

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,

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

Petitioner,

Index No.
260441/2019

v.

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,

Respondent.

AMICUS CURIAE BRIEF OF RICHARD L. CUPP JR.

Respectfully submitted,
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I. INTEREST OF AMICUS CURIAE

I am a law school professor, and I have published several scholarly articles and papers related to animal legal personhood.¹ In 2014, the State of New York Supreme Court, Appellate Division, Third Judicial Department (hereafter “Third Department”), unanimously rejected a lawsuit brought by the Nonhuman Rights Project, Inc. (hereafter “NhRP”) seeking legal personhood for a chimpanzee. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dep’t 2014), *lv denied*, 26 N.Y.3d 902 (2015) (hereafter *Lavery I*). The *Lavery I* court cited two of the law review articles I have authored addressing the subject: Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from “Marginal” Cases*, 45 Ariz. St. L. J. 1 (2013); and Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L. Rev. 27 (2009). *See Lavery I*, 124 A.D.3d at 151.

The NhRP has asserted that the *Lavery I* decision “relied almost exclusively” on these two law review articles that I authored. Brief for Petitioner-Appellant, *Nonhuman*

¹ *See, e.g.*, Richard L. Cupp Jr., *Litigating Nonhuman Animal Legal Personhood*, 50 Tex. Tech. L. Rev. 573 (2018) (hereafter “*Litigating Animal Personhood*”); Richard L. Cupp Jr., *Edgy Animal Welfare*, 95 Denver L. Rev. 865 (2018); Richard L. Cupp Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 68 Fl. L. Rev. 465 (2017) (hereafter “*Cognitively Impaired*”); 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) (hereafter “*Children & Chimps*”); 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). I have also written about issues related to animal legal personhood for media publications. *See, e.g.*, Richard L. Cupp Jr., *Animal Cruelty Laws Don’t Depend on Animal Rights*, N.Y. Times, Oct. 2nd, 2014.

Rights Project Inc. v. Lavery, N.Y. Supreme Ct., App. Div., 1st Dept., Index No. 162358/15, Oct. 28, 2016, at p. 50.

The NhRP later filed a new lawsuit regarding the same chimpanzee in the New York State Supreme Court, New York County, and also pursued a separate lawsuit in New York State Supreme Court, New York County, relating to a different chimpanzee. Both lawsuits were rejected by judges of the New York State Supreme Court, New York County, and the NhRP appealed both decisions to the State of New York Supreme Court, Appellate Division, First Judicial Department (hereafter “First Department”). The First Department granted my petition to file an amicus curiae brief opposing the appeals.

In 2017 the First Department ruled on the case, issuing a decision unanimously rejecting animal legal personhood in *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73 (1st Dep’t 2017) (hereafter *Lavery II*), *lv denied*, 31 N.Y.3d 1054 (2018). The court addressed my amicus curiae brief in support of its ruling. *Id.* at 78.²

I am not an elephant zoological expert, and thus do not assert special insight regarding whether the elephant at issue would be better off staying in her current living environment or being transported across the country at her advanced age to the facility the NhRP claims would be better for her. Rather, my brief only addresses the legal issue of whether the dispute should be a matter of human legal responsibility for appropriate animal welfare, which I support, or legal personhood for animals, which I oppose.

² The full text of my *Lavery II* amicus curiae brief the NhRP discusses is available in Richard L. Cupp Jr., *Litigating Animal Personhood*, *supra* note 1, at 584-98 (Appendix A).

II. RESPONDING TO JUSTICE FAHEY'S QUESTIONS AND CONCERNS IN HIS CONCURRING OPINION REJECTING THE NhRP'S APPEAL

The NhRP's lawsuits in New York have led to multiple reported appellate decisions, including *Lavery I* in the Third Department and *Lavery II* in the First Department, establishing strong precedent that legal protections for animals are appropriate, but that animals are not legal persons. All of the NhRP's lawsuits have failed in seeking to establish animal legal personhood. Most recently, in August, 2019, the Connecticut Appeals Court joined the New York Courts by unanimously rejecting legal personhood for an elephant in *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 192 Conn. App. 36 (Conn. App. Ct. 2019). Like the unanimous New York courts in *Lavery I* and *Lavery II*, in its ruling *Commerford* emphasized that "an elephant, or any nonhuman animal for that matter, is incapable of bearing duties and social responsibilities required by such social compact." *Id.* at 46.

With no animal legal personhood victories, the NhRP relies heavily in its briefing on a concurring opinion by Justice Eugene M. Fahey of the New York Court of Appeals in a case where the Court of Appeals unanimously ruled against the NhRP. The NhRP refers to Justice Fahey's concurring opinion in *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 31 N.Y.3d 1054 (2018) (hereafter "*Lavery Concurrence*"), approximately 22 times in its Memorandum of Law in Support of Petition for Habeas Corpus, and approximately six times in its Supplemental Memorandum of Law Upon Transfer.

One might imagine from this degree of emphasis that Justice Fahey adopted the NhRP's animal legal personhood position in his concurring opinion rejecting the NhRP's appeal. However, he did not. Rather, Justice Fahey's concurrence voiced questions and

concerns about intelligent animals' appropriate legal status. This brief primarily addresses those questions and concerns.

A. Justice Fahey's Concern that Intelligent Animals Must be more than "Mere" Things

Perhaps the beginning and the end of Justice Fahey's concurrence best summarize his questions and concerns. He begins by opining that there is not a viable legal solution to the concerns he raises: "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. This is hardly a statement of support for making animals legal persons; rather it seems to assert that there is, in his view, no good legal answer to the problems he perceives. Justice Fahey concludes 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.

Justice Fahey seems understandably frustrated by the knowledge that granting legal personhood to intelligent animals would be highly problematic (law is "inadequate" to address the dilemma), while at the same time recognizing that intelligent animals must be treated with much more regard than "mere" things. His apparent misgivings about utilizing an animal legal personhood paradigm are appropriate, but his description of intelligent animals' property status would benefit from added nuance.

"Merely a thing" is an emotionally loaded term in describing animals' property status, and it creates a red herring. A "mere" thing brings to mind an inanimate object, such as a table or a chair, which has no legal protection. The idea of treating chimpanzees and elephants no differently than we treat inanimate objects is of course

offensive. It is also inconsistent with reality. Many animal cruelty and neglect laws provide protections for animals, even though animals are a unique form of property.³

Justice Fahey expresses concern about overly simplistic “either/or” propositions.⁴ Either/or propositions regarding the status of property, particularly when presented in emotionally-charged language, are in this context overly simplistic. The property paradigm entails impressive breadth, and oversimplifying the nuances of various forms of property invites confusion.⁵ Framing all forms of property as “mere things” is a formula for generating unmerited cognitive dissonance. As the Texas Supreme Court explained, “The term ‘property’ is not a pejorative but a legal descriptor, and its use should not be misconstrued as discounting the emotional attachment that pet owners undeniably feel.” *Strickland v. Medlen*, 397 S.W.3d 184, 186 (Tex. 2013).

The 2016 Oregon Supreme Court case *State v. Newcomb*, 375 P.3d 434 (Or. 2016), exemplifies thoughtful judicial analysis recognizing that animals are a form of property, but also that animals are much different than inanimate, “mere” property. In *Newcomb*, a police officer lawfully seized the defendant’s malnourished dog because the officer had probable cause to believe that the dog had been criminally neglected, and was in need of medical treatment. *Id.* at 442. The officer seized the dog when the defendant refused to provide consent for a medical evaluation. *Id.* at 437. The officer arranged for a warrantless blood test to rule out medical causes for the malnutrition. *Id.* The blood test

³ The Wildlife Conservation Society’s Memorandum of Law in Opposition to Proposed Order to Show Cause cites some of these legal protections. See Memorandum of Law in Opposition to Proposed Order to Show Cause, pp. 8-9.

⁴ *Lavery Concurrence* at 1059 (“Whether a being has the right to seek freedom from confinement through the writ of habeas corpus should not be treated as a simple either/or proposition.”).

⁵ The property paradigm’s flexibility of course does not extend to humans, and the treatment of some humans as legal property in history is repugnant and shameful. Humans’ relevant distinctiveness is addressed *infra*, Part II(C).

showed no medical cause for the malnutrition, and this evidence was used not only to give the dog appropriate medical treatment, but also to help convict the owner of criminal neglect for underfeeding the dog. *Id.*

The defendant argued that the dog's blood test should have been excluded from evidence because the dog was her property. Because the dog was her property, the defendant asserted, taking its blood without her consent or a warrant to gather evidence against her violated her freedom from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution, as well as Oregon law. *Id.* The defendant callously argued that as her property the dog was "no different than a folder or a stereo or a vehicle or a boot." *Id.* at 437-38.

The Oregon Supreme court appropriately rejected the defendant's argument. It affirmed that animals are a form of property, but noted that "[t]he crimes of animal abuse and neglect are themselves reflections of the distinctive nature of animals as property." *Id.* at 440. Animals are distinctive from other forms of property because they "are sentient beings capable of experiencing pain, stress and fear[.]" *Id.* at 441 (quoting *State v. Fessenden*, 333 P.3d 278, 283 (Or. 2014), quoting Or. Rev. Stat. Ann. § 167.305(1) (Westlaw through 2018 Reg. Sess.)).

The court acknowledged that "[t]o be sure, the protection given to animals under Oregon law does not place them on a par with humans." *Newcomb*, 375 P.3d at 441. However, the court emphasized that the law does not allow humans to treat animals like we "are free to treat other forms of property. Oregon law also places affirmative obligations on those who have custody of an animal to ensure that animal's basic welfare; those obligations have no analogue for inanimate property." *Id.* The court concluded that taking

the dog's blood without a warrant or consent did not violate the defendant's privacy rights, because the state legally seized the dog, and the test was medically appropriate for diagnosis and treatment of the ill animal. *Id.* at 444.⁶

As *Newcomb* illustrates, animals' status as a unique, protected form of property does not mean that they do not "matter." Laws related to animals should entail careful, thoughtful consideration of animals' capacity to suffer physically and emotionally. In situations where our laws do not provide enough protection for animals, our laws should evolve within the property paradigm. Although they are not legal persons, animals capable of suffering are emphatically not "mere" things.⁷

The *Commerford* case may provide the most recent illustration of recognizing this important nuance in its August 20, 2019 decision rejecting the NhRP's case seeking elephant legal personhood:

We acknowledge that elephants are magnificent animals who naturally develop social structures and exhibit emotional and intellectual capacities. They are deserving of humane treatment whether they exist in the wild or captivity. Our law recognizes – as any pet owner knows – that animals are sentient beings and an entirely different kind of property than a chair or a table.

Commerford, 192 Conn. App. at 48 n.9.

B. Raising the Dangerous "Argument from Marginal Cases"

⁶ The court also concluded that, although the Supreme Court of the United States has not yet addressed a case involving a person's Fourth Amendment privacy interest in a dog or other animal, the Supreme Court of the United States would likely interpret the Fourth Amendment in a manner consistent with the Oregon Supreme Court's ruling. *Id.* at 445.

⁷ I elaborate on this concept 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 U. Cin. L. Rev. 1023 (2016), and in Richard L. Cupp Jr., *Edgy Animal Welfare*, *supra* note 1.

Without using the term, Justice Fahey's concurrence raises what some philosophers and others call "the argument from marginal cases."⁸ In this context, the argument from marginal cases may be viewed as asserting that if "marginal" humans with significant cognitive limitations are recognized as legal persons, justice demands granting legal personhood to animals whose autonomy is equal to or greater than the autonomy of the "marginal" humans. The argument from marginal cases addresses two categories of humans for comparison with animals: young children who have not yet developed strong autonomy, and other humans with significant cognitive impairments.⁹

The repugnant nature of the phrase's description of humans with cognitive limitations signals its dangers (again, Justice Fahey did not use this terminology, but it is used by some others to describe the argument). Infant children are emphatically not "marginal;" people with significant cognitive impairments are emphatically not "marginal." At present our laws seek to treat children and humans with cognitive impairments as full persons. *See, e.g., In Re Gault*, 387 U.S. 1, 4 (1967) (child accused of juvenile delinquency entitled to due process); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) ("intellectually disabled" patients entitled to due process). If, however, we begin viewing these humans as somehow on the edge of personhood because they are at the edge of some continuum of autonomy associated with personhood, their rights will become more fragile.

⁸ *See, e.g.,* Daniel A. Dombrowski, *Babies and Beasts* 1-2 (1997) (introducing the argument from marginal cases).

⁹ I have written more detailed critiques of the argument from marginal cases in this context. Elaboration is provided in Richard L. Cupp Jr., *Children & Chimps*, *supra* note 1, at pp. 19-48 (focusing on why the "young children" branch of the argument from marginal cases is unpersuasive and dangerous), and Richard L. Cupp Jr., *Cognitively Impaired*, *supra* note 1, at 499-513 (focusing on why the "other humans with significant cognitive limitations" branch of the argument from marginal cases is unpersuasive and dangerous).

Justice Fahey in effect raises the argument from marginal cases in stating “[e]ven if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one’s infant child or a parent suffering from dementia.” *Lavery Concurrence*, 31 N.Y.3d at 1057 (citations omitted). Of course Justice Fahey would not want to weaken the rights of vulnerable infant children or comatose adults. However, highlighting the unintended potential consequences of comparing the rights status of humans with cognitive limitations and the rights status of intelligent animals is important to avoid unintended erosion of enthusiasm for the rights of infants and other humans with cognitive limitations.

As a disability rights scholar has noted in analyzing the argument from marginal cases, “[t]he ‘animalization’ of marginalized groups of all types has often served to reinforce and justify dehumanizing treatment of group members.” Gerald V. O’Brien, *People with Cognitive Disabilities: The Argument from Marginal Cases and Social Work Ethics*, 48 Soc. Work 331, 331 (2003). Justifying animal personhood on the basis of comparisons between animals and humans with cognitive limitations cannot avoid creating implications for the vulnerable humans as well as for the animals. If they are successful, such comparisons not only bring animals closer to humans, they also bring the most vulnerable humans closer to animals. As stated by Professor O’Brien, “By comparing ‘marginal’ humans to animals, the AMC [‘argument from marginal cases’] may unwittingly dehumanize people with cognitive disabilities and be yet another way our society justifies maltreatment of its most vulnerable members.” *Id.*

If courts begin to undertake a general practice of focusing on individual intelligence as a basis for declaring a being a person, some humans will not measure up to some animals. Over time, this would threaten our current sensibility that all humans, however vulnerable, merit human rights because they are human.

Although a number of academic philosophers and other scholars – typically those who support strong animal rights or animal liberation – support the argument from marginal cases, a number of other scholars directly or indirectly reject it.¹⁰ *See. e.g.*, Carl Cohen & Tom Regan, *The Animal Rights Debate* 36-37 (2001) (philosopher Carl Cohen stating the argument deserves “to be permanently set aside”); Douglas MacClean, *Is “Human Being” a Moral Concept?*, 30 Phil. & Pub. Pol’y Q. 16, 20 (2010) (among other concerns, “[a]s life is farther removed from human beings and human society, moral reasons cease to govern our relationships with it”); Richard Posner, *Animal Rights*, in *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives* 55-59 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (among other concerns, the argument is based on an intuition and does not give a reason for ignoring strongly contrary intuitions); Richard A. Epstein, *The Dangerous Claims of the Animal Rights Movement*, 10 The Responsive Community 28, 33 (2000) (“[t]hese human beings, whatever their impairments, are the fathers, mothers, sisters, and brothers of other human beings in ways that chimpanzees and bonobos are not”); Gerald V. O’Brien, *supra*, at 335 (“[a]s it is described in the writings of animal rights scholars, the [argument from marginal cases] is in opposition to core social work values . . . [t]he dignity and worth of people living on the margins of society is

¹⁰ Some of these scholars reject in substance the argument from marginal cases without employing the term “marginal cases.”

diminished when we bestow quasi-human status on them or suggest that their moral standing is comparable to animals.”); Stephen Drake, *Connecting Disability Rights and Animal Rights – A Really Bad Idea*, Notdeadtet.org, Oct. 11, 2010 (“When disabled people are equated with animals, it never works out well for us.”), available at <https://notdeadyet.org/2010/10/connecting-disability-rights-and-animal.html> (last visited Sept. 3rd, 2019).

C. Recognizing that Humans are Distinctive in Our Legal System is not Irrational Speciesism

The argument from marginal cases is not only a grave danger to the most vulnerable humans. The argument is also incorrect in its intuition that humans should not be viewed as distinctive under our human legal system.

Justice Fahey’s concurrence inaccurately characterizes *Lavery II* as “based on nothing more than the premise that a chimpanzee is not a member of the human species.” *Lavery Concurrence*, 31 N.Y.3d at 1057. Although *Lavery II* sets forth multiple reasons for its ruling, Justice Fahey seems to be referencing a sentence in the decision that briefly responds to the argument from marginal cases by stating “This argument ignores the fact that these are still human beings, members of the human community.” *Lavery II*, 152 A.D.3d at 78.¹¹ Justice Fahey’s concurrence missed 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.

¹¹ The *Lavery II* precedes this language with: “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.” *Lavery II*, 152 A.D.3d at 78.

Focusing on the human community¹² in limiting legal personhood is rational rather than arbitrary. The most significant identifying characteristic of all humans is their humanity, not their abilities, and humans with cognitive limitations are deeply connected to the human community or society in ways that animals can never be connected to human society.¹³ Professor Carl Cohen has explained that “persons 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, *The Animal Rights Debate*. See also, e.g., Timothy Chappell, *On the Very Idea of Criteria for Personhood*, 49 Southern J. of Philosophy 1 (2011) (challenging the argument that criterial properties should define personhood and defending humanity as the basis for defining personhood).

Thus, a central consideration anchoring the personhood of humans who lack capacity is their membership in the human community. 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 only is such agency not the norm among animals, it is never present among animals. When a chimpanzee at a zoo smashed the skull of a baby chimpanzee,¹⁴ there was doubtless no talk of criminally prosecuting the “murderer.” Personhood in the human legal system is related to humans’ norm of distinctive moral agency, and humans with cognitive limitations are first and foremost humans even when they do not fit this norm.

¹² This includes human proxies, such as corporations.

¹³ 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 1, at 487-513.

¹⁴ See *Adult Chimpanzee Kills Baby Chim in Front of Shocked Los Angeles Zoo Visitors*, CBS NEWS (June 27, 2012, 2:01 PM), <http://www.cbsnews.com/news/adult-chimpanzee-kills-baby-chimp-in-front-of-shocked-los-angeles-zoo-visitors/> (last visited Sept. 3rd, 2019).

D. Only Legal Persons are Eligible for a Writ of Habeas Corpus, and the “Intrinsic Nature” of Elephants and Chimpanzees Does Not Call for Making them Legal Persons

Justice Fahey’s concurrence states that it is better to “ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus.” *Lavery Concurrence*, 31 N.Y.3d at 1057. Coupled with his statement in another part of his opinion that it “may be arguable that a chimpanzee is not a ‘person’” (*Id.* at 1059), it appears that Justice Fahey may be understandably skittish about adopting legal personhood as a paradigm for animals. But even the NhRP seems to agree that being found to be a legal person is a prerequisite for possessing legal rights. As quoted by the *Commerford* court, the NhRP’s petition in that case stated that determining “[w]ho is a ‘person’ is the most important individual question that comes before a court, as the term person identifies those entities capable of possessing one or more legal rights.” *Commerford*, 192 Conn. App. at 39. A court cannot ignore the damaging consequences of declaring an animal to be a legal person if it is tempted toward granting the animal a writ of habeas corpus.

Justice Fahey’s concurrence also states that whether chimpanzees have the right to liberty protected by habeas corpus “will depend on our assessment of . . . chimpanzees as a species.” *Lavery Concurrence*, 31 N.Y.3d at 1057. However, given the foundations of our society and its legal system, the only appropriate assessment regarding chimpanzees, elephants, and other animals relates to their inability, both as a norm and regarding each individual animal, to bear the legal responsibilities that our society imposes as a norm on persons.

III. CONNECTIONS BETWEEN RIGHTS AND RESPONSIBILITIES ARE BROAD AND DEEP ASSUMPTIONS IN OUR SOCIETY AND IN OUR GOVERNMENT, INCLUDING OUR LEGAL SYSTEM

The NhRP's argument that the unanimous New York appellate decisions that have found rights to be connected to duties have misunderstood the philosophical theory of social contract is misguided. The NhRP's argument rests on too narrow a framing of the connections between rights and duties in our society, and too narrow a framing of how broad ideals that are sometimes described in the language of social contract underpin our society. Merriam-Webster defines social contract in terms of rights and duties. A social contract is "an actual or hypothetical agreement among the members of an organized society or between a community and its ruler that defines and limits the rights and duties of each." <https://www.merriam-webster.com/dictionary/social%20contract> (last visited Sept. 3rd, 2019).

The relationship between rights and duties that is sometimes described with social contract language – we might also describe it as a moral community – is broad rather than narrow. Each right need not correlate with a specific duty. Whether the relationship between rights and duties is discussed in terms of a social contract or in other terms, it is important to the foundations of our society, and to our entire form of government, including our legal system. In this context, recognizing the relationship between rights and duties is an assertion that a norm of sufficient moral agency to be held accountable under the community's rules matters. Our founders' interest in John Locke's theories reflect a broad and deep connection between rights and duties in our societal foundations, rather than formal adoption of all aspects of any competing variant of the philosophical theory of social contract.

As the *Commerford* court noted, until the NhRP began bringing its animal personhood lawsuits, there was little direct authority regarding animal legal personhood. *Commerford*, 192 Conn. App. at 44. The NhRP unconvincingly seeks to use the paucity of explicit authority stemming from the radical nature of its claims to support its theory that animals may be held to be persons.¹⁵ But the conflicts between the NhRP's theory of animal legal personhood and the foundations of our society are apparent, even if courts and societal leaders have seldom previously found it necessary to state explicitly that animals cannot be persons.¹⁶ The founders, and later American leaders such as Abraham Lincoln, would feel no reason to expressly tie "persons" to humans in setting forth broad ideas related to the general connectedness of rights and duties as a basis for government,

¹⁵ The NhRP's claims that my position regarding a societal connection between rights and duties lacks support. For example, the NhRP quotes a source criticizing my provision of a "*See generally*" citation of several pages of an article by Peter De Marneffe as supporting my assertion that "Contractualism promotes the notion of the social contract, in which societally imposed responsibilities are accepted in exchange for individual rights owed by society. Ideals of freedom and democracy that form the basis of our system of government were inspired by social contract theory." Richard L. Cupp Jr., *Children & Chimps*, *supra* note 1, at 13 (citing Peter de Marneffe, *Contractualism, Liberty, & Democracy*, 104 *Ethics* 764, 764-83 (1994)). The critic finds it "strange" that I would cite de Marneffe, because his article is not a historical treatment of contractualism, and because de Marneffe does not "even once claim in his piece that individual rights are exchanged for responsibilities. Indeed, throughout the entire piece, the author never once uses the words duty, responsibility, reciprocate, exchange, or synonymous terms." Supplemental Memorandum of Law Upon Transfer, p. 18 (quoting Craig Ewasiuk, *Escape Routes: The Possibility of Habeas Corpus Protection For Animals Under Modern Social Contract Theory*, 48 *Colum. Human Rights L. Rev.* 69, 82-83 (2017)). However, although he may not use these specific terms, de Marneffe repeatedly refers to liberties and restrictive language such as limitations on liberties. *See, e.g.*, de Marneffe, *supra*, at 764. Limitations on liberties create societal responsibilities (such as being restricted from smoking marijuana or hunting whales, examples de Marneffe provides – without using the word "responsibilities" – on p. 764). De Marneffe states that "The contractualist position thus requires that the exercise of political power respect both the freedom of the individual and the freedom of the people to make law. Having a common moral basis, liberty and democracy are therefore compatible, for the people can exercise their power to make law while respecting the basic liberties that protect the individual." *Id.* Further, many other sources, including those cited in this brief, also support recognizing a connection between rights and duties.

¹⁶ In addition to the growing body of precedent being created by the NhRP's multiple lawsuits in New York and Connecticut, in 2012 a federal court expressly held that an orca is not a person under the Constitution's Thirteenth amendment in *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment, Inc.*, 842 F. Supp. 2d 1259, 1264 (S.D. Cal. 2012) ("the Thirteenth . . . Amendment only applies to humans").

because the fact that only humans could be persons would have seemed to be a given to them.

The assumption of a norm of sufficient moral agency to participate in government is implied throughout American history. For example, in one of the most respected quotes in American history, President Abraham 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), <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm> (last visited Sept. 3rd, 2019). President Lincoln recognized that government of persons, including law, is not only a communal enterprise *by* persons, it is specifically *for* persons. Further, a government *of* persons also precludes animals, because no animals can meaningfully participate in government, whereas the norm for humans is participation in a system of rights and duties.

The Declaration of Independence states that “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). This language broadly connects the rights of the governed to their consent to the limitations of freedoms (i.e., legal responsibilities) inherent in government.

In light of our society’s foundations assuming both rights and responsibilities for humans, it is not surprising that the American Bar Association’s section addressing civil liberties was until 2015 named “The Section of Individual Rights and Responsibilities.”¹⁷

¹⁷ See *Proposal to Amend Section 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

The title recognizes that our rights and our responsibilities are connected. We teach our children about the social contract as the broad “basis for the American system of government,” rather than as a narrow tool solely relevant to creating citizens. The Yale National Initiative to Strengthen Teaching in Public Schools includes an article on its website that addresses teaching the importance of social contract ideas to public school students to help them understand our government. The article notes: “The social contract is the basis for the American system of government, and it is important for our students to understand the major principles behind our Constitution,” and “In order to achieve a better life, social-contract theory states that people choose to give up some of their personal freedoms and in return are able to live and work in an organized and secure society.”: April M. Higgins, *Our Visible Social Contract*, Yale National Initiative to Strengthen Teaching in Public Schools, https://teachers.yale.edu/curriculum/viewer/initiative_13.01.02_u (last visited Sept. 3rd, 2019). We teach our children that our national foundations include giving up some personal freedoms (i.e., accepting responsibilities) in order to protect rights.

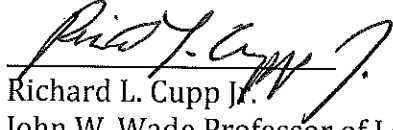
As beings with strong moral agency, humans should be accountable for appropriate treatment of elephants. Arguments and counterarguments may be made regarding whether elephants should ever be held in captivity. Our legislatures should be receptive to listening to all sides and open to changing laws if they conclude that change is appropriate. But elephants are not part of our human society and government in which

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. I have taken much of this discussion on the Declaration of Independence and the ABA’s *Section of Individual Rights and Responsibilities* name from my amicus curiae brief that was cited in the *Lavery II* decision; the brief is available as an appendix to Richard L. Cupp, *Litigating Nonhuman Animal Legal Personhood*, 50 TEX. TECH L. REV. 573 (2018).

rights and duties are intertwined as a norm. Whether Happy stays with the Wildlife Conservation Society or is moved to a different location should be a matter of human responsibility for appropriate animal welfare, not a matter of pretending that Happy is a person.

Dated: September 4th, 2019

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard L. Cupp Jr.", written over a horizontal line.

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