
HUMAN RESPONSIBILITY, NOT LEGAL PERSONHOOD, FOR NONHUMAN ANIMALS

By Richard L. Cupp, Jr.*

INTRODUCTION

We should focus on human legal accountability for responsible treatment of nonhuman animals rather than radically restructuring our legal system to make them legal persons.¹ This paper outlines a number of concerns about three ongoing related lawsuits seeking legal personhood for chimpanzees filed in New York state courts by the Nonhuman Rights Project (NhRP) in late 2013.

The lawsuits, *The Nonhuman Rights Project v. Lavery*, *The Nonhuman Rights Project v. Presti*, and *The Nonhuman Rights Project v. Stanley*, mostly overlap in terms of their legal theories.² They collectively involve four chimpanzees, two of which are kept by private individuals, and two of which were kept until recently for research on the evolution of bipedalism at Stony Brook University. The lawsuits each seek a common law writ of habeas corpus for the chimpanzees.³ The lawsuits do not claim that any existing laws are being violated in the chimpanzees' treatment. Rather, the lawsuits argue that the chimpanzees are entitled to legal personhood under liberty and equality principles, asserting that each chimpanzee is "possessed of autonomy, self-determination, self-awareness, and the ability to choose how to live his life, as well as dozens of complex cognitive abilities that comprise and support his autonomy."⁴ The lawsuits also assert that the chimpanzees are entitled to legal personhood under a New York statute allowing humans to create inter vivos trusts for the care of animals.⁵ The lawsuits seek to have the chimpanzees moved to a sanctuary that confines chimpanzees, but in a manner the lawsuits argue is preferable to the chimpanzees' present living situations.⁶

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As of the writing of this paper, the lawsuits have been unsuccessful. By the author's count, eighteen New York judges have ruled against the lawsuits thus far.⁷ A unanimous intermediate appellate court rejecting *Lavery* emphasized that "collectively, human beings possess the unique ability to bear legal responsibility."⁸ Another unanimous intermediate appellate court rejecting *Presti* raised an additional challenge without contradicting *Lavery*. The *Presti* court asserted that even if a chimpanzee were a person for purposes of habeas corpus (without addressing whether it actually is a person for this purpose), a habeas writ is only appropriate for immediate release from confinement, and being moved to a sanctuary is still a form of confinement.

The NhRP is seeking to appeal *Lavery* and *Presti* to the State of New York Court of Appeals. *Stanley* was most recently dismissed by a lower court judge, Justice Barbara Jaffe, in Manhattan in July 2015. The Manhattan *Stanley* ruling rejected the lawsuit because it found the *Lavery* appellate decision to be controlling under stare decisis, and because it believed the issue should be left to the legislature or to the State of New York Court of Appeals. Although the ruling emphasized that the law may evolve, and took a sympathetic tone with some of the NhRP's positions without highlighting some of the serious problems with the lawsuit, it did not advocate for animal legal personhood. Rather, the decision in rather vague dicta seemed to imply support more generally for further consideration of the issue without staking out a position. In further dicta, the decision expressly rejected using the past mistreatment of slaves, women, and other humans as an analogy for extending legal personhood to animals. The NhRP has announced that it will appeal the ruling to a New York intermediate appellate court.

Despite a lack of success thus far, these lawsuits are only at the beginning of a long-term struggle, and the issue's ultimate outcome is far from clear. Although the lawsuits are misguided in many ways, they should not be underestimated. The question of how we treat animals is exceptionally serious, both for animals and for human morality.⁹ The emotional appeal of doing something very dramatic in an effort to help animals, especially the animals that are most like us, is understandably strong to many people. As expressed by Justice Jaffe in the lower court Manhattan *Stanley* ruling, "The similarities between chimpanzees and humans inspire the empathy felt for a beloved pet."¹⁰

This paper encourages greater empathy for animals, but introduces and briefly outlines several (although not all) problems with the lawsuits, and calls instead for a focus on evolving standards of human responsibility for animals' welfare as a means of protecting animals, rather than granting legal personhood to animals.

I. ANIMAL LEGAL PERSONHOOD AS PROPOSED IN THE LAWSUITS WOULD POSE THREATS TO THE MOST VULNERABLE HUMANS

One of the most serious concerns about legal personhood for intelligent animals is that it presents an unintended, long-

term, and perhaps not immediately obvious threat to humans—particularly to the most vulnerable humans.

Among the most vulnerable humans are people with cognitive impairments¹¹ that may give them no capacity for autonomy or less capacity for autonomy than some animals, whether because of age (such as in infancy), intellectual disabilities, or other reasons.¹² To be clear, supporting personhood based on animals' intelligence does not imply that one *wants* to reduce the protections afforded humans with cognitive impairments. Indeed, my understanding is that the lawsuits seek to pull smart animals up in legal consideration, rather than to push humans with cognitive impairments down.¹³

However, despite these good intentions, there should be deep concern that, over a long horizon, allowing animal legal personhood based on cognitive abilities could unintentionally lead to gradual erosion of protections for these especially vulnerable humans. The sky would not immediately fall if courts started treating chimpanzees as persons. As noted above, that is part of the challenge in recognizing the danger. But over time, both the courts and society might be tempted to not only view the most intelligent animals more like we now view humans, but also to view the least intelligent humans more like we now view animals.¹⁴

Professor Laurence Tribe has expressed concern that the approach to legal personhood for intelligent animals set forth in a much-discussed book by Steven Wise, the president and lead attorney of the NhRP, might be harmful for humans with cognitive impairments. The book, *Rattling the Cage*, was published in 2000.¹⁵ In 2001, Professor Tribe stated “enormous admiration for [Mr. Wise’s] overall enterprise and approach,” but cautioned that “[o]nce we have said that infants and very old people with advanced Alzheimer’s and the comatose have no rights unless we choose to grant them, we must decide about people who are three-quarters of the way to such a condition. I needn’t spell it out, but the possibilities are genocidal and horrific and reminiscent of slavery and the holocaust.”¹⁶

Mr. Wise later responded in part: “I argue that a realistic or practical autonomy is a sufficient, not a necessary, condition for legal rights. Other grounds for entitlement to basic rights may exist.”¹⁷ But Mr. Wise also noted that in his view entitlements to rights cannot be based only on being human.¹⁸ I did not find in the NhRP’s briefs an explanation of why, despite Mr. Wise’s apparent view that being part of the human community is not alone sufficient for personhood, he and the NhRP think courts should recognize personhood in someone like a permanently comatose infant. If the argument is that the permanently comatose infant has rights based on dignity interests, but that dignity is not grounded in being a part of the human community, why would this proposed alternative basis for personhood only apply to humans and to particularly intelligent animals? Would all animals capable of suffering, regardless of their level of intelligence, be entitled to personhood based on dignity? If a rights-bearing but permanently comatose infant is not capable of suffering, would even animals that are *not* capable of suffering be entitled to dignity-based personhood under this position?¹⁹ The implications of some alternative non-cognitive approach to personhood that rejects drawing any lines related to humanity may be exceptionally expansive and problematic.

Further, good intentions do not prevent harmful consequences. Regardless of the NhRP’s views and desires regarding the rights of cognitively impaired humans, going down the path of connecting individual cognitive abilities to personhood would encourage us as a society to think increasingly about individual cognitive ability when we think about personhood. Over the course of many years, this changed paradigm could gradually erode our enthusiasm for some of the protections provided to humans who would not fare well in a mental capacities analysis. Deciding chimpanzees are legal persons based on the cognitive abilities we have seen in them may open a door that swings in both directions regarding rights for humans as well as for animals, and later generations may well wish we had kept it closed.²⁰

II. APPLAUDING AN EVOLVING FOCUS ON HUMAN RESPONSIBILITY FOR ANIMAL WELFARE RATHER THAN THE RADICAL APPROACH OF ANIMAL LEGAL PERSONHOOD

When addressing animal legal personhood, the proper question is not whether our laws should evolve or remain stagnant. Our legal system *will* evolve regarding animals, and indeed is already in a period of significant change. One major reason for this evolution is our shift from an agrarian society to an urban and suburban society. Until well into the twentieth century, most Americans lived in rural areas. Most American families owned or encountered livestock and farm animals whose utility was economic. Now we are an urban and suburban society, and relatively few of us are directly involved in owning animals for economic utility. Rather, when most of us now encounter living animals, they are most frequently companion animals kept for emotional utility. Most of us view the animals in our lives in terms of affection rather than as financial assets. As law gradually reflects changes in society, transformation in our routine interactions with animals doubtless has influenced the trend toward providing them more protections in many respects.

A second major reason we are evolving in our legal treatment of animals is the advancement of scientific understanding about animals. We are continually learning more about animals’ minds and capabilities. As we have gained more understanding of animals, we have generally evolved toward developing more compassion for them, and this increasing compassion has been to some extent and will continue to be increasingly reflected in our protection laws.

This evolution is a good thing, and it is probably still closer to its initial significant acceleration in the twentieth century than it is to a point where it will slow down. In other words, it seems quite probable that we will continue in a period of notable change in our treatment of animals for some time. We will continue evolving; the only question is *how* we should evolve. Two unsatisfactory positions and a centrist position may be identified in answering this question. One unsatisfactory position would be clinging to the past, and denying that we need any changes regarding how our laws treat animals. A second unsatisfactory position on the other extreme would be to radically reshape our understanding of legal personhood, with potentially dangerous consequences.

A centrist alternative to these extremes involves

maintaining our legal focus on human responsibility for how we treat animals, but applauding changes to provide additional protection where appropriate. As emphasized by the intermediate appellate court that unanimously dismissed the NhRP's *Lavery* appeal, "Our rejection of a rights paradigm for animals does not, however, leave them defenseless."²¹ When our laws or their enforcement do not go far enough to prevent animals from being mistreated, we should change our laws or improve their enforcement rather than assert that animals are legal persons. The legislatures' role in legal evolution should be respected and embraced, and courts should refrain from adopting extreme legal theories that would not enhance justice and that would be contrary to the views of most citizens.

III. AMONG BEINGS OF WHICH WE ARE AWARE, APPROPRIATE LEGAL PERSONHOOD IS ANCHORED ONLY IN THE HUMAN COMMUNITY

As explained by the philosopher Carl Cohen, "Animals cannot be the bearers of rights because the concept of right is *essentially human*—it is rooted in the human moral world and has force and applicability only within that world."²²

Our society and government are based on the ideal of moral agents coming together to create a system of rules that entail both rights and duties. Being generally subject to legal duties and bearing rights are foundations of our legal system because they are foundations of our entire form of government. We stand together with the ideal of a social compact, or one might call it a responsible community, to uphold all of our rights, including of course our inalienable rights.²³ As stated in the Declaration of Independence, "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."²⁴ One would be hard-pressed to convince most Americans that this is not important, as from childhood Americans learn it as a bedrock of our social structure. It is not surprising that the American Bar Association's section addressing civil liberties is called "The Section of Individual Rights and Responsibilities."²⁵

This does not require viewing every specific protection of a right as corresponding to a specific duty imposed on an individual. The connection between rights and duties for personhood is in some aspects broader and more foundational than that. It comes first in the foundations of our society, rather than solely in analysis of specific obligations and rights for persons governed by our laws. As the norm, we insist that persons in our community of humans and human proxies be subjected to responsibilities along with holding rights, regardless of whether a specific right or limitation requires or does not require a specific duty to go along with it.

It misses the point to argue, as the NhRP seems to do in its *Lavery* brief seeking leave to appeal from the State of New York Court of Appeals, that personhood is unrelated to duties because we can call freedom from slavery a bodily liberty immunity right that does not require capacity.²⁶ First, as noted elsewhere in this section, this is too narrow a conceptualization of connections between rights and duties. Further, whether freedom from slavery requires capacity does not control the question of personhood, since cognitively impaired humans' personhood is anchored in the responsible community of humans, even if

they cannot make responsible choices themselves. The NhRP's argument does not avoid the problem that a chimpanzee, although an impressive being we need to treat with exceptional thoughtfulness, should not be considered a *person* within our intrinsically human legal system, whereas humans with cognitive limitations should be recognized as persons.

Professor Wesley Hohfeld wrote about the form of rights and duties between persons in the early twentieth century, and the NhRP's brief seeking leave to appeal the intermediate appellate court's *Lavery* decision seeks to invoke his analysis to argue for chimpanzee legal personhood.²⁷ Perhaps the most basic problem with the NhRP's argument is that we are dealing with a question that must precede Hohfeldian analysis of the forms of rights granted to persons. Professor Hohfeld's description of rights assumed it was dealing with the rights of *persons*.²⁸ Our issue revolves around determining who is a member of society eligible for those rights and protections; in other words, who is a person. This is a foundational question that is not answered by Hohfeldian analysis.²⁹

It is sometimes asserted that since we give corporations personhood, justice requires that we should give personhood to intelligent animals. But this ignores the fact that corporations are created by humans as a proxy for the rights and duties of their human stakeholders. They are simply a vehicle for addressing *human* interests and obligations.³⁰

The NhRP argues that "if humans bereft of autonomy, self-determination, sentience, consciousness, even a brain, are entitled to legal rights, *then* this Court must either recognize Tommy's just equality claim to bodily liberty or reject equality entirely."³¹ Although not described as such in the lawsuits, reasoning along these lines is often referred to by philosophers as "the argument from marginal cases."³² The concept of an "argument from marginal cases" has an unsettling tone, because most of us do not want to think of *any* humans as being "marginal." The pervasive view that *all* humans have distinctive and intrinsic human dignity regardless of their capabilities may have cultural, religious, or even instinctual foundations.

All of these foundations would on their own present huge challenges for animal legal personhood arguments to overcome in the real world of law, but they are not the only reasons to reject the arguments. Humans with cognitive impairments are a part of the human community, even if their own agency is limited or nonexistent. Among the beings of which we are presently aware, humans are the only ones for whom the *norm* is capacity for moral agency sufficiently strong to fit within our society's system of rights and responsibilities. It may be added that no other beings of which we are presently aware living today (even, for example, the most intelligent of all chimpanzees) ever meet that norm. Recognizing personhood in our fellow humans regardless of whether they meet the norm is a pairing of like "kind"³³ where the "kind" category has special significance—the significance of the norm being the only creatures who can rationally participate as members of a society such as ours.

Morally autonomous humans have unique natural bonds with other humans who have cognitive impairments, and thus denying rights to them also harms the interests of society—we are all in *community* together. Infants are human infants, and adults with severe cognitive impairments are humans who are

other humans' parents, siblings, children, or spouses. We have all been children, and we relate to children in a special way. Further, we all know that we could develop cognitive impairments ourselves at some point in our lives, and this reminds us that humanity is the most defining characteristic of persons with cognitive impairments.

Thus, recognizing that personhood is anchored in the human moral world does not imply that humans with cognitive impairments are not persons or have no rights. As explained by Professor Cohen, "this criticism mistakenly treats the essentially moral feature of humanity as though it were a screening function for sorting humans, which it most certainly is not."³⁴ It would be a serious misperception to view the appellate court's decision in *Lavery* as actually threatening to infants and others with severe cognitive impairments in finding connections between rights and duties. This misperception would reflect an overly narrow view of how rights and duties are connected. Regarding personhood, they are connected with human society in general, rather than on an individual-by-individual capacities analysis.³⁵ Again, appropriate legal personhood is anchored in the human moral community, and we include humans with severe cognitive impairments in that community because they are first and foremost humans living in our society.³⁶ Indeed, the history of legal rights for children and for cognitively impaired humans is a history of increasing emphasis on their humanity.³⁷ The *Lavery* court noted that "some humans are less able to bear legal duties or responsibilities than others. These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility."³⁸

IV. HOW FAR MIGHT ANIMAL PERSONHOOD AND RIGHTS EXTEND?

The NhRP has stated that a goal of using these lawsuits is to break through the legal wall between humans and animals.³⁹ But we have no idea how far things might go if the wall comes down. One might suspect that many advocates would push for things to go quite far.

In the real world, law does not fit perfectly with any single philosophical theory or other academic theory because judges must be intensely conscious of the practical, real world consequences of their decisions. One practical consequence courts should expect if they break through the legal wall between animals and humans is a broad and intense proliferation of expansive litigation without a meaningful standard for determining how many of the billions of animals in the world are intelligent enough to merit personhood. We should not fool ourselves into minimizing the implications of these lawsuits by thinking that they are, in the long run, only about the smartest animals.

How many species get legal personhood based on intelligence is just the start. Once the wall separating humans and nonhumans comes down, that could serve as a stepping stone for many who advocate a focus on the capacity to suffer as a basis for legal personhood. Animal legal rights activists do not all see eye to eye regarding whether they should focus on seeking legal standing for all animals who are capable of suffering or on legal personhood and rights for particularly smart animals like chimpanzees. However, these approaches may only be different

beginning points with a similar possible end point.

The intelligent animal personhood approach that begins with the smartest animals is more pragmatic in the short term, because the immediate practical consequences of granting legal standing to all sentient animals could be immensely disruptive for society.⁴⁰ We do not have much economic reliance on chimpanzees, there are relatively few of them in captivity compared to many other animals, and we can recognize that they are particularly intelligent and more similar to humans than are other animals. Thus, perhaps a court could be tempted to believe that granting personhood to chimpanzees would be a limited and manageable change. If that were accepted as a starting position, there is no clear or even fuzzy view of the end position. It would at least progress to assertions that most animals utilized for human benefit have some level of autonomy interests sufficient to allow them to be legal persons who may have lawsuits filed on their behalf on that basis. Professor Richard Epstein has recognized the slipperiness of this slope, pointing out that, "unless an animal has some sense of self, it cannot hunt, and it cannot either defend himself or flee when subject to attack. Unless it has a desire to live, it will surely die. And unless it has some awareness of means and connections, it will fail in all it does."⁴¹

Once the personhood door opens to the more intelligent animals, it would also encourage efforts to extend personhood on the basis of sentience rather than autonomy. The implications of much broader potential expansion of legal personhood based on either autonomy definitions or sentience could be enormous, and society should carefully think through them. Any court that contemplates restructuring our legal system must also contemplate the practical consequences.

V. A FEW WORDS ABOUT THE COMMON LAW WRIT OF HABEAS CORPUS

Professor Tribe has argued that the *Lavery* intermediate appellate court decision misunderstood the "crucial role" the common law writ of habeas corpus has historically played "in providing a forum to test the legality of someone's ongoing restraint or detention."⁴² He also says it serves as "a crucial guarantor of liberty by providing a judicial forum to beings the law does not (yet) recognize as having legal rights and responsibilities on a footing equal to others."⁴³

The common law writ of habeas corpus has indeed served as a vehicle for *humans* to test the legality of ongoing restraint. However, humans are not simply "beings," they are human beings, and their legal personhood is anchored in the human community. If habeas corpus jurisdiction were to be granted for any beings for whom an advocate wished to test the legality of restraint, would it be available for earthworms restrained in containers to be sold at gardening stores? If courts began to broadly allow habeas writs to test the legality of any nonhuman being's restraint, and then focused only on the scope of habeas corpus *relief* to limit boundaries, they could be opening themselves up to habeas corpus claims for countless animals.

The New York habeas corpus statute states that a "*person*" or one acting on the person's behalf may petition for the writ.⁴⁴ Thus, the jurisdiction question is related to the ultimate question of legal personhood under the statute's language. Boundaries

are needed for jurisdiction as well as for substantive relief, and, among the beings of which we are presently aware, habeas corpus should be grounded only in the human community.⁴⁵

CONCLUSION

Recognizing that personhood is a fit for humans and not a fit for animals in our legal system does not limit us to considering animals as “mere” things with the same status as inanimate objects. “Mere” things such as inanimate objects do not have laws protecting them. This is not an argument that we have done enough for animals. Society is increasingly interested in protecting animals through law, and we must continue to develop our protections. As noted above, in some areas our laws have not yet caught up with our evolving views on the protection of animals, and quite a bit of evolution is likely still ahead even from an animal welfare perspective.⁴⁶

Felony animal cruelty statutes provide a hopeful example of the kind of evolution that we have experienced and likely will continue to experience without restructuring our legal system to divorce personhood from humans and human proxies. Twenty-five years ago, few states made felony status available for serious animal cruelty.⁴⁷ A misdemeanor was the most serious charge available in most states. However, by 2014, our laws in this area had dramatically evolved. In that year South Dakota became the last of *all* states to make serious animal cruelty eligible for felony status.⁴⁸ We need to continue evolving our legal system like this to provide more protection to animals where appropriate, not because animals are legal persons, but because humans need to be responsible in their treatment of animals.

Endnotes

1 For the sake of brevity I will hereafter refer to nonhuman animals as “animals.”

2 Because the lawsuits are so similar, this paper will cite to the NhRP’s initial brief for one, *Nonhuman Rights Project v. Lavery*, as representative. See Petitioner’s Memorandum of Law in Support of Order to Show Cause & Writ of Habeas Corpus and Order Granting the Immediate Release of Tommy, People ex. rel. The Nonhuman Rights Project, New York Supreme Court, Fulton County, Dec. 2nd, 2013 [hereafter “*Lavery* Brief”], available at <http://www.nonhumanrightsproject.org/wp-content/uploads/2013/12/Memorandum-of-Law-Tommy-Case.pdf>. The *Lavery* lawsuit was rejected by a lower court and in a reported intermediate appellate decision, People ex. rel. Nonhuman Rights Project, Inc. v. Lavery, 124 A.D. 3d 148 (3rd Dept. 2015), and the NhRP is now seeking to appeal the case to the State of New York Court of Appeals. Another lawsuit involves a chimpanzee named Kiko kept by a private owner. This lawsuit was also rejected by a lower court and in a reported intermediate appellate decision, Matter of the Nonhuman Rights Project, Inc. v. Presti, 124 A.D. 3d 1334 (4th Dept. 2015), and the NhRP is also seeking to appeal this case to the State of New York Court of Appeals. The third lawsuit, *Stanley*, involves two chimpanzees, named Hercules and Leo, who were until recently used in research at Stony Brook University. In July 2015, it was reported that the research project involving the chimpanzees had ended and that “the chimps will be leaving the university . . . soon.” Associated Press, *Chimps Denied Legal Personhood will be Retired from Research*, NEW YORK TIMES, July 31st, 2015, available at http://www.nytimes.com/aponline/2015/07/31/us/ap-us-chimps-legal-rights.html?_r=0. *Stanley* was initially filed in Suffolk County, New York, but after being rejected by a lower court and by an intermediate appellate court, it was refiled in New York County. The New York County lower court judge, Justice Barbara Jaffe, ruled against the lawsuit in July 2015. The Nonhuman Rights Project v. Stanley, Supreme Court of the State of New York, New York County, Decision and Order, Index. No. 152736/15, July 29, 2015, available at <http://www.nonhumanrightsproject.org/wp-content/uploads/2015/07/Judge-Jaffes-Decision-7-30-15.pdf>. The Nonhuman

Rights Project has indicated that it plans to appeal this ruling as well. Many of the legal documents associated with the three lawsuits are available at <http://www.nonhumanrightsproject.org/>.

3 Although two of the lawsuits involve chimpanzees kept by private individuals rather than a government entity, the NhRP cites New York and other cases granting habeas corpus writs when a person was wrongfully imprisoned by a nongovernmental actor. The lawsuits’ focus on common law habeas corpus rather than on constitutional arguments distinguishes them from *Tilikum v. Sea World Parks & Entertainment, Inc.*, 842 F. Supp. 2d 1259 (2012). In *Tilikum*, protection against slavery and involuntary servitude under the Constitution of the United States’ 13th Amendment was asserted for five orcas owned by Sea World. *Id.* at 1260. In rejecting the lawsuit, the court held that the 13th Amendment applies only to “humans.” *Id.* at 1262.

4 *Lavery* Brief, *supra* note 2, at 77.

5 *Id.* at 49-52.

6 *Id.* at 1.

7 This includes one lower court judge each for the *Lavery* and *Presti* lawsuits, two lower court judges for the *Stanley* lawsuit, five intermediate appellate judges each for the *Lavery* and *Presti* lawsuits, and four intermediate appellate judges for the *Stanley* lawsuit. See *supra* note 2.

8 *Lavery*, 124 A.D.3d at 152.

9 As recognized by Immanuel Kant, “He who is cruel to animals becomes hard also in his dealings with men.” IMMANUEL KANT, LECTURES ON ETHICS 240 (Louis Infield trans., Harper Torchbooks 1963) (1780).

10 The Nonhuman Rights Project v. Stanley, Supreme Court of the State of New York, New York County, Decision and Order, Index. No. 152736/15, July 29th, 2015, available at <http://www.nonhumanrightsproject.org/wp-content/uploads/2015/07/Judge-Jaffes-Decision-7-30-15.pdf>.

11 This paper will use the term “cognitive impairments” to refer to all human cognitive limitations, including those related to childhood and intellectual disabilities, as well as being comatose or being impaired due to an injury, illness or medical condition.

12 The implications of cognitive impairments for young children and for other humans are addressed at length in Richard L. Cupp Jr., *Cognitively Impaired Adults, Intelligent Animals, and Legal Personhood*, which will be made available at SSRN.com, and in Richard L. Cupp Jr., *Children, Chimps, and Rights Arguments from “Marginal” Cases*, 45 Az. St. L. J. 1 (2013) [hereinafter *Children & Chimps*].

13 The *Lavery* Brief states that “*Homo Sapiens* membership has been laudably designated a *sufficient* reason for legal personhood. Even the permanently comatose and anencephalic of our human species are entitled to fundamental legal rights under international and American law. However, ‘the thesis that humans should be ascribed rights simply for being humans has received practically no support from philosophers.’” *Lavery* Brief, *supra* note 2, at 70 (emphasis in original) (citation omitted), quoting Daniel Wikler, *Concepts of Personhood: A Philosophical Perspective*, in DEFINING HUMAN LIFE: MEDICAL, LEGAL, AND ETHICAL IMPLICATIONS 13, 19 (1983). The *Lavery* Brief later states “The NhRP agrees that humans who have never been sentient or conscious nor possessed of a brain *should* have basic legal rights. But *if* humans bereft of autonomy, self-determination, sentience, consciousness, even a brain, are entitled to legal rights, *then* this Court must either recognize Tommy’s just equality claim to bodily liberty or reject equality entirely.” *Lavery* Brief, *supra* note 2, at 73 (emphasis in original).

14 See Richard A. Posner, *Animal Rights*, 110 YALE L. J. 527, 535 (2000) (a secular argument for dichotomizing between humans and animals is that “if we fail to maintain a bright line between animals and human beings, we may end up by treating human beings as badly as we treat animals, rather than treating animals as well as we treat (or aspire to treat) human beings.”).

16 Laurence H. Tribe, *Ten Lessons our Constitutional Experience Can Teach us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1, 7 (2001). Thank you to Justin Beck for highlighting this passage to me in conversation and in his presently unpublished paper addressing animal personhood issues. Justin Beck, *The Gradual Move Toward Nonhuman Personhood: Assessing the Moral and Legal Implications of the New Animal Rights Movement*, 28-29, 54 (copy on file with author).

17 Steven M. Wise, *Rattling the Cage Defended*, 43 B.C. L. REV. 623, 650 (2002).

18 *Id.* at 650-51. I disagree with Mr. Wise, and believe that treating humans distinctively makes sense, because the human community is in fact distinctive in important aspects. *See infra* Section 3.

19 In his book DRAWING THE LINE, Mr. Wise seems to argue that, under equality principles, granting rights to a “baby born into a permanent vegetative state” or to a man with an IQ of ten supports granting rights to what he describes as “Category 2” animals in terms of autonomy values (in addition to the animals who may be among the most intelligent, such as great apes). STEVEN M. WISE, DRAWING THE LINE 237-38, 241 (2002). In Category 2 he includes animals such as dogs, African Elephants, and African Grey Parrots, which are known to probably have relatively strong intelligence. *Id.* at 241. He also asserts that, with animals that are lower on the scale of the probability of practical autonomy, at a point the disparities in autonomy between the animals and a man with very low intelligence “become small enough to allow a judge to distinguish rationally between that creature and a severely retarded man. At some point, the psychological and political barriers to equality for a nonhuman animal with a low autonomy value become insuperable.” *Id.* at 238. But what if we consider the baby born into a permanent vegetative state instead of an adult with a severe cognitive disability (who may, despite his disability, have some abilities)? Would an equality argument based on individual autonomy, if accepted, suggest personhood for many, many more animal species that may have autonomy equal to or less than that of an adult with a severe cognitive disability, but more autonomy than that of an infant born into a permanently vegetative state? In light of our recognition of the legal personhood of an infant born into a permanently vegetative state, how many animals would *not* merit personhood if an equality argument based on individual autonomy were accepted?

20 Regarding a possible misconception that acknowledging personhood’s foundation in a societal framework of rights and responsibilities could somehow be a threat to humans without the capacity for responsibility, *see infra* Section 3.

21 *Lavery*, 124 A.D.3d at 152.

22 CARL COHEN & TOM REGAN, THE ANIMAL RIGHTS DEBATE 30 (2001).

23 Of course, we have in some instances shamefully failed to follow this ideal, such as in allowing the odious institution of slavery. Because noncitizen humans, even noncitizen unlawful enemy combatants, are human, recognizing some rights for them is consistent with our foundational societal principles. We assert some responsibilities for noncitizen humans as they interact with our society in addition to recognizing that they have some rights as they interact with our society. *See also* note 45.

24 THE DECLARATION OF INDEPENDENCE (U.S. 1776).

25 American Bar Association Section of Individual Rights and Responsibilities, http://www.americanbar.org/groups/individual_rights.html (last visited June 3rd, 2015).

26 Memorandum of Law in Support of Appellant’s Motion for Leave to Appeal to the Court of Appeals, Court of Appeals of the State of New York at 19-22, *People ex. rel. The Nonhuman Rights Project v. Lavery*, 124 A.D.3d 148 (N.Y.App. Div. Feb. 23, 2015) (No. 518336), <http://www.nonhumanrightsproject.org/wp-content/uploads/2015/02/6.-Motion-for-Lave-to-Appeal-and-Affirmation-in-Support.pdf>.

28 Professor Hohfeld stated, “[S]ince the purpose of the law is to regulate the conduct of human beings, all jural relations must, in order to be clear and direct in their meaning, be predicated of such human beings.” Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710, 721 (1917).

29 “[S]ince Hohfeld’s theory is largely descriptive, it does not really tell us what grounds our duties and, thus, what ultimately grounds rights. While Hohfeld’s theory may help us to identify and explicate legal issues, it is not a method for determining social and legal philosophical issues.” Thomas G. Kelch, *The Role of the Rational and the Emotive in a Theory of Animal Rights*, 27 B.C. ENVTL. AFF. L. REV. 1, 9 (1999).

30 *See Lavery*, 124 A.D.3d at 152; Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 52-63 (2009).

31 *Lavery* Brief, *supra* note 2, at 73 (emphasis in original).

32 *See Children & Chimps*, *supra* note 12, at 22-28.

33 Regarding animals and humans, Professor Cohen asserts that “[t]he critical distinction is one of kind.” COHEN & REGAN, *supra* note 22, at 37.

34 *Id.*

35 Of course, individual capacities are relevant to some specific rights (for example, the right to vote). They are not relevant to humans’ personhood.

36 Further, the status quo views humans as persons based on their humanity, and infants and other cognitively impaired persons are unquestionably included. It is rejecting this status quo in favor of an approach that denies membership in the human community as the foundation for personhood that would create risk for cognitively impaired humans, not maintaining the status quo.

37 *See, e.g.*, RICHARD FARSON, BIRTHRIGHTS: A BILL OF RIGHTS FOR CHILDREN 1 (1978) (asserting that denying rights to children denies “their right to full humanity”).

38 *Lavery*, 124 A.D.3d at 152. For a brief discussion of views about the conflicting academic philosophical concepts of “will theory” and “interest theory” for rights in the context of these lawsuits, see Richard L. Cupp Jr., *Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals*, 33 PACE ENV. L. REV. ___ (forthcoming 2015).

39 “Our goal is, very simply, to breach the legal wall that separates all humans from all nonhuman animals.” Nonhuman Rights Project website, *Lawsuit Filed Today on Behalf of Chimpanzees Seeking Legal Personhood*, Dec. 3rd, 2013, available at <http://www.nonhumanrightsproject.org/2013/12/02/lawsuit-filed-today-on-behalf-of-chimpanzee-seeking-legal-personhood/> (last visited June 5, 2015).

40 *See Children & Chimps*, *supra* note 12, at 21. The Manhattan *Stanley* ruling asserted in a footnote that “the floodgates argument is not a cogent reason for denying relief.” *The Nonhuman Rights Project v. Stanley*, Supreme Court of the State of New York, New York County, Decision and Order, Index. No. 152736/15, July, 29th, 2015, available at <http://www.nonhumanrightsproject.org/wp-content/uploads/2015/07/Judge-Jaffes-Decision-7-30-15.pdf>. The judge cited *Enright v. Eli Lilly & Co.*, 77 NY2d 377, 392-93 (1991), which involved a proposed tort law expansion. Although no pinpoint citation was provided, apparently the court was referencing the dissent in *Enright*. *Id.* at 392-93. (Hancock, J., dissenting). Interestingly, the majority opinion in *Enright* found it appropriate to consider what it viewed as “staggering implications” of the proposed expansion, and the difficulty, if the expansion were accepted, “of confining liability by other than artificial and arbitrary boundaries.” *Id.* at 384. In the NhRP lawsuits, courts must consider that there is no basis for determining how far to extend legal personhood among the world’s billions of animals if personhood is grounded in a vague intelligence standard.

41 Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, in CASS R. SUNSTEIN & MARTHA C. NUSSBAUM, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 154 (2004).

42 *Letter Brief of Amicus Curiae Laurence H. Tribe in Support of Motion for Leave to Appeal* 3, People ex. rel. The Nonhuman Rights Project v. Lavery, Court of Appeals of the State of New York, Index No. 518336, May 8, 2015, available at <http://www.nonhumanrightsproject.org/wp-content/uploads/2015/05/Tribe-Amicus-Curiae-Letter-Brief-FINAL.pdf>.

43 *Id.* at 4.

44 N.Y. Code section 7002(a). Section 7003, addressing “When the writ shall be issued,” also indicates it is for a “person.” *Id.* at section 7003(a).

45 This is not inconsistent with allowing habeas corpus and personhood for detainees held by the United States at Guantanamo Bay. The detainees are human. Although American courts have in some situations not granted full personhood to some subsets of humans (such as when the odious practice of slavery was an American institution), because of personhood’s focus on humanity American courts have never extended personhood beyond humans and human proxies. *See also supra* note 23.

46 *See supra* note 21 and accompanying text.

47 The Animal Legal Defense Fund has gathered information about the year each state adopted felony animal cruelty provisions. *See* Animal Legal Defense Fund, *U.S. Jurisdictions With and Without Felony Animal Cruelty Provisions*, <http://aldf.org/resources/advocating-for-animals/u-s-jurisdictions-with-and-without-felony-animal-cruelty-provisions/> (last visited June 3, 2015). According to the website’s list, as of 1990, only six states had adopted felony animal cruelty provisions. *Id.*

48 *South Dakota is Last State to Make Animal Cruelty a Felony*, J. OF THE AM. VET. MED. ASS’N NEWS, June 15, 2014, <https://www.avma.org/News/JAVMANews/Pages/140615f.aspx>, (last visited June 3, 2015).

