APL 2021-00087
Bronx County Clerk's Index No. 260441/19
Appellate Division–First Department Case No. 2020-02581

Court of Appeals

of the

State of New York

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

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

Petitioner-Appellant,

– against –

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

Respondents-Respondents.

BRIEF OF *AMICUS CURIAE* RICHARD L. CUPP JR. [1] IN SUPPORT OF RESPONDENTS-RESPONDENTS

LAW OFFICE OF CALVIN D. WEAVER
51 Main Street
Hammondsport, New York 14840
Tel.: (607) 569-7070
Fax: (607) 569-7071
calvinweaverlaw@gmail.com

Attorney for Amicus Curiae

[1] John W. Wade Professor of Law, Pepperdine University Caruso School of Law. University affiliation is noted for identification purposes only. This brief reflects only the author's scholarship and views; it does not purport to reflect the views of Pepperdine University or any other institution.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

ARGUMENT 3

I. LEGAL PERSONHOOD RIGHTS AND A NORM OF LEGAL ACCOUNTABILITY ARE INTERTWINED AS A FOUNDATION OF OUR SOCIETY AND ITS LEGAL SYSTEM 3

A. The United States Government, Scholars, and Societal Leaders have recognized that Legal Rights are intertwined with a Norm of Legal Accountability 6

1. The United States Government on Rights and Duties 6

2. Some Examples of Scholars recognizing that Legal Rights are intertwined with Legal Accountability 9

B. The Legal Personhood of Children and Humans with Cognitive Limitations is Anchored in their Membership in the Human Community 12

C. The *Amicus Curiae* Briefs by Animal Law Professors who Support Animal Legal Personhood are Unpersuasive 15

D. Principles of the Social Contract Support Recognizing that Legal Rights are intertwined with a Norm of Legal Accountability 17

II. THE AMICUS CURIAE BRIEFS FILED BY ACADEMIC PHILOSOPHERS DO NOT MAKE A PERSUASIVE CASE FOR ADOPTING THE NRP'S LEGAL THEORY, AND IN SOME RESPECTS THEY UNDERMINE IT 21

III. MISPLACING RELIANCE ON HOHFELDIAN ANALYSIS 24

IV. WILL THEORY AND INTEREST THEORY DO NOT VALIDATE THE NRP'S POSITION 25

V. ANIMAL LEGAL PERSONHOOD AS PROPOSED IN THE NRP'S LAWSUIT WOULD ENDANGER HUMANS WITH SIGNIFICANT COGNITIVE LIMITATIONS 26

CONCLUSION 29

CERTIFICATION OF COMPLIANCE WITH PRINTING SPECIFICATIONS 31

TABLE OF AUTHORITIES

Page

Cases

Moore v. Ganim,
660 A.2d 742 (Conn. 1995) 20

Naruto v. Slater,
888 F.3d 418 (9th Cir. 2018) (Smith, J., concurring in part) 6

Nonhuman Rights Project, Inc. v. Lavery,
152 A.D.3d 73 (1st Dep't 2017), *lv denied*, 31 N.Y.3d 1054
(2018)..2, 4, 12

Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.,
216 A.3d 839, 845 (Conn. App. Ct. 2019), *mot. recons. en banc denied*, AC 192411 (Conn. App. Ct. 2019), *cert. denied*, 217 A.3d 635 (Conn. 2019) 2, 4, 20, 29

Nonhuman Rights Project, Inc. v. R. W. Commerford & Sons, Inc.,
231 A.3d 1171 (Conn. App. Ct. 2020) 2, 4

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)..2, 4, 15

Other Authorities

Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863),
(available at http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm). 8

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/ 5

American Declaration of the Rights and Duties of Man. Claudio M. Grossman, *American Declaration of the Rights and Duties of Man* (1948), in *Max Planck Encyclopedia of Public International Law* (A)(1) (2010).. 7

American Declaration of the Rights and Duties of Man, Preamble, (1948), *available at* https://www.oas.org/dil/access_to_information_human_right_American Declaration_of_the_Rights_and_Duties_of_Man.pdf 7, 8

Ari Ne'eman, *Effective Altruism and Disability Rights are Incompatible*, NOS Magazine, March 30th, 2017, available at http://nosmag.org/effective-altruism-and-disability-rights-are-incompatible-peter-singer/ 27

Barack Obama, Remarks Accepting the Presidential Nomination at the Democratic National Convention in Charlotte, N.C. *in* 2 *Pub. Papers* 1320 (Sept. 6, 2012) 21

Brian Gilmore, *American Rousseau: Barak Obama and the Social Contract*, 35 Thur. Marsh. L. Rev. 9 (2009) 21

Carl Cohen & Tom Regan, *The Animal Rights Debate* 30 (2001) 3, 13

Christine M. Korsgaard, in *Personhood, Animals, and the Law*, Think 25, 26–27 (2013). 9, 27

David L. Braddock & Susan L. Parish*, Social Policy Toward Intellectual Disabilities in the Nineteenth and Twentieth Centuries,* in *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* 83, 90–91 (Stanley S. Herr et al. eds., 2003) 6

Fernando Berdion Del Valle & Kathryn Sikkink, *(Re)discovering Duties: Individual Responsibilities in the Age of Rights*, 26 Minn. J. of Int'l L. 189, 190 (2017) 10

Gerald V. O'Brien, *People with Cognitive Disabilities: The Argument from Marginal Cases and Social Work Ethics*, 48 Soc. Work 331, 331 (2003) 26

Gerard Elfstrom, *Nonhuman Persons*, 144 Philosophy Now 22, 24 (2021)... 23

George Washington, Farewell Address (Sept. 17, 1796) (*available at* The Avalon Project, Yale Law School, https://avalon.law.yale.edu/18th_century/washing.asp). 9

Harold Hongju Koh & Lawrence O. Gostin, *Introduction: The Human Rights Imperative*, in *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* 1 (Stanley S. Herr et al. eds., 2003) 14

J. Raz, *On the Nature of Rights*, 93 Mind 194, 204 (1984)............................... 28

John Locke, *Second Treatise of Government* Ch. 2, Sec. 6 (1690) 19, 20

Margaret Foster Riley, in *CRISPR Creations and Human Rights*, 11 L. & Ethics of Hum. Rts. 225, 240–41 (2017) 4, 11

Martha C. Nussbaum, *Working with and for Animals: Getting the Theoretical Framework Right*, 94 Den. L. Rev. 609, 616 (2017) 22

Peter Singer, *Practical Ethics* 117 (2nd ed. 1993) 27

Philippa Strum, *Rights, Responsibilities, and the Social Contract*, in *International Rights and Responsibilities for the Future* 29 (Kenneth W. Hunter & Timothy C. Mack, eds., 1996)......................................11, 18

Richard Evans Farson, *Birthrights: A Bill of Rights for Children* 1 (Penguin Books 1978) 14

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) 1, 29

Richard L. Cupp Jr., *Children, Chimps, and Rights Arguments from Marginal Cases*, 45 Ariz. St. L. J. 1 (2013)... 1

Richard L. Cupp Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 69. Fla. L. Rev. 465 (2017) 1, 13

Richard L. Cupp Jr., *Considering the Private Animal and Damages*, 98 Wash U. L. Rev. 1313 (2021).. 1

Richard L. Cupp. Jr., *Edgy Animal Welfare*, 95 Denv. L. Rev. 865 (2018)... 1

Richard L. Cupp Jr., *Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals*, 33 Pace Envtl. L. Rev. 517 (2016) 1

Richard L. Cupp Jr., *Litigating Nonhuman Animal Legal Personhood*, 50 Tex. Tech. L. Rev. 573 (2018) 1

Richard L. Cupp. Jr., *Moving beyond Animal Rights: A Legalist/Contractualist Critique*, 46 San Diego L. Rev. 27 (2009) 1

Robert Garner, *Animal Welfare: A Political Defense*, 1 J. of Anim. L. & Ethics 161, 161 (2006) 16

The Function of Rights: The Will Theory and the Interest Theory 2.2.2, Stanford Encyclopedia of Philosophy (Feb. 24, 2020), available at http://plato.stanford.edu/entries/rights/#2 25

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) 25

Timothy Chappell, *On the Very Idea of Criteria for Personhood*, 49 S. J. of Phil. 1 (2011) 13

Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L. J. 710, 721 (1917) 24

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Professor Richard L. Cupp Jr. serves as the John W. Wade Professor of Law at Pepperdine University Caruso School of Law (affiliation noted for identification purposes only). Professor Cupp has published articles and essays in scholarly journals proposing approaches to creating stronger protections for animals without creating animal legal personhood, and addressing concerns about applying legal personhood to animals.[2] Professor Cupp has interest in this case because of its weighty public policy implications and because of his scholarly work addressing animal welfare reform and the concept of animal legal personhood.

Three unanimous appellate courts have included citations to either an *amicus curiae* brief or law review articles authored by Professor Cupp in their opinions rejecting the Nonhuman Rights Project Inc.'s ("NRP") arguments for animal legal personhood. *Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73, 78 (1st

---

[2] *See* Richard L. Cupp Jr., *Considering the Private Animal and Damages*, 98 Wash U. L. Rev. 1313 (2021); Richard L. Cupp. Jr., *Edgy Animal Welfare*, 95 Denv. L. Rev. 865 (2018); Richard L. Cupp Jr., *Litigating Nonhuman Animal Legal Personhood*, 50 Tex. Tech. L. Rev. 573 (2018); Richard L. Cupp Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 69. Fla. L. Rev. 465 (2017) (hereafter "*Cognitively Impaired*"); Richard L. Cupp Jr., *Animals as More than "Mere Things," but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm*, 84 U. Cin. L. Rev. 1023 (2016); Richard L. Cupp Jr., *Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals*, 33 Pace Envtl. L. Rev. 517 (2016); Richard L. Cupp Jr., *Children, Chimps, and Rights Arguments from Marginal Cases*, 45 Ariz. St. L. J. 1 (2013); Richard L. Cupp. Jr., *Moving beyond Animal Rights: A Legalist/Contractualist Critique*, 46 San Diego L. Rev. 27 (2009); Richard L. Cupp Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones toward Abolishing Animals' Property Status*, 60 SMU. L. Rev. 3 (2007).

Dep't 2017) ("*Lavery II*"), *lv denied*, 31 N.Y.3d 1054 (2018); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 152 (3d Dep't 2014) ("*Lavery I*"), *lv denied*, 26 N.Y.3d 902 (2015); *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 216 A.3d 839, 845 (Conn. App. Ct. 2019), *mot. recons. en banc denied*, AC 192411 (Conn. App. Ct. 2019), *cert. denied*, 217 A.3d 635 (Conn. 2019) ("*Commerford I*").[3]

SUMMARY OF ARGUMENT

This lawsuit is not about animal rights per se, but rather about a dangerous and extreme interpretation of animal rights. New York courts and other courts, the United States government, government leaders and many scholars recognize that in our society rights associated with legal personhood are intertwined with a norm of legal accountability. This accountability represents a human community norm rather than an attribute that is required of every member of the human community. Although recognizing the interconnectedness of personhood rights and a norm of accountability does not require reference to the social contract, the founders' social contract ideals reflect this interconnectedness. The philosophical arguments asserted in support of animal legal personhood are not persuasive. Neither Hohfeldian analysis nor will theory nor interest theory support legal personhood.

[3] In 2020 a second Appellate Court of Connecticut decision unanimously rejected the NRP's legal theories in *Nonhuman Rights Project, Inc. v. R. W. Commerford & Sons, Inc.*, 231 A.3d 1171 (Conn. App. Ct. 2020) ("*Commerford II*").

Finally, animal legal personhood as proposed in this lawsuit would endanger humans with cognitive limitations.

ARGUMENT

I. LEGAL PERSONHOOD RIGHTS AND A NORM OF LEGAL ACCOUNTABILITY ARE INTERTWINED AS A FOUNDATION OF OUR SOCIETY AND ITS LEGAL SYSTEM

This lawsuit is not about animal rights per se, but rather about a dangerous and extreme interpretation of animal rights. The NRP does not assert a "soft" interpretation of animal rights, such as an argument that any legal protections create "rights" regardless of whether the subject itself is permitted to seek enforcement of them. Rather, it is pursuing a "strong" view of animal rights, holding that something is truly a right only if a being is permitted to assert it as a legal person. Because the NRP demands the much more ambitious "strong" rights of legal personhood, whether an animal could be viewed as having "soft" rights with no allowance for being the claimant in a legal action to enforce them (and instead relying upon governmental entities to protect the rights) is irrelevant to this lawsuit. Thus, "rights" in this brief will generally refer to rights that entail legal personhood.

In New York and the United States, legal personhood rights are intertwined with a norm of legal accountability. Humans are the only beings for which the norm is capacity for moral agency sufficiently strong to function within our

society's legal system of rights and responsibilities. Further, no other beings (even, for example, the most intelligent of all elephants) ever meet that norm. As explained by the prominent philosopher Carl Cohen, "[a]nimals cannot be the bearers of rights because the concept of right is *essentially human*; it is rooted in the human moral world and has force and applicability only within that world." Carl Cohen & Tom Regan, *The Animal Rights Debate* 30 (2001) (emphasis in original).[4] This is not irrational "speciesism." For example, although Neanderthals were humans, they are often classified as a different species of humans than our species, Homo sapiens. If Neanderthals were alive at present, they might well possess a norm of sufficient moral accountability to be recognized as legal persons within our moral world, despite representing what is often described as a different species of humans. *See* Margaret Foster Riley, *CRISPR Creations and Human Rights,* 11 L. & Ethics of Hum. Rts. 225, 242-46 (2017).

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

---

[4] Courts view corporations as proxies for their human owners, and thus corporate rights and rights of other human proxies are focused on humanity. *See Lavery I*, 124 A.D.3d 148, 152; *Lavery II*, 152 A.D.3d 73, 78-79.

norm is a pairing of like “kind” where the “kind” category has special significance—the significance of the norm being the only beings who can rationally participate as members of a society subject to a legal system such as ours.

Pointing out that elephants possess some sense of choices in their lives is not sufficient; there is no evidence that they, either as a norm or as individuals, demonstrate a *sufficient* level of moral agency to be justly held legally accountable and to possess legal personhood rights under our human legal system. In 2012, when an adult chimpanzee at the Los Angeles Zoo beat a three-month-old baby chimpanzee in the head until the baby died, doubtless no authorities contemplated charging the perpetrator in criminal court.[5] Surely an elephant committing “murder” would not be prosecuted in our criminal justice system either. Just as legal accountability is not a fit for elephants in our human legal system, legal personhood rights are not a fit for elephants in our human legal system.

As *Commerford I* noted, until the NRP began bringing its animal personhood lawsuits, there was little direct authority regarding animal legal personhood. *Commerford I*, 216 A.3d at 844. But with the NRP’s proliferation of lawsuits, the case law is growing. The unanimous decisions in *Lavery I, Lavery II*,

[5] *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/.

Commerford I, and *Commerford II* all emphasize the significance of legal accountability in rejecting legal personhood rights for animals. In 2018, a Ninth Circuit judge added that "[p]articipation in society brings rights and corresponding duties" in concurring with a decision rejecting a copyright infringement lawsuit an animal rights group brought ostensibly on behalf of a monkey. *Naruto v. Slater*, 888 F.3d 418, 432 n.6 (9th Cir. 2018) (Smith, J., concurring in part). Seeking legal redress is participating in society. As addressed below, many other sources also provide support for these rulings.

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

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

1. The United States Government on Rights and Duties

In the years prior to World War II, social Darwinism and the eugenics movement devalued human rights. For example, individuals with cognitive limitations were often sterilized and in other ways mistreated.[6] After the greatly

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

magnified horrors of World War II, the United States and other nations recognized the need to work together in articulating and protecting fundamental rights for all humans.

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

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

> The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty. Duties of a juridical nature presuppose others of a moral nature which support them in principle and constitute their basis.

American Declaration of the Rights and Duties of Man, Preamble, (1948), *available at* https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf.

This declaration by the United States and other nations could hardly be clearer in repudiating the NRP's efforts to disconnect accountability from rights. Rights and duties are interrelated in "*every"* social and political activity. *Id.* Duties are a "prerequisite" for rights. *Id.* Human moral agency is central; legal duties are presupposed by humans' moral duties. Other language in the preamble notes that humans are born free and equal as humans are "endowed by nature with reason and conscience." *Id.* Importantly, the Declaration's language does not distinguish between human society rights and other rights; it recognizes that *all* rights capable of being asserted by the rights holder are focused on humanity.

President Abraham Lincoln provided a particularly prominent example of recognizing the intertwining of rights and accountability. In one of the most frequently repeated quotes in American history, President Lincoln concluded the Gettysburg Address by declaring that "government of the people, by the people, and for the people, shall not perish from the earth."[7] President Lincoln recognized that government *of* persons, which includes our legal system, is not only a communal enterprise *by* persons, it is specifically *for* persons. Citizens and even noncitizen humans are generally capable of meaningfully interacting with the communal enterprise of government, including its legal system. No animals have

[7] President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), (available at http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm).

this ability, and thus they must be treated appropriately by persons rather than misidentified as persons.

As another of many available examples, in his Farewell Address President George Washington noted: “The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.”[8]

Of course, the American Declaration that the United States formally adopted and follows did not carve out any exceptions allowing massive and harmful societal upheaval through assignment of personhood rights to animals. Neither did Lincoln’s Gettysburg Address, nor Washington’s Farewell Address. Providing appropriate care for animals is exceptionally important. But personhood rights are only a fit regarding humans, as only humans have the norm of capacity for responsibilities that go along with rights.

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

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

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

Christine M. Korsgaard, in *Personhood, Animals, and the Law*, Think 25, 26–27 (2013). Further, Professor Korsgaard references the "common view" that "rights are grounded in some sort of agreement that is reciprocal," and the social contract's connection to this broadly held philosophical position. *Id.* at 27. Professor Korsgaard's quite interesting *amicus curiae* brief filed in this case, which she substantively begins with, for good reason, a declaration that "This brief does not address the issue of Happy's personhood,"[9] is addressed *infra* at pages 22-24.

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

Professor Philippa Strum notes that "[I]ndividual responsibility to the community is central to rights and contact theory as articulated in the Western

---

[9] Korsgaard Amicus Curiae brief, p. 5.

tradition." Philippa Strum, *Rights, Responsibilities, and the Social Contract*, in *International Rights and Responsibilities for the Future* 29 (Kenneth W. Hunter & Timothy C. Mack, eds., 1996). She adds that "rights and responsibilities have been connected from the inception of the idea of individual rights in Western political thought." *Id.* at 30–31.

University of Virginia School of Law Professor Margaret Foster Riley writes that "[i]mportantly, it is not that we deny that animals have will; it is that we recognize that they are not able to exercise that will in the context of human moral order. We cannot tell the tiger that it is morally wrong to eat us and expect the tiger to comply." Margaret Foster Riley, *supra*, at 240–41. Professor Riley further explains:

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

Id. at 240.

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

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

The personhood of humans lacking capacity to bear legal and moral obligations, such as children and those with significant cognitive limitations, is anchored in the community of humans. Humans' personhood is not based on an individual analysis of intellect, but rather on being a part of the human community[10] where moral agency sufficient to accept our laws' duties as well as their rights is the norm.

Lavery II correctly affirmed this point. The court noted the NRP's argument 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. However, the court appropriately rejected the NRP's position, stating that "[t]his argument ignores the fact that these are still human beings, members of the human community." *Id*.

Lavery II's observation is not a simplistic call to favor humans regardless of whether doing so makes sense. Focusing on the human community in limiting legal

---

[10] 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.

personhood is rational rather than arbitrary. The most significant identifying characteristic of all humans is their humanity, not their abilities. Humans with cognitive limitations are deeply connected to the human community or society in ways that animals can never be connected to human society.[11] Professor Carl Cohen has explained that "[p]ersons who, because of some disability, are unable to perform the full moral functions natural to human beings are not for that reason ejected from the human community." Cohen & Regan, *supra*, at 37; *see also, e.g.*, Timothy Chappell, *On the Very Idea of Criteria for Personhood*, 49 S. J. of Phil. 1 (2011) (challenging the argument that criterial properties should define personhood and defending humanity as the basis for defining personhood).

Humans are the only beings 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. Personhood in the human legal system is related to humans' distinctive moral agency, and humans with cognitive limitations are first and foremost humans even when they do not as individuals fit this agency norm.

[11] I address this in much more detail, and provide a short history of courts' present focus on the humanity of humans with cognitive limitations rather than their intellectual abilities in assigning legal rights and personhood, in Richard L. Cupp Jr., *Cognitively Impaired, supra* note 2, at 487–513.

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

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

Lavery I is in accord with *Lavery II* regarding this, stating that "[t]o be sure, some humans are less able to bear legal duties or responsibilities than others. These

differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility." *Lavery I*, 124 A.D.3d at 152 n.3.

Thus, both *Lavery* decisions recognize the significance of the norm of legal responsibility among humans. Our pragmatic legal system routinely utilizes reasonable norms in appropriate circumstances. Few if any norms are more reasonable – indeed compelling – than a norm recognizing legal personhood for all humans regardless of their individual capacities. This is because all humans' core identities are as deeply interconnected members of our human community, and our human community is uniquely capable of moral accountability under our legal system.

C. The *Amicus Curiae* Briefs by Animal Law Professors who Support Animal Legal Personhood are Unpersuasive

The *amicus curiae* briefs submitted by animal law professors who challenge the *Lavery I* and *Lavery II* decisions are both unsurprising and unpersuasive. Their position is unsurprising because animal law professors are a self-selecting group, and many may have strongly favored radical and daring positions such as granting legal personhood to animals long before these cases were decided. As one writer described:

> Defending animal welfare is an increasingly unenviable task for anyone who desires popularity and credibility within the animal protection movement. Animal welfare is clearly not as 'sexy' or

> 'cutting edge' as animal liberation or animal rights. To talk of animal rights or liberation is to be perceived as modern, radical and daring.

Robert Garner, *Animal Welfare: A Political Defense*, 1 J. of Anim. L. & Ethics 161, 161 (2006).

In any event, the animal law professors' critiques of the *Lavery* decisions are unpersuasive, and they neglect a core aspect of the decisions. For example, the *amicus curiae* brief submitted by a group of "American and Canadian Law Professors" on March 18th, 2022 ("AC Professors' Br.") accuses the *Lavery* decisions of "speciesism" and "anthropocentricism." AC Professors' Br. p. 3. The brief inaccurately alleges that the decisions' linking of personhood rights and duties would exclude humans who lack duties from personhood but for reliance on "simple biological prejudice" in holding that personhood applies to all humans regardless of their individual capacities. *Id.* at p. 6.

This critique misses the not merely rational, but deeply compelling reasons for recognizing both that the norm among humans is accountability under our legal system, and that this *norm* is what matters rather than the capacities of individual humans. The Respondents have pointed out that others supporting the Appellants have also made this error. *See* Respondents' Response to *Amici* Briefs of Laurence H. Tribe, Sherry F. Colb, Michael C. Dorf and Buddhist Scholars, pp. 2-7.

As *Lavery I* and *Lavery II* both correctly recognized in unanimous decisions, all humans' core identities are as deeply interconnected members of our human

community. Courts do not *gift* humans lacking strong cognitive abilities with legal personhood; they *recognize* that all humans are first and foremost members of the human community and thus fully persons. *See* analysis and citations, *supra* Part I (B).

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

The social contract ideals that the United States' founders loosely but frequently referenced reflect the connection between legal personhood and a norm of legal accountability in our society and its legal system. As demonstrated in the previous sections of this brief, recognizing the interconnectedness of legal personhood and a norm of sufficient agency to be accountable under our legal system does not require reference to the social contract. However, the founders' social contract ideals reflect this interconnectedness. Further, contrary to the tenor of the NRP's and some of their *amicus curiae* supporters' arguments, scholarly recognition of the relationship between social contract ideals and the ability to hold rights is commonplace.

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

of society as based on a kind of social contract supports such a conception of rights." Korsgaard, *supra*, at 27.[12] As noted above, Professor Strum observes that this is a mainstream – even a "central" – understanding: "[I]ndividual responsibility to the community is central to rights and contact theory as articulated in the Western tradition." Strum, *supra*, at 29.

The NRP and some of the *amici* supporting the NRP create a red herring in arguing that the social contract creates only citizens, not persons. As noted by Professor Strum, the social contract's principles are connected to the question of rights and personhood in the Western tradition. *Id.* The principles of the social contract reflect that it is the general capacity for normative self-government in the human world that distinguishes humans as legal and moral persons.

A being must possess sufficient moral agency to be societally accountable to participate in the social contract that created and sustains our government, including our legal system. Thus, the social contract reflects the centrality of accountability to our legal system, which articulates and protects legal rights. No

---

[12] Professor Korsgaard notes that foreigners who are not a party to the social contract are afforded legal rights, but she also acknowledges that reciprocity can be required of foreigners. *Id.* at 27–28. However, she asserts that human rights are based on "not merely . . . the interests protected under some actual social contract," but also on broader interests. *Id.* at 28. Thus, although she rejects legal personhood for animals based on their intelligence, as her amicus curiae brief reflects, she supports some form of rights at a broader level, seemingly for *all* animals capable of having interests. As addressed *infra* on pages 22-24, this reflects that her proposed approach to enhanced consideration of animals' interests is far different from what the NRP seeks.

animals are capable of participating in the social contract that is our human government, including its legal system. Humans have a norm of such capacity, and those who do not fit the norm are first and foremost defined by their membership in the human community.[13]

The relevance of social contract principles to legal personhood cannot be negated by pointing to natural rights as the founders' source of moral personhood; the issue before the court is *legal* personhood under our legal system. Natural rights are related to legal personhood, but legal personhood under our legal system presupposes government and our legal system, which our society recognizes as being created under our social contract. Further, John Locke's writings on natural rights emphasize the obligations or duties that go along with liberties. In his *Second Treatise of Government*, a book that was of particular importance to our nation's founders, Locke writes that humans' natural state is to be free. However, he adds: "But though this be a state of liberty, yet it is not a state of license . . . The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions." John Locke, *Second Treatise of Government* Ch. 2, Sec. 6 (1690).

---

[13] *See supra*, pages 12-15.

In other words, even under the state of nature, freedom is intertwined with obligations – the law of nature "obliges every one." *Id.*

Not surprisingly, Locke distinguishes animals from the human community. Humans are equal by nature as members of "the same species and rank," and "born to all the same advantages of nature, and the use of the same faculties." Locke at Sec. 4. Humans share "all in one community of nature," which Locke distinguishes from "the inferior ranks of creatures." *Id.* at Sec. 6.

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

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

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

Finally, the social contract ideal is not oppressive. To the contrary, this ideal that is at the core of our society helps to bring us together. As stated by President Barak Obama, "We, the People, recognize that we have responsibilities as well as rights; that our destinies are bound together." Barack Obama, Remarks Accepting the Presidential Nomination at the Democratic National Convention in Charlotte, N.C. *in* 2 *Pub. Papers* 1320 (Sept. 6, 2012). *See also* Brian Gilmore, *American Rousseau: Barak Obama and the Social Contract*, 35 Thur. Marsh. L. Rev. 9 (2009) (comparing Barak Obama to the philosopher Jean-Jacques Rousseau in their shared attraction to social contract ideals).

II. THE *AMICUS CURIAE* BRIEFS FILED BY ACADEMIC PHILOSOPHERS DO NOT MAKE A PERSUASIVE CASE FOR ADOPTING THE NRP'S LEGAL THEORY, AND IN SOME RESPECTS THEY UNDERMINE IT

Professor Martha Nussbaum, who has filed an *amicus curiae* brief encouraging the court to "release Happy from a life of captivity,"[14] has repeatedly criticized the NRP's approach to animal rights, including in a speech in 2020.[15] In a 2017 article she stated: "Sooner or later, people will wake up to the fact that Wise [Steven Wise is the NRP's president and lead attorney] is playing bait and switch:

[14] Nussbaum Brief, p. 2.
[15] *See* Respondents' Opp. to Prof. Martha C. Nussbaum's Motion for Leave to Appear as *Amicus Curiae*, pp. 6-7.

likeness to humans for some creatures, some other as yet unannounced rationale for other creatures."[16]

The "capacities" approach Professor Nussbaum promotes over the NRP's approach calls for "examin[ing] the capacities of each creature" in determining what is needed to allow a "whole life" for the creature. Nussbaum Brief, p. 12. Professor Nussbaum also insists that "Happy's personhood cannot be based on her identity as an elephant but should instead be based on her capabilities as her own individual being." *Id.* at 26. Under this approach, presumably *every* animal with some minimal degree of capacities would be entitled to an individual day in court to determine whether it is being allowed a whole life.

As noted above, Professor Korsgaard's *amicus curiae* brief begins substantively with the words "This brief does not address the issue of Happy's personhood."[17] But of course, this case revolves around the issue of legal personhood. Professor Gerard Elfstrom's analysis of Korsgaard's views provides insight as to why she may have chosen to highlight that she is not addressing personhood:

> So although Korsgaard differs from Kant in arguing that nonhuman animals matter morally, she agrees with Kant that only human beings are capable of functioning as moral agents. In other words, she is assuming that

[16] Martha C. Nussbaum, *Working with and for Animals: Getting the Theoretical Framework Right*, 94 Den. L. Rev. 609, 616 (2017).
[17] Korsgaard Brief, p. 5.

> nonhuman animals are unable to grasp general moral principles and align their actions with them. The activists of the Nonhuman Rights Project are thus faced with the difficulty that nonhuman animals can never be persons in the way humans are. From this perspective, the Nonhuman Rights Project is misconceived. But there are robust grounds for asserting that nonhuman animals should matter morally simply because of the ways they can suffer.[18]

Indeed, Professor Korsgaard's broad conception of animal rights seems to be comparable in breadth to Professor Nussbaum's broad conception, and Professor Korsgaard's views do not seem to support an intelligence/autonomy approach to animal legal personhood. Her brief asserts that "We take our lives to matter because they matter to us, and we should take Happy's life to matter because it matters to her." Korsgaard Brief, p. 12. This seems to indicate that *every* animal who has any interest at all in its life should have some level of "rights." Her brief further asserts that "Indeed, the very fact that there are laws against cruelty to animals shows that most Americans, and most people, think that animals do have at least some rights." *Id.* at 21. Professor Korsgaard's views of rights appear to be dramatically different from the legal personhood rights based on elephants' strong cognitive abilities asserted in the NRP's lawsuit, and her brief does not support the NRP's legal personhood theory.

[18] Gerard Elfstrom, *Nonhuman Persons*, 144 Philosophy Now 22, 24 (2021).

Perhaps the most useful purpose served by the philosophers' *amicus curiae* briefs is in demonstrating the limitations of abstract academic philosophy in providing workable answers to the concrete and pragmatic issues courts must rule upon. Animal rights theories seeking to rework our legal system are interesting. But the interconnectedness of legal personhood rights and a norm of legal accountability constitutes, as addressed above, a foundation of our society and its legal system, and this interconnectedness has been supported by unanimous New York court decisions, by other court decisions, by the United States government, by national leaders, and by many scholars.

III. MISPLACING RELIANCE ON HOHFELDIAN ANALYSIS

The NRP is incorrect in asserting that Professor Wesley Hohfeld's writings about the form of rights and duties between persons support the NRP's demand for creation of elephant legal personhood. Perhaps the most basic problem with the NRP's argument is that this court is addressing a question that must precede the Hohfeldian analysis of the forms of rights granted to persons. Professor Hohfeld's description of rights assumed it was dealing with the rights of *persons*.[19] This case revolves around a more foundational question: whether this court should create personhood for an elephant. The appropriate boundaries of personhood cannot be

---

[19] 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).

answered by Hohfeldian analysis. As acknowledged by professor Thomas Kelch, "[S]ince Hohfeld's theory is largely descriptive, it does not really tell us what grounds our duties and, thus, what ultimately grounds rights. While Hohfeld's theory may help us to identify and explicate legal issues, it is not a method for determining social and legal philosophical issues." Thomas G. Kelch, *The Role of the Rational and the Emotive in a Theory of Animal Rights*, 27 B.C. Envtl. Aff. L. Rev. 1, 9 (1999).

IV. WILL THEORY AND INTEREST THEORY DO NOT VALIDATE THE NRP'S POSITION

Seeking to justify animal legal personhood based on interpretations of the academic "will theory" or the academic "interest theory" of rights, as discussed by Professor Tribe's *amicus curiae* brief, is also unhelpful. Philosophers and other scholars have squabbled over whether one of these theories provides a better accounting of the function of rights than the other "literally for ages." *The Function of Rights: The Will Theory and the Interest Theory* 2.2.2, Stanford Encyclopedia of Philosophy (Feb. 24, 2020), available at http://plato.stanford.edu/entries/rights/#2. Both academic theories are challenged regarding practical application. For example, after pointing out criticisms of the will theory, the Stanford Encyclopedia of Philosophy notes that "the interest theory is also misaligned with any ordinary understanding of rights." *Id*. Further, Professor Joseph Raz, a prominent philosopher who is an interest theory

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

V. ANIMAL LEGAL PERSONHOOD AS PROPOSED IN THE NRP'S LAWSUIT WOULD ENDANGER HUMANS WITH SIGNIFICANT COGNITIVE LIMITATIONS

Perhaps the most troubling aspect of creating animal legal personhood based on animals' intellectual capacities is its danger to the most vulnerable humans—humans who possess weak intellectual capacities. As a disability scholar explains, "By comparing 'marginal' humans to animals, the AMC ['argument from marginal cases'—the term philosophers often use for the argument that if rights are granted to humans with lower cognitive capacities than some animals, justice requires granting rights to the more intelligent animals as well] may unwittingly dehumanize people with cognitive disabilities and be yet another way our society justifies maltreatment of its most vulnerable members." Gerald V. O'Brien, *People with Cognitive Disabilities: The Argument from Marginal Cases and Social Work Ethics*, 48 Soc. Work 331, 331 (2003).

The NRP compares animals and humans with significant cognitive limitations in its Verified Petition:

> Because even humans bereft of consciousness may seek the remedy of habeas corpus to protect their bodily liberty, this Court must either recognize an autonomous nonhuman being's just claim to bodily liberty or contravene the fundamental principle of equality that is deeply enshrined in New York statutory, constitutional, and common law.

Verified Petition, Oct. 21, 2018, Paragraph 20.

Professor Peter Singer is a prominent advocate of the argument from marginal cases. He is also one of the most prominent and vocal supporters of the NRP's animal personhood lawsuits – Singer has published at least two op-eds supporting the lawsuits.

Singer is notorious for views he has expressed regarding how humans with significant disabilities compare to animals. For example, he wrote:

> Some members of other species are persons: some members of our own species are not. No objective assessment can support the view that it is always worse to kill members of our species who are not persons than members of other species who are. On the contrary, as we have seen there are strong arguments for thinking that to take the lives of persons is, in itself, more serious than taking the lives of non-persons. So it seems that killing, say, a chimpanzee is worse than the killing of a human being who, because of a congenital intellectual disability, is not and never can be a person.

Peter Singer, *Practical Ethics* 117 (2nd ed. 1993). Because of the views he has expressed, disability rights advocacy groups sometimes stage protests at Singer's speaking events. *See* Ari Ne'eman, *Effective Altruism and Disability Rights are Incompatible*, NOS Magazine, March 30th, 2017, available at

http://nosmag.org/effective-altruism-and-disability-rights-are-incompatible-peter-singer/.

The NRP states that autonomy is sufficient but not necessary for assigning legal personhood. If another basis for granting personhood to beings lacking in strong autonomy were capacity to suffer or experience pleasure, presumably this would necessitate casting a much wider personhood net than covering only those humans who do not make the grade under the NRP's autonomy approach. All species of mammals and many other animals can experience pain. Granting personhood to all animals capable of suffering would be even more unworkable than the NRP's dramatically unworkable autonomy approach.

The NRP's stated views on personhood are not as restrictive as those Singer has supported, but Singer's perspective as one of the NRP's most prominent supporters illustrates the exceptionally radical and harmful changes regarding how we view humans that some proponents of animal legal personhood might press for if courts were to open the door.

Going down the path of connecting animals' cognitive abilities to personhood, even though the animals do not have sufficient cognitive ability to be morally accountable under our legal system, would unintentionally, but in effect, encourage courts and society to think increasingly about individual humans' cognitive abilities when considering personhood. This would create a significant

long-term danger to the rights of individuals with significant cognitive limitations. Deciding elephants are legal persons based on their cognitive abilities would open a door that, over time, swings in both directions regarding rights for humans as well as for animals, and future generations would wish we had kept it closed.

CONCLUSION

When addressing animal legal personhood, the proper question is not whether New York's laws regarding animals should evolve or remain stagnant. New York's laws protecting animals need to continue evolving as our sensibilities and knowledge regarding animals evolves.[20] Rigid opposition to reform is unacceptable, but the radical and unworkable approach of creating animal legal personhood is also unacceptable.

As a progressive but centrist alternative to these extremes, New York's legislature should embrace thoughtful continuing evolution of its animal welfare paradigm, which is focused on human responsibilities regarding our treatment of animals. As the *Commerford I* court recognized, [t]his case . . . is more than what the petitioner purports it to be." *Commerford I*, 216 A.3d 839, 844. Judicially creating animal legal personhood would cause harmful and substantial societal

---

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

upheaval, and proposals for new animal protections should instead be addressed to the legislature.

Dated: April 7, 2022

Respectfully submitted,

By:

Richard L. Cupp Jr.
John W. Wade Professor of Law
Pepperdine University
Caruso School of Law*
Telephone No. (310) 506-4658
richard.cupp.@pepperdine.edu

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

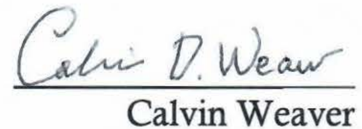
CERTIFICATION OF COMPLIANCE WITH PRINTING SPECIFICATIONS

I hereby certify pursuant to 22 N.Y.C.R.R. § 500.13(c) that the foregoing brief was prepared on a computer using Microsoft Word.

A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14 point in body, 12 point in footnotes
Line spacing: Double-spaced

The total number of words in this brief, including point headings and footnotes and excluding the signature block and the table of contents, table of citations, proof of service, is 6,998.



Calvin Weaver