

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of a Proceeding under Article 70 of the
CPLR for a Writ of Habeas Corpus and Order to Show
Cause,

NOTICE OF MOTION

THE NONHUMAN RIGHTS PROJECT, INC. on
behalf of HAPPY,

Index No. 260441/2019

Petitioner-Appellant,

Appellate Division

-against-

Case No.: 2020-02581

JAMES J. BREHENY, in his official capacity as
Executive Vice President and General Director of the
Bronx Zoo, and THE WILDLIFE CONSERVATION
SOCIETY,

Respondents-Respondents.

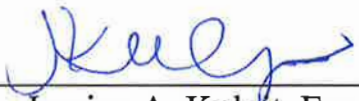
PLEASE TAKE NOTICE that, upon the annexed affirmation of Jessica A. Kulpit, dated September 16, 2020, with exhibits thereto, the undersigned will move this Court, on behalf of Professor Richard L. Cupp, at a term of the Appellate Division of the Supreme Court, First Department, at the Courthouse located at 27 Madison Avenue, New York, New York, for an Order granting leave to file the annexed Brief as *Amicus Curiae* in support of Respondents-Respondents James J. Breheny and the Wildlife Conservation Society, in the above-captioned appeal.

PLEASE TAKE FURTHER NOTICE that the Motion is returnable at 10 o'clock in the morning on September 28, 2020, which is at least 9 days from the

date of service of these papers. Arguments will be on the papers and no appearance is permitted or required.

Dated: Buffalo, New York
September 16, 2020

LAW OFFICES OF JESSICA A.
KULPIT

By: 
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University affiliation noted for
identification purposes only.

NOTICE (via NYSCEF) TO:

New York State Supreme Court
Appellate Division, First Department
Clerk's Office
27 Madison Avenue
New York, New York 10010

and

All Counsel of Record

SUPREME COURT OF THE STATE OF NEW
YORK
APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of a Proceeding under Article 70 of
the CPLR for a Writ of Habeas Corpus and Order to
Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC. on
behalf of HAPPY,

Petitioner-Appellant,

-against-

JAMES J. BREHENY, in his official capacity as
Executive Vice President and General Director of
the Bronx Zoo, and THE WILDLIFE
CONSERVATION SOCIETY,

Respondents-Respondents.

**AFFIRMATION IN
SUPPORT OF MOTION
OF RICHARD L. CUPP
FOR LEAVE TO FILE
BRIEF AS *AMICUS
CURIAE***

Index No. 260441/2019

Appellate Division
Case No.: 2020-02581

I, Jessica A. Kulpit, Esq., an attorney admitted to practice before the Court of the
State of New York, hereby affirm under the penalty of perjury:

1. I am not a party to this proceeding and I do not represent any party
involved. I submit this affirmation on behalf of Professor Richard L. Cupp. in
support of his motion to submit the attached Brief as *Amicus Curiae* in support of
Respondents-Respondents James J. Breheny and the Wildlife Conservation Society
on this appeal. Exhibit A is the Order appealed from. Exhibit B is the Notice of
Appeal.

2. Richard L. Cupp Jr. is the John W. Wade Professor of Law at Pepperdine University Caruso School of Law.¹ He is familiar with the legal issues involved in the above-captioned action. Professor Cupp has interest in this case because of its weighty public policy implications and because of his scholarly work addressing animal welfare reform and the concept of animal legal personhood.

3. Professor Cupp's proposed brief focuses on the legal and societal issue of whether concerns regarding animals should focus on human legal responsibility for appropriate animal welfare or on creating legal personhood for animals. His proposed brief includes arguments and sources that may not otherwise come to the attention of the court.

4. Professor Cupp has published several scholarly works related to animal legal personhood. As a writer with expertise in this subject, his perspective in the proposed brief should be helpful to the Court in considering this case. Professor Cupp's scholarly writings related to nonhuman legal personhood include: Richard L. Cupp Jr., *Considering the Private Animal and Damages*, WASH U. L. REV. (forthcoming 2021), *draft available at* <https://ssrn.com/abstract=3555986>;

¹ University and all other organizational affiliations noted in this Affirmation and in Professor Cupp's CV, attached as Exhibit C, are for identification purposes only. This brief reflects only the author's scholarship and views; it does not purport to reflect the views of Pepperdine University or any other institution or organization.

Richard L. Cupp, Jr., *Edgy Animal Welfare*, 95 DENV. L. REV. 865 (2018); Richard L. Cupp Jr., *Litigating Nonhuman Animal Legal Personhood*, 50 TEX. TECH. L. REV. 573 (2018); Richard L. Cupp Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 69. FLA. L. REV. 465 (2017); Richard L. Cupp Jr., *Animals as More than “Mere Things,” but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm*, 84 U. CIN. L. REV. 1023 (2016); Richard L. Cupp Jr., *Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals*, 33 PACE ENVTL. L. REV. 517 (2016); Richard L. Cupp Jr., *Children, Chimps, and Rights: Arguments from “Marginal” Cases*, 45 ARIZ. ST. L. J. 1 (2013); Richard L. Cupp, Jr., *Moving beyond Animal Rights: A Legalist/Contractualist Critique*, 46 SAN DIEGO L. REV. 27 (2009); Richard L. Cupp Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones toward Abolishing Animals’ Property Status*, 60 SMU. L. REV. 3 (2007).

5. This court accepted an *amicus curiae* brief Professor Cupp submitted in *Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73 (1st Dep’t 2017) (“*Lavery II*”), *lv denied*, 31 N.Y.3d 1054 (2018). This court cited Professor Cupp’s brief in its unanimous opinion rejecting the Nonhuman Rights Project, Inc.’s (“NRP”) appeal. *Lavery II*, 152 A.D.3d at 78.

6. In *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 152 (3d Dep't 2014), *lv denied*, 26 N.Y.3d 902 (2015), the court's unanimous opinion rejecting the Nonhuman Rights Project, Inc.'s ("NRP") appeal cited two law review articles authored by Professor Cupp. *Id.* at 151.

7. Most recently, in *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 216 A.3d 839 (Conn. App. Ct. 2019), *mot. recons. en banc denied*, AC 192411 (Conn. App. Ct. 2019), *cert. denied*, 217 A.3d 635 (Conn. 2019), the Appellate Court of Connecticut unanimously rejected a lawsuit brought by the NRP seeking to create legal personhood for elephants. The court cited a law review article authored by Professor Cupp in its opinion. *Commerford*, 216 A.3d at 845.

8. According to Google Scholar, as of September 15th, 2020, Professor Cupp's scholarly publications on all subjects have been cited 678 times. In addition to citations in scholarly publications, this includes approximately 22 citations in reported court cases, two of which are in Supreme Court of the United States cases. Professor Cupp has authored more than 30 scholarly publications, including publications in, among others, the *NYU Law Review*, the *Northwestern University Law Review*, the *Washington University Law Review* (forthcoming), the *Illinois Law Review*, the *George Washington Law Review*, the *American Journal of Bioethics*, the *UC Davis Law Review*, the *Florida Law Review*, the *Arizona State Law Journal*, and the *Brooklyn Law Review*.

9. Professor Cupp has published op-eds relating to animals' legal status in *The New York Times*, *The Los Angeles Times*, and other media sources. Some of the many media sources that have quoted Professor Cupp in articles related to animals' legal status include *The New York Times*, *The Washington Post*, *The Associated Press*, *The Atlantic*, *National Geographic*, *USA TODAY*, *The Chicago Tribune*, *The Boston Globe*, *The BBC*, *Science Magazine*, *Popular Science*, *The San Francisco Chronicle*, *The Guardian*, *The Telegraph*, *Newsday*, *The Christian Science Monitor*, *China Daily*, *Agence France Presse*, *The Independent*, *The New Republic*, *CBS News*, *ABC News*, *CNN*, *The Vancouver Sun*, *The Seattle Times*, *The Agenzia Giornalistica Italia*, *The Iraqi National News Agency*, and *The St. Louis Post-Dispatch*.

10. Professor Cupp has made numerous presentations addressing issues related to animals' legal status at academic conferences and for scientific and other organizations. Many of these presentations are listed in Professor Cupp's CV, which is attached hereto as Exhibit C.

11. Professor Cupp is a member of the American Law Institute and the American Bar Foundation. He is also a member of the Executive Committee of the Association of American Law Schools Section on Animal Law, and is past-chair of the Association of American Law Schools Section on Torts and Compensation.

Professor Cupp is a member in good standing of the bar of the State of California, and is admitted to practice in federal court in the Southern District of California.

12. Professor Cupp has not received compensation for this proposed brief, and he does not work for, consult, own shares in or presently receive funding from any corporation or organization that would benefit from this brief. Professor Cupp was previously awarded research grants by the National Association of Biomedical Research in support of the 2007, 2009 and 2013 articles cited above. Professor Cupp was assisted by counsel for Respondents in mechanical aspects of preparing his brief. Professor Cupp's proposed Brief is attached as Exhibit D.

Dated: Buffalo, New York
September 16, 2020

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*Not admitted in New York. University affiliation noted for identification purposes only.

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 5

The Northman Rights Project
on behalf of HAPPY -against-

Brekens, James J.

Index No. 260441/19

Hon. Alison Y. Tuitt

Justice Supreme Court

The following papers numbered 1 to 16 were read on ^{these} ~~this~~ motions Seq. No. 1, 2, 4-12
for Miscellaneous Reliefs noticed on various dates 9/13/19

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that ~~this motion is~~ ^{these motions and} order to show causes, Verified Petition, and related motions are decided in accordance with the Annexed memorandum decision.

Motion is Respectfully Referred to Justice:
Dated: _____

Dated: 2/18/20

Hon. A. Y. Tuitt

J.S.C.

Allison Y. Tuitt, J.S.C.

- | | | |
|------------------------------|--|---|
| 1. CHECK ONE..... | <input type="checkbox"/> CASE DISPOSED IN ITS ENTIRETY | <input type="checkbox"/> CASE STILL ACTIVE |
| 2. MOTION IS..... | <input type="checkbox"/> GRANTED | <input type="checkbox"/> DENIED <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| 3. CHECK IF APPROPRIATE..... | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> SCHEDULE APPEARANCE |
| | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFEREE APPOINTMENT |

C

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

In the Matter of a Proceeding under Article 70 of the
CPLR for a Writ of Habeas Corpus and Order to
Show Cause,

INDEX NUMBER: 260441/2019

THE NONHUMAN RIGHTS PROJECT, INC.,
on behalf of HAPPY,

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as
Executive Vice President and General Director of
Zoos and Aquariums of the Wildlife Conservation
Society and Director of the Bronx Zoo and
WILDLIFE CONSERVATION SOCIETY,

Present:
HON. ALISON Y. TUITT
Justice

Respondents.

On Calendar of 1/6/2020

The following papers, numbered as follows:

Read on these:

<u>Order to Show Cause, Verified Petition, related papers</u>	<u>1-14</u>
<u>Order to Show Cause with Temporary Restraining Order</u>	<u>15</u>
<u>Motion to Dismiss or Change Venue, related papers</u>	<u>16-21</u>
<u>Motion for a Protective Order, related papers</u>	<u>22-26</u>
<u>Motion for Leave to File Late Papers</u>	<u>27</u>
<u>Motion for Preliminary Injunction, related papers</u>	<u>28-32</u>
<u>Motion to Strike Respondents' Verified Answer, related papers</u>	<u>33-38</u>
<u>Motion for an Order Granting Amici Leave to File an Amicus Curiae Brief</u>	<u>39-46</u>

Upon the foregoing papers, the Order to Show Cause and Verified Petition for Writ of Habeas Corpus and Respondent's motion to dismiss the Petition are consolidated for purposes of this decision. For the reasons set forth herein, the motion to dismiss the Petition is granted and the Petition is dismissed. The remainder of the related motions are denied as moot.

Procedural History

This is a habeas corpus proceeding brought by Petitioner, the NhRP on behalf of Happy, a 48 year old Asian elephant situated in the Bronx Zoo, New York. Petitioner commenced the proceeding on October 2, 2018 in Supreme Court, Orleans County by filing a Verified Petition or a Common Law Writ of Habeas Corpus and Order to Show Cause pursuant to CPLR Article 70 on behalf of Happy. The NhRP alleges that Happy is being unlawfully imprisoned in the Bronx Zoo and demands her immediate release to an appropriate elephant sanctuary of which there are two in the United States, both which have agreed to provide lifetime care at no cost to the Bronx Zoo. In lieu of serving an answer to the Petition, the Bronx Zoo moved to change the venue of these proceedings from Orleans County to Bronx County or, in the alternative, to dismiss the proceedings with prejudice. On January 18, 2019, the Orleans County Court granted the branch of the motion to change venue, and the matter was transferred to Bronx County. The parties brought several other motions that were not decided by the Orleans County Court, and were transferred to this Court. Among the motions that the NhRP filed in Orleans County was a preliminary injunction requesting that the Orleans County Court enjoin the Bronx Zoo from removing Happy from the State of New York pending the outcome of this proceeding. Respondents' moved to dismiss the Petition on the grounds that controlling New York law holds that habeas corpus protection under CPLR Article 70 should not be extended to animals as the NhRP fails to cite any legal precedent applicable in the State of New York to support its position. Additionally, the NhRP brought motions to strike Respondents' opposition to Petitioner's proposed Order to Show Cause, to allow the filing of late reply papers, and, for a protective order. There was also a motion of *Amici* to File Brief *Amicus Curiae*. This Court heard oral arguments on these proceedings on August 12, 2019, September 23, 2019, October 21, 2019 and January 6, 2020.

The NhRP seeks the issuance of the Writ of Habeas Corpus and Order to Show Cause demanding that Respondents demonstrate forthwith the basis of their imprisonment of Happy; upon a determination that

Happy is being unlawfully imprisoned, an Order directing her immediate release from the Respondents' custody to an appropriate sanctuary; and, an award for the NhRP for the costs and disbursements of this action.

The Parties

The NhRP is a not-for-profit corporation, a civil rights organization dedicated to changing “the common law status of at least some nonhuman animals from mere ‘things,’ which lack the capacity to possess any legal rights, to ‘persons,’ who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them.” <https://www.nonhumanrights.org/who-we-are/>. For the past 20 years, the NhRP has worked to change the status of such nonhuman animals as chimpanzees and elephants from legal things to legal persons. The NhRP has filed similar cases in several other New York Courts with the goal of obtaining legal rights for chimpanzees, elephants, and ultimately for other animals.

Respondent the Wildlife Conservation Society (“WCS”) is a not-for-profit corporation, headquartered at the Bronx Zoo, whose mission statement is to save wildlife and wild places worldwide through science, conservation action, education and inspiring people to value nature. Opened in 1899, the Bronx Zoo, a WCS park, cares for thousands of endangered or threatened animals and provides experiences to visitors that may spark a lifelong passion to protect animals and their natural habitats. WCS manages the Bronx Zoo along with other New York City wildlife parks and zoos. Respondent James Breheny is WCS’ Executive Vice President and General Director of Zoos and Aquariums, and is the Director of the Bronx Zoo.

Happy the Elephant

Happy is a 48 year old female Asian elephant who was captured in the wild and brought to the United States when she was one year old. In 1977, Happy and another elephant named Grumpy arrived at the Bronx Zoo. There, in addition to being on display, Happy gave rides and participated in “elephant extravaganzas”. For the next 25 years, Happy and Grumpy lived together. The Bronx Zoo had other elephants, and they were kept two by two. In 2002, the Bronx Zoo paired Happy and Grumpy with two other elephants, Patty and Maxine in the same elephant exhibit. Patty and Maxine attacked Grumpy who tumbled and fell, and was seriously injured. Grumpy never recovered from her injuries and was euthanized. Thereafter, the Bronx

Zoo separated Happy from them, and introduced a younger female Asian elephant named Sammie into her portion of the exhibit. Sammie suffered from severe liver disease and was euthanized in 2006. The Bronx Zoo announced after the death of Sammie that it would not acquire any new elephants. Since 2006, Happy has been living alone at the Bronx Zoo. The NhRP argues, in essence, that Happy has been imprisoned in solitary confinement, notwithstanding the uncontroverted scientific evidence that Happy is an autonomous, intelligent being with advanced cognitive abilities akin to human beings.

The NhRP's arguments

The NhRP brings the instant proceeding alleging that Happy is being unlawfully imprisoned by Respondents in the Bronx Zoo. Happy has been living alone in an one-acre enclosure within the Bronx Zoo since Sammie's death in 2006. The NhRP argues that Happy has been, and continues to be, denied direct social contact with any other elephants, and spends most of her time indoors in a large holding facility lined with elephant cages, which are about twice the length of the animals' bodies. The NhRP argues that whether Respondents are in violation of any federal, state or local animal welfare laws in their detention of Happy is irrelevant as to whether or not the detention is lawful. The NhRP further contends that this habeas corpus case is neither an animal protection, nor animal welfare case. The Petition does not allege that Happy is illegally confined because she is kept in unsuitable conditions, nor does it seek improved welfare for Happy. Rather, this Petition seeks that this Court recognize Happy's alleged common law right to bodily liberty, and order her immediate release from Respondents' current and continued alleged unlawful detention so that her liberty and autonomy may be realized. NhRP argues that it is the fact that Happy is imprisoned at all, rather than her conditions of her imprisonment, that is unlawful.

The NhRP seeks Happy's immediate release from her imprisonment to a permanent elephant sanctuary, two of which have agreed to take Happy: the Professional Animal Welfare Society ("PAWS") in California, and The Elephant Sanctuary in Tennessee. In support of its application, the NhRP submits expert scientific affidavits from five of the world's most renowned experts on the cognitive abilities of elephants: the affidavit of Joyce Pool; the supplemental affidavit of Joyce Pool; the joint affidavit of Lucy Bates and Richard W. Byrne; the affidavit of Karen McComb; and, the affidavit of Cynthia J. Moss. The NhRP also submits the affidavit from an expert in the care and rehabilitation of captive elephants in sanctuary. In his affidavit, Ed

Stewart, President and Co-Founder of PAWS, states that PAWS has agreed to provide permanent sanctuary to Happy should she be released.

The NhRP submits its expert affidavits which demonstrate that Happy possesses complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty. These include: autonomy; empathy; self-awareness; self-determination; theory of mind (awareness that others have minds); insight; working memory; an extensive long-term memory that allows them to accumulate social knowledge; the ability to act intentionally and in a goal-oriented manner, and to detect animacy and goal directedness in others; to understand the physical competence and emotional state of others; imitate, including vocal imitation; point and understand pointing; engage in true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do); cooperate and build coalitions; cooperative problem-solving, innovative problem-solving, and behavioral flexibility; understand causation; intentional communication, including vocalizations to share knowledge and information with others in a manner similar to humans; ostensive behavior that emphasizes the importance of particular communication; wide variety of gestures, signals and postures; use of specific calls and gestures to plan and discuss a course of action, adjust their plan according to their assessment of risk, and execute the plan in a coordinated manner; complex learning and categorization abilities; and, an awareness of and response to death, including grieving behaviors.

The NhRP's experts state that African and Asian elephants share numerous complex cognitive abilities with humans, such as self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities. Each is a component of autonomy. The experts opine that African and Asian elephants are autonomous, as they exhibit self-determination behavior that is based on a freedom of choice. As a psychological concept, it implies that the individual is directing their behavior based on some non-observable, internal cognitive process, rather than simply responding reflexively. Physical similarities between human and elephant brains occur in areas that link to the capacities necessary for autonomy and self-awareness. The NhRP further alleges that Happy is the first elephant to pass the mirror self-recognition-test ("MSR"), considered to be an indicator of an animal's self-awareness and is thought to correlate with higher forms of empathy and altruistic behavior. As do humans, Asian elephants exhibit MSR, which is the ability to recognize a reflection in the mirror as oneself, while the mark test involves surreptitiously placing a colored mark on an individual's forehead that she cannot see or be aware of without the aid of a mirror. If the individual

uses the mirror to investigate the mark, the individual must recognize the reflection of herself. The NhRP experts argue that MSR is significant because it is a key identifier of self-awareness, which is intimately related to autobiographical memory in humans and is central to autonomy and being able to direct one's own behavior to achieve personal goals and desires. By demonstrating they can recognize themselves in a mirror, the experts claim that elephants must be holding a mental representation of themselves from another perspective, and thus must be aware that they are a separate entity from others.

Both chimpanzees and elephants demonstrate an awareness of death by reacting to dead family or group members. Having a mental representation of the self, which is a pre-requisite for MSR, likely confers an ability to comprehend death. Wild African elephants have been observed using their tusks, trunk or feet to attempt to lift sick, dying or dead elephants. Although they do not give up trying to lift or elicit movement from a dead body immediately, elephants appear to realize that once dead, the carcass can no longer be helped; and instead, they engage in more "mournful" or "grief stricken" behavior, such as standing guard over the body with a dejected demeanor and protecting it from predators. They have been observed covering the bodies of their dead with dirt and vegetation. Mothers who lose a calf may remain with the calf's body for an extended period, but do not behave towards the body as they would a live calf. The general demeanor of elephants attending to a dead elephant is one of grief and compassion, with slow movements and few vocalizations. These behaviors are akin to human responses to the death of a close relative or friend, and demonstrate that elephants possess some understanding of life and the permanence of death. Elephants frequently display empathy in the form of protection, comfort and consolation, as well as by actively helping those in difficulty, assisting injured ones to stand and walk, or helping calves out of rivers or ditches with steep banks. In an analysis of behavioral data collected from wild African elephants over a 40 year continuous field study, the experts concluded that as well as possessing their own intentions, elephants can diagnose animacy and goal directedness in others, understand physical competence and emotional state of others, and attribute goals and mental states to other.

The Bronx/WCS' arguments

Respondents move to dismiss the Petition on the grounds that the NhRP, to no avail, has previously prosecuted several unsuccessful lawsuits on behalf of chimpanzees. Controlling New York precedent provides that animals are not entitled to habeas corpus protection under CPLR Article 70. Respondents argue

that contrary to the NhRP allegations, Happy is not unlawfully imprisoned at the Bronx Zoo. The AZA Standards for Elephant Management and Care and the Animal Welfare Act are the two primary standards for the care and management of elephants in AZA-accredited institutions in the United States. Respondents argue that the Bronx Zoo's compliance with these standards ensures that Happy is provided with excellent care focused on her well-being. The AZA Standards require that "[o]utdoor habitats must provide sufficient space and environmental complexity to both allow for and stimulate natural behavioral activities and social interactions resulting in healthy and well-adapted elephants." The Standards include requirements for variation in an elephant's environment including varied terrain to allow for exercise and "foraging, wallowing, bathing, digging, and resting." "While outdoors and weather permitting, elephants must have regular access to water sources, such as a [sic] pools, waterfalls, misters/sprinklers, or wallows that provide enrichment and allow the elephants to cool and/or bathe themselves." Additional standards are included for subjects such as elephant diet, exercise, medical management, foot care, and skin care. Daily behavioral assessments of elephants must be conducted and recorded in a daily log. Elephant care professionals, managers, and directors who work for the Bronx Zoo are also required to complete AZA's Principles of Elephant Management courses. To remain an AZA-accredited zoo, the Bronx Zoo submits annual reports regarding its elephant program, and is regularly inspected by AZA representatives and individuals from peer institutions. An elephant specialist is included in every AZA accreditation inspection of the Bronx Zoo. On April 27, 2018, in response to the Bronx Zoo's most recent report, the AZA confirmed that the Bronx Zoo is in compliance with the AZA Standards for elephants.

In addition, the Bronx Zoo is regulated under the Animal Welfare Act and Animal Welfare Regulations. Although the Animal Welfare Act does not contain any elephant-specific requirements, the Act's standards and regulations ensure that animals receive humane care and treatment at regulated facilities. Among its requirements, the Animal Welfare Act requires the Bronx Zoo to employ an attending veterinarian who shall provide adequate care, and maintain compliance with standards for "the humane handling, care, treatment, housing, and transportation of animals. Compliance with the Animal Welfare Act is overseen by the U.S. Department of Agriculture ("USDA") Animal Care. USDA inspectors make routine, unannounced inspections of facilities like the Bronx Zoo at least once a year. Respondents argue that Happy's living conditions are therefore not "unlawful" according to applicable standards.

Happy's routine care program incorporates the AZA Standards and requirements under the

Animal Welfare Act. On a daily basis, Happy's appetite, food intake, stool appearance and quantity, overall activity, and responsiveness to keepers are monitored. Happy also receives baths on a daily basis. Everyday Happy's keepers assess her body condition, provide her with various forms of enrichment that encourage mental and physical stimulation, and engage in positive reinforcement training sessions that help to maintain behaviors used to facilitate Happy's care. On a regular basis, the Bronx Zoo conducts voluntary blood draws and trunk washes, as well as weigh-ins to monitor Happy's health. Weather permitting, Happy has regular, year-round access to a large, naturalistic outdoor exhibit in which she may go swimming and engage in other species-typical behavior, and also has regular overnight access to a large outdoor space. Patrick Thomas, PhD, Vice President and General Curator of WCS and Associate Director of the Bronx Zoo, states that Happy has developed a familiarity and comfort with her keepers, and she recognizes her surroundings as her familiar, longstanding environment. It is his opinion that suddenly taking her away from this environment and introducing entirely new surroundings without the support of her keepers could inflict long-term damage on Happy's welfare. Mr. Thomas states that Happy has also shown in past experiences that she does not respond well to even temporary, short moves within the Bronx Zoo. He believes that transporting Happy the long distance from the Bronx Zoo across the country to the sanctuary in California would cause severe stress and potentially inflict long-term physical harm. Based on his 40 years of experience and responsibilities in supervising the care of animals at the Bronx Zoo, including Happy, to the best of his knowledge, Mr. Thomas opines that Happy is currently healthy and well-adapted to her surrounding in the Bronx Zoo.

Paul P. Calle, WCS's Vice President for Health Programs, Chief Veterinarian and Director of the Zoological Health Program based at the Bronx Zoo, states that the Bronx Zoo undertakes a multitude of efforts to ensure Happy's continued physical and psychological well-being and health. Happy is given visual checks by the care staff several times each day and, on occasion when an issue is identified, the veterinary staff responds appropriately to any concern that is noted. The veterinary staff conducts regular health assessments of Happy through body condition evaluations, oral, dental and foot examinations. Baseline toe x-rays of Happy's feet were completed, and are repeated for comparative analysis, on an as-needed basis to address particular areas of concern as they arise. Veterinary staff are consulted by keepers regarding nail and pad conditions, with veterinary participation in trims, evaluations, or treatments as necessary. Veterinary staff participate in development and maintenance of medical behaviors (trunk wash, oral/dental evaluation, blood sampling, foot

work, presentation for injections or x-rays) in conjunction with Happy's animal keeper staff. Happy's health care is recorded and documented in her individual medical record, and documented in the Bronx Zoo's annual AZA Elephant Program Annual Report. Mr. Calle states that based upon his responsibilities in providing veterinary care for almost 30 years to animals at the Bronx Zoo, including Happy, and to the best of his knowledge, Happy is currently healthy and well-adapted to her present surroundings. During his experience with Happy, she has become very distressed during short moves from one area of the Zoo to another. Mr. Calle opines that given Happy's age and longstanding familiarity and attachment to her surroundings, a long-distance move, such as that proposed by the NhRP to California, would cause substantial stress to Happy. Imposing this move on Happy would create a serious risk to her long-term health that Mr. Calle does not believe is justified. In his professional opinion, Happy's health and well-being would not be best served by moving her to an animal sanctuary such as the facility operated by the PAWS Sanctuary.

James J. Breheny, Director of WCS, argues that the NhRP's expert affidavits provide little to no relevant information regarding whether Happy is "unlawfully imprisoned" at the Bronx Zoo. In substance, the affidavits are almost verbatim duplicates of each other and barely address Happy. The affidavits the NhRP relies upon only provide generalized, anecdotal discussions of African and Asian elephants as observed in the wild. Mr. Breheny argues that the affidavits posit that elephants are generally better suited to the company of other elephants, without accounting for the particular needs, wants, and temperament of any one elephant. None of the expert affidavits submitted in support of the NhRP's Petition make any reference to Happy, her current state of well-being, or her needs as a 48 year old Asian elephant who has lived for over 40 years at the Bronx Zoo. Mr. Breheny argues that elephants who have lived at zoos for long periods of time are significantly different from elephants in the wild, and the characteristics of one cannot generally be attributed to the other, therefore, the NhRP's supporting expert affidavits have limited applicability to Happy and her specific needs. In contrast, the Bronx Zoo employees, including Mr. Breheny himself, have been caring for Happy's interest and well-being, knowing her individually for over 40 years.

The Bronx Zoo has significant resources for the care and well-being of Happy, including a large number of highly trained and experienced staff that provides excellent care and medical attention for Happy, as well as the sustained financial resources of a major institution. Happy also has longstanding relationships and familiarity with her caregivers and surroundings at the Bronx Zoo, where she has lived for nearly all of her life.

Mr. Breheny alleges that the NhRP does not take into consideration Happy's unique characteristics, personality and needs. For example, there is Happy's history of not interacting well with other elephants at the Bronx Zoo, which is why she is housed separately since her companion died. The NhRP also fails to consider that Happy may not socialize well with the elephants in the sanctuary due to her alleged acrimonious behavior. Based upon past experiences with Happy, the Bronx Zoo knows that she becomes particularly distressed by even short moves within the Zoo. Based upon his expertise and decades-long experience with Happy, Mr. Breheny states his professional opinion that Happy's interest would not be best served by moving her to an animal sanctuary.

The NhRP Counter-Arguments

In response, the NhRP argues that the Bronx Zoo imprisons Happy in a tiny, cold, lonely, "un-elephant-friendly", an unnatural place that ignores her autonomy as well as her social, emotional, and bodily liberty needs, while daily inflicting further injury upon her that would be remedied by transferring her to any American elephant sanctuary. They argue that the Bronx Zoo's unlawful imprisonment of Happy, an autonomous, extraordinarily cognitively-complex being, violates her common law right to bodily liberty. The NhRP has placed before the Court five deeply educated, independent, expert opinions, all firmly grounded in decades of education, observation, and experience, by some of the most prominent elephant scientists in the world. In great detail, these opinions carefully demonstrate that elephants are autonomous beings possessed of extraordinarily cognitively complex minds. The NhRP specifically demands that this Court determine that Happy possesses the common law right to bodily liberty and immediate release from her unlawful imprisonment so that her autonomy may be realized. The NhRP argues that the notion that living on a 2,300 acre sanctuary, such as PAWS is comparable to being imprisoned in the Bronx Zoo's approximately one acre elephant exhibit is absurd. The NhRP contends that the purported experts on behalf of the Bronx Zoo have not published or submitted for publication any peer-reviewed articles about elephants, nor have they studied or examined any elephants in the wild or in any other zoo. Similarly, none of the Bronx Zoo's affiants present any evidence that they have studied any wild elephant, or know about an elephant's basic social, emotional, behavioral, liberty, and autonomy needs, whether captive or wild.

The NhRP also takes issue with Mr. Calle's statement that to the best of his knowledge, Happy is currently healthy and well-adapted to her present surroundings. Mr. Calle fails to properly address the very

small space available to Happy at the Bronx Zoo. There are three possible locations for elephants at the Zoo: an indoor “holding area” or elephant barn; a barren cemented walled outdoor elephant yard that appears to be 0.05 of an acre; and, a Zoo exhibit, listed as being only 1.15 acres. Since the Bronx Zoo elephants are incompatible, the naturalistic exhibit area has to be shared on a rotational basis. At night, Happy is usually in a small pen in the barn or in the barren outdoor yard. During most days, weather permitting, she is also in the barren outdoor elephant yard. Dr. Poole notes that it is difficult for members of the public to obtain much information about Happy’s behavior other than viewing short videos of her captured by visitors to the Zoo. Dr. Poole states that in these videos, Happy is engaged in only five activities/behavior: standing facing the fence/gate; dusting, swinging her trunk in stereotypical behavior; standing with one or two legs lifted off the ground, either to take weight off painful, diseased feet or again engaging in stereotypic behavior; and once, eating grass. According to Dr. Poole, only two of these activities are natural, dusting and eating grass, and being alone in a small place, there is little else for her to do.

Dr. Poole found that Happy has no general problem getting along with other elephants, and opines that Happy is not anti-social, per se, but the historical information indicates that Happy was once attacked by Maxine and Patty and there was a risk that it could happen again. The NhRP argues that in the 40 years that she has been at the Bronx Zoo, Happy has only been given a choice of four companions, with whom she was forced to share a space that for an elephant is the equivalent of the size of a house. Two of these companions she liked and lost, and the other two attacked her. Dr. Poole opines that this is a confirmation of the Bronx Zoo’s inability to meet Happy’s basic needs. Moreover, Dr. Poole notes that the claims that Happy does not do well with change; that she will not survive the transport; that a transfer to a sanctuary will be too stressful; that she does not know how to socialize; and, that her unique personality is problematic, have often been disproven. Dr. Poole states that elephants with serious physical or psychological problems in zoos have usually become more normal functioning elephants when given more appropriate space in a sanctuary such as PAWS. Dr. Poole then provides examples of elephants similar to Happy who, when moved from a zoo to a sanctuary, almost immediately blossomed into happy, successful, autonomous, and socially and emotionally fulfilled beings. Dr. Poole opines that such space permits autonomy and allows elephants to develop healthy social relationships and to engage in a near natural movement, foraging, and repertoire of behavior.

The Law

New York Courts have addressed the question of “personhood” with respect to chimpanzees. The NhRP has brought four identical, separate habeas corpus proceedings on behalf of “imprisoned chimpanzees” in four different counties, each within a different department of the Supreme Court, Appellate Division. The NhRP argued that chimpanzees are entitled to habeas corpus relief as their human-like characteristics render them “persons”. In each case, the trial court declined habeas corpus relief for the chimpanzees, and the NhRP appealed each decision. On appeal, all four Departments of the Appellate Division affirmed the decisions of the trial courts to decline habeas corpus relief.

The NhRP has standing to file the Petition for habeas corpus on behalf of Happy. Pursuant to CPLR 7002(a), a petition may be brought by “[a] person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf..., may petition without notice for a writ of habeas corpus...”. “As the statute places no restriction on who may bring a petition for habeas on behalf of the person restrained, ... petitioner [NhRP] has met its burden of demonstrating that it has standing.” The Nonhuman Rights Project, Inc. v. Stanley Jr. M.D., 2015 WL 1804007 (N.Y. Sup. Ct. 2015), amended in part, The Nonhuman Rights Project, Inc. v. Stanley, 2015 WL 1812988 (N.Y. Sup. 2015). Indeed, in the six habeas corpus cases that the NhRP has filed on behalf of chimpanzees in New York, the Courts found that NhRP had standing. See, Id.; People ex rel Nonhuman Rights Project Inc. v. Lavery, 998 N.Y.S.2d 248 (3d Dept. 2014); Nonhuman Rights Project, Inc. ex rel Kiko v. Presti, 999 N.Y.S.2d 652 (4th Dept. 2015); Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 54 N.Y.S.3d 392 (1st Dept. 2017), leave to appeal den., 31 N.Y.3d 1054 (2018); Nonhuman Rights Project on Behalf of Tommy v. Lavery, 31 N.Y.3d 1054 (2018); Nonhuman on Behalf of Tommy v. Lavery, 31 N.Y.3d 1065 (2018). Thus, this Court finds that the NhRP has standing to bring the habeas corpus proceeding on behalf of Happy.

However, on the question of whether an animal may be a “person”, the Courts have held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus. In People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248 (3d Dept. 2014), the appeal presented the novel question of whether a chimpanzee is a “person” entitled to the rights and protections afforded by the writ of habeas corpus. In Lavery, like here, the NhRP did not allege that respondents were in violation of any state or federal statutes respecting the domestic possession of wild animals. Instead it argued that a chimpanzee is a

“person” entitled to fundamental rights.

According to petitioner, while respondents are in compliance with state and federal statutes, the statutes themselves are inappropriate. Yet, rather than challenging any such statutes, petitioner requests that this Court enlarge the common-law definition of “person” in order to afford legal rights to an animal. We decline to do so, and conclude that a chimpanzee is not a “person” entitled to the rights and protections afforded by the writ of habeas corpus. Id. at 249

* * *

Not surprisingly, animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law... Petitioner does not cite any precedent-and there appears to be none-in state law, or under English common law, that an animal could be considered a “person” for the purposes of common-law habeas corpus relief. In fact, habeas corpus relief has never been provided to any nonhuman entity. Id. at 249-250

* * *

Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings. Id. at 251

(Internal citations omitted).

In The Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015), the NhRP brought an Article 70 proceeding under the common law for a writ of habeas corpus, on behalf of Hercules and Leo, two chimpanzees in the custody of respondent State University of New York at Stony Brook, seeking an Order directing their release and transfer to a sanctuary in Florida. The conditions under which Hercules and Leo were confined were not challenged by NhRP and it did not allege that respondents are violating any laws. While the Court was extremely sympathetic to the plight of the NhRP, on behalf of Hercules and Leo, it nonetheless held that given the Third Department precedent to which it is bound, the chimpanzees are not “persons” entitled to rights and protections afforded by the writ of habeas corpus, and the petition was denied, and the proceeding was dismissed.

In Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti, 999 N.Y.S.2d 652 (4th Dept. 2015), *lv. denied* 26 N.Y.3d 901 (2015), the NhRP sought a writ of habeas corpus on behalf of another chimpanzee, Kiko, arguing that he was illegally confined because he was kept in unsuitable conditions, and sought to have him

placed in a sanctuary. The Court did not address the question of whether a chimpanzee was deemed a person for habeas corpus purposes, or whether the NhRP had standing to seek habeas corpus on the chimpanzee's behalf. The Fourth Department affirmed the dismissal of the petition, holding that habeas corpus did not lie where the NhRP sought only to change the conditions of confinement rather than the confinement itself. In this matter, the NhRP sought to transfer Kiko to a different facility, a sanctuary, that it deemed more appropriate. The Court held that even if a chimpanzee was deemed a person for habeas corpus purposes, and even if the NhRP had standing to seek habeas corpus relief on Kiko's behalf, habeas corpus did not lie as it is well-settled that habeas corpus relief must be denied where the subject of the petition is not entitled to immediate release. Since the NhRP did not seek the immediate release of Kiko, but sought to transfer him to a sanctuary, habeas corpus does not lie. Here, the trial court declined to sign the order to show cause seeking habeas corpus relief, and the Fourth Department affirmed.

While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees, petitioner does not cite any sources indicating that the United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty, or that the Legislature intended the term "person" in CPLR article 70 to expand the availability of habeas protection beyond humans. No precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a "person" and entitled to habeas relief. In fact, habeas relief has never been found applicable to any animal. Id. at 395-396.

The asserted cognitive and linguistic capabilities of chimpanzees do not translate to a chimpanzee's capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions. Petitioner does not suggest that any chimpanzee charged with a crime in New York could be deemed fit to proceed, i.e., to have the "capacity to understand the proceedings against him or to assist in his own defense". Id. at 396.

* * *

Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community. Id.

Even assuming, however, that habeas relief is potentially available to chimpanzees, the common-law writ of habeas corpus does not lie on behalf of the two chimpanzees at issue in these proceedings. Petitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that "there are no

adequate facilities to house [them] in proximity to the [c]ourt.” Instead, petitioner requests that respondents be ordered to show “why [the chimpanzees] should not be discharged, and thereafter, [the court] make a determination that [their] detention is unlawful and order [their] immediate release to an appropriate primate sanctuary... Since petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court. Id. at 397.

(Internal citations omitted).

In Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 54 N.Y.S.3d 392 (1st Dept. 2017), lv denied 31 N.Y.3d 1054 (2018), the NhRP filed two petitions for habeas corpus on behalf of two chimpanzees, Tommy and Kiko. Supreme Court declined to extend habeas corpus relief to the chimpanzees. The NhRP appealed and the Appellate Division, First Department affirmed, holding that the human-like characteristics of chimpanzees did not render them “persons” for purposes of habeas corpus relief. The Court noted that any position to the contrary is without legal support or legal precedent. The asserted cognitive and linguistic capabilities of chimpanzees did not translate to a chimpanzee’s capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions. The Court further held that even if habeas corpus was potentially available to chimpanzees, writ of habeas corpus did not lie on behalf of the chimpanzees where the NhRP did not challenge the legality of the detention, but merely sought their transfer to a different and more appropriate facility.

Analysis

Regrettably, in the instant matter, this Court is bound by the legal precedent set by the Appellate Division when it held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus. Lavery, 54 N.Y.S.3d at 392. The First and Fourth Departments did not address the question of personhood for chimpanzees. For purposes of the decisions, both Appellate Departments noted that even if the NhRP had standing to bring the habeas corpus proceeding, and habeas corpus was potentially available to chimpanzees, the NhRP did not meet its burden for habeas corpus relief because it did not challenge the legality of the chimpanzees' detention, but merely sought transfer of the chimpanzees to sanctuaries. Thus, both Courts assumed, for purposes of the argument, that the NhRP had standing and that habeas corpus was available to the chimpanzee. However, the Third Department squarely addressed the question and held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus.

This Court is extremely sympathetic to Happy's plight and the NhRP's mission on her behalf. It recognizes that Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings. Notwithstanding, in light of the Appellate Division, Third Department's holding that animals are not "persons", this Court is also constrained to find that Happy is not a "person" entitled to the writ of habeas corpus. In Lavery, 31 N.Y.3d 1054 (2018), the NhRP motion for leave to appeal the Third Department decision to the Court of Appeals was denied. However, in a concurring opinion, Justice Fahey noted that the denial of leave to appeal was not a decision on the merits of the NhRP claim. He stated that "[t]he question will have to be addressed eventually. Can a non-human animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing?" Id. at 1057. Justice Fahey further noted that "[t]he issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing." Id. at 1059.

Conclusion

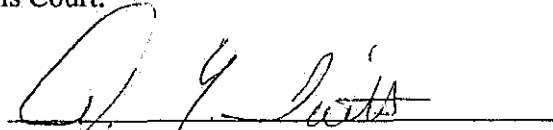
This Court agrees that Happy is more than just a legal thing, or property. She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty. Nonetheless, we are constrained by the caselaw to find that Happy is not a "person" and is not being illegally imprisoned. As stated by the First Department in Lavery, 54 N.Y.S.3d at 397, "the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process". The arguments advanced by the NhRP are extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot. Nevertheless, in order to do so, this Court would have to find that Happy is a "person" and, as already stated, we are bound by this State's legal precedent.

Accordingly, Respondents' motion to dismiss the Petition is granted and the Petition is dismissed. The remainder of the motions are denied as academic or moot.

This constitutes the decision and Order of this Court.

Dated:

February 18, 2020



Hon. Alison Y. Tuitt

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,

**Index No.: 260441/2019
(Bronx County)**

THE NONHUMAN RIGHTS PROJECT, INC., on behalf
of HAPPY,

NOTICE OF APPEAL

Petitioner,

Hon. Justice Alison Y. Tuitt
Justice Supreme Court
Bronx County

-against-

JAMES J. BREHENY, in his official capacity as the
Executive Vice President and General Director of Zoos and
Aquariums of the Wildlife Conservation Society and Director
of the Bronx Zoo, and WILDLIFE CONSERVATION
SOCIETY,


Respondents.

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PLEASE TAKE NOTICE that the Petitioner, The Nonhuman Rights Project, Inc. ("NhRP"), on behalf of an elephant named Happy, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, for the First Judicial Department, from the decision and Order of the Supreme Court of the State of New York, County of Bronx (Hon. Justice Tuitt), dated February 18, 2020 and entered in the office of the Clerk of the County of Bronx on February 19, 2020, which granted Respondents' motion to dismiss the NhRP's Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause. Petitioner appeals from each and every part of that decision and Order.

Respectfully submitted,

Dated: 2/25/2020


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EXHIBIT C

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- Professor of Law, Pepperdine Caruso School of Law, 1998 to 2004.
- Associate Professor of Law, Pepperdine Caruso School of Law, 1991 to 1998.

Vice Dean, Pepperdine Caruso School of Law, 2012 to 2013.

Associate Dean for Research, Pepperdine Caruso School of Law, 2005 to 2008.

Associate Dean for Academics, Pepperdine Caruso School of Law, 2002 to 2005.

Attorney, Gray, Cary, Ware & Friedenrich (now known as DLA Piper), San Diego, California, 1987 to 1989; Pepperdine Associate General Counsel, 1989 to 1991.

RESEARCH INTERESTS

Animals' legal and moral status, products liability, and torts.

SELECTED PROFESSIONAL AFFILIATIONS

- Member, American Law Institute, 1999 to present.
- Fellow, American Bar Foundation, 2018 to present.
- Member, Executive Committee, Association of American Law Schools Section on Animal Law, 2019 to present.
- Chair, Association of American Law Schools Section on Torts and Compensation Systems, 2006 to 2007 (member, Executive Committee, 2002 to 2007).
- Editorial Board Member, *The Brief* (27,000 subscriber quarterly magazine of the American Bar Association's Tort & Insurance Practice Section), 2001 to 2005.

SCHOLARSHIP CITATIONS

As of September, 2020: approximately 678 scholarly publication citations listed by Google Scholar, including approximately 22 court case citations (two of which are in Supreme Court of the United States cases). H-index: 16; i10-Index: 19.

BOOKS

- DAVID A. FISHER, WILLIAM C. POWERS, JR., RICHARD L. CUPP, JR., MICHAEL D. GREEN & JOSEPH SANDERS, *PRODUCTS LIABILITY CASES & MATERIALS* (5th ed., 2014).

LAW REVIEW AND OTHER SCHOLARLY PUBLICATIONS

- *Considering the Private Animal and Damages*, 98 WASH. U. L. REV. ____ (forthcoming 2021).
- *Edgy Animal Welfare*, 95 DENVER L. REV. 865 (2018).
- *Litigating Nonhuman Animal Legal Personhood*, 50 TEX. TECH. L. REV. 573 (2018).
- *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 68 FL. L. REV. 465 (2017).
- *Animals as More than “Mere Things,” but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm*, 84 CINN. L. REV. 1023 (2016) (solicited article).
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- *Children, Chimps, and Rights Arguments from “Marginal” Cases*, 45 AZ. ST. LAW J. 1 (2013).
- *Seeking Redemption for Torts Law: Review of HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE*, 27 J. OF LAW & RELIGION 185 (2011-12) (solicited essay/book review).
- *In Praise of Moral Judgment: The RESTATEMENT (THIRD) OF TORTS and Flagrant “Bad Guy” Trespassers*, 1 WAKE FOREST L. REV. ONLINE 37 (2011) (solicited essay).
- *International Tobacco Litigation’s Evolution as a United States Torts Law Export: To Canada and Beyond?*, 38 PEPPERDINE L. REV. 283 (2011) (solicited article).

- *Tort Reform or Tort Restriction: Rhetoric as Scorekeeper*, in ANDREW POPPER, MATERIALS ON TORT REFORM (THOMPSON/WEST 2010) (solicited essay).
- *Preemption's Rise (and Bit of a Fall) as Products Liability Reform: Wyeth, Riegel, Altria, and the RESTATEMENT (THIRD)'s Prescription Product Design Defect Standard*, 74 BROOKLYN L. REV. 727 (2009).
- *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27 (2009).
- *Bioethics and the Explosive Rise of Animal Law*, 9 AMERICAN J. OF BIOETHICS 1 (Issue 5, 2009) (solicited essay).
- *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status*, 60 SMU L. REV. 3 (2007).
- *Successor Liability for Defective Products: A Redesign Ongoing*, 72 BROOKLYN L. REV. 1173 (2007) (primary author; coauthored with Christopher J. Frost).
- *Believing in Products Liability: Reflections on Daubert, Doctrinal Evolution, and David Owen's PRODUCTS LIABILITY LAW*, 40 U.C. DAVIS L. REV. 511 (2006).
- *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 PEPP. L. REV. 203 (2003) (solicited article).
- *The Rhetoric of Strict Products Liability versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874 (2002) (primary author; coauthored with cognitive psychologist Danielle Polage).
- *Proximate Cause, the Proposed Basic Principles Restatement, and Products Liability*, 53 SOUTH CAROLINA L. REV. 1085 (2002).
- *Vets in the Doghouse: Are Pet Suits Economically Viable?* 31 THE BRIEF 42 (2002) (coauthored with Amber E. Dean).
- *Product Design Safety and Tort Law: The Impact of Increasing Cohesion in Civil Liability Standards*, 8 INJURY CONTROL & SAFETY PREVENTION 37 (2001).
- *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect Fair Game?*, 27 PEPPERDINE L. REV. 685 (2000) (solicited article).
- *Redesigning Successor Liability*, 1999 UNIVERSITY OF ILLINOIS L. REV. 845.

- *The Continuing Search for Proper Perspective: Whose Reasonableness Should Be at Issue in a Prescription Product Design Defect Analysis?*, 30 SETON HALL L. REV. 233 (1999) (solicited article).
- *Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor*, 7 KANSAS JOURNAL OF LAW & PUBLIC POLICY 113 (1998) (solicited essay).
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- *The "Uncomplicated" Law of Products Liability: Reflections of a Professor Turned Juror*, 91 NORTHWESTERN UNIVERSITY L. REV. 1082 (1997).
- *Defining the Boundaries of "Alternative Design" under the RESTATEMENT (THIRD): The Nature and Role of Substitute Products in Design Defect Analysis*, 63 TENNESSEE L. REV. 329 (1996).
- *Rethinking Conscious Design Liability for Prescription Drugs: The RESTATEMENT (THIRD) Standard versus a Negligence Approach*, 63 GEORGE WASHINGTON L. REV. 76 (1994).
- *Sharing Accountability for Breast Implants: Strict Products Liability and Medical Professionals Engaged in Hybrid Sales/Service Cosmetic Products Transactions*, 21 FLORIDA STATE L. REV. 873 (1994).
- *Comment, Religious Torts: Applying the Consent Doctrine as Definitional Balancing*, 19 U.C. DAVIS L. REV. 949 (1986).

OP-EDS (partial list)

- Law-related op-eds published in *The New York Times*, *The Los Angeles Times* (multiple), *USA TODAY*, *The Philadelphia Inquirer*, *The National Law Journal*, *The Conversation*, *The Indianapolis Star*, *The Oakland Tribune*, *The Sacramento Bee*, and *The L.A. Daily Journal*.

SELECTED PRESENTATIONS

- *Animal Rights Law: For or Against*, Cambridge Centre for Animal Rights Law (July 8th, 2020).
- *Victimhood, Personhood, and a Horse [Re]Named Justice*, Paris Remedies Discussion Forum, Université Paris Dauphine PSL Research University (Paris, France (June, 2019).

- Discussant, The Aspen Institute *Justice and Society Program*, Aspen, Colorado (July 6th-12th, 2018).
- *Edgy Animal Welfare*, University of Denver Sturm College of Law, Denver Law Review symposium, *Uproar, the Intersection of Animals and the Law* (Feb. 9th, 2018).
- *Future Directions for Laboratory Animal Law*, Harvard Law School, panel moderator and member of workshop planning committee; workshop convened by the Roundtable on Science and Welfare in Laboratory Animal Use of the National Academies of Science, Engineering and Medicine's Institute for Laboratory Animal Research, the Animal Law and Policy Program of the Harvard Law School, and the Petrie-Flom Center for Health Law Policy, Biotechnology and Bioethics of the Harvard Law School (Jan. 26th, 2018).
- *The Legal Rights of Animals*, debate on the podcast "Lawyer 2 Lawyer" addressing animal legal personhood, July 7th, 2017, (podcast available at <https://legaltalknetwork.com/podcasts/lawyer-2-lawyer/2017/07/the-legal-rights-of-animals/>).
- *Animal Legal Personhood Update*, "Excellence Beyond Compliance" teleconference for zoological professionals (Nov. 14th, 2017).
- *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, Irish Association of Law Teachers Annual Conference, Waterford, Ireland (Nov. 20th, 2016).
- *Animals as More than "Mere Things," but Still Property, Under an Evolving Animal Welfare Paradigm*, Inaugural Victor E. Schwartz Chair in Torts Lecture (University of Cincinnati School of Law, Cincinnati, Ohio, Oct. 21st, 2015).
- *What Zoologists Need to Know about Animal Legal Personhood*, national teleconference for zoologists hosted by *Excellence Beyond Compliance* (Sept. 7th, 2015).
- *Emotions-Based Damages for Tortious Death of a Companion Animal in California and Beyond*, Ventura County Bar Association Animal Law Section (August 20th, 2015, Ventura, California).
- *Are Some Animals Entitled to Legal Personhood?*, Idaho State Bar Animal Law Section (teleconference to Boise, Idaho, March 9th, 2015).
- *Animal Personhood: A Debate*, sponsored by the Federalist Society (National Press Club, Washington, D.C., Feb. 11th, 2015) (available at <https://www.youtube.com/watch?v=pm6aLlp7b0U>).

- *Medical Research and the Evolving Legal Personhood Battlefield*, Massachusetts Society for Medical Research (Boston, Mass., December 8th, 2014).
- *Animal Legal Personhood: What Neuroscientists Need to Know*, Society for Neuroscience Annual Conference, *Neuroscience 2014* (Washington, D.C., Nov. 15th, 2014).
- *A New Area of Animal Litigation: Animal Personhood*, Ventura County Bar Association Animal Law Section (August 20th, 2014, Ventura, California).
- *Understanding Animal Legal Personhood Issues*, National Association for Biomedical Research Webinar, (Washington, D.C., April 16th, 2014).
- *Live Chat: Should Animals be Granted Legal Rights?*, webcast chat/debate regarding animal legal personhood, sponsored and moderated by the magazine *Science* (Dec. 5th, 2013) (available at <https://www.youtube.com/watch?v=vXE-5rOpEKY>).
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- *Biomedical Research and State Sunshine Laws in the United States*, presentation for Institute of Medicine Forum on Neuroscience and National Academies of Science Committee on Science, Technology, and Law conference entitled *U.S. and European Animal Research Regulations: Impact on Neuroscience Research*, Kavli Royal Society International Centre, United Kingdom (July 26th, 2011).
- *Internationalizing United States Torts Law: Paths and Consequences*, presentation to the faculty of Saint Louis University School of Law (Saint Louis, Missouri, March 30th, 2011).
- *The Evolving Legal Status of Research Animals*, panel presentation at *Neuroscience 2010* (San Diego, California, November 15th, 2010).
- *Animal Rights Versus Contractualist Animal Welfare*, presentation for American Agricultural Law Association annual symposium (Omaha, Nebraska, October 9th, 2010).
- *Tobacco Litigation as Export*, presentation for *Pepperdine Law Review* symposium (Malibu, California, April 16th, 2010).
- *Enhancing Legal Scholarship as a Faculty*, presentation to the faculty of Faulkner Law School (Montgomery, Alabama, September 19th, 2009).

- *Engaging Veterinarians in the Animal Law Debate over Noneconomic Damages for Negligent Death of a Pet*, National Webinar hosted by the American Veterinary Medical Association (February 22nd, 2009).
- *The Restatement (Third)'s Prescription Drug Design Standard and Preemption's Rise*, presentation for *Brooklyn Law Review* symposium, (New York, New York; November 14th, 2008).
- *Scientific Research and the Rise of Animal Law*, presentation to the National Academy of Sciences Committee on Science, Technology and Law (Cape Cod, Massachusetts, October 20th, 2008).
- *Neuroscience Research and the Rise of Animal Law*, presentation to the National Academy of Sciences Committee on Neuroscience (Washington, D.C., October 16th, 2008).
- *Developing as a Legal Scholar*, presentation to the faculty of John Marshall Law School of Atlanta (Atlanta, January 31st, 2007).
- *Noneconomic Damages for Harm to Companion Animals*, presentation to AEI-Brookings Judicial Education Program Symposium on Civil Justice Issues (Washington, D.C.; December 8th, 2006).
- *Animal Ownership: Academia, Industry & Research*, presentation to the Indiana Bar Center (Indianapolis, Indiana; October 27th, 2006).
- *Animal Hospitals and Noneconomic Damages for Harm to Companion Animals*, presentation at the American Animal Hospital Association Board of Directors annual meeting (Denver, Colorado; October 20th, 2006).
- *Animal Law and Scientific Research*, presentation at the National Institutes of Health (Washington, D.C.; May 16th, 2006).
- *Animal Law and Scientific Research*, presentation at the National Association of Biomedical Research's annual meeting (Washington, D.C.; May 15th, 2006).
- *The Daubert Trilogy and Products Liability*, presentation to joint session of the Association of American Law Schools Section on Evidence and Section on Torts and Compensation Systems (Washington, D.C.; January 8th, 2006).
- *Tort and Remedies Issues Relating to Veterinary Malpractice*, presentation to American Veterinary Medical Association Task Force on Legal Remedies (Chicago, Illinois; September 19th, 2005).

- Hank Hannah Memorial Lecture, *Pet Loss Damages & Litigation*, presentation to annual meeting of American Veterinary Medical/Legal Association (Minneapolis, Minnesota; July 17th, 2005).
- *Of Human Suffering and Animal Death: Analyzing the Trend Toward Noneconomic Damages Claims by Humans for Tortious Harm to Companion Animals*, presentation at symposium sponsored by the Animal Health Institute (Washington, D.C.; September 15th, 2004).
- *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, faculty chair and presenter at conference and symposium sponsored by the *Pepperdine Law Review* (Malibu, California; April 5th, 2003).
- *Awarding a Portion of Punitive Damages Judgments to the State: If It Worries Both the Defense Bar and the Plaintiffs' Bar, It Must Be a Good Idea*, presentation at 2000 American Legislative Exchange Council national conference for state legislators (San Diego, California; July 7th, 2000).
- *Product Design Safety and Tort Law: The Impact of Increasing Cohesion in Civil Liability Standards*; 5th World Conference on Injury Prevention & Control (New Delhi, India; March 7th, 2000).
- *Future Trends in Malpractice Liability for Veterinarians*, presentation at the 1999 Wild West Veterinary Conference, a conference of veterinarians from Western states (Reno, Nevada; October 12th, 1999).
- *Cigarette Litigation's Offspring: Assessing Tort Issues Related to Guns, Alcohol, and Other Controversial Products in Light of the Tobacco Wars*, faculty chair and moderator at conference and symposium sponsored by the *Pepperdine Law Review* (Los Angeles, California; March 6th, 1999).
- *Healing Prescription Product Design Liability: Continuing Progress Toward a Middle Ground Cure*, presentation at a *Seton Hall Law Review* symposium entitled *Proving Defect After the RESTATEMENT (THIRD): An Academy/Bench/Bar Dialogue* (Newark, New Jersey; February 12th, 1999).
- *Successor Liability for Defective Products: Some Thoughts on the RESTATEMENT (THIRD)'s Approach*, presentation at University of Kansas conference for judges organized by the Center for Organizational Economics entitled *The RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY: Is it a Defective Product?* (Lawrence, Kansas; June 26th, 1998).
- *Redesigning Successor Liability*, presented as part of the Pepperdine University School of Law's Scholars' Workshops Series (Malibu, California; April 23rd, 1998).

NEWS MEDIA APPEARANCES AND INTERVIEWS

National Television

- Interviews on CBS Evening News; CNN; Fox News Network; MS-NBC; Court TV; Lifetime Television Network, Lifetime News; quoted in many other television news reports.

Radio

- Numerous interviews on national, international, and local radio programs; quoted in many other radio news programs.

Print and Digital Media

- Quoted in numerous national, international, and local newspapers and magazines, and in numerous digital media sources, addressing law-related issues.

SELECTED EXPERIENCE

- Advising many organizations on aspects of animals' legal status, including the National Academy of Sciences Committee on Science, Technology and Law, the National Academy of Sciences Committee on Neuroscience, the American Veterinary Medical Association, the National Association for Biomedical Research, the Animal Health Institute, and the American Animal Hospital Association.
- Co-Author, 2010 Pepperdine University School of Law Self-Study for ABA/AALS Accreditation Process.
- Faculty Chair, *Pepperdine Law Review* 2010 Symposium, *Does the World Still Need Torts Law (Or Did it Ever)?*; Faculty Chair for two other *Pepperdine Law Review* symposia addressing torts issues in 1999 and 2003.
- Coordinator, Pepperdine University School of Law successful preparation for and application for membership in Order of the Coif, 2002 to 2008.
- Rick J. Caruso Research Fellow, 1996 to 1997, 2005 to 2006.

SELECTED AWARDS

- Appointed as John W. Wade Professor of Law in recognition of scholarly excellence, 2004.

- Pepperdine Caruso School of Law Dean's Award for Excellence in Scholarship, 2018.
- 2009 Best Professional Scholarship Award, American Agricultural Law Association (for *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L. Rev. 27 (2009)).

EDUCATION

J.D., University of California, Davis, School of Law, 1987

- Editor-in-Chief, *U.C. Davis Law Review*

B.A., History, Pepperdine University (*magna cum laude*), 1983

ADDITIONAL ACTIVITIES AND AFFILIATIONS

- Member, Board of Directors, Meals on Wheels West, 2009 to 2018.
- Member, State Bar of California (active).
- Admitted to practice, United States Ninth Circuit Court of Appeals.
- Admitted to practice, United States District Court, Southern District of California.
- Adviser, Pepperdine Caruso School of Law Student Animal Legal Defense Fund, 2009 to present.

EXHIBIT D

New York Supreme Court

Appellate Division — First Department

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,
THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HAPPY,

**Appellate
Case No.:
2020-02581**

Petitioner-Appellant,

— against —

JAMES J. BREHENY, in his official capacity as Executive Vice President and
General Director of Zoos and Aquariums of the Wildlife Conservation Society
and Director of the Bronx Zoo and WILDLIFE CONSERVATION SOCIETY,

Respondents-Respondents.

BRIEF FOR *AMICUS CURIAE* RICHARD L. CUPP, JR. IN SUPPORT OF RESPONDENTS-RESPONDENTS

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PRELIMINARY STATEMENT¹

The vitriol with which the Nonhuman Rights Project, Inc. (“NRP”) attacks this court’s unanimous ruling against it issued just three years ago fails to improve the NRP’s unpersuasive arguments. Further, the irony of the NRP inaccurately characterizing recognition that legal personhood rights are intertwined with a norm of legal accountability as an idiosyncratic and specious theory, while demanding that this court initiate a dramatic societal upheaval by designating animals as legal persons, is not subtle.

The NRP’s core arguments have not changed since this court rejected its animal legal personhood argument in *Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73, 78, 80 (1st Dep’t 2017) (“*Lavery II*”), *lv denied*, 31 N.Y.3d 1054 (2018) (emphasizing that chimpanzees do not have the ability to bear legal duties and that the issue of animal legal personhood is “better suited to the legislative process”). Further, the *Lavery II* ruling was not the first nor the most recent unanimous appellate ruling rejecting the NRP’s arguments and recognizing that legal rights² and a norm of capacity to bear legal duties are intertwined. In 2014,

¹ This brief reflects only the author’s scholarship and views; it does not purport to reflect the views of Pepperdine University or any other institution.

² I refer here not to a “soft” interpretation of rights, such as an argument that any legal protections create “rights” regardless of whether the subject is permitted to seek enforcement of them, but rather to the “strong” view holding that something is truly a right only if a being is permitted to assert it as a legal person. Because the NRP demands the much more ambitious “strong” rights of legal personhood, whether an animal could be viewed as having “soft” rights

the State of New York Supreme Court, Appellate Division, Third Judicial Department unanimously rejected the first NRP lawsuit seeking legal personhood for a chimpanzee, noting that “[n]eedless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions.” *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 152 (3d Dep’t 2014), *lv denied*, 26 N.Y.3d 902 (2015) (“*Lavery I*”).

In August 2019, the Appellate Court of Connecticut joined the New York courts by unanimously rejecting legal personhood for an elephant in *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 216 A.3d 839 (Conn. App. Ct. 2019), *mot. recons. en banc denied*, AC 192411 (Conn. App. Ct. 2019), *cert. denied*, 217 A.3d 635 (Conn. 2019) (“*Commerford*”). Like the New York courts in *Lavery I* and *Lavery II*, *Commerford* highlighted the connection between ascription of rights and “imposition of societal obligations and duties.” *Id.* at 845. The NRP’s further appeals led to further unanimous rejections by Connecticut courts. *See Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 197 Conn. App. 353 (2020), *cert. denied*, 335 Conn. 929, 2020 WL 4199821 (July 7, 2020). Despite it being exceptionally relevant and recent case law

with no allowance for being the claimant in a legal action to enforce them is irrelevant to this lawsuit.

from a neighboring jurisdiction, the NRP failed even to acknowledge *Commerford* in its brief, much less rebut the court's ruling.

I have published articles and essays in scholarly journals regarding animals' legal status, and regarding some approaches legislatures and courts should consider to create stronger protections for animals without going so far as granting them legal personhood.³ *Lavery I* and *Commerford* cite law review articles I have published,⁴ and *Lavery II* cites an *amicus curiae* brief I submitted to the court.⁵

This brief focuses on the legal and societal issue of whether concerns regarding

³ See Richard L. Cupp Jr., *Considering the Private Animal and Damages*, WASH U. L. REV. (forthcoming 2021), draft available at <https://ssrn.com/abstract=3555986>; Richard L. Cupp Jr., *Edgy Animal Welfare*, 95 DENV. L. REV. 865 (2018); Richard L. Cupp Jr., *Litigating Nonhuman Animal Legal Personhood*, 50 TEX. TECH. L. REV. 573 (2018); Richard L. Cupp Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 69. FLA. L. REV. 465 (2017); Richard L. Cupp Jr., *Animals as More than "Mere Things," but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm*, 84 U. CIN. L. REV. 1023 (2016); Richard L. Cupp Jr., *Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals*, 33 PACE ENVTL. L. REV. 517 (2016); Richard L. Cupp Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 ARIZ. ST. L. J. 1 (2013); Richard L. Cupp Jr., *Moving beyond Animal Rights: A Legalist/Contractualist Critique*, 46 SAN DIEGO L. REV. 27 (2009); Richard L. Cupp Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones toward Abolishing Animals' Property Status*, 60 SMU. L. REV. 3 (2007). Parts of this brief draw from some of these articles. I have also engaged in several public discussions and debates with Mr. Steven Wise, the NRP's lead attorney; some of these discussions and debates are accessible on the internet. See, e.g., *Lawyer 2 Lawyer: The Legal Rights of Animals*, Legal Talk Network (July 7, 2017), available at <https://legaltalknetwork.com/podcasts/lawyer-2-lawyer/2017/07/the-legal-rights-of-animals/>

⁴ See *Lavery I*, 124 A.D.3d at 151 (referencing Richard L. Cupp Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 ARIZ. ST. L.J. 1, 12–14 (2013). and Richard L. Cupp Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27 69–70 (2009)); *Commerford*, 216 A.3d at 845 (referencing Richard L. Cupp Jr., *Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals*, 33 PACE ENVTL. L. REV. 517, 527 (2016)).

⁵ *Lavery II*, 152 A.D.3d at 78.

animals should focus on human legal responsibility for appropriate animal welfare or on creating legal personhood for animals. New York should continue its laudable evolution toward creating more responsible protections for animals, but the court should reject the unwarranted and societally harmful approach of assigning legal personhood to animals.

POINT I

LEGAL RIGHTS AND A NORM OF LEGAL ACCOUNTABILITY ARE INTERTWINED AS A FOUNDATION OF OUR SOCIETY

In our society, legal personhood rights are intertwined with a norm of legal accountability. 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 function within our society's legal system of rights and responsibilities. Further, no other beings of which we are presently aware living today (even, for example, the most intelligent of all elephants) ever meet that norm. As explained by the prominent philosopher Carl Cohen, “[a]nimals 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.” Carl Cohen & Tom Regan, *The Animal Rights Debate* 30 (2001) (emphasis in original).

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.

Recognizing personhood in our fellow humans regardless of whether they meet the norm is a pairing of like “kind” 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 subject to a legal system such as ours.

Pointing out that elephants possess some sense of choices in their lives is not sufficient; there is no evidence that they, either as a norm or as individuals, demonstrate a *sufficient* level of moral agency to be justly held legally accountable and to possess legal rights under our human legal system. In 2012, when an adult chimpanzee at the Los Angeles Zoo beat a three-month-old baby chimpanzee in the head until the baby died, doubtless no authorities seriously contemplated charging the perpetrator in criminal court.⁶ Surely an elephant committing “murder” would not be prosecuted in our criminal justice system either. Just as legal accountability is not a fit for elephants in our human legal system, legal personhood rights are not a fit for elephants in our human legal system.

⁶ *Adult Chimpanzee Kills Baby Chim in Front of Shocked Los Angeles Zoo Visitors*, CBS NEWS (June 27, 2012), <http://www.cbsnews.com/news/adult-chimpanzee-kills-baby-chimp-in-front-of-shocked-los-angeles-zoo-visitors/>.

As *Commerford* noted, until the NRP began bringing its animal personhood lawsuits, there was little direct authority regarding animal legal personhood. *Commerford*, 216 A.3d at 844. But with the NRP's proliferation of lawsuits, the case law is growing. As addressed above in Part I, the unanimous decisions in *Lavery I*, *Lavery II*, and *Commerford* all emphasize the significance of legal accountability in rejecting legal personhood rights for animals. Recently, a Ninth Circuit judge added that "[p]articipation in society brings rights and corresponding duties" in concurring with a decision rejecting a copyright infringement lawsuit an animal rights group brought ostensibly on behalf of a monkey. *Naruto v. Slater*, 888 F.3d 418, 432 n.6 (9th Cir. 2018) (Smith, J., concurring in part). Seeking legal redress is participating in society. As addressed below, numerous sources evidence support for these rulings.

A. The United States Government, Scholars, and Societal Leaders have recognized that Legal Rights are intertwined with a Norm of Legal Accountability

Noting that legal rights are intertwined with a norm of legal accountability is not idiosyncratic or lacking in support. To the contrary, our national government, scholars, and societal leaders have both directly and indirectly supported this connection that is part of our societal foundation.

1. The United States Government on Rights and Duties

In the years prior to World War II, social Darwinism and the eugenics movement devalued human rights. For example, individuals with cognitive limitations were often sterilized and in other ways mistreated.⁷ After the greatly magnified horrors of World War II, the United States and other nations recognized the need to work together in articulating and protecting fundamental rights for all humans.

In 1948, the United States and other members of the Organization of American States created “the first international human rights instrument of the modern era,” entitled the American Declaration of the Rights and Duties of Man. Claudio M. Grossman, *American Declaration of the Rights and Duties of Man* (1948), in *Max Planck Encyclopedia of Public International Law* (A)(1) (2010). It preceded the Universal Declaration of Human Rights by more than six months. *Id.*

The American Declaration provides a straightforward yet elegant illustration of the United States’ affirmation of the interrelationship between rights and duties. Its preamble reads, in relevant part:

The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are

⁷ See David L. Braddock & Susan L. Parish, *Social Policy Toward Intellectual Disabilities in the Nineteenth and Twentieth Centuries*, in *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* 83, 90–91 (Stanley S. Herr et al. eds., 2003).

interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty. Duties of a juridical nature presuppose others of a moral nature which support them in principle and constitute their basis.

American Declaration of the Rights and Duties of Man, Preamble, (1948),

available at

https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf.

This declaration by the United States and other nations could hardly be clearer in repudiating the NRP's efforts to disconnect accountability from rights. Rights and duties are interrelated in "every" social and political activity. *Id.* Duties are a "prerequisite" for rights. *Id.* Human moral agency is central; legal duties are presupposed by humans' moral duties. Other language in the preamble notes that humans are born free and equal as humans are "endowed by nature with reason and conscience." *Id.*

2. Some Examples of Scholars recognizing that Legal Rights are intertwined with Legal Accountability

Recognizing that legal rights are intertwined with human moral agency and accountability is commonplace. As explained by Christine M. Korsgaard, Harvard University's Arthur Kingsley Porter Professor of Philosophy, "So many philosophers have agreed that it is in virtue of normative self-government that human beings count as persons in the legal and moral sense."

Christine M. Korsgaard, in *Personhood, Animals, and the Law*, THINK 25, 26–27 (2013). Further, Professor Korsgaard references the “common view” that “rights are grounded in some sort of agreement that is reciprocal,” and the social contract’s connection to this broadly held philosophical position. *Id.* at 27.⁸

Another Harvard professor, Kathryn Sikkink, and her coauthor Fernando Berdion Del Valle, affirm that “[A]ll human rights imply duties. For many scholars, this logical relationship is so widely acknowledged that asserting it borders on truism.” Fernando Berdion Del Valle & Kathryn Sikkink, *(Re)discovering Duties: Individual Responsibilities in the Age of Rights*, 26 MINN. J. OF INT’L L. 189, 190 (2017). Further, duties are “[r]ecognized as an important predecessor to rights,” *Id.* at 195, and “the linking of rights and duties is a deeply-rooted principle in the history of human rights—a history that cuts across the traditional boundaries of liberalism, conservatism, and communitarianism.” *Id.* at 197.

Professor Philippa Strum notes that “[I]ndividual responsibility to the community is central to rights and contract theory as articulated in the Western tradition.” Philippa Strum, *Rights, Responsibilities, and the Social Contract*, in *International Rights and Responsibilities for the Future* 29 (Kenneth W. Hunter &

⁸ For further discussion of some of Professor Korsgaard’s views regarding animal rights and the social contract, see *infra* note 9.

Timothy C. Mack, eds., 1996). She adds that “rights and responsibilities have been connected from the inception of the idea of individual rights in Western political thought.” *Id.* at 30–31.

University of Virginia School of Law Professor Margaret Foster Riley writes that “[i]mportantly, it is not that we deny that animals have will; it is that we recognize that they are not able to exercise that will in the context of human moral order. We cannot tell the tiger that it is morally wrong to eat us and expect the tiger to comply.” Margaret Foster Riley, in *CRISPR Creations and Human Rights*, 11 L. & ETHICS OF HUM. RTS. 225, 240–41 (2017). Professor Riley further explains:

Only humans are able to engage in moral abstractions and language that conveys those moral abstractions. That in turn may make it possible for humans to make moral rules and laws that support those moral rules. Those legal aspects allow humans to create political structures that are necessary for us to coexist and thrive in broad social networks. But once those structures are in place, we need something to protect us from the oppressive force of those political structures. Under either a Political conception or a Naturalist conception, that something is human rights. Significantly those human rights exist as both claims and responsibilities within the social networks.

Id. at 240.

Citations of these scholars are merely illustrative of the position upon which many scholars have agreed that the rights and duties of personhood are intertwined.

3. Some Examples of Founders and other Leaders recognizing that Legal Rights are intertwined with Legal Accountability

The Founders as well as other leaders have both directly and indirectly acknowledged the intertwining of rights and accountability throughout American history. For example, in one of the most frequently repeated quotes in American history, President Abraham Lincoln concluded the Gettysburg address by declaring that “government of the people, by the people, and for the people, shall not perish from the earth.” President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), (*available at* <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>). President Lincoln recognized that government of persons, which includes our legal system, is not only a communal enterprise *by* persons, it is specifically *for* persons. Further, a government *of* persons also precludes animals, because no nonhuman animals can meaningfully participate in government, whereas the norm for humans is participation in a system of rights and duties.

Providing a few more examples of the many other writings and statements by governmental and societal leaders reflecting that legal rights are broadly intertwined with legal accountability may be useful:

George Washington:

The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.

George Washington, Farewell Address (Sept. 17, 1796) (*available at* The Avalon Project, Yale Law School, https://avalon.law.yale.edu/18th_century/washing.asp).

Thomas Paine:

A Declaration of rights is, by reciprocity, a Declaration of Duties also. Whatever is my right as a man is also the right of another; and it becomes my duty to guarantee as well as to possess.

Thomas Paine, *The Rights of Man by Thomas Paine Being an Answer to Mr. Burke's Attack on the French Revolution*, Part 12 of 16 (*available at* <https://www.ushistory.org/Paine/rights/c1-021.htm>).

John F. Kennedy:

This Nation is now engaged in a continuing debate about the rights of a portion of its citizens. That will go on, and those rights will expand until the standard first forged by the Nation's founders has been reached, and all Americans enjoy equal opportunity and liberty under law. But this nation was not founded solely on the principle of citizens' rights. Equally important, though too often not discussed, is the citizen's responsibility. For our privileges can be no greater than our obligations. The protection of our rights can endure no longer than the performance of our responsibilities.

John F. Kennedy, Remarks in Nashville at the 90th Anniversary Convocation of Vanderbilt University (May 18, 1963) (*available at* John F. Kennedy Presidential Library and Museum Archives, <https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/vanderbilt-university-19630518>).

William J. Clinton:

We must do what America does best: offer more opportunity to all and demand responsibility from all.

William J. Clinton, First Inaugural Address (Jan. 20, 1993) (*available at* The Avalon Project, Yale Law School, https://avalon.law.yale.edu/20th_century/clinton1.asp).

Barack H. Obama:

We, the people, recognize that we have responsibilities as well as rights; that our destinies are bound together, that a freedom which only asks “what’s in it for me,” a freedom without a commitment to others, a freedom without love or charity or duty or patriotism is unworthy of our founding ideals and those who died in their defense.

Barack Obama, Remarks Accepting the Presidential Nomination at the Democratic National Convention in Charlotte, N.C. in 2 Pub. Papers 1320 (Sept. 6, 2012).

B. Principles of the Social Contract Support Recognizing that Legal Rights are intertwined with a Norm of Legal Accountability

Professor Korsgaard writes that “[t]he traditional distinction between persons and things groups the ability to have rights and the liability to having obligations together. One common view about why that should be so is that rights are grounded in some sort of agreement that is reciprocal: I agree to respect certain claims of yours, provided that you respect certain similar claims of mine. The view of society as based on a kind of social contract supports such a conception of

rights.” Korsgaard, *supra*, at 27.⁹ As noted above, Professor Strum observes that this is a mainstream – even a “central” – understanding: “[I]ndividual responsibility to the community is central to rights and contract theory as articulated in the Western tradition.” Strum, *supra*, at 29.

The NRP and the Brief of *Amicus Curiae* of Philosophers in Support of Petitioner-Appellant (“Animal Rights Philosophers’ Brief”)¹⁰ create a red herring in arguing that the social contract creates only citizens, not persons. As demonstrated in the writings by Professors Korsgaard and Strum quoted above, the principles of the social contract are connected to the question of rights and personhood in the Western tradition. The principles of the social contract reflect that it is the general capacity for normative self-government in the human world that distinguishes humans as legal and moral persons.

⁹ Professor Korsgaard notes that foreigners who are not a party to the social contract are afforded legal rights, but she also acknowledges that reciprocity can be required of foreigners. *Id.* at 27–28. However, she asserts that human rights are based on “not merely . . . the interests protected under some actual social contract,” but also on broader interests. *Id.* at 28. Thus, although she rejects legal personhood for animals based on their intelligence, she supports some form of rights at a broader level for *all* animals capable of suffering. *Id.* at 25–28, 32. In addressing the basis of human rights, she fails to note the strong emphasis on the rights/duties interconnection emphasized, for example, by the American Declaration of the Rights and Duties of Man, addressed above in Part II.A.1. In any event, her proposed approach to enhanced consideration of animals’ interests is far different from what the NRP seeks.

¹⁰ The gathering together of 11 philosophy professors and a graduate student who have “long-standing active interests in our duties to other animals,” Animal Rights Philosophers’ Br. 1, and who support an edgy legal personhood theory, is not a particularly impressive feat. Among the thousands of philosophy professors and students in the United States, a not insignificant number would doubtless support reordering our societal structure to make animals legal persons.

A being must possess sufficient moral agency to be societally accountable to participate in the social contract that created our government, including our legal system. Thus, the social contract reflects the centrality of accountability to our legal system, which articulates and protects legal rights. No animals are capable of participating in the social contract that is our human government, including its legal system. Humans have a norm of such capacity, and those who do not fit the norm are first and foremost defined by their membership in the human community.¹¹

Natural rights' connection to *moral* personhood does not negate the connection between social contract principles and *legal* personhood. The issue before the court is legal personhood under our legal system. Natural rights implicate human moral agency and are related to legal personhood, but legal personhood under our legal system presupposes government and its system of laws, which our society recognizes as being created by our social contract.

Further, John Locke's writings on natural rights emphasize the obligations or duties that go along with liberties. In his *Second Treatise of Government*, a book that was of particular importance to our nation's founders, Locke writes that humans' natural state is to be free. However, he adds: "But though this be a state of liberty, yet it is not a state of license . . . The state of

¹¹ See *infra*, Part II.C.

nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.” John Locke, Second Treatise of Government Ch. 2, Sec. 6 (1690). In other words, even under the state of nature, freedom is intertwined with obligations – the law of nature “obliges every one.” Id. Human moral accountability, the social contract, and legal personhood under our legal system are interrelated.

The Animal Rights Philosophers’ Brief asserts that “[e]lephants have advanced analytic abilities akin to human beings,” and that they “possess the requisite characteristics” to enter into social contracts as persons. Animal Rights Philosophers’ Br. 15. This argument is quite noteworthy. It illustrates the vast divide between some academic philosophers and our pragmatic legal system. Elephants of course do not have the requisite abilities to enter into our human society’s social contract. Suggesting that any elephants could perform civic duties, vote or be justly subject to criminal or civil liability for wrongdoing under our human laws would be absurd.

Not surprisingly, Locke distinguishes animals from the human community. Humans are equal by nature as members of “the same species and rank,” and “born to all the same advantages of nature, and the use of the same

faculties.” Locke at Sec. 4. Humans share “all in one community of nature,” which Locke distinguishes from “the inferior ranks of creatures.” Id. at Sec. 6.

The NRP’s critique of addressing our social contract as involving an exchange related to societally imposed responsibilities and individual rights owed by society is also misguided. A contract, including the social contract, obviously reflects that the general capacity to make an exchange is required. Broadly, in the social contract humans gain *legal* rights protections under our legal system, through the creation of government and our system of laws, but they also accept limitations on liberties, and they accept legal accountability. As explained in *Commerford*, quoting both Locke and the Connecticut Supreme Court,

“Our Supreme Court has noted that “[t]he social compact theory posits that all individuals are born with certain natural rights and that people, in freely consenting to be governed, enter a social compact with their government by virtue of which they relinquish certain individual liberties in exchange ‘for the mutual preservation of their lives, liberties, and estates.’ J. Locke, ‘Two Treatises of Government,’ book II (Hafner Library of Classics Ed. 1961) ¶ 123, p. 184; see also 1 Z. Swift, *A System of the Laws of the State of Connecticut* (1795) pp. 12–13.”

216 A.3d at 845 (quoting *Moore v. Ganim*, 660 A.2d 742, 762–63 (Conn. 1995)).

C. The Legal Personhood of Children and Humans with Cognitive Limitations is Anchored in their Membership in the Human Community

The personhood of humans lacking capacity to bear legal and moral obligations, such as children and those with significant cognitive limitations, is anchored in the responsible community of humans. Humans' personhood is not

based on an individual analysis of intellect, but rather on being part of the human community¹² where moral agency sufficient to accept our laws' duties as well as their rights is the norm.

Justice Fahey's concurrence in *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 31 N.Y.3d 1054 (2018) misreads *Lavery II* as "based on nothing more than the premise that a chimpanzee is not a member of the human species." *Id.* at 1057 (Fahey, J., concurring).¹³ Although *Lavery II* sets forth multiple reasons for its ruling, Justice Fahey seems to be referencing *Lavery II*'s statement that

Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community.

Lavery II, 152 A.D.3d at 78.

¹² 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 noncitizens as they interact with our society in addition to recognizing that they have some rights as they interact with our society. Corporate personhood is also anchored in humanity, as courts view corporations as proxies for their human owners.

¹³ Although Justice Fahey voiced questions and concerns about intelligent animals' appropriate legal status, his concurrence refrained from concluding that the NRP's animal legal personhood theory should be adopted. He began his concurrence with "The inadequacy of the law as a vehicle to address some of our most difficult ethical dilemmas is on display in this matter," *id.* at 1055, and he concluded his concurrence with "While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing." *Id.* at 1059. I would readily agree that a chimpanzee is not *merely* a thing; it is not a legal person, but it is a highly intelligent animal that requires our legal system's thoughtful consideration in creating and enforcing animal welfare laws mandating appropriate human responsibility.

Justice Fahey’s concurrence misses the significance of *Lavery II*’s emphasis on humans with cognitive limitations being part of the human *community*, and the fact that being human has significance because of the unique attributes of humans.

Focusing on the human community in limiting legal personhood is rational rather than arbitrary. The most significant identifying characteristic of all humans is their humanity, not their abilities. Humans with cognitive limitations are deeply connected to the human community or society in ways that animals can never be connected to human society.¹⁴ Professor Carl Cohen has explained that “[p]ersons who, because of some disability, are unable to perform the full moral functions natural to human beings are not for that reason ejected from the human community.” Cohen & Regan, *supra*, at 37; *see also, e.g.*, Timothy Chappell, *On the Very Idea of Criteria for Personhood*, 49 S. J. OF PHIL. 1 (2011) (challenging the argument that criterial properties should define personhood and defending humanity as the basis for defining personhood).

Humans are the only beings of whom we are aware who, as a norm, possess sufficient moral agency to be held accountable under our legal system. Not

¹⁴ I address this in much more detail, and provide a short history of courts’ present focus on the humanity of humans with cognitive impairments rather than their intellectual abilities in assigning legal rights and personhood, in Richard L. Cupp Jr., *Cognitively Impaired*, *supra* note 3, at 487–513.

only is such agency not the norm among animals, it is never present among animals. Personhood in the human legal system is related to humans' distinctive moral agency, and humans with cognitive limitations are first and foremost humans even when they do not as individuals fit this norm.

Humans with normal moral agency have unique natural bonds with other humans who have cognitive limitations, and thus denying rights to those with cognitive limitations also harms the interests of society. Infants' primary identities are as humans, and adults with severe cognitive impairments' primary identities are as humans who are also other humans' parents, siblings, children or spouses. Further, we all know that we could develop cognitive impairments ourselves at some point in our lives.

The history of legal rights for children and for cognitively impaired humans is a history of emphasis on their humanity. *See, e.g.*, Richard Evans Farson, *Birthrights: A Bill of Rights for Children* 1 (Penguin Books 1978) (1974) (asserting that denying rights to children denies “their right to full humanity”); Harold Hongju Koh & Lawrence O. Gostin, *Introduction: The Human Rights Imperative*, in *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* 1 (Stanley S. Herr et al. eds., 2003) (noting that “[s]ince the Second World War, international human rights have been defined as embracing those universally recognized inalienable rights to whose enjoyment all persons are

entitled solely by virtue of being born human,” and that this includes individuals with disabilities). *Lavery I* is in accord with *Lavery II* regarding this, stating that “[t]o be sure, 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.” *Lavery I*, 124 A.D.3d at 152 n.3.

POINT II

HOHFELDIAN ANALYSIS OF RIGHTS AND DUTIES DOES NOT SUPPORT INVENTING ANIMAL LEGAL PERSONHOOD

The NRP is incorrect in asserting that Professor Wesley Hohfeld’s writings about the form of rights and duties between persons support the NRP’s demand for creation of elephant legal personhood. Perhaps the most basic problem with the NRP’s argument is that this court is addressing a question that must precede the 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*.¹⁵ This case revolves around a more foundational question: whether this court should create personhood for an elephant. The appropriate boundaries of personhood cannot be answered by Hohfeldian analysis. As acknowledged by professor

¹⁵ 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).

Thomas Kelch, “[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).

Similarly, Professor Arthur Corbin warned against developing “the erroneous impression that [Hohfeld]’s analysis was offered as a method of determining social and legal policy—not only for the purpose of distinguishing between a right and a privilege, between a right and a power or an immunity, but also as a method of determining whether any of these jural relations existed or should exist. An understanding of the distinction has no bearing on whether either a right or a privilege exists.” Arthur L. Corbin, *Forward* to Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* xi (Yale Univ. Press 1964) (1919).¹⁶

¹⁶ Seeking to justify animal legal personhood based on interpretations of the academic “will theory” or the academic “interest theory” of rights, as suggested in Professor Tribe’s *amicus curiae* brief, is also unhelpful. Philosophers and other scholars have squabbled over whether one of these theories provides a better accounting of the function of rights than the other “literally for ages.” *The Function of Rights: The Will Theory and the Interest Theory* 2.2.2, Stanford Encyclopedia of Philosophy (Feb. 24, 2020), available at <http://plato.stanford.edu/entries/rights/#2.2>. Both academic theories are challenged regarding practical application. For example, after pointing out criticisms of the will theory, the *Stanford Encyclopedia of Philosophy* notes that “the interest theory is also misaligned with any ordinary understanding of rights.” *Id.* Further, Professor Joseph Raz, a prominent philosopher who is an

POINT III

THE NRP’S LEGAL THEORY SEEKS BROAD SOCIETAL UPHEAVAL RATHER THAN A CHANGE FOR ONE ELEPHANT, AND THERE IS NO CLEAR (OR EVEN FUZZY) LINE REGARDING HOW FAR ANIMAL LEGAL PERSONHOOD MIGHT EXTEND

The NRP has stated that a goal of these lawsuits is to break through the legal wall between humans and animals.¹⁷ But we have no idea how far things might go if this wall is breached. One might suspect that many advocates would push for things to go quite far.

Courts are appropriately thoughtful about the practical consequences of their decisions. One practical consequence that should be expected if the legal wall between animals and humans is breached is the opening of a floodgate 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. The implications of this lawsuit are not, in any way, limited to only the smartest animals.

interest theory proponent, has noted that “[t]he definition of rights itself does not settle the issue of who is capable of having rights beyond requiring that rights-holders are creatures who have interests. What other features qualify a creature to be a potential right-holder is a question bound up with substantive moral issues.” J. Raz, in *On the Nature of Rights*, 93 MIND 194, 204 (1984).

¹⁷ “Our goal is, very simply, to breach the legal wall that separates all humans from all nonhuman animals.” Michael Mountain, *Lawsuit Filed Today on Behalf of Chimpanzees Seeking Legal Personhood*, NONHUMAN RIGHTS PROJECT (Dec. 2, 2013), available at <http://www.nonhumanrightsproject.org/2013/12/02/lawsuit-filed-today-on-behalf-of-chimpanzee-seeking-legal-personhood/> [<https://perma.cc/6BDE-85B8>].

How many species get legal personhood based on intelligence is just the start. Breaching the wall separating humans and animals would serve as a stepping stone for many who advocate for granting legal personhood to *all* animals capable of suffering. The intelligent animal personhood approach is more pragmatic in the short term, because the immediate practical consequences of granting legal standing to all animals capable of suffering could be immensely disruptive for society.

As a society we have almost no economic reliance on elephants, there are relatively few of them in captivity compared with many other animals, and we can recognize that they are particularly intelligent and closer to humans than are other animals. Thus, it is perhaps tempting to some to believe that granting personhood to elephants would be a limited and manageable change. But 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. NYU School of Law Professor Richard Epstein has recognized the slipperiness of this slope, pointing out that “[u]nless an animal has some sense of self, [it] cannot hunt, and [it] cannot either defend [itself] 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.” Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, in *Animal Rights: Current Debates and New Directions* 154 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

The *Commerford* court was astute in recognizing that “[t]his case . . . is more than what the petitioner purports it to be,” and that ruling for the NRP would “upend this state's legal system.” 216 A.3d at 844.

POINT IV

ANIMAL LEGAL PERSONHOOD AS PROPOSED IN THE NRP’S LAWSUIT WOULD ENDANGER THE MOST VULNERABLE HUMANS

Perhaps the most troubling aspect of creating animal legal personhood based on animals’ intellectual capacities is its danger to the most vulnerable humans—humans who possess weak intellectual capacities. As a disability scholar explains, “By comparing ‘marginal’ humans to animals, the AMC [‘argument from marginal cases’—the term philosophers often use for the argument that if rights are granted to humans with lower cognitive capacities than some animals, justice requires granting rights to the more intelligent animals as well] may unwittingly dehumanize people with cognitive disabilities and be yet another way our society justifies maltreatment of its most vulnerable members.” Gerald V. O’Brien, *People*

with Cognitive Disabilities: The Argument from Marginal Cases and Social Work Ethics, 48 SOC. WORK 331, 331 (2003).¹⁸

Going down the path of connecting individual cognitive abilities to personhood would encourage courts and society to think increasingly about individual cognitive ability when thinking about personhood. Deciding elephants are legal persons based on their cognitive abilities would open a door that, over time, swings in both directions regarding rights for humans as well as for animals, and future generations would likely wish we had kept it closed.

CONCLUSION

When addressing animal legal personhood, the proper question is not whether our laws regarding animals should evolve or remain stagnant. Our laws protecting animals need to continue evolving as our sensibilities and knowledge regarding animals evolves.¹⁹ Rigid opposition to reform is unacceptable, but the radical approach of creating animal legal personhood is also unacceptable.

¹⁸ The NRP's embraces such comparisons in emphasizing Justice Fahey's statement that even if animals cannot bear duties, courts recognize rights for infants and comatose human adults who also cannot bear duties. Brief for Petitioner-Appellant, p. 38. As addressed above, on this issue Justice Fahey misses the significance of *Lavery II*'s emphasis on humans with cognitive limitations being part of the human community.

¹⁹ I address this at greater length in Richard L. Cupp Jr., *Animals as More than "Mere Things," but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm*, 84 CIN. L. REV. 1023 (2016) (asserting that society is appropriately demanding evolution of the animal welfare paradigm to provide greater protections for animals).

As a centrist alternative to these extremes, our legal system should embrace thoughtful continuing evolution of our animal welfare paradigm, which is focused on human responsibilities regarding our treatment of animals, and it should reject creating a dangerous new paradigm of animal legal personhood.

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