NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CLPR for a Writ of Habeas Corpus **Index No. 162385/15**

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

Petitioner-Appellant,
v.

PATRICK C. LAVERY, individually and as an officer of Circle L. Trailer Sales, Inc., DIANE L. LAVERY, and CIRCLE L. TRAILER SALES, INC.

Respondents-Respondents

LETTER-BRIEF OF AMICUS CURIAE RICHARD L. CUPP JR.[1] IN OPPOSITION TO PETITIONER-APPELLANT'S APPEAL OF DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS AND ORDER TO SHOW CAUSE

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I. PRELIMINARY STATEMENT

In December, 2015 the Supreme Court of the State of New York, County of New York, denied the motion of Petitioner-Appellant Nonhuman Rights Project Inc. (hereafter "NhRP") for an Order to Show Cause and Writ of Habeas Corpus. This Letter-Brief argues that the New York Supreme Court, Appellate Division, First Department, should deny the NhRP's appeal of that ruling.

In appropriately declining to sign the NhRP's proposed order to show cause, the trial court wrote: "Declined, to the extent that the courts in the Third Dept. determined the legality of Tommy's detention, an issue best addressed there, & absent any allegation or ground that is sufficiently distinct from those set forth in the first petition (CPLR 70039b)[)]."

The Appellant Division, Third Department ruled against the NhRP's petition for a writ of habeas corpus for a chimpanzee in a unanimous opinion in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014), *leave to appeal denied*, 26 N.Y.3d 902 (2015). The NhRP asserts that *Lavery* "relied almost exclusively" on two law review articles that I authored. Appellate Brief at 50.

I have published several scholarly articles related to nonhuman animal legal personhood.[2] My two articles cited by *Lavery* are *Children, Chimps, and Rights Arguments from "Marginal" Cases*, 45 AZ. ST. L. J. 1 (2013) and *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27 (2009). *See Lavery*, 124 A.D.3d at 151. Much of this amicus curiae Letter-Brief is excerpted from two more recent articles: *Cognitively Impaired Adults, Intelligent Animals, and Legal Personhood*, 68 FLA. L. REV. __ (forthcoming, 2017, available at http://ssrn.com/abstract=2775288); and *Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals*, 33 PACE ENVTL. L. REV. 517 (2016).

II. THE NHRP ASSERTED CHIMPANZEES' ABILITY TO BEAR DUTIES AND RESPONSIBILITIES IN THEIR EARLIER *TOMMY* LAWSUIT THAT WAS REJECTED

The NhRP argues that "the Second Tommy petition presented substantial new grounds not previously presented and determined in response to *Lavery*."

[2] Richard L. Cupp Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 68 FLA. L. REV. __ (forthcoming, 2017, available at http://ssrn.com/abstract=2775288); 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., *Human Responsibility, Not Legal Personhood, for Nonhuman Animals*, 16 ENGAGE Iss. 2 (2015); Richard L. Cupp Jr., *Children, Chimps, and Rights Arguments from "Marginal" Cases*, 45 AZ. ST. L. J. 1 (2013); Richard L. Cupp Jr., *Moving Beyond Animal Rights: A Legal/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).

Appellant's Brief, p. 29. The alleged "new grounds" are affidavits "demonstrat[ing] that chimpanzees routinely bear duties and responsibilities and therefore can be 'persons' even under the erroneous *Lavery* holding." *Id.* However, this is not a new issue in the litigation. The NhRP asserted in its first brief in the original Tommy Fulton County lawsuit filed in 2013 that chimpanzees possess moral agency, and it cited expert affidavits in support of this assertion. The brief stated:

> Chimpanzees appear to have moral inclinations and some level of moral agency; they behave in ways that, if we saw the same thing in humans, we would interpret as a reflection of moral imperatives (McGrew Aff. at ¶26). They ostracize individuals who violate social norms (McGrew Aff. at ¶26). They respond negatively to inequitable situations, e.g. when offered lower rewards than companions receiving higher ones, for the same task (McGrew Aff. at ¶26). When given a chance to play economic games, such as the Ultimatum Game, they spontaneously make fair offers, even when not obliged to do so (McGrew Aff. at ¶26).

Petitioner's Memorandum of Law in Support of Motion for Order to Show Cause & Writ of Habeas Corpus Granting the Immediate Release of Tommy, Nonhuman Rights Project Inc. v. Lavery, State of New York, Supreme Court County of Fulton, Dec. 2nd, 2013, at page 32 (available at http://www.nonhumanrightsproject.org/wp-content/uploads/2013/12/Memorandum-of-Law-Tommy-Case.pdf

The brief also asserted:

> The evidence that chimpanzees and humans share the capacity for "autonomy" is strong (King Aff. at ¶¶ 11; Osvath Aff. at ¶ 11). Autonomous behavior demonstrates that a choice was made; it was not based on reflexes, innate behaviors, or any conventional categories of learning, or concept formation (King Aff. at ¶¶ 3-4).

Id. at page 9.

Essentially, the new affidavits submitted by the NhRP following the *Lavery* decision simply repeat and provide more details on issues that the NhRP previously raised in its original *Tommy* lawsuit that was dismissed.

III. THE NHRP'S BRIEF FAILS TO RECOGNIZE THE DISTINCTIVE NATURE OF HUMANS' AND THEIR PROXIES' CAPACITY TO BEAR LEGAL DUTIES

The NhRP's efforts to utilize additions to previous expert affidavits and some new expert affidavits to strengthen the argument already made in the original *Tommy* lawsuit that chimpanzees have some sense of moral responsibility in their relationships is the most notable distinction between the original *Tommy* lawsuit and the present *Tommy* lawsuit. This is in response to the *Lavery* court's unanimous decision recognizing that chimpanzees are not persons in our legal system because they are not capable of bearing legal duties. *Lavery*, 124 A.D.3d at 152.

The *Lavery* court's focus was on *legal* accountability, not on whether chimpanzees have *some* sense of accountability. ("Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal

responsibilities or be held legally accountable for their actions"). *Id.* Whether chimpanzees could be described as having *some* capacity for moral responsibility in their relationships is quite obviously not the pertinent question regarding legal personhood under our human legal system. Common sense suggest that ants, whose ability to work together for the greater good of their colony is observable even by non-experts, could probably be described as having something like a sense of responsibility toward the other ants in their colony or to the colony as a whole. Across many species of animals, mothers and, among some species, fathers demonstrate characteristics that probably could be described in terms of a sense of responsibility for their young offspring. Absent this capacity for responsibility in a parent, in many species the young would die. Perhaps any type of mature animal that lives cooperatively in some kind of family or group normally has something like a sense of responsibility to the other animals in the family or group.

But of course we do not assign legal duties to ants or to any other nonhuman animals. The pertinent question is not whether chimpanzees possess anything that could be characterized as a sense of responsibility, but rather whether they possess a *sufficient* level of moral agency to be justly held legally accountable as well as to possess legal rights under our human legal system. When, in 2012, 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.[3] Similarly, when, in 2009, a chimpanzee attacked a woman in a manner that police described as "unprovoked" and as "brutal and lengthy," causing severe, life-threatening injuries, doubtless no authorities seriously considered bringing criminal battery charges against the chimpanzee.[4]

According to the NhRP website, NhRP President Steven Wise has a poster at his home office that reads "[w]e may be the only lawyers on earth whose clients are always innocent."[5] This makes the point. As confirmed by the unanimous *Lavery* decision, our legal system appropriately does not view chimpanzees as possessing sufficient moral agency to be accountable under our human legal system. *Lavery*, 124 A.D.3d at 152. A typical prosecutor in the United States would not even entertain the idea of seeking to impose legal responsibilities on chimpanzees based on the concept of moral responsibility.[6] Whether chimpanzees

[3] *Adult Chimpanzee Kills Baby Chimp 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/ [https://perma.cc/AK4E-Z3GS].
[4] Stephanie Gallman, *Chimp Attack 911 Call: 'He's Ripping Her Apart'*, CNN (Feb. 18, 2009), http://www.cnn.com/2009/US/02/17/chimpanzee.attack/index.html?iref=24hours [https://perma.cc/SS3H-MQTJ].
[5] Michael Mountain, *At Sundance, A Triumph for "Unlocking the Cage"*, NONHUMAN RIGHTS PROJECT (Jan. 29, 2016), http://www.nonhumanrightsproject.org/2016/01/29/at-sundance-a-triumph-for-unlocking-the-cage/ [https://perma.cc/QY9S-ZAJE].
[6] Authorities restrain, confine, or even kill chimpanzees and other animals if they are a threat to humans or to other animals (whether ever killing a violent chimpanzee is ever appropriate is highly questionable, other than in a situation involving an imminent and very serious threat where no other options are available). This is based on a perceived need to protect humans, animals, or property, rather than based on a conclusion that the animal is morally blameworthy.

possess *some* degree of a quality that could be described as moral responsibility is irrelevant; they can only interact with our society in a manner that suggests they should be legal persons with rights and duties if they have sufficient moral agency to be generally held accountable under our laws.

The NhRP's brief argues that "[t]he two Cupp articles merely set forth one professor's personal preference for a narrow philosophical contractualism that arbitrarily excludes every nonhuman animal, while including every human being, in support of which he cites no cases." Appellant's Brief at 54. An amicus brief filed opposing the appeal of the original *Lavery* case responded to a similar assertion by the NhRP that practically no philosophers have supported "rights for being human" by noting "the vast western philosophical canons to the contrary."[7]

But at an even more fundamental level, the NhRP's brief is incorrect in seeking to pigeonhole the connections between rights and duties that are at the foundation of our society and our legal system narrowly into any "branch" of an abstract academic philosophical theory, with the apparent implication that the connections should be accepted or rejected based on whatever views are currently fashionable among academic philosophers. Noting that courts do not feel bound by

[7] Brief of Amicus Curiae Bob Kohn Against Issuance of Writ of Habeas Corpus at 17, Nonhuman Rights Project, Inc. v. Lavery, No. 518336/2014, (N.Y. App. Div. 2014), http://www.nonhumanrightsproject.org/wp-content/uploads/2014/06/16.-Brief-of-amicus-curiae-Bob-Kohn-against-issuance-of-writ-of-habeas-corpus.pdf [https://perma.cc/Y4SQ-Z6NQ].

strict adherence to the formal confines of competing academic philosophical theories would be quite an understatement. Philosophical theories may be useful to courts in some endeavors, such as understanding or explaining the foundations of a society, but abstract theoretical philosophy is merely a tool at best. Courts seek justice and are influenced by a multitude of factors, rather than deferring to the shifting sands of current majority, minority, and majority and minority branch positions among theoretical academic philosophers, most of whom have no legal training or experience.

Similarly, the observations and analyses in my law review articles regarding our society and legal system broadly connecting the concepts of rights and duties since our foundation as a nation are not a call for judicial endorsement of any formal academic philosophical theories—or their branches—in all of their particulars. Focusing legal personhood on humans and their proxies is not arbitrary, but rather a recognition that requiring legal accountability to each other as the norm in a community of humans is at the core of our human society and its legal system. John Locke's contractualist assertions were appropriately important to our nation's founders, and thus are important to understanding the foundations and core of our society.[8] But our founders viewed Locke's ideas as a useful tool for

[8] *See, e.g.*, Eric G. Luna, *Sovereignty and Suspicion*, 48 DUKE L. J. 757, 859 (1999) ("Locke's writings were a primary authority for the Colonists, and his social contract furnished the political theory for both the American Revolution and the framing of the Constitution.").

explaining the foundations of a democratic society rather than treating contractualism – much less any of its branches – as a formal academic philosophical theory that must be embraced in all of its particulars as set forth by scholars.

The history of rights expansion in our society has been a history of focusing on the humanity of those who were previously denied rights. As stated in Article I of the United Nation's Declaration of Human Rights adopted after the atrocities of World War II, "All humans are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward each other in a spirit of brotherhood."[9] Even the rights evolution of humans with limited autonomy, such as children and individuals with significant cognitive impairments,[10] has appropriately focused on those individuals' belonging in the human community as the basis for granting them rights.[11]

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[9] United Nations, Universal Declaration of Human Rights, Art. I, Dec. 10th, 1948 (available at http://www.un.org/en/universal-declaration-human-rights/). Regarding our legal system's eventual recognition of slaves as full humans deserving of rights, the famed primatologist Frans de Waal wrote: "rights are part of a social contract that makes no sense without responsibilities. This is the reason that the animal rights movement's outrageous parallel with the abolition of slavery -- apart from being insulting -- is morally flawed: slaves can and should become full members of society; animals cannot and will not." Frans B.M. de Waal, *We the People: And Other Animals . . .*, NY TIMES, Aug. 20th, 1999 (available at http://www.emory.edu/LIVING_LINKS/OurInnerApe/pdfs/WePeople.html).

[10] This Letter-Brief will use the term "cognitive impairments" to refer to all human cognitive limitations, including those related to childhood and intellectual disabilities, as well as being comatose or being impaired due to an injury, illness, or medical condition.

[11] The children's rights movement's focus on children's humanity is addressed in is more fully addressed in Richard L. Cupp, *Children, Chimps, and Rights Arguments from "Marginal" Cases*, 45 AZ. ST. L. J. 1, 10-17 (2013). The rights movement for individuals with significant

While there may be no case law prior to *Lavery* expressly rejecting habeas corpus for animals because no reported lawsuits had previously made such a radical assertion, courts have readily rejected analogous claims. For example, when a lawsuit was brought seeking application of the Thirteenth Amendment to the Constitution of the United States to orcas held in captivity, a district court dismissed the lawsuit in a short opinion because the Thirteenth Amendment "applies to persons, and not to non-persons such as orcas." Tilikum ex rel. PETA, Inc. v. Sea World Parks & Entm't Inc., 842 F. Supp.2d 1259, 1263 (S.D. Cal. 2012).

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

As explained by the 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). 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

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cognitive impairments' focus on those individuals' humanity as the basis of their rights is addressed in Richard L. Cupp Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 68 FLA. L. REV. __ (*forthcoming*, 2017, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2775288). Although our society's history entails denying rights to some humans, it has never extended rights beyond humans and their proxies.

duties and bearing rights are foundations of our legal system because they are foundations of our entire form of government.

We stand together with the ideal of a social compact – one might call it a moral community – to uphold all of our rights, including our inalienable rights.[12] As stated in the Declaration of Independence, "to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). One would be hard-pressed to convince most Americans that this is not important, as from childhood Americans learn it as a bedrock of our social structure. It is not surprising that the American Bar Association's section addressing civil liberties was until 2015 called "The Section of Individual Rights and Responsibilities."[13]

This does not require viewing every specific protection of a right as corresponding to a specific duty imposed on an individual. The connection

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

[13] *See Proposal to Amend §10.1(a) of the ABA Constitution and Bylaws to reflect the name change of the Section of Individual Rights and Responsibilities to the Section of Civil Rights and Social Justice,* Aug. 3-4, 2015 (explaining that the name was being changed from the Section of Individual Rights and Responsibilities to the Section of Civil Rights and Social Justice because "[t]he Section's activities have always been grounded in Constitutional rights and principles, but have expanded beyond that," leading to confusion regarding the section's focus), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2015_hod_annual_meeting_11-2.docx.

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

It misses the point to argue, as the NhRP seems to do (Appellant's Brief, pp. 57-58), that personhood is unrelated to duties because bodily liberty is an immunity right that does not require capacity. First, as explained above, this is too narrow a conceptualization of connections between rights and duties: although rights and duties are broadly connected in the foundations of our society, not every specific right needs to correlate with a specific duty. Further, whether bodily liberty requires capacity and hence duties does not control the question of personhood, since the personhood of humans lacking capacity, such as those with significant cognitive limitations, is anchored in the responsible community of humans, even if they cannot make responsible choices themselves.

Humans' personhood is not based on an individual analysis of intellect, but rather on being part of the human community where moral agency sufficient to accept our laws' duties as well as their rights is the norm. The NhRP's argument

does not avoid the problem that a chimpanzee, although an impressive being we need to treat with exceptional thoughtfulness, should not be considered a *person* within our intrinsically human legal system, whereas humans – including humans with significant cognitive limitations – should be recognized as persons.

Professor Wesley Hohfeld wrote about the form of rights and duties between persons in the early twentieth century, and the NhRP's Appellate Brief seeks to invoke his analysis to argue for chimpanzee legal personhood. Appellate Brief, pp. 56-57. Perhaps the most basic problem with the NhRP's argument is that we are dealing with 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*.[14] This case's issue revolves around who is a member of society eligible for those rights and protections; in other words, who is a person. This is a foundational question that is not answered by Hohfeldian analysis.[15]

[14] 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).

[15] "[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).

It is sometimes asserted that since we give corporations personhood, justice requires that we should give personhood to intelligent animals. However, this argument ignores that corporations and other entities granted personhood in the United States are created by humans as a proxy for the rights and duties of their human stakeholders.[16] They are simply a vehicle for addressing *human* interests and obligations.

The Appellant's Brief argues that "if humans bereft even of sentience are entitled to personhood, then this Court must either recognize Tommy's just equality claim to bodily liberty or reject equality." Appellant Brief, p. 49. Although not described as such in the Appellant's Brief, reasoning along these lines is often referred to by philosophers as "the argument from marginal cases." *See* Richard L. Cupp Jr., *Children, Chimps, and Rights Arguments from "Marginal" Cases*, 45 AZ. ST. LAW J. 1, 22-28 (2013). The concept of an "argument from marginal cases" has an unsettling tone, because most of us do not want to think of *any* humans as being "marginal." The pervasive view that *all* humans have distinctive and intrinsic human dignity regardless of their capabilities may have cultural, religious, or even instinctual foundations.

[16] This is addressed in more depth in Richard L. Cupp Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 52-63 (2009) (analyzing the history of corporate personhood being consistently defined as a proxy for human interests under all major theories seeking to explain corporate personhood).

All of these foundations would on their own present enormous challenges for animal legal personhood arguments to overcome in the real world of law, but they are not the only reasons to reject the arguments. Humans with significant cognitive impairments are a part of society's community, even if their own agency is limited or nonexistent. Among the beings of which we are presently aware, humans are the only ones for whom the norm is capacity for moral agency sufficiently strong to function within our society's legal system of rights and responsibilities. Further, it may be added that no other beings of whom we are presently aware living today (even, for example, the most intelligent of all chimpanzees) *ever* meet that norm. Recognizing personhood in our fellow humans regardless of whether they meet the norm is a pairing of like "kind" 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.

Morally autonomous humans have unique natural bonds with other humans who have cognitive impairments, and thus denying rights to them also harms the interests of society—we are all in a community together. Infants' primary identities are as humans, and adults with severe cognitive impairments' primary identities are as humans who are other humans' parents, siblings, children or spouses.

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

Thus, recognizing that personhood is anchored in the human moral world does not imply that humans with significant cognitive impairments are not persons or have no rights. As explained by Professor Cohen, "[t]his criticism . . . mistakenly treats the essentially moral feature of humanity as though it were a screen for sorting humans, which it most certainly is not."[17] It would be a serious misperception to view the *Lavery* decision as actually threatening to infants and others with severe cognitive impairments in finding connections between rights and duties. This misperception would reflect an overly narrow view of how rights and duties are connected.

Regarding personhood, they are connected with human society as a whole, rather than on an individual-by-individual capacities analysis.[18] Again, appropriate legal personhood is anchored in the human moral community, and we include humans with severe cognitive impairments in that community because they are

[17] COHEN & REGAN, *supra* note 35, at 37.
[18] Of course, individual capacities are relevant to some specific rights (for example, the right to vote). They are not relevant to humans' personhood.

first and foremost humans living in our society.[19] Indeed, as noted above, the history of legal rights for children and for cognitively impaired humans is a history of emphasis on their humanity. *See, e.g.*, RICHARD FARSON, BIRTHRIGHTS: A BILL OF RIGHTS FOR CHILDREN 1 (1978) (asserting that denying rights to children denies "their right to full humanity"). The *Lavery* court noted 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*, 124 A.D.3d at 152 n.3.

V. ANIMAL LEGAL PERSONHOOD AS PROPOSED IN THE *TOMMY* LAWSUIT WOULD POSE THREATS TO THE MOST VULNERABLE HUMANS

A danger that is underestimated and far out on the horizon may be more likely to advance from threat to harm than a similar danger that is immediate and clearly seen. One of the most serious concerns about legal personhood for intelligent animals is that it presents an unintended, long-term, and perhaps not immediately obvious threat to humans—particularly to the most vulnerable humans.

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

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

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

Professor Laurence Tribe has expressed concern that the approach to legal personhood set forth in a much-discussed book by NhRP President Steven Wise might be harmful for humans with cognitive impairments. Mr. Wise's book,

Rattling the Cage, was published in 2000, and it broke new ground in setting forth arguments for intelligent animal legal personhood. STEVEN M. WISE, RATTLING THE CAGE (2000). In 2001 Professor Tribe stated "enormous admiration for [Mr. Wise's] overall enterprise and approach," but cautioned:

> [o]nce we have said that infants and very old people with advanced Alzheimer's and the comatose have no rights unless we choose to grant them, we must decide about people who are three-quarters of the way to such a condition. I needn't spell it out, but the possibilities are genocidal and horrific and reminiscent of slavery and of the holocaust.

Laurence H. Tribe, *Ten Lessons our Constitutional Experience Can Teach us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1, 7 (2001).

Mr. Wise later responded in part: "I argue that a realistic or practical autonomy is a sufficient, not a necessary, condition for legal rights. Other grounds for entitlement to basic rights may exist."[20] But Mr. Wise also noted that, in his view, entitlements to rights cannot be based only on being human.[21] I did not find in the Appellant's Brief an explanation of why, despite Mr. Wise's apparent view that being part of the human community is not alone sufficient for personhood; he and the NhRP think courts should recognize personhood in someone like a permanently comatose infant. If the argument is that the permanently comatose

[20] Steven M. Wise, *Rattling the Cage Defended*, 43 B.C. L. REV. 623, 650 (2002).
[21] *Id*. at 650–51. I disagree with Mr. Wise and believe that treating humans distinctively makes sense because the human community is in fact distinctive in important aspects.

infant has rights based on dignity interests, but that dignity is not grounded in being a part of the human community, why would this proposed alternative basis for personhood only apply to humans and to particularly intelligent animals? Would all animals capable of suffering, regardless of their level of intelligence, be entitled to personhood based on dignity? If a rights-bearing but permanently comatose infant is not capable of suffering, would even animals that are not capable of suffering be entitled to dignity-based personhood under this position?[22] The implications of some alternative non-cognitive approach to personhood that rejects drawing any lines related to humanity may be exceptionally expansive and problematic.

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

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

VI. THERE IS NO CLEAR OR EVEN FUZZY LINE REGARDING HOW FAR ANIMAL LEGAL PERSONHOOD, IF RECOGNIZED, MIGHT EXTEND

The NhRP has stated that a goal of using these lawsuits is to break through the legal wall between humans and animals.[23] But we have no idea how far things might go if the wall is breached. One might suspect that many advocates would push for things to go quite far.

[23] "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), http://www.nonhumanrightsproject.org/2013/12/02/lawsuit-filed-today-on-behalf-of-chimpanzee-seeking-legal-personhood/ [https://perma.cc/6BDE-85B8].

As noted above, in the real world law does not fit perfectly with any single philosophical theory or other academic theory because courts are intensely conscious of the practical, real world consequences of their decisions. One practical consequence that should be expected if the legal wall between animals and humans is broken through 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 consequences of this lawsuit are not, in any way, limited to only the smartest animals.

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

The intelligent animal personhood approach is more pragmatic in the short term, because the immediate practical consequences of granting legal standing to all sentient animals could be immensely disruptive for society. We do not have much economic reliance on chimpanzees, there are relatively few of them in

captivity compared to many other animals, and we can recognize that they are particularly intelligent and closer to humans than are other animals. Thus, it is perhaps tempting to some to believe that granting personhood to chimpanzees 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 himself or flee when subject to attack. Unless it has a desire to live, it will surely die. And unless it has some awareness of means and connections, it will fail in all it does." 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).

Opening the personhood door to the more intelligent animals would also encourage efforts to extend personhood on the basis of sentience rather than solely seeking extensions based on autonomy. The implications of much broader potential expansion of legal personhood based on either autonomy definitions or sentience could be enormous and are not limited simply to chimpanzees.

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

When addressing animal legal personhood, the proper question is not whether our laws regarding animals should evolve or remain stagnant. Our legal system *will* evolve regarding animals and indeed is already in a period of significant change as society is demanding better treatment of animals. At one extreme, some might argue that our laws and enforcement of those laws regarding animal protection are adequate and require no further significant evolution. Such an approach is unrealistic and undesirable.[24] Arguing that courts should grant legal personhood to animals is at the other extreme, and, as described above, could wreak disastrous consequences.

A centrist alternative to these extremes involves maintaining our legal focus on human responsibility for how we treat animals, but applauding changes to provide additional protection where appropriate. As emphasized by the Third Department In unanimously dismissing the NhRP's *Lavery* appeal, the Third Department emphasized that "[o]ur rejection of a rights paradigm for animals does not, however, leave them defenseless," and that the NhRP "is fully able to

[24] *See* Richard L. Cupp Jr., *Animals as More than "Mere Things," but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm*, 82 CINN. L. REV. __ (*forthcoming* 2016, *available at* http://ssrn.com/abstract=2788309) (arguing that society is appropriately demanding evolution of the animal welfare paradigm to provide greater protections for animals).

importune the Legislature to extend further legal protections to chimpanzees." *Lavery*, 124 A.D.3d at 152-53. As a society we need to continue our evolution toward increased protection of animals, but they should not be made legal persons.

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