.*, Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 428 (D.C. Cir. 1998) (noting plaintiffs believed primates' deplorable living conditions violated the Animal Welfare Act and sued through the Administrative Procedure Act).

53 *See* Gary L. Francione, *Some Thoughts on the Abolitionist Approach*, ABOLITIONIST APPROACH (Oct. 24, 2009), http:// www.abolitionistapproach.com/some-thoughts-on-the-abolitionist-approach.

"compromised" movement; renounced the effectiveness of professionalized groups bound to organizational maintenance and hesitant to challenge exploitative industries; and accused the movement of failing in general to address the property status of nonhuman animals, even reinforcing commodification through "regulationist" and "welfarist" measures.[54] Francione's abolitionist approach, then, calls for recognition of the personhood of animals and the equal consideration of their interests based on their self-awareness and capacity to suffer.[55]

The organizational tactics of the previous decade's Civil Rights Era and other human rights movements affirmed and heavily influenced this aggressive mobilization of the animal rights movement. The discourse of the animal rights movement, like that in the Civil Rights Movement, began to reference groups of powerful individuals oppressing and exploiting weaker individuals; overt and subtle acts of systematic violence by the dominant against the marginalized; and the ignorance and apathy of social or institutional bystanders that can exacerbate the injustice.[56] Discussion of the intersectionality of inequalities underscored the movement previously,[57] namely in the work of Marjorie Spiegel and her 1988 book, *The Dreaded Comparison*,[58] but Francione brought it to forefront:

> [W]e cannot make meaningful distinctions between the quality of sentient experiences between humans and nonhumans that would justify imposing any pain and suffering on nonhumans incidental to our use of them as our resources, any more than we can make such distinctions between or among humans for the purpose of justifying slavery or otherwise treating humans exclusively as resources.[59]

Francione also identified the parallel between the two movements in that the "fundamental interests of sentient beings are commodified and treated as tradable depending on economic consequences."[60] This view creates many tactical similarities between the two movements in emphasizing the use of graphic imagery, narratives, and other depictions of suffering in motivating participation.[61] Participation in both movements is also paralleled

54 *See id*; *see also* Wrenn, *supra* note 36, at 2; *see generally* GARY L. FRANCIONE & ROBERT GARNER, THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION? 1–4 (2010).

55 FRANCIONE & GARNER, *supra* note 54, at 14–24.

56 Carter Dillard, *Is the Animal Rights Movement Civil Rights 2.0?* ANIMAL LEGAL DEF. FUND: BLOG (July 23, 2013), http://aldf.org/blog/.is-the-animal-rights-movement-civil-rights-2-0/.

57 Writing in 1898, activist Henry Salt compared "the present condition . . . of domestic animals . . . to that of the negro slaves of a 100 years ago: . . . [there is] the same exclusion from the common pale of humanity; the same hypocritical fallacies, to justice that exclusion; and, as a consequence, the same deliberate stubborn denial of their social 'rights.'" Wrenn, *supra* note 36.

58 Spiegel claims that, like slavery, the exploitation of animals is invisible and aided by a belief that animals are inferior and naturally intended to be dominated and consumed. Spiegel posits this mindset that de-stigmatizes and alienates what could be an extension of the values that enabled exploitation of other, "inferior" human beings. MARJORIE SPIEGEL, THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY 15–32 (1997).

59 FRANCIONE & GARNER, *supra* note 54, at 24–25.

60 *Id.* at 229.

61 *See* Elizabeth L. DeCoux, *Speaking for the Modern Prometheus: The Significance of Animal Suffering to the Abolitionist Movement*, 16 ANIMAL L. R. 9 (2009).

through use of tactics like nonviolent and violent direct action and social resistance; commercial abstention; media campaigning; economic, political, and moral suasion; legislative efforts; and legal action.

II. TILIKUM'S LEGAL STRATEGY AND IMPLICATIONS

Tilikum was captured off the coast of Iceland at the age of two and sold to Sealand of the Pacific in 1984, where Tilikum performed for seven years.[62] In 1991, Tilikum was sold to SeaWorld after killing a trainer.[63] In 1999, Tilikum was again suspected of violence when a man who broke into the park was found dead in his tank; whether Tilikum pulled him in or he jumped is uncertain.[64] It wasn't until 2010 that Tilikum's behavior became infamous, when he killed a trainer during a show at SeaWorld Orlando.[65] The drama spurred investigations by animal rights activists, namely Gabriela Cowperwaithe, who began the filming of the documentary *Blackfish* in order to learn the full story.[66] *Blackfish* follows Tilikum's capture, abuse in the parks, and behavior. It includes testimonials from biologists and former SeaWorld employees and trainers, who describe their experiences with Tilikum and other captive whales.[67] *Blackfish* was released in 2013 at the Sundance Film Festival;[68] meanwhile, in 2011, PETA filed as "next friends" of Tilikum and other whales, a complaint[69] alleging SeaWorld violated the orcas' Thirteenth Amendment rights[70] to be free from slavery and involuntary servitude.[71] According to the complaint, forced captivity of the whales had caused them to exhibit unnatural psychological and physical ailments: specifically, orcas develop aggressive behavior and die premature deaths due to their unnatural living conditions.[72] As such, the orcas sought to enjoin SeaWorld from keeping

62 Complaint for Declaratory and Injunctive Relief at 7, Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Ent, 842 F. Supp. 2d 1259 (S.D. Cal. 2012) (No. 11-cv-02476 JM WMC) [hereinafter Complaint].

63 *See* Jeffrey Kluger, *Killer-Whale Tragedy: What Made Tilikum Snap*, TIME (Feb. 26, 2010), http://content.time.com/time/health/article/0,8599,1968249,00.html (noting that Tilikum, along with two other whales, caused a trainer to drown during a performance).

64 *See* Martin Evans, *The Story Behind Tilikum the Killer Whale*, TELEGRAPH (Feb. 26, 2010), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7322889/The-story-behind-Tilikum-the-killer-whale.html. *See also* Kluger, *supra* note 63.

65 *See* Kluger, *supra* note 63 (reporting that Tilikum jumped out of the water and grabbed the trainer's ponytail and drowned her to death).

66 *See* Eric Kohn, *Sundance Interview: 'Blackfish' Director Gabriela Cowperthwaite Discusses Suffering Orcas, Trainer Death, and Why SeaWorld Hasn't Seen the Movie*, INDIEWIRE (Jan. 26, 2013), http://www.indiewire.com/article/sundance-interview-blackfish-director-gabriela-cowperthwaite-discusses-suffering-orcas-trainer-death-and-why-seaworld-hasnt-seen-the-movie.

67 *See id.*

68 David Roonet, *Blackfish: Sundance Review*, HOLLYWOOD REP. (Jan. 21, 2013), http://www.hollywoodreporter.com/review/blackfish-sundance-review-414203.

69 Complaint, *supra* note 62, at 1. By acting as next friends, PETA sought to structure the lawsuit in such a way that the orcas were attempting to sue in their own legal right. *Id.* at 2.

70 U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States.").

71 *See* Complaint, *supra* note 62, at 1.

72 *Id.* at 5. On average, both male and female captive orcas live 8.5 years in captivity; in comparison, male orcas can live up to 60 years in the wild and female orcas can live up to 90 years in the wild. *Id.*

them captive and forcing them to perform.[73] The orcas also requested that the court appoint a guardian to facilitate their release from SeaWorld.[74] Not only did the case cause a media wildfire, but PETA's litigation strategy also departed from traditional strategies that animal advocacy organizations commonly use to litigate animal issues:[75] PETA raised a constitutional claim, listed the orcas as the plaintiffs, and sued as next friends.[76]

Instead of relying on the standard animal welfare litigation acts like the Animal Welfare Act (AWA) or the Endangered Species Act (ESA), PETA relied upon a constitutional claim in the case, arguing the Thirteenth Amendment's prohibition of slavery also applied to nonhuman animals.[77] If PETA was successful on this challenge, orca whales like Tilikum would receive constitutional protection.[78] Additionally, if PETA had used a traditional, animal welfare-based litigation strategy (for example, presenting a claim that stipulated the continued confinement of the orcas was acceptable pending certain improvements in their keeping),[79] the outcome could have resulted in more "humane" living conditions for the orcas, rather than complete freedom or legal rights; thus, the decision to bring a claim under the Constitution was aimed at achieving the animal right's objective of "extending rights to animals" and liberating them of their inferior legal status.

Unlike in previous animal welfare litigation claims under the AWA or ESA, the only plaintiffs listed were the whales themselves.[80] Usually AWA cases only require that human plaintiffs, not the nonhuman animals, show they have standing by showing a cognizable injury in fact—not whether the animals themselves had standing in their own right to raise the AWA claims.[81] Further, although claims under the ESA usually list the endangered species as plaintiffs, advocacy organizations are also listed.[82] Courts then only have to

73 *See* Complaint, *supra* note 62, at 20.
74 *See id.*
75 *See, e.g.,* Mouzourakis, *supra* note 10, at 231.
76 *See* Complaint, *supra* note 62, at 1.
77 *See id.* at 17–20.
78 *See id*. at 20.
79 Examples of welfare-based litigation under the AWA or the ESA can be seen in Animal Legal Def. Fund v. Glickman, 154 F.3d 426 (D.C. Cir. 1998) (alleging that human plaintiff suffered aesthetic injuries by observing isolated primates deprived of enrichment or companionship), and Am. Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334 (D.C. Cir. 2003) (alleging that a circus employee suffered aesthetic injuries in observing Asian elephants being beaten with bullhooks and chained to hard surfaces).
80 Complaint, *supra* note 62, at 1–2.
81 Mouzourakis, *supra* note 10, at 238–39; *e.g.*, Animal Legal Def. Fund, 154 F.3d 426 (plaintiffs were not isolated, non-human primates in zoo; rather, plaintiffs were humans alleging aesthetic injuries due to viewing non-human primates living in isolated conditions).
82 *E.g.*, Palila v. Hawaii Department of Land and Nat. Res., 852 F.2d 1106 (9th Cir. 1988) (primary plaintiff was the bird itself, but it was accompanied by plaintiffs the Sierra Club, the National Audubon Society, the Hawaii Audubon Society, and Alan C. Ziegler).

determine if one of the plaintiffs had standing to bring the lawsuit; usually, the standing analysis in those cases focused on the organization's standing, not that of the species.[83]

Interestingly, *Tilikum* is not the only case that employed this plaintiff-listing strategy for whales. A 2004 case from the Ninth Circuit involved the entire cetacean community (whales, dolphins, and porpoises) suing President George W. Bush for authorizing the Navy to use sonar equipment that allegedly violated various federal environmental statutes.[84] This move was based on another Ninth Circuit case from 1988[85] which announced in the opinion, "[a bird]…has legal status and wings its way into federal court as a plaintiff in its own right."[86] The court held such a statement to be merely "nonbinding dicta."[87]

PETA's resurrection of this strategy—emphasizing the premise that animals can sue in their own name and right—is critical under an animal rights-based objective because it establishes a nonhuman animal's legal claim can be independent from a human's injury.[88] PETA did make one final unique move in their presentation of the case by suing as next friends of the orcas,[89] which had never before been used in animal litigation.[90] Relying on next friend status was another groundbreaking test litigation strategy by PETA to determine the viability of such a tool in the future for animal rights litigation.[91] The tool was arguably necessary though, based on the inherent inability of Tilikum and his podmates to sue SeaWorld in the same capacity as humans; the reliance on next friend status thus is representative of animals' true status in the law.

83 Mouzrakis, *supra* note 10, at 238–239; *see also, e.g.*, Marbled Murrelet v. Babbitt, 83 F.3d 1068 (9th Cir. 1998) (listing the Environmental Protection Information Center also as a named plaintiff); Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441 (9th Cir. 1992) (listing the Sierra Club also as a named plaintiff).

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

85 *See* Palila v. Hawaii Department of Land and Nat. Resources, 852 F.2d 1106 (9th Cir. 1988).

86 *Id.* at 1107. The statement was controversial among the courts, as it seemed to grant standing to animals suing under the ESA, while others read it as nonbinding dicta. *E.g.*, Marbled Murrelet v. Pacific Lumber Co., 880 F. Supp. 1343, 1346 (N.D. Cal. 1995) ("Thus, as a protected species under the ESA, the marbled murrelet has standing to sue 'in its own right.'") (quoting *Palila*, 852 F.2d at 1107); Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45, 49 (D. Mass. 1993); *see also* Mouzourakis, *supra* note 10, at 239–40.

87 *Cetacean Cmty.*, 386 F.3d at 1173.

88 Mouzourakis, *supra* note 10, at 240.

89 *See* Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012). Next friend standing comes from Rule 17(c)(2) of the Federal Rules of Civil Procedure: "[a] minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by guardian ad litem." It is often used in cases involving prisoners, minors, and mentally incompetent people.

90 SeaWorld's Reply to PETA's Opposition to SeaWorld's Motion to Dismiss the Complaint at 9, Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259 (S.D. Cal. 2012) (No. 3:11-cv-02476).

91 Mouzourakis, *supra* note 10, at 240.

III. THE *TILIKUM* OPINION

In response to the allegations of the plaintiffs, the defendant SeaWorld filed both a motion to dismiss for failure to state a claim and a motion to dismiss for lack of subject matter jurisdiction due to lack of standing on the part of the plaintiffs.[92]

Preliminary requirements had to be met before the standing question was addressed: a plaintiff must first be (1) a legal person who (2) possesses a legal right and there must be (3) a private right of action.[93] Under the Constitution, federal courts have subject matter jurisdiction over "cases" and "controversies."[94] According to the U.S. Supreme Court in *Lujan v. Defenders of Wildlife*,[95] a case or controversy is present when the plaintiff demonstrates that: (1) the plaintiff suffered an injury in fact that is concrete and particularized and actual or imminent; (2) there is a causal connection between the conduct complained of and the injury in fact; and (3) it is likely, as opposed to speculative, that a favorable decision will redress the plaintiff's injury. All three elements have historically been difficult for animal litigants to prove, although courts have broadened sufficient findings in recent years.[96] If any element is missing from the claim, then the case will be dismissed due to lack of subject matter jurisdiction.

If constitutional standing can be proven, the next step for the plaintiff is to establish prudential standing, an additional set of requirements beyond Article III constitutional standing. Federal courts will not tolerate suits where "the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens";[97] rather, the harm must be "distinct and palatable"[98] and reasonably within the "zone of interests" that the statute or constitutional provision in question was intended to protect.[99]

The court in *Tilikum* analyzed in detail whether the Thirteenth Amendment applied to non-humans, examining the "plain and ordinary meaning of the Amendment, historical context, and judicial interpretations."[100] When the Thirteenth Amendment passed in 1865,

92 FED. R. CIV. P. 12(b)(1), (6); *see also* Tilikum, 842 F. Supp. 2d at 1261.

93 Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1, 2 (2010).

94 U.S. CONST. art. III, § 2. The case-or-controversy limitation limits federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." Flast v. Cohen, 392 U.S. 83, 95 (1968).

95 Lujan v. Def. of Wildlife, 504 U.S. 555, 560–61 (1992).

96 *See, e.g.*, Am. Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnun & Bailey Circus, 317 F.3d 334, 337 (D.C. Cir. 2003) (finding that the plaintiff could meet the injury in fact prong of the *Lujan* test because plaintiff had a close relationship with mistreated elephants and planned to continue to visit the elephants); *id.* at 337 ("[A]n injury in fact can be found when a defendant adversely affects a plaintiff's enjoyment of flora or fauna, which the plaintiff wishes to enjoy again upon the cessation of the defendant's actions."); Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 432 (D.C. Cir. 1998) (noting that aesthetic and emotional attachment to an animal can serve as an injury); *see also* Katherine Burke, *Can We Stand for It? Amending the Endangered Species Act with an Animal-Suit Provision,* 75 U. COLO. L. REV. 633, 665 (2004).

97 Warth v. Seldin, 422 U.S. 490, 499 (1975).

98 Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979).

99 Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

100 Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259, 1262 (S.D. Cal. 2012).

slavery was understood to apply only to humans.[101] The court noted that Abraham Lincoln's contemporaneous Emancipation Proclamation explicitly mentioned persons when it freed slaves; therefore, the only reasonable interpretation of the language of the Amendment is that nonhuman animals like orcas were not considered "enslaved" under the Thirteenth Amendment, which defines slavery as a uniquely human practice.[102] PETA attempted to argue that rights within the Constitution can expand and change over time within the spirit of the Constitution.[103] However, the court held that the Thirteenth Amendment, unlike the Fourteenth Amendment, cannot expand to protect nonhumans because it does not involve more flexible notions of "due process," "equal protection," or "cruel and unusual punishment," which are "fundamental constitutional concepts subject to changing conditions and evolving norms of our society."[104]

Thus, the case was dismissed for lack of subject matter jurisdiction because the plaintiffs lacked redressability under their claim, which was required to have the proper standing defined by Article III of the Constitution; the court noted that "there is no likelihood of redress under the Thirteenth Amendment because the Amendment only applies to humans, and not orcas."[105] Regarding PETA's use of next friend standing in the suit, however, the court concluded in a footnote that it did not reject such status solely because it was in relation to nonhumans;[106] rather, the status was rejected because the orcas themselves did not have standing to bring a constitutional challenge in federal court.[107] This important distinction indicates that animal litigants may be able to bring claims using next friend standing to nonhuman animals in the future.

IV. THE LEGACY OF *TILIKUM* FOR NONHUMAN RIGHTS

By dismissing the claim for lack of standing, the *Tilikum* decision indicates that courts are still reluctant to grant independent legal status to animals, especially since the Article III analysis was arguably misapplied to the plaintiffs in the case.[108] The *Tilikum* decision also has precluded the chance for legal development in applying the analysis to

101 *See id.* at 1263.
102 *Id.*
103 O'Connor, *supra* note 1 (quoting legal scholar Laurence Tribe: "Ours is a vibrant Constitution, more than capable of warding off past evils while also speaking to circumstances in which we come to recognize that familiar principles apply in ways previously unforeseen. So it seems to me no abuse of the Constitution to invoke it on behalf of non-human animals cruelly confined for purposes of involuntary servitude.").
104 *Tilikum*, 842 F. Supp. 2d at 1264.
105 *Id.*
106 *See id.* at 1262 n.2.
107 *See id.*
108 The *Tilikum* court determined that the orcas did not have Article III standing because the orcas could not meet the redressability prong of the test; however, this confuses the redressability prong of the *Lujan* test with the plaintiffs' inability to meet prudential standing requirements. The redressability prong of the *Lujan* test asks whether "the requested relief will redress the alleged injury," not whether a plaintiff can meet prudential standing requirements. *See* Mouzourakis, *supra* note 10, at 243.

animal-plaintiffs in the future.[109] Although the court did not even approach the issue, there is a likelihood that, had Article III standing been established, the court would have still dismissed for lack of subject matter jurisdiction because the orcas would not have had prudential standing: Tilikum's claim is unlikely to be within the "zone of interests" of the Thirteenth Amendment, given its historical significance to the experience of black Americans and current understandings and prioritizations of civil and human rights.[110]

In this sense, *Tilikum* embodied the conclusion that the parallel movements between civil rights and animal liberation will have immense difficulty coalescing. While independent legal standing and capacity is an appropriate goal for the animal rights/animal liberation movement, the law will struggle to fully construct personhood status for nonhuman animals equivalent to that of human animals. The goals and understandings of the animal rights movement cannot play "catch up" to the Civil Rights Movement; certain hierarchical gaps will remain, as the structure of the laws and society are constructed exclusively for humans. Furthermore, the inclusion of other humans in the social circle of equality has not fully been achieved; creating closer and closer parallels between animal rights and civil rights runs the risk of undermining the work that remains to be done for fellow humans.[111] As the animal rights movement has slowly progressed over the past century, the appropriation of discourse and imagery from the Civil Rights Movement was helpful and legitimizing; however, as the implications of granting more consideration for animals demands altering their legal and social status, the parallels seem to splinter, and animal liberationists and welfarists alike must forge new forms of personhood.

The nonhuman abolitionist movement has appropriated the human experience as a means of drawing attention to the similar manifestations of oppression in both instances; however, this appropriation could prove problematic in creating movement alliances, as it

109 "The orcas were seeking an injunction to enjoin SeaWorld from holding the orcas captive and requested specific performance for SeaWorld to release them from SeaWorld. The orcas' alleged injury—that captivity causes the whales emotional and psychological distress that shortens their life expectancy—arguably would be redressed by releasing the orcas from captivity to a more 'suitable habitat.' The *Tilikum* court's analysis of the redressability prong hinged on whether the Thirteenth Amendment applied to orcas, but it should have hinged on whether a 'favorable decision' would likely redress the orcas' alleged injury. In this case, a favorable decision would have been that the Thirteenth Amendment applied to orcas, and that SeaWorld is enjoined from keeping the orcas as slaves or indentured servants. Because the redressability prong was met under the facts of this case, the *Tilikum* court should have then assessed the injury in fact and causation prongs of the *Lujan* test. The orcas' claim easily meets the causation element because SeaWorld's captivity of the orcas is causing them physical and emotional stress. Because the orcas arguably meet the redressability and causation prongs of the *Lujan* test, the *Tilikum* court would then need to determine if the orcas suffered an injury in fact to complete the Article III analysis. . . . . Determining that an animal-plaintiff, in its own right, can suffer an injury in fact of a legally cognizable interest would have been a great victory for the advancement of animal rights. After such a ruling, animal-plaintiffs subjected to poor living conditions would easily meet Article III standing requirements because the animal is the one who actually suffers the injury. . . . . As such, had the *Tilikum* court appropriately analyzed the orcas' standing, the court could have created precedent that advanced animal rights." *Id.* at 243–44.

110 *See* Risa L. Goluboof, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L. J. 1609, 1645 (2001).

111 *See, e.g.*, Jack Schlossberg, *50 Years Later, Civil Rights Struggle is Far From Over*, CNN (Aug. 1, 2013, 1:27 PM), http://www.cnn.com/2013/08/01/opinion/schlossberg-voting-rights/.

often lacks sensitivity and can alienate many demographics; it is Spiegel's "dreaded comparison" incarnate.[112] In an interview with *The Daily Show*, activist Elaine Brown called PETA's lawsuit "beyond insulting" and a "cruel and racist joke."[113] "Animal cruelty does not rise to slavery. . . . Part of the slave condition was that blacks were not really human beings."[114] In other words, because blacks were often compared to nonhumans as a means to dehumanize and otherize them to justify their oppression and discrimination, putting animal rights on the same level of concern as civil rights can cause tension between the two movements.[115]

PETA has caught heat for similar comparisons between racial violence and animal cruelty before: in both 2005 and 2011, PETA unveiled exhibits called respectively, "Are Animals the New Slaves?"[116] and "Glass Walls,"[117] showing graphic pictures of lynchings, slavery, and the Holocaust alongside images of caged and slaughtered animals. The campaigns, although aimed at expanding the scope of concern and sense of justice for all, as well as speaking out against oppression "regardless of the race, gender, age, nationality or species of the victims,"[118] teetered dangerously on the verge of utilizing black bodies as a sort of "cause currency," dehumanizing the suffering of racial minorities in order to emphasize that of animals.

Spiegel counters this reaction to the "dreaded comparison" in arguing that comparing human and nonhuman experiences is not to degrade the former but to elevate the latter: "Comparing the suffering of animals to that of blacks (or any other oppressed group) is offensive only to the speciesist: one who has embraced the false notions of what animals are like."[119] Other activists have similarly argued that this sense of offense arises from humans' underlying notions of superiority to nonhumans.[120] These activists have hoped to push understandings of moral concern to nonhumans on the basis of their sentience, self-awareness, and potential to suffer.[121]

There are other considerations that could become problematic in determining the appropriateness of comparing the two groups, though, as human abolitionist activism and ending oppression of blacks extends beyond issues regarding property status and use, and

112 *See* Wrenn, *supra* note 36, at 179; *see also* SPIEGEL, *supra* note 58.
113 *The Daily Show: Episode #17058 Louise Slaughter,* (Comedy Central television broadcast Feb. 15, 2012), http://www.thedailyshow.com/watch/wed-February-15-2012/seaworld-of-pain.
114 *Id.*
115 Wrenn, *supra* note 36.
116 John P. Avlon, Opinion, *PETA's Animal Slavery Insanity*, N.Y. SUN (Aug. 16, 2005), http://www.nysun.com/opinion/petas-animal-slavery-insanity/18661/.
117 Danielle Wright, *Another PETA Exhibit Compares Animal Cruelty to Slavery,* BET.COM (Jul. 21, 2011), http://www.bet.com/news/national/2011/07/21/another-peta-exhibit-compares-animal-cruelty-to-slavery.html.
118 *Id.*
119 SPIEGEL, *supra* note 58, at 30.
120 *See* KAREN DAVIS, THE HOLOCAUST AND THE HENMAID'S TALE: A CASE FOR COMPARING ATROCITIES, at xii (2005).
121 Wrenn, *supra* note 36.

infiltrates many social institutions.[122] The human civil rights movement has begun to address the aftermath of "liberation," while the nonhuman rights movement has hardly contemplated the implications of such a consequence. Most importantly, the nature of nonhuman animals themselves undermines the comparison of the two liberationist movements. Animals cannot speak for themselves; thus, representations of their experiences and of their demands are never fully in their control. The *Tilikum* plaintiffs requested a guardian to determine their release from SeaWorld,[123] but how can PETA know that this is the true relief sought? How can PETA establish that Tilikum and his podmates have any sense of the legal mechanism that would free them from the park? Additionally, animals are not and cannot be held to the same standard of moral agency as humans; if this were the case, Tilikum would not only be entitled to freedom from slavery, but also potentially accountable for the deaths caused during his time in captivity. The language of the Thirteenth Amendment provides that involuntary servitude is permissible if it is punishment for a crime;[124] if PETA were truly willing to grant protection for the orcas under this constitutional provision, then it would seem that all the provision's aspects would then apply to nonhumans, meaning animals could also be put on trial for their actions. Would that also mean animals had a right to vote under the Fifteenth Amendment?[125]

The orca's standing and status in this case is no doubt problematic, even preposterous, considering the current conceptions of animal sentience and self-awareness as well as the contextual significance of the Thirteenth Amendment's prohibition of slavery. It is possible that the litigation here was intentionally polarizing to garner increased attention and concern for the plight of the whales; with the most radical action taken, compromises and other smaller victories become more achievable. However, this strategy does not warrant disregarding the intersectionality and divergences of the nonhuman and human rights movement. Under the similar dynamics, claims-making, and tactics of the civil rights movement, the animal rights movement has pushed the ideology of concern and consideration to the point where extra sensitivity is now required and new trails must be wrought for societal and legal recognition and rights. Just because freedom for Tilikum is warranted does not mean that the abolition amendment should be stripped of its unique historical significance and taxied into the discourse of animal liberation.

122 For instance, after the failed efforts of the American Reconstruction era, civil rights efforts focused on deconstructing racism and segregation. More recently, the movement has challenged continued loss of power and personhood for African Americans as perpetuated by the American prison system and disadvantages for occupational, educational, and housing opportunities. *Id.*

123 Complaint, *supra* note 62, at 20.

124 U.S. CONST. amend. XIII, § 1.

125 U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

V. PROPOSED DIMENSIONS FOR NEW NONHUMAN LEGAL PERSONHOOD

Tilikum did offer new insights into the future of the animal rights movement on the ground as well as within the law. First, the litigation became another cog in the campaign engine that drove PETA's cause against SeaWorld, symbolic of the social push to reform SeaWorld and liberate animals in the parks. Second, it also laid interesting new groundwork for future litigants hoping to establish animals as legal entities, inside and outside of the Constitution.

Although it was released a little over a year after the conclusion of the litigation, *Blackfish* was powerful fodder in PETA's anti-SeaWorld campaign, vindicating the *Tilikum* lawsuit and its impact on orca advocacy. The documentary became salient because of its visually tangible evidence of the orcas' injuries as a result of their captivity.[126] PETA relied on the media attention garnered by *Blackfish* to push the SeaWorld agenda to more mainstream audiences.[127] Impassioned supporters of freeing Tilikum took advantage of the raised awareness, publicly protesting SeaWorld events and speaking out against the corporation in new, creative ways,[128] including creating leverage in conventional business strategies.[129] In addition to the litigation, PETA sources its campaign to a variety of outlets: documentaries, social media, the Internet, newspapers and mainstream television, and live protests.[130] The documentary also provided an influx of resources needed to put increased scrutiny on SeaWorld. In January 2014, after a USDA inspection of the San Diego park, PETA filed a complaint that led to a USDA citation for several violations of the Animal Welfare Act.[131] Then, in July, after another report revealed trainers were using zinc oxide to cover up sunburns and skin damage on the orca whales at the park, PETA filed another

126 Tim Zimmermann, *First Person: How Far Will the Blackfish Effect Go*? NAT'L GEOGRAPHIC (Jan. 13, 2014) http://news.nationalgeographic.com/news/2014/01/140113-blackfish-seaworld-killer-whale-orcas/.

127 "Once PETA began calling attention to *Blackfish*, support soared, with thousands of people visiting the campaign website, SeaWorldOfHurt.com. . . . A month later, PETA's tweet marking the 30th anniversary of Tilikum's capture from the wild was retweeted more than 4,500 times." Bonnie McEwan, *PETA vs. SeaWorld: The Creative Tactics and Tech that Drive PETA's SeaWorld Campaign*, NONPROFIT Q. (June 3, 2014), https://nonprofitquarterly.org/policysocial-context/24286-peta-vs-seaworld-the-creative-tactics-and-tech-that-drive-peta-s-seaworld-campaign.html.

128 "In 2013, when SeaWorld sponsored a float in Macy's Thanksgiving Day Parade and the Tournament of Roses Parade on New Year's Day, PETA volunteers stood along the route to protest . . . [an] activist . . . received national media coverage when she jumped a barricade while holding a "Boycott SeaWorld" sign at both parades." *Id.* Reality star Stephen "Steve-O" Gilchrist also caused a media frenzy when he climbed onto a San Diego freeway sign that listed Sea World Drive and posted the word "SUCKS" directly over Drive to read "Sea World SUCKS." Michelle Moons, *PETA May Be on the Hook for Fines if 'Jackass' Steve-O Charged in 'SeaWorld Sucks' Stunt*, BREITBART NEWS NETWORK (Sept. 6, 2014), http://www.breitbart.com/Breitbart-California/2014/09/06/PETA-May-Be-on-the-Hook-for-Fines-If-Jackass-Steve-O-Charged-in-SeaWorld-Sucks-Stunt.

129 "In April 2013, when SeaWorld's stock went public, PETA became a shareholder, giving it the necessary standing to offer a resolution at SeaWorld's annual meeting, calling on the company to create a coastal retirement sanctuary for its orcas." SeaWorld successfully petitioned the Securities and Exchange Commission for permission to ignore the resolution. McEwan, *supra* note 127.

130 *See id.*

131 Melissa Cronin, *SeaWorld Slapped With (Another) USDA Complaint Over Animal Abuse Allegations*, DODO (Oct. 21, 2014), https://www.thedodo.com/seaworld-usda-complaint-awa-775350391.html.

complaint and requested an investigation.[132] Finally, *Blackfish* spurred the proposal of the Orca Welfare and Safety Act (AB 2140) in March 2014, which would eliminate performance-based entertainment and captive breeding of the whales with an ultimate goal of phasing out killer whale captivity in California.[133] Most importantly, however, SeaWorld announced in November 2015 that its traditional orca shows would be replaced with displays "focused on the natural behavior of the whales."[134] March 2016 marked the biggest victory for the orcas yet; after years of resistance, SeaWorld faced the music and announced that it would end its captive breeding program.[135] Sadly, the announcement came on the heels of news that Tilikum, the poster child of this liberation campaign, was seriously ill and likely to die soon.[136]

A. Tilikum in Context

Although more effectively viewed as one facet in the anti-SeaWorld campaign as a whole, the *Tilikum* litigation is rich with new dimensions of advocacy for Tilikum and other captive nonhuman animals, which is where new theoretical expansions of legal personhood can be created. It is even arguable that by analyzing Tilikum's right to a private action under the Thirteenth Amendment and his other available legal rights, the court implicitly acknowledged his underlying legal personhood.[137] Two major points of experimentation can be seen in the court's discussion of the constitutional claims brought and the plaintiff's use of next friend standing in *Tilikum*.

Some authorities argue that the *Tilikum* opinion alludes to raising claims under the Fourteenth Amendment, as opposed to the Thirteenth, as a more viable option for legal claims in future animal rights-based cases.[138] The court noted that the Fourteenth Amendment, unlike the Thirteenth Amendment, was open to expansive interpretation and it offers due process and equal protection;[139] however, these constitutional guarantees do

132 Melissa Cronin, *USDA Complaint Filed Over SeaWorld's Sunburned Orcas*, DODO (Jul. 24, 2014), https://www.thedodo.com/usda-complaint-filed-over-seaw-641021639.html.

133 Paul Janes, *California Bill Would Ban SeaWorld Orca Shows*, USA TODAY (Apr. 8, 2014, 9:00 AM), http://www.usatoday.com/story/news/nation-now/2014/03/07/san-diego-seaworld-orca-shows/6162331/.

134 Ameena Schelling, *SeaWorld Ending Its Old Orca Show … And Starting A New One*, DODO (Nov. 9, 2015), https://www.thedodo.com/seaworld-ending-orca-shows-1446372109.html.

135 Greg Allen, *SeaWorld Agrees To End Captive Breeding Of Killer Whales*, NPR (Mar 17, 2016), http://www.npr.org/sections/thetwo-way/2016/03/17/470720804/seaworld-agrees-to-end-captive-breeding-of-killer-whales.

136 Tim Zimmermann, *Tilikum, SeaWorld's Killer Orca, is Dying*, NAT'L GEOGRAPHIC (Mar. 10, 2016), http://news.nationalgeographic.com/2016/03/160310-tilikum-killer-whale-orca-death-seaworld-sick-dying/.

137 *See* Emma Maddux, *Time to Stand: Exploring the Past, Present, and Future of Nonhuman Animal Standing*, WAKE FOREST L. REV. (Apr. 1, 2013), http://wakeforestlawreview.com/2013/04/time-to-stand-exploring-the-past-present-and-future-of-nonhuman-animal-standing/.

138 *See* Mouzourakis, *supra* note 10, at 242.

139 Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259, 1264 (S.D. Cal. 2012).

explicitly apply to *persons*—specifically *citizens*—within the Union.[140] Therefore, relying on this constitutional provision is even more complicated than relying on the Thirteenth Amendment, as neither of these statuses have yet to be applied to orcas or nonhuman animals under the law.

That is not to say, however, that the possibility is completely foreclosed, as *Roe v. Wade*,[141] *Citizens United*,[142] and *Hobby Lobby*[143] have proven that personhood is more of an artificial and juridical construct—often granted, importantly, for the sake of achieving a larger collective or political goal.[144] If it can be argued that, regardless of a nonhuman animal's independent ability to suffer injury with legal redress under the law, a human advocacy collective has an interest in appropriating juridical personhood to whales and other nonhumans, then perhaps nonhuman animals are entitled to legal personhood similar to that of corporations. Much like nonhuman animals, corporations (which include lobbyist organizations, churches, and large businesses) cannot have a legal presence without the conduct of humans who have a stake in promoting the interests of that entity, either as a collective of persons or as a persona independent of its components. Additionally, securing rights similar to those of corporations for nonhuman animals makes sense under the law for the purpose of promoting social, economic, and even moral interests without examining the "humanity" of those entities.

The Fourteenth Amendment has been a major substrate for legal evolution of corporate personhood,[145] and animal litigants should restructure our conceptions of nonhuman animals such that their protection can be secured under the Fourteenth Amendment. Furthermore, other Amendments lend themselves to broad interpretations that could provide protection for animals, like the Eighth Amendment's prohibition of cruel and unusual punishment. [146]

B. Alternate Routes to Liberation

Beyond the amendments themselves, authorities have presented additional theories and constructions of nonhuman legal personhood recognizable under the Constitution. The first is premised upon the autonomy of nonhuman animals and grants them various

140 U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States.").

141 Roe v. Wade, 410 U.S. 113 (1973) (allowing states to protect "fetal life after viability" even though a fetus is not "a person within the meaning of the Fourteenth Amendment").

142 Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010) (finding that corporations are legally people with the right to free speech).

143 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (finding that corporations are legal persons with religious rights).

144 *See* Imani Gandy, Roe v. Wade *and Fetal Personhood: Juridical Persons Are Not Natural Persons, and Why it Matters,* REALITY CHECK (Jan. 3, 2013), http://rhrealitycheck.org/article/2013/01/03/fetal-personhood-laws-juridical-persons-are-not-natural-persons-and-why-it-matter/.

145 *See* Nina Totenberg, *When Did Companies Become People? Excavating The Legal Evolution*, NPR (Jul. 28, 2014), http://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution.

146 U.S. CONST. amend. VIII, § 1 ("[C]ruel and unusual punishments [shall not be] inflicted.").

degrees of equal status under the law as humans of comparable or potentially zero autonomy.[147] The second considers the grant of legal personhood as a shibboleth to animals' capabilities: it secures negative rights against suffering and delivers due weight to the interests of nonhuman animals in the balance of law.[148] Both potential theories seem to operate with an understanding that future standing of nonhuman animals will depend not only on human revocation of presumed superiority over and entitlement to nonhuman animals,[149] but also on progressive use of already-present and traditional legal tools brought through legal guardianship. PETA's use of next friend status in *Tilikum* is but one possible example where a guardian may sue on behalf of an animal in a similar fashion constructed for children and the mentally incompetent.[150] As a next friend or guardian *ad litem*, individuals (humans, in this scenario) are supposed to operate in the best interest of their ward (animals, in this scenario), who is presumed to lack the ability to determine their best interests.[151] Additionally, these next friends appointed by the court do not even have to be attorneys; they merely must prove that they have the best interests of their ward at heart.[152] Not only has this approach been successful in previous animal rights cases,[153] but it is also very compatible with the current court system and it honors a sense of the animals' "equitable self-ownership," meaning that they have independence, autonomy, and interests devoid of those of humans.[154]

Another route is currently in the works by Steven Wise of the Nonhuman Rights Project (NHRP) regarding the use of the common law writ of *habeas corpus* for simians.[155] This work can be seen in this year's series of landmark cases from New York for privately-owned chimps, among them Tommy,[156] Kiko,[157] Leo, and Hercules.[158] The *habeas corpus*

147 Steven M. Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity Rights in a Liberal Democracy*, 22 VT. L. REV. 793, 840 (1998).

148 Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 401 (2003).

149 *See* Bryant, *supra* note 12, at 328.

150 *See* Katherine A. Burke, *Can We Stand for It? Amending the Endangered Species Act with an Animal-Suit Provision*, 75 U. COLO. L. REV. 633, 652 (2004) (discussing the role and function of next friends under rule 17(c)).

151 *See* KIMBERLY K. SMITH, GOVERNING ANIMALS: ANIMAL WELFARE AND THE LIBERAL STATE 121 (2012).

152 *See id.*

153 *See* Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004); *see also* David N. Cassuto, *Legal Standing for Animals and Advocates*, 13 ANIMAL L. 61 (2006).

154 SMITH, *supra* note 151, at 121.

155 The group has been exploring the various aspects of the writ, including the following: "the circumstances under which the writ may be used by third parties or used to transfer custody rather than as a release from custody; when the writ is superseded by constitutional or statutory writs of habeas corpus and when these writs merely supplement the common law; . . . and under what circumstances a third party may assert another's right under common law habeas corpus." Wise, *supra* note 93, at 9.

156 *Tommy Case,* NON-HUM. RTS. PROJECT, http://www.nonhumanrightsproject.org/category/courtfilings/tommy-case/ (last updated Feb. 12, 2016).

157 *Kiko Case*, NON-HUM. RTS. PROJECT, http://www.nonhumanrightsproject.org/category/courtfilings/kiko-case/ (last updated Feb. 11, 2016).

158 *Hercules and Leo Case*, NON-HUM. RTS. PROJECT http://www.nonhumanrightsproject.org/category/courtfilings/hercules-and-leo-case/ (last updated Mar. 28, 2016).

writ, meaning "you should have the body" in Latin,[159] is a summons addressed to a custodian (usually a prison official) demanding that a prisoner be taken before the court, and that the custodian present proof of his authority to detain the prisoner.[160] If the custodian is acting beyond his or her authority, then the prisoner must be released.[161] Any aggrieved prisoner, or another person acting on his or her behalf, may petition for a writ of *habeas corpus*.[162] This "great writ," as named by Chief Justice Marshall,[163] functions to preserve freedom from illegal custody of the innocent and to liberate those "imprisoned without sufficient cause."[164]

Tommy was the first chimpanzee for which the Nonhuman Rights Project filed a writ against his owners. In doing so, the Nonhuman Rights Project was requesting that his owners, as his custodians, prove they have lawful authority to "detain" Tommy[165] and consequently requested his release to a sanctuary.[166] In December 2014, a three-judge appellate division panel ruled unanimously that Tommy's owner is not obligated to release him from what an animal rights' group has called unlawful detention.[167] In its decision, the appeals court reiterated the lower court's findings that chimpanzees, though intelligent, are unfit to take on the legal implications of personhood, ruling that, "unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions."[168]

At the same time, the NHRP filed a similar writ for Kiko, a chimp owned by a couple near Niagara Falls: again, Wise argued that Kiko's owners had no authority to detain him, and he deserved freedom in a sanctuary.[169] In argument, the court asked whether moving Kiko from one form of captivity to another represented a fundamental improvement in his life. Wise responded, "In the place he's in now, he's owned property…[at a sanctuary,] they would be obligated to respect his autonomy, his self-determination."[170] This argument

159 *Habeas corpus*, BLACK'S LAW DICTIONARY 709 (6th ed. 1990).
160 *See Habeas Corpus*, 'LECTRIC L. LIBR. (2015), http://www.lectlaw.com/def/h001.htm.
161 *Id.*
162 *Id*.
163 *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 96 (1807).
164 *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830); *see also* BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 131, 133 (1991).
165 Jon Kelly, *The Battle to Make Tommy the Chimp a Person*, BBC (Oct. 9, 2014), http://www.bbc.com/news/magazine-29542829.
166 Elizabeth Barber, *Chimpanzees Are Not Entitled to Human Rights, New York Court Says*, TIME (Dec. 4, 2014), http://time.com/3619581/chimpanzee-tommy-human-animal-rights/.
167 *Id.*
168 *Id.*
169 Brandon Keim, *Court Hears Second Case for Chimpanzee's Rights*, WIRED (Dec. 3, 2104), http://www.wired.com/2014/12/chimp-personhood-hearing/.
170 *Id.*

failed, however, to persuade the appeals court that this shifting of captivities was an adequate appeal for freedom, and Kiko's writ was also denied.[171]

Hercules and Leo, however, have made more progress than any of their counterparts. In April 2015, the New York Supreme Court heard arguments in a lawsuit the Nonhuman Rights Project filed against Stony Brook University asking for the release of two chimpanzees involved in research.[172] The court granted a writ of *habeas corpus* for the chimps, granting them their day in court to challenge the validity of their captivity.[173] Upon the issuance of the writ and order to show cause, the university, represented by the Attorney General of New York, appeared in court in order to provide a legally sufficient reason for detaining Hercules and Leo.[174] In July 2015, the judge denied relief for Hercules and Leo based on the precedent set before in Tommy's case; however, the judge noted:

> 'Legal personhood' is not necessarily synonymous with being human … Rather, the parameters of legal personhood have been and will continue to be discussed and debated by legal theorists, commentators, and courts and will not be focused on semantics or biology, even philosophy, but on the proper allocation of rights under the law, asking, in effect, who counts under our law.[175]

The NHRP has appealed the decision and is working to settle the case; in the meantime, the university has ended testing on the two chimps, and negotiations now include the potential to release the chimps to a sanctuary.[176]

These suits, by implying the writ of *habeas corpus* could be used to challenge the keeping of certain animals, suggest that such animals are entitled to the right of legal personhood, as the writ can only be applied to legal persons.[177] At the very least, these suits propose that these animals are legal persons for the purpose of a habeas proceeding where

171 Brandon Keim, *Another Court Denies Legal Rights for a Chimpanzee*, WIRED (Jan 5, 2015), http://www.wired.com/2015/01/court-denies-kiko-chimp-rights/.

172 *See* Tim De Chant, *Chimpanzees Granted Habeas Corpus, a Right Normally Reserved for Humans*, NOVA NEXT (Apr. 21, 2015), http://www.pbs.org/wgbh/nova/next/nature/chimpanzees-granted-habeas-corpus-a-legal-action-normally-reserved-for-humans/.

173 *See* David Grimm, *Updated: Judge's ruling grants legal right to research chimps*, SCIENCE, http://news.sciencemag.org/plants-animals/2015/04/judge-s-ruling-grants-legal-right-research-chimps/ (last updated Apr. 22, 2015).

174 *Judge Recognizes Two Chimpanzees as Legal Persons, Grants them Writ of Habeas Corpus*, NON-HUM. RTS. PROJECT, http://www.nonhumanrightsproject.org/2015/04/20/judge-recognizes-two-chimpanzees-as-legal-persons-grants-them-writ-of-habeas-corpus/ (last updated Apr. 21, 2015).

175 *New York Justice Denies Habeas Corpus Relief for Hercules and Leo Given Precedent Set in Previous Case, 'For Now,'* NON-HUM. RTS. PROJECT (July 30, 2015), http://www.nonhumanrightsproject.org/2015/07/30/new-york-justice-denies-habeas-corpus-relief-for-hercules-and-leo-given-precedent-set-in-previous-case-for-now/.

176 *Notice of Appeal Filed in Hercules and Leo Case*, NON-HUM. RTS. PROJECT (Aug. 20, 2015), http://www.nonhumanrightsproject.org/2015/08/20/notice-of-appeal-filed-in-hercules-and-leo-case/.

177 *See* Philip Sherwell, *Tommy the Circus Chimp is a 'Person' Entitled to his Liberty, US court told*, TELEGRAPH (Oct. 8, 2014), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11150088/Tommy-the-circus-chimp-is-a-person-entitled-to-his-liberty-US-court-told.html; *see also* Megan Gannon, *Court Could Decide If Chimpanzees Are Legal Persons*, LIVE SCI. (Oct. 7, 2014), http://www.livescience.com/48166-chimpanzee-personhood-case-appeal.html.

there is a question regarding their freedom to bodily liberty.[178] How Hercules and Leo's suit moves forward will have possible implications for orcas like Tilikum in the future.

The ALDF has also attempted to liberate another orca whale, Lolita, in another marine entertainment park using a different litigation scheme. According to a January 2013 settlement agreement reached after the ALDF, PETA, the Orca Network, and four individuals filed a lawsuit against the National Marine Fisheries Service (NMFS) regarding Lolita's unlawful exclusion from the Endangered Species Act (ESA); the agency must now either include Lolita in the ESA listing or supply a legal reason to exclude her.[179] Her family that remains in the wild has already been listed as endangered, as a part of the Pacific Northwest's Southern Resident orca population, where Lolita was captured. [180] Lolita—captive for more than forty years, one of the longest periods in North America—has remained exempt from ESA protection, however.[181] In February 2014, however, The National Oceanic and Atmospheric Administration agreed to add the forty-nine-year old whale to the ESA listing, which could create legal opportunities to request her rehabilitation and release into the wild—or to a marine refuge closer to home; it could also create a means to more adequately protect Lolita while she remains in captivity.[182]

Beyond these possibilities, opportunity lies in legislative efforts to codify provisions that create suits where nonhuman animals do have appropriate standing, independent of human guardians. For example, Dave Favre's tort theory that works in next friend suits does not displace the legal status of nonhuman animals, but rather targets the right of ownership, and can be incorporated into statute.[183] In his theory, nonhuman animals have "equitable self-ownership," to the extent that they as plaintiffs may "prevail against anyone who harms [their] fundamental interest[s]. . . , if the human defendant's interests do not substantially outweigh [theirs]."[184] This theory works to alter enforcement of animal legislation without completely undermining the understanding of nonhuman animals as property in law. [185]

Obviously, though, new and innovative ways of creating a space for animals in the legal landscape are developing every day. These strategies rely both on preexisting legislation specific to animals, like the novel use of the ESA seen in Lolita's case, to revolutionary conceptions of ancient common law doctrines like the application of *habeas*

178 *Judge Recognizes Two Chimpanzees as Legal Persons, Grants them Writ of Habeas Corpus*, *supra* note 174; *see generally* Grimm, *supra* note 173.
179 *PETA Petition Floats New Strategy to Free Lolita*, ANIMAL LEGAL DEF. FUND (Jan. 23, 2013), http://aldf.org/press-room/press-releases/aldf-peta-petition-floats-new-strategy-to-free-lolita.
180 *Id.*
181 *Id.*
182 John Couwels, *Captive Killer Whale to be Added to Endangered Species List*, CNN (Feb. 6, 2015), http://www.cnn.com/2015/02/05/us/captive-killer-whale-lolita-endangered-species/.
183 *See* Bryant, *supra* note 12, at 292.
184 *Id.*
185 *Id.* at 283.

corpus to chimpanzees. These litigation schemes mold new ideas for nonhuman personhood onto the legal landscape in ways that implicitly accept concern for other species without obscuring other historical legal mechanisms aimed at different anthropocentric injustices. Furthermore, these strategies wrestle with questions that the animal legal defense movement must wrestle with in the wake of *Tilikum*: what does it mean to say that animals cannot ever be fully recognized and equal to humans under the law? What does it mean to be human, legally? How do we know what legal recourse is most in line with the desires of non-human animals—or that legal recourse is the right choice at all? Will certain gaps always remain between animals and humans in the law, a system constructed exclusively for humans and by humans? Furthermore, and most importantly here, does creating parallels between animal rights and civil rights undermine the work that remains to be done for fellow humans still disadvantaged under the law and within our society today? These questions demand answers that negotiate novel forms of legal personhood for animals, many of which have yet to be explored or fathomed.

CONCLUSION

In the past century, there has been gradual expansion in recognition of legal rights for formerly oppressed minorities and for animals through the work of their respective movements for social change and litigation advocacy. Conceptual connections exist between both movements: there was similar discourse on power differentials; similar disputes over how to build the movement and over how to frame the problem, the solution, and the motivations for participation;[186] and similar goals in building positive law from normative principles.[187] Appropriations of language and tactics between the two movements are evident and have been essential to increased mobilization, as is typical in intersectional social movements.[188] Often, such social justice movements employ ideas of morality, sympathy, and justice and attract overlapping concerned audiences. It is no surprise, then, that nonhuman rights litigation has moved into the arena formerly reserved for enslavement and oppression of humans. These tactics push the boundaries on animal liberation, equality, and personhood, as courts attempt to reconcile understandings of humans' moral obligations to nonhumans; this was especially the case in *Tilikum*, where the court affirmed the legal rights of animals, but denied their legal personhood by disregarding their standing. Thus, the courts remain reluctant to fully grant fundamental legal rights and personhood to nonhumans. This is also seen now in cases like those of the

186 *See* Wrenn, *supra* note 36 ("Typical of other social movements…the abolitionist movement was heavily factionalized and divided over the use of violence, moral suasion, and legal and religious institutions.").

187 *See* Maddux, *supra* note 137.

188 *See* Wrenn, *supra* note 36 ("[A]ppropriation is an important mechanism for oppressed or resource-poor groups….Marginalized groups might quickly gain a sense of identity and legitimacy in drawing on other movements….[It] also represents the interactive nature of social movements, which exist in a dynamic relation with one another, a reality that is also often ignored in traditional models.").

chimpanzees in New York, where a developing sense of justice for animals compels courts to question the desire of these nonhuman captives and the adequacy of remedies for the alleged harms they experience.

The Thirteenth Amendment changes the legal status of an entire tract of the population from property to persons. The provision was inconceivable at the time, with slavery's vast economic benefits to those in power as well as society as a whole, not to mention the fundamental perceptions of slaves as nonhuman. Because abolition was merely expanding rights to other previously unrecognized humans, the "dreaded comparison" of Tilikum to black slaves is often met with outrage and disbelief, and the *Tilikum* litigation is considered more of an impact statement. Animals, under the law, seem to have a long way to go before they are viewed as more than property. However, the abolitionist and civil rights movements prove the power of social, political and legal efforts to alter social understandings and recognize the humanity of former slaves. In turn, *Tilikum* proves that, little by little, the movement is seeking out the weaknesses in the "immutable" belief that nonhuman animals lack rights or personhood. Social discourse continues to condemn human-inflicted suffering, whether directed at other humans or at nonhuman animals.[189] It also challenges how we as humans understand our humanity: what does it mean to suffer, to think, to desire? How does the law accommodate these notions? Why?

Future animal rights litigation strategies should continue to push for new, creative conceptions of fundamental legal rights and principles, and to carve out the deeper notions of personhood and humanity under the law. While the historical moorings of the Thirteenth Amendment establish the limit of overlapping movements towards social justice and reduction of suffering, there remain other avenues to creatively excoriate the specieist hierarchy between animals and humans, and to create a niche of justiciable protection for nonhuman species. Tilikum and all of the other captive orcas deserve a more appropriate legal position in the law reflective of our inherent disdain for exploitation and domination of the weak.

189 Maddux, *supra* note 137.