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ESSAY

FOCUSING ON HUMAN RESPONSIBILITY RATHER THAN LEGAL PERSONHOOD FOR NONHUMAN ANIMALS*

RICHARD L. CUPP, JR.**

We should focus on human legal accountability for responsible treatment of nonhuman animals rather than radically restructuring our legal system to make them legal

* This essay corresponds with two briefs by Steve Wise and Professor Larry Tribe. These briefs are published on PELR's website: Steve Wise & Elizabeth Stein, *Memorandum of Law in Support of Petition for Habeas Corpus*, 33 PACE ENVTL. L. REV. 542 (2016) (brief originally filed in Nonhuman Rights Project, Inc. v. Lavery, No. 162358/2015 (N.Y. Sup. Ct. 2015)); Laurence H. Tribe, *Letter Brief of Amicus Curiae Laurence H. Tribe in Support of Motion for Leave to Appeal*, 33 PACE ENVTL. L. REV. 661 (2016) (letter-brief originally filed in People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 38 N.E.3d 828 (N.Y. 2015) (No. 2015-293)).

** John W. Wade Professor of Law, Pepperdine University School of Law. I thank the PACE ENVIRONMENTAL LAW REVIEW and Steven Wise for inviting me to write this essay, and the Pepperdine University School of Law for providing a research grant in support of this essay and other publications. Thank you also to Jodi Kruger, Natalie Lagunas, and Samantha Parrish for providing consistently outstanding research assistance, to Naomi Goodno, David Han, Barry McDonald, and Robert Pushaw for providing feedback on a draft of this essay; and Justin Beck and Mark Scarberry for their thoughts and input regarding animal legal personhood. The input and assistance these individuals have graciously provided me do not necessarily reflect agreement with any or all of this Article's theses. Most or much of this essay was also published addressing a previous manifestation of the lawsuit in Richard L. Cupp Jr., *Human Responsibility, Not Legal Personhood, for Nonhuman Animals*, 16 ENGAGE 34, 38 (2015). Both essays draw heavily from the author's comments in *Animal Personhood: A Debate*, <http://www.fed-soc.org/multimedia/detail/animal-personhood-a-debate-event-audiovideo>, and both essays are largely excerpted from a more thorough article, *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, which will be made available at SSRN.com.

persons.¹ This essay, provided at the kind invitation of the *Pace Environmental Law Review* and Steven Wise, President of the Nonhuman Rights Project, Inc.,² outlines a number of concerns about animal legal personhood. It does so primarily in the context of the plaintiff's brief in *The Nonhuman Rights Project, Inc. v. Lavery*, filed in the New York Supreme Court, New York County.³ The first *Lavery* lawsuit (*Lavery I*) was filed in Fulton County in late 2013.⁴ After *Lavery I* was dismissed at the trial court and appellate levels, the second *Lavery* lawsuit (*Lavery II*) was filed in New York County in late 2015. The *Pace Environmental Law Review* is publishing a memorandum of law by Steve Wise and Elizabeth Stein in support of the petition for habeas corpus in *Lavery II*⁵ along with an amicus brief by Professor Laurence Tribe⁶ supporting the the appeal of *Lavery I* and this essay opposing the lawsuit.

The arguments plaintiffs provide in their *Lavery I* brief and in their *Lavery II* brief feature many similar themes, but this essay will focus primarily on the language of the *Lavery II* brief, as it is the more recent. As with *Lavery I*, the *Lavery II* brief

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

2. Hereafter "NhRP."

3. Memorandum of Law in Support of Petition for Habeas Corpus, Nonhuman Rights Project, Inc. v. Lavery, No. 162358/2015 (N.Y. Sup. Ct. 2015), <http://www.nonhumanrightsproject.org/wp-content/uploads/2015/12/Memo-of-Law-Dec-2-2015.pdf> [<https://perma.cc/CM7V-P7US>] [hereinafter *Lavery II Brief*]. The lower court dismissed the lawsuit, and the Nonhuman Rights Project has indicated it will file an appeal. See *New York Trial Court Denies Tommy's Second Bid for Freedom*, NONHUMAN RIGHTS PROJECT (Jan. 7, 2016), <http://www.nonhumanrightsproject.org/2016/01/07/new-york-court-denies-tommys-bid-for-freedom/> [<https://perma.cc/7DJH-LH4Y>].

4. See Petitioner's Memorandum of Law in Support of Order to Show Cause & Writ of Habeas Corpus & Order Granting the Immediate Release of Tommy, Nonhuman Rights Project, Inc. v. Lavery, 2014 N.Y. Slip Op 77524(U) (2014) (No. 518336), <http://www.nonhumanrightsproject.org/wp-content/uploads/2013/12/Memorandum-of-Law-Tommy-Case.pdf> [<https://perma.cc/94RU-VC83>] [hereinafter *Lavery I Brief*].

5. *Lavery II Brief*, *supra* note 3. This will be published on PELR's website at <http://digitalcommons.pace.edu/pelr/>.

6. Letter Brief of Amicus Curiae Laurence H. Tribe in Support of Motion for Leave to Appeal, People *ex. rel.* Nonhuman Rights Project, Inc. v. Lavery, No. 518336/2015, (N.Y. 2015) [hereinafter Tribe Letter Brief], <http://www.nonhumanrightsproject.org/wp-content/uploads/2015/12/7.-Exhibit-6-Tribe-Amicus-Curiae-Letter-Brief.pdf> [<https://perma.cc/B4JY-NJ5T>].

seeks a common law writ of habeas corpus for a chimpanzee named Tommy that was kept in upstate New York by a private individual.⁷ As with *Lavery I*, the *Lavery II* brief does not claim that any existing laws are being violated in the chimpanzee's treatment. Rather, both the *Lavery I* and *Lavery II* briefs argue that the chimpanzee is entitled to legal personhood under liberty and equality principles.⁸ The *Lavery II* brief specifically asserts that he "possesses dozens of complex cognitive abilities that comprise and support his autonomy and bodily liberty. Moreover, he can shoulder duties and responsibilities both within chimpanzee societies and within human/chimpanzee societies."⁹ As with *Lavery I*, the *Lavery II* brief also asserts that Tommy is entitled to legal personhood under a New York statute allowing humans to create *inter vivos* trusts for the care of animals.¹⁰ Both *Lavery* briefs seek to have the chimpanzee moved to a sanctuary that confines chimpanzees, but in a manner the briefs argue is preferable to the chimpanzee's living situation when the lawsuits were filed.¹¹

The NhRP has filed several closely related lawsuits seeking legal personhood for chimpanzees, including *Lavery I* and *Lavery II*, in New York since late 2013.¹² As of the writing of this essay,

7. See *Lavery II Brief*, *supra* note 3. The Nonhuman Rights Project reported in February 2016 that Tommy had been moved to a "roadside zoo" in Michigan. See Lauren Choplin, *Update: Tommy*, NONHUMAN RIGHTS PROJECT, (Feb. 16, 2016), <http://www.nonhumanrightsproject.org/2016/02/12/update-tommy/> [https://perma.cc/BPG5-HBAD].

8. *Lavery II Brief*, *supra* note 3, at 102–10; *Lavery I Brief*, *supra* note 4, at 55–77.

9. *Lavery II Brief*, *supra* note 3, at 113; see also *Lavery I Brief*, *supra* note 4, at 77 ("Tommy is possessed of autonomy, self-determination, self-awareness, and the ability to choose how to live his life, as well as dozens of complex cognitive abilities that comprise and support his autonomy.").

10. *Lavery II Brief*, *supra* note 3, at 110–14; see also *Lavery I Brief*, *supra* note 4, at 49–52.

11. *Lavery II Brief*, *supra* note 3, at 6; *Lavery I Brief*, *supra* note 4, at 1.

12. *People ex rel. Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d 248 (App. Div. 3d Dep't 2015); *Nonhuman Rights Project v. Presti*, 999 N.Y.S.2d 652 (App. Div. 4th Dep't 2015); *Nonhuman Rights Project v. Stanley*, 16 N.Y.S.3d 898 (Sup. Ct. 2015); *Order to Show Cause & Writ of Habeas Corpus, Nonhuman Rights Project v. Presti*, No. 150149/2016, (N.Y. Sup. Ct. Jan. 29, 2016), <http://www.nonhumanrightsproject.org/wp-content/uploads/2016/01/Decision-of-Justice-Jaffe-dated-1.29.16.pdf> [https://perma.cc/784U-3DRX]; *Order to Show Cause & Writ of Habeas Corpus, Nonhuman Rights Project v. Lavery*, No. 162358 (N.Y. Sup. Ct. Dec. 23, 2015), <https://iapps.courts.state.ny.us/fbem/>

all of the courts making decisions on the cases have rejected them.¹³ By the author's count, at least twenty-three New York judges have participated in ruling against the lawsuits thus far.¹⁴

A cursory history of the *Lavery I* and *Lavery II* lawsuits may be helpful for understanding the context of the *Lavery II* brief. After first being rejected by the Fulton County Supreme Court, *Lavery I* was again rejected by a unanimous five-judge panel of the New York State Supreme Court Appellate Division, Third Judicial Department, in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*.¹⁵ In the *Lavery I* decision, the court emphasized that "collectively, human beings possess the unique ability to bear legal responsibility."¹⁶

The NhRP filed a motion for leave to appeal to the Court of Appeals of the State of New York,¹⁷ but the Court denied the

DocumentDisplayServlet?documentId=2FAAP/keZ_PLUS_ptiKc1FQrdhQ==&system=prod [https://perma.cc/M6H9-JQZZ] [hereinafter Order to Show Cause & Writ of Habeas Corpus (Dec. 23, 2015)].

In December 2015 the lower court dismissed *Lavery II*, and the Nonhuman Rights Project has indicated it will file an appeal. *See New York Trial Court Denies Tommy's Second Bid for Freedom*, *supra* note 3. In January 2016, shortly after the dismissal of the *Lavery II* case, the Nonhuman Rights Project filed its most recent lawsuit. This one involves the same parties named in the *Presti* case, but was instead filed in New York County. *See NhRP Re-Files Habeas Corpus Case on Behalf of Kiko in New York*, NONHUMAN RIGHTS PROJECT (Jan. 12, 2016), <http://www.nonhumanrightsproject.org/2016/01/12/nhrp-re-files-habeas-corpus-case-on-behalf-of-kiko-in-new-york/> [https://perma.cc/GZS4-ZM8M]. A trial court judge dismissed this most recent lawsuit in January 2016, and the NhRP has indicated it will appeal. *See New York Supreme Court Judge Denies Kiko's Second Habeas Corpus Bid*, NONHUMAN RIGHTS PROJECT (Feb. 11, 2016), <http://www.nonhumanrightsproject.org/2016/02/11/new-york-trial-court-denies-kikos-latest-habeas-corpus-bid/> [https://perma.cc/ZCV7-4HLQ].

13. *See supra* note 12.

14. This includes one lower court judge each for *Lavery I* and the first *Presti* lawsuit, two lower court judges for the *Stanley* lawsuit (one of these judges, Justice Barbara Jaffe, dismissed three of the lawsuits: *Stanley*, *Lavery II*, and the second *Presti* lawsuit), five unanimous intermediate appellate judges each for the *Lavery* and *Presti* lawsuits, four intermediate appellate judges for the *Stanley* lawsuit, and at least five judges of the New York Court of Appeals in its decision denying the NhRP's motion to appeal the intermediate appellate rulings in *Lavery I* and in the first *Presti* lawsuit.

15. *People ex rel. Nonhuman Rights Project v. Lavery*, 998 N.Y.S.2d 248 (App. Div. 3d Dep't 2014).

16. *Id.* at 251 n.3.

17. Motion for Leave to Appeal & Affirmation in Support, Nonhuman Rights Project, Inc. v. Lavery, No. 518336/2015 (N.Y. App. Div. Feb. 23, 2015) <http://www.nonhumanrightsproject.org/wp-content/uploads/2015/02/6.-Motion->

2016] *FOCUSNG ON HUMAN RESPONSIBILITY* 521

motion in September 2015.¹⁸ The NhRP then filed *Lavery II* in New York County, providing additional expert affidavits and arguing that the Third Department's appellate decision in *Lavery I* was wrongly decided.¹⁹ The trial court dismissed *Lavery II* in December 2015, writing only that it “[d]eclined, to the extent that the Third Dept. determined the legality of Tommy’s detention, an issue best addressed there, [and] absent any allegation or ground that is sufficiently distinct from those set forth in the first petition.”²⁰ The NhRP has indicated that it will appeal this decision.²¹

Although the NhRP has not yet succeeded in making animals legal persons in either *Lavery* case or any other lawsuits, these

for-Leave-to-Appeal-and-Affirmation-in-Support.pdf [<https://perma.cc/GC2Q-SPJR>].

18. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 38 N.E.3d 828 (N.Y. 2015). On the same day, the New York Court of Appeals also denied a motion to appeal the intermediate appellate court decision in *Presti*. *See Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 38 N.E.3d 827 (N.Y. 2015).

19. *Lavery II Brief*, *supra* note 3, at 72–85.

20. Order to Show Cause & Writ of Habeas Corpus (Dec. 23, 2015), *supra* note 12, at 2.

21. *See New York Trial Court Denies Tommy’s Second Bid for Freedom*, *supra* note 3. The trial court judge who dismissed *Lavery II*, Justice Barbara Jaffe, previously rejected the *Stanley* lawsuit that was also filed in New York County. *Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 918 (Sup. Ct. 2015). In rejecting *Stanley*, she found the *Lavery I* appellate decision to be controlling under *stare decisis*, and she indicated that the issue should be left to the legislature or to the New York Court of Appeals. *Id.* at 914–17. Although the ruling emphasized that the law may evolve and took a sympathetic tone with some of the NhRP’s positions without highlighting some of the serious problems with the lawsuit, it did not advocate for animal legal personhood. *See id.* at 918. Rather, the decision in vague dicta seemed to imply support more generally for further consideration of the issue without staking out a position. *See id.* In further dicta, the decision expressly rejected using the past mistreatment of slaves, women, and other humans as an analogy for extending legal personhood to animals. *Id.* at 912. The NhRP has filed an appeal with the First Department. *Notice of Appeal Filed in Hercules and Leo Case*, NONHUMAN RIGHTS PROJECT (Aug. 20, 2015), <http://www.nonhumanrightsproject.org/2015/08/20/notice-of-appeal-filed-in-hercules-and-leo-case/> [<https://perma.cc/9MP7-FJB7>]. Later, in January 2016, Justice Jaffe also rejected the second *Presti* lawsuit. *See Nonhuman Rights Project, Inc. v. Presti*, No. 150149/2016 (N.Y. Sup. Ct. Jan. 29, 2016), <http://www.nonhumanrightsproject.org/wp-content/uploads/2016/01/Decision-of-Justice-Jaffe-dated-1.29.16.pdf> [<https://perma.cc/784U-3DRX>]. Many of the legal documents associated with the chimpanzee lawsuits are available online. *See Court Cases*, NONHUMAN RIGHTS PROJECT, <http://www.nonhumanrightsproject.org/category/courtfilings/> [<https://perma.cc/LB6G-4GTT>].

lawsuits are only the beginning of a long-term struggle, and the issue's ultimate outcome is far from clear. Although the lawsuits are misguided in many ways, they should not be underestimated. The question of how we treat animals is exceptionally serious, both for animals and for human morality.²² The emotional appeal of doing something very dramatic in an effort to help animals, especially the animals that are most like us, is understandably strong to many people. This essay encourages greater empathy for animals, but introduces and briefly outlines several problems with the lawsuits and calls instead for a focus on evolving standards of human responsibility for animals' welfare as a means of protecting animals rather than granting legal personhood to animals.²³

I. ANIMAL LEGAL PERSONHOOD AS PROPOSED IN THE *LAVERY* LAWSUITS 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.

Among the most vulnerable humans are people with cognitive impairments²⁴ 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.²⁵ To be clear, supporting

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

23. This essay does not undertake to address all problems with the lawsuits.

24. This essay 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.

25. See Richard L. Cupp Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=543387 (forthcoming); Richard L. Cupp Jr., *Children, Chimps, and Rights Arguments from “Marginal” Cases*, 45 AZ. ST. L. J. 1 (2013)

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 *Lavery* briefs seek to pull smart animals up in legal consideration, rather than to push humans with cognitive impairments down.²⁶

However, despite these good intentions, there should be deep concern that over a long horizon, allowing animal legal personhood based on cognitive abilities could unintentionally lead to gradual erosion of protections for these especially vulnerable humans. The sky would not immediately fall if courts started treating chimpanzees as persons. As noted above, that is part of the challenge in recognizing the danger. But, over time, both the courts and society might be tempted 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 Steven M. Wise might be harmful for humans with cognitive impairments. The book, *Rattling the Cage*, was published in 2000,

[hereinafter *Children & Chimps*], for an in-depth discussion of the implications of cognitive impairments for young children and other humans.

26. The *Lavery I* brief states:

Homo sapiens membership has been laudably designated a *sufficient* condition for legal personhood. Even the permanently comatose and anencephalic of our species, humans are entitled to fundamental legal rights under international and American law. However, "the thesis that humans should be ascribed rights simply for being human has received practically no support from philosophers."

Lavery I Brief, *supra* note 4, at 70 (citation omitted) (quoting Daniel Wikler, *Concepts of Personhood: A Philosophical Perspective*, in *DEFINING HUMAN LIFE: MEDICAL, LEGAL, AND ETHICAL IMPLICATIONS* 12, 19 (Margery W. Shaw & A. Edward Doudera eds., 1983). The *Lavery I* brief later states:

The NhRP agrees that humans who have never been sentient nor conscious nor possessed of a brain *should* have basic legal rights. But *if* humans bereft of autonomy, self-determination, sentience, consciousness, even a brain, are entitled to personhood and legal rights, *then* this Court must either recognize Tommy's just equality claim to bodily liberty or reject equality entirely.

Lavery I Brief, *supra* note 4, at 73. The *Lavery II* brief has a virtually identical quote as well. *Lavery II Brief*, *supra* note 3, at 109 ("Humans who have never been sentient or conscious or possessed of a brain *should* have basic legal rights. But *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.").

and it broke new ground in setting forth arguments for intelligent animal legal personhood directed at a popular audience.²⁷ 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.²⁸

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.”²⁹ But Mr. Wise also noted that, in his view, entitlements to rights cannot be based only on being human.³⁰ I did not find in the *Lavery* briefs an explanation of why, despite Mr. Wise’s apparent view, that being part of the human community is not alone sufficient for personhood; he and the NhRP think courts should recognize personhood in someone like a permanently comatose infant. If the argument is that the permanently comatose infant has rights based on dignity interests, but that dignity is not grounded in being a part of the human community, why would this proposed alternative basis for personhood only apply to humans and to particularly intelligent animals? Would all animals capable of suffering, regardless of their level of intelligence, be entitled to personhood based on dignity? If a rights-bearing but permanently comatose infant is not capable of suffering, would even animals that are not capable of suffering be

27. STEVEN M. WISE, *RATTLING THE CAGE* (2000).

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

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

30. *Id.* at 650–51. I disagree with Mr. Wise and believe that treating humans distinctively makes sense because the human community is in fact distinctive in important aspects. See *infra* notes 32–59 and accompanying text.

entitled to dignity-based personhood under this position?³¹ The implications of some alternative non-cognitive approach to personhood that rejects drawing any lines related to humanity may be exceptionally expansive and problematic.

Further, good intentions do not prevent harmful consequences. Regardless of the NhRP's views and desires regarding the rights of cognitively impaired humans, going down the path of connecting individual cognitive abilities to personhood would encourage us as a society to think increasingly about individual cognitive ability when we think about personhood. Over the course of many years, this changed paradigm could gradually erode our enthusiasm for some of the protections provided to humans who would not fare well in a mental capacities analysis. Deciding chimpanzees are legal persons based on the cognitive abilities we have seen in them may open a door that swings in both directions regarding rights for humans as well as for animals, and later generations may well wish we had kept it closed.³²

31. 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?

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

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

When addressing animal legal personhood, the proper question is not whether our laws should evolve or remain stagnant. Our legal system *will* evolve regarding animals and indeed is already in a period of significant change. One major reason for this evolution is our shift from an agrarian society to an urban and suburban society. Until well into the twentieth century, most Americans lived in rural areas. Most American families owned or encountered livestock and farm animals whose utility was economic.

Now we are an urban and suburban society, and relatively few of us are directly involved in owning animals for economic utility. Rather, when most of us now encounter living animals, they are most frequently companion animals kept for emotional utility. Most of us view the animals in our lives as in terms of affection rather than as financial assets. As law gradually reflects changes in society, transformation in our routine interactions with animals doubtless has influenced the trend toward providing them more protections in many respects.

A second major reason we are evolving in our legal treatment of animals is the advancement of scientific understanding about animals. We are continually learning more about animals' minds and capabilities. As we have gained more understanding of animals, we have generally evolved toward developing more compassion for them, and this increasing compassion has been, to some extent, and will continue to be, increasingly reflected in our protection laws.³³

This evolution is a good thing, and it is probably still closer to its initial significant acceleration in the twentieth century than it is to a point where it will slow down. In other words, it seems quite probable that we will continue in a period of notable change

33. These bases for changing attitudes toward animal protection are also addressed in Richard L. Cupp Jr., *Animals as More Than "Mere Things," But Still Property*: A Call for Continuing Reform of the Animal Welfare Paradigm, CINN. L. REV. (forthcoming 2016) [hereinafter "*More Than Mere Things*"], for a discussion on these bases for changing attitudes toward animal protection.

2016] *FOCUSNG ON HUMAN RESPONSIBILITY* 527

in our treatment of animals for some time. We will continue evolving; the only question is *how* we should evolve.

Two unsatisfactory positions and a centrist position may be identified in answering this question. One unsatisfactory position would be clinging to the past and denying that we need any changes regarding how our laws treat animals. A second unsatisfactory position on the other extreme would be to radically reshape our understanding of legal personhood, with potentially dangerous consequences.

A centrist alternative to these extremes involves maintaining our legal focus on human responsibility for how we treat animals, but applauding changes to provide additional protection where appropriate. As emphasized by the Third Department in unanimously dismissing the NhRP's *Lavery* appeal: "[o]ur rejection of a rights paradigm for animals does not, however, leave them defenseless."³⁴ When our laws or their enforcement do not go far enough to prevent animals from being mistreated, we should change our laws or improve their enforcement rather than assert that animals are legal persons.

III. AMONG BEINGS OF WHICH WE ARE AWARE, APPROPRIATE LEGAL PERSONHOOD IS ANCHORED ONLY IN THE HUMAN MORAL 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."³⁵

Our society and government are based on the ideal of moral agents coming together to create a system of rules that entail both rights and duties. Being generally subject to legal duties and bearing rights are foundations of our legal system because they are foundations of our entire form of government.

We stand together with the ideal of a social compact, or one might call it a moral community, to uphold all of our rights,

34. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 998 N.Y.S.2d 248, 251 (Sup. Ct. 2014).

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

including our inalienable rights.³⁶ 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.”³⁷ 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.”³⁸

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

It misses the point to argue, as the NhRP seems to do in the *Lavery II* brief, that personhood is unrelated to duties because bodily liberty is an immunity right that does not require capacity.³⁹ First, as noted elsewhere in this section, this is too

36. 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. *See infra* note 72.

37. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

38. *See* ABA H.D. 11-2 (2015), http://www.americanbar.org/content/dam/aba/directories/policy/2015_hod_annual_meeting_11-2.docx [<https://perma.cc/FY2N-GVSK>] (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).

39. *Lavery II Brief*, *supra* note 3, at 80–81. Professor Hohfeld was also invoked in the plaintiffs’ appeal of the *Lavery I* appellate decision. *See* Memorandum of Law in Support of Appellant’s Motion for Leave to Appeal to the Court of Appeals at 19–20, *Nonhuman Rights Project, Inc. v. Lavery*, 998

narrow a conceptualization of connections between rights and duties. Further, whether freedom from slavery requires capacity does not control the question of personhood, since cognitively impaired humans' personhood is anchored in the responsible community of humans, even if they cannot make responsible choices themselves. The NhRP's argument does not avoid the problem that a chimpanzee, although an impressive being we need to treat with exceptional thoughtfulness, should not be considered a *person* within our intrinsically human legal system, whereas humans with cognitive limitations should be recognized as persons.

Professor Wesley Hohfeld wrote about the form of rights and duties between persons in the early twentieth century, and the NhRP's *Lavery II* brief seeks to invoke his analysis to argue for chimpanzee legal personhood.⁴⁰ 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*.⁴¹ Our 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.⁴²

It is sometimes asserted that since we give corporations personhood, justice requires that we should give personhood to

N.Y.S.2d 248 (App. Div. 2015) (No. 518336/2015), <http://www.nonhumanrightsproject.org/wp-content/uploads/2015/02/6.-Motion-for-Leave-to-Appeal-and-Affirmation-in-Support.pdf> [<https://perma.cc/TW4Y-9HLT>].

40. *Lavery II Brief*, *supra* note 3, at 80–81.

41. 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).

42. “[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).

intelligent animals.⁴³ However, this argument ignores that corporations are created by humans as a proxy for the rights and duties of their human stakeholders.⁴⁴ They are simply a vehicle for addressing *human* interests and obligations.⁴⁵

The *Lavery II* 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.”⁴⁶ The *Lavery I* brief similarly argues that “*if* humans bereft of autonomy, self-determination, sentience, consciousness, even a brain, are entitled to personhood and legal rights, *then* this Court must either recognize Tommy’s just equality claim to bodily liberty or reject equality entirely.”⁴⁷ Although not described as such in the *Lavery I* or *Lavery II* briefs, reasoning along these lines is often referred to by philosophers as “the argument from marginal cases.”⁴⁸

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.”⁴⁹ The pervasive view that *all* humans have distinctive and intrinsic human dignity regardless of their capabilities may have cultural, religious, or even instinctual foundations.

All of these foundations would on their own present huge challenges for animal legal personhood arguments to overcome in the real world of law, but they are not the only reasons to reject the arguments. Humans with cognitive impairments are a part of 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 which we are presently aware living

43. Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 51 (2009).

44. *Id.* at 52–53.

45. *See id.* at 52–63 (analyzing the history of corporate personhood being consistently defined as a proxy for human interests under all major theories seeking to explain corporate personhood).

46. *Lavery II Brief*, *supra* note 3, at 109.

47. *Lavery I Brief*, *supra* note 4, at 73.

48. *See Children & Chimps*, *supra* note 25, at 22–28.

49. *Id.* at 28–29.

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 are human infants and adults with severe cognitive impairments are humans who are other humans’ parents, siblings, children or spouses.

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

Thus, recognizing that personhood is anchored in the human moral world does not imply that humans with cognitive impairments are not persons or have no rights. As explained by Professor Cohen, “[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.”⁵⁰ It would be a serious misperception to view the appellate court’s decision in *Lavery* as actually threatening to infants and others with severe cognitive impairments in finding connections between rights and duties. This misperception would reflect an overly narrow view of how rights and duties are connected.

Regarding personhood, they are connected with human society in general, rather than on an individual-by-individual capacities analysis.⁵¹ Again, appropriate legal personhood is anchored in the human moral community, and we include humans with severe cognitive impairments in that community because they are first and foremost humans living in our

50. COHEN & REGAN, *supra* note 35, at 37.

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

society.⁵² Indeed, the history of legal rights for children and for cognitively impaired humans is a history of emphasis on their humanity.⁵³ 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.”⁵⁴

52. 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.

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

54. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 998 N.Y.S.2d 248, 251 n.3 (Sup. Ct. 2014). . In Professor Tribe’s *Amicus Curiae* Letter Brief in support of NhRP’s motion for leave to appeal to the New York Court of Appeals, he raises two common theoretical conceptualizations of the function of human rights that are debated by academic philosophers and other theorists: the “interest theory” and the “will theory.” Tribe Letter Brief, *supra* note 6, at 8–10. The will theory “asserts that the function of a right is to give its holder control over another’s duty.” Leif Wenar, *Rights*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2.2 (Edward N. Zalta ed., 2015), <http://plato.stanford.edu/entries/rights/#2.2> [<https://perma.cc/JK87-9SN6>]. The interest theory maintains that “the function of a right is to further the right-holder’s interests.” *Id.* Philosophers and other academicians have squabbled over whether one of these theories provides a better accounting of the function of rights than the other “literally for ages.” *Id.* Both theories are problematic if rigidly applied. For example, the *Stanford Encyclopedia of Philosophy* notes that “the interest theory is also misaligned with any ordinary understanding of rights.” *Id.* In any event, although one could argue that animals have interests and thus should have some form of “rights” under an expansive view of the interest theory that goes beyond its usual focus on humans and human proxies, such a conclusion is not in any way compelled under the theory. See J. Raz, *On the Nature of Rights*, 93 MIND 194, 204 (1984) (a prominent interest theory proponent noting that “[t]he definition of rights itself does not settle the issue of who is capable of having rights beyond requiring that right-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.”). Professor Tribe asserts that even under will theory, which may be viewed as a more restrictive perspective on the function of rights, it is:

unsustainable to equate legal personhood with rights-holding because the class of potential rights-holders under that definition would exclude what our culture universally regards as legal persons. Needless to say, infant children and comatose adults are

IV. THE *LAVERY II* BRIEF FAILS TO RECOGNIZE THE DISTINCTIVE NATURE OF HUMANS' CAPACITY TO BEAR LEGAL DUTIES

The most notable distinction between the *Lavery II* brief and the *Lavery I* brief is that the *Lavery II* brief seeks to utilize additions to previous expert affidavits and some new expert affidavits to strengthen the argument already made in the *Lavery I* brief that chimpanzees have some sense of moral responsibility in their relationships.⁵⁵ 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.⁵⁶

Whether chimpanzees have some quality that could be described as a sense of moral responsibility in their relationships is quite obviously not the pertinent question regarding legal personhood under our human legal system. 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. Perhaps any type of mature animal that lives cooperatively in some kind of family

paradigmatic legal persons. Yet they certainly do *not* possess what will theorists would deem rights.

Tribe Letter Brief, *supra* note 6, at 9. But this line of argument undervalues courts' consistent emphasis on humanity's centrality to personhood. Our courts have appropriately recognized that there is something distinctive in humanity. As discussed above, this perception of distinctiveness may have cultural, religious or even instinctual foundations, but infants and comatose humans should also be considered first as humans rather than by their limitations because they are factually part of society's community, even if they cannot themselves act as moral agents. *See supra* notes 32–47 and accompanying text. Further, courts of course appropriately do not tend to declare allegiance to either of these competing academic philosophical theories in addressing rights. Courts are, to say the least, not rigidly beholden to conflicting academic philosophical theories.

55. *See, e.g., Lavery II Brief, supra* note 3, at 16–17. Although the argument is emphasized less in *Lavery I*, the *Lavery I* brief also argues that chimpanzees have moral agency. *See, e.g., Lavery I Brief, supra* note 4, at 44.

56. *Lavery*, 998 N.Y.S.2d at 251.

or group could be described as normally having 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 sufficient moral responsibility to be 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.⁵⁷ 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.⁵⁸

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.”⁵⁹ This makes the point. Our legal system appropriately does not view chimpanzees as possessing sufficient moral agency to be accountable under our human legal system. 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.⁶⁰ Whether chimpanzees possess

57. *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>].

58. 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>].

59. 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>].

60. 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

2016] *FOCUSNG ON HUMAN RESPONSIBILITY* 535

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 responsibility to be held accountable under our laws.

The *Lavery II* brief also argues that the two law review articles cited by the *Lavery* court “merely set forth Professor Cupp’s personal preference for an exceedingly narrow branch of philosophical theory of contractualism that arbitrarily excludes every nonhuman animal, while including every human being, in support of which he cites no cases.”⁶¹ An amicus brief filed opposing the appeal of *Lavery I* responded to a similar assertion by the NhRP that practically no philosophers have supported “rights for being human” by pointing out “the vast western philosophical canons to the contrary.”⁶²

But at an even more fundamental level, noting that courts do not feel bound by strict adherence to academic philosophical theories would be an understatement. Philosophical theories may be useful in some endeavors, such as understanding or explaining the foundations of a society, but abstract theoretical philosophy is merely a tool at best. Judges seek justice at a broad level 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.

Similarly, my observations and analyses 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. As articulated throughout this essay and my other writings, focusing legal personhood on humans and their proxies among the beings

property, rather than based on a conclusion that the animal is morally blameworthy.

61. *Lavery II Brief*, *supra* note 3, at 76.

62. 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>].

of which we are presently aware 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.

The history of rights expansion has been a history of focusing on the humanity of those who were previously denied rights. While there may be no case law before *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, [*sic*] and not to non-persons such as orcas.”⁶³

Finally, as explained by Justice Jaffe in rejecting *Lavery II*, the *Lavery II* brief and its affidavits fail to provide “any allegation or ground that is sufficiently distinct from those set forth in the first petition.”⁶⁴ An argument that chimpanzees are capable of bearing some sorts of responsibilities was previously made, albeit with less emphasis, in the *Lavery I* brief that was unanimously rejected in the *Lavery* appellate decision.⁶⁵

63. *Tilikum ex rel. PETA, Inc. v. Sea World Parks & Entm't Inc.*, 842 F. Supp.2d 1259, 1263 (S.D. Cal. 2012).

64. Order To Show Cause & Writ of Habeas Corpus (Dec. 23, 2015), *supra* note 12, at 2.

65. For example, the *Lavery I* 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).

Lavery I Brief, *supra* note 4, at 32.

V. HOW FAR MIGHT ANIMAL PERSONHOOD AND RIGHTS EXTEND?

The NhRP has stated that a goal of using these lawsuits is to break through the legal wall between humans and animals.⁶⁶ But we have no idea how far things might go if the wall comes down. One might suspect that many advocates would push for things to go quite far.

As noted above, in the real world, law does not fit perfectly with any single philosophical theory or other academic theory because judges must be intensely conscious of the practical, real world consequences of their decisions. One practical consequence courts should expect if they break through the legal wall between animals and humans is 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. We should not fool ourselves into minimizing the implications of these lawsuits by thinking that they are, in the long run, only about the smartest animals.

How many species get legal personhood based on intelligence is just the start. Once the wall separating humans and 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.⁶⁷ We do not have

66. "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>].

67. See *Children & Chimps*, *supra* note 25, at 21. The Manhattan Stanley ruling asserted in a footnote that "the floodgates argument is not a cogent

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, perhaps a court could be tempted to believe that granting personhood to chimpanzees would be a limited and manageable change. If that were accepted as a starting position, there is no clear or even fuzzy view of the end position. It would at least progress to assertions that most animals utilized for human benefit have some level of autonomy interests sufficient to allow them to be legal persons who may have lawsuits filed on their behalf on that basis. Professor Richard Epstein has recognized the slipperiness of this slope, pointing out that “[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.”⁶⁸

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 society should carefully think them through. Any court that contemplates making this restructuring of our legal system must also contemplate the practical consequences.

reason for denying relief.” *Nonhuman Rights Project, Inc. v. Stanley*, 16 N.Y.S.3d 898, 917 n.2 (Sup. Ct. 2015). The judge cited *Enright v. Eli Lilly & Co.*, 570 N.E.2d 198, 204 (N.Y. 1991) (Hancock, J. dissenting), which involved a proposed tort law expansion. Although no pinpoint citation was provided, apparently the judge was referencing the dissent in *Enright*. *Id.* Interestingly, the majority opinion in *Enright* found it appropriate to consider what it viewed as “staggering implications” of the proposed expansion, and the difficulty, if the expansion were accepted, “of confining liability by other than artificial and arbitrary boundaries.” *Id.* at 201. In the NhRP lawsuits, courts must consider that there is no basis for determining how far to extend legal personhood among the world’s billions of animals if personhood is grounded in a vague intelligence standard.

68. 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).

2016] *FOCUSNG ON HUMAN RESPONSIBILITY* 539

VI. THE POLITICAL PROCESS IS IMPORTANT IN ADDRESSING THIS TYPE OF PROPOSED CHANGE

As noted above, it seems quite likely that Americans will continue to push for more protections of animals through the democratic process, and that is a good thing. But of course most citizens would oppose making animals legal persons, and courts need to demonstrate restraint and to respect the democratic process. Courts applying common law do not *always* need to wait for legislatures to act, but the more monumental the potential change, and the more it would violate the views of most citizens, the more thoughtful courts need to be about whether it is appropriate for them to make the change.

VII. A FEW WORDS ABOUT THE COMMON LAW WRIT OF HABEAS CORPUS IN *LAVERY*

Professor Tribe has argued that the *Lavery* appellate court decision misunderstood the “crucial role” the common law writ of habeas corpus has historically played in “providing a forum to test the legality of someone’s ongoing restraint or detention.”⁶⁹ He also says that it serves as “a crucial guarantor of liberty by providing a judicial forum to beings the law does not (yet) recognize as having legal rights and responsibilities on a footing equal to others.”⁷⁰

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

69. Tribe Letter Brief, *supra* note 6, at 3.

70. *Id.* at 4.

The New York habeas corpus statute states that a “*person*” or one acting on the person’s behalf may petition for the writ.⁷¹ Thus, the jurisdiction question is related to the ultimate question of legal personhood under the statute’s language. Boundaries are needed for jurisdiction as well as for substantive relief, and, among the beings of which we are presently aware, habeas corpus should be grounded only in the human community.⁷²

VIII. ANIMAL TRUSTS DO NOT CREATE NEW LEGAL PERSONS

The *Lavery I* brief and the *Lavery II* brief argue that animals are already recognized as legal persons in New York. They assert that a New York state statute allowing humans to create an *inter vivos* trust for their companion animals or other animals makes the animals beneficiaries, and that “only ‘persons’ may be trust beneficiaries.”⁷³ But when a state permits people to create trusts to care for animals, the legislative intent is not to declare that the animals are now legal persons with autonomy rights. Rather, the intent is doubtless to give humans peace of mind in knowing that their beloved animals will be cared for after they pass away, as well as to facilitate good care for animals. Further, as explained by New York Assistant Attorney General Christopher Coulston in opposing this argument in one of the related chimpanzee cases, elsewhere a New York statute defines the term “animal,” which is used repeatedly in the companion animal *inter vivo* trust statute, as “every living creature *except* a human being.”⁷⁴

71. N.Y. C.P.L.R. 7002(a) (MCKINNEY 2012).

72. This is not inconsistent with allowing habeas corpus and personhood for detainees held by the United States at Guantanamo Bay. *See Boumediene v. Bush*, 553 U.S. 723, 798 (2008). The detainees are human. Although American courts have in some situations not granted full personhood to some subsets of humans (such as when the odious practice of slavery was an American institution), because of personhood’s focus on humanity American courts have never extended personhood beyond humans and human proxies. *See also supra* note 36.

73. *Lavery I Brief*, *supra* note 4, at 50; *see also Lavery II Brief*, *supra* note 3, at 72.

74. Respondent’s Memorandum of Law in Opposition to the Petition for a Writ of Habeas Corpus & in Support of their Cross-Motion to Change Venue to Supreme Court, Suffolk County at 16, *Nonhuman Rights Project v. Stanley*, No.

IX. CONCLUSION

Recognizing that personhood is a fit for humans rather than animals in our legal system does not limit us to considering animals as “mere things” with the same status as inanimate objects. “Mere things” do not have laws protecting them. This is not an argument that we have done enough for animals. Society is increasingly interested in protecting animals through law, and we should continue to develop our protections. As noted above, in some areas, our laws have not yet caught up with our evolving views on the protection of animals and quite a bit of evolution is likely still ahead even from an animal welfare perspective.⁷⁵

Felony animal cruelty statutes provide a hopeful example of the kind of evolution that we have experienced and likely will continue to experience without restructuring our legal system to divorce personhood from humans and human proxies. Twenty-five years ago few states made felony status available for serious animal cruelty.⁷⁶ A misdemeanor was the most serious charge available in most states. However, by 2014, our laws in this area had dramatically evolved. In that year, South Dakota became the last of *all* states to make serious animal cruelty eligible for felony status.⁷⁷ We need to continue evolving our legal system like this to provide more protection to animals where appropriate, not because animals are legal persons, but because humans need to be responsible in their treatment of animals.

152736/2015 (N.Y. Sup. Ct. May 22, 2015) (citing N.Y. AGRIC. & MKTS. LAW § 350 (McKinney 2015)), <http://www.nonhumanrightsproject.org/wp-content/uploads/2015/05/Reply-Brief-from-AG-5-22-15.pdf> [<https://perma.cc/P8JC-BKE6>].

75. See *supra* notes 30–31 and accompanying text. I argue this point in more depth and provide suggestions for some types of changes courts and legislatures should make in framing animals’ property status in *More than Mere Things*, *supra* note 33.

76. The Animal Legal Defense Fund has gathered information about the year each state adopted felony animal cruelty provisions. See *Jurisdictions With Felony Animal Cruelty Provisions*, ANIMAL LEGAL DEFENSE FUND (Apr. 2012), http://aldf.org/downloads/Felony_Status_List%204-12.pdf [<https://perma.cc/YP8L-5EBR>]. According to the website’s list, as of 1990, only six states had adopted felony animal cruelty provisions. *Id.*

77. *South Dakota is Last State to Make Animal Cruelty a Felony*, J. AM. VETERINARY MED. ASS’N NEWS (June 15, 2014), <https://www.avma.org/News/JAVMANews/Pages/140615f.aspx> [<https://perma.cc/YB7N-AAD4>].