COGNITIVELY IMPAIRED HUMANS, INTELLIGENT ANIMALS, AND LEGAL PERSONHOOD

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Abstract

This Article analyzes whether courts should grant legal personhood to intelligent animal species, such as chimpanzees, with a particular focus on comparisons made to cognitively impaired humans whom the law recognizes as legal persons even though they may have less practical autonomy than intelligent animals. Granting legal personhood would allow human representatives to initiate some legal actions with the animals as direct parties to the litigation, as the law presently allows for humans with cognitive impairments that leave them incapable of representing their own interests. For example, a human asserting to act on behalf of an intelligent animal might seek a writ of habeas corpus to demand release from a restrictive environment where less restrictive environments, such as relatively spacious sanctuaries, are available. Highly publicized litigation seeking legal personhood in a habeas corpus context for chimpanzees is underway in New York, and the lawsuits have garnered the support of some eminent legal scholars and philosophers. Regardless of its short-term success or failure, this litigation represents the beginning of a long struggle with broad and deep societal implications.

A unanimous New York appellate court quoted and largely followed a previous article by the author in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery* (*Lavery I*), a prominent and controversial 2014 appellate decision addressing (and rejecting) legal personhood for

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chimpanzees. In June 2017, another unanimous New York appellate court agreed with the *Lavery I* decision in *In re Nonhuman Rights Project, Inc. v. Lavery* (*Lavery II*), and the court addressed an amicus curiae brief by the author in explaining its decision. This Article builds on the author's previous article followed in *Lavery I* and supported by the reasoning of *Lavery II*. The previous article focused on justice arguments based on young children with limited practical autonomy being granted legal personhood status. The New York lawsuits and other significant developments have highlighted important additional issues and nuances since the previous article's publication. Further, in the previous article, the author indicated that additional scholarship was necessary to address justice arguments based on the recognition of legal personhood for humans with cognitive impairments not related to typical childhood development, such as humans with significant intellectual disabilities or comatose humans. This Article analyzes these comparisons based on cognitive impairments not related to childhood and examines issues presented by the New York lawsuits. The Article concludes that, like comparisons between intelligent animals and young children, comparisons between intelligent animals and humans with cognitive impairments unrelated to childhood do not support restructuring our legal system to make animals persons. Further, the rights of the most vulnerable humans, particularly humans with severe cognitive impairments, would be endangered over the long term if the law were to grant legal personhood to some animals based on cognitive abilities. Thus, courts should continue to reject animal legal personhood in the lawsuits that will likely continue to be filed in numerous jurisdictions for decades. However, legislatures and courts should embrace societal evolution calling for greater human responsibility regarding treatment of animals.

INTRODUCTION

The *New York Times* did not create the controversy over whether courts should determine that an intelligent nonhuman animal, such as a chimpanzee, is a legal person entitled to some level of bodily liberty.[1] However, the *Times*'s series of articles and op-eds highlighting the lawsuits likely helped generate the more widespread media firestorm of coverage regarding the lawsuits and demonstrated that the issues involved are on the cutting edge of legal rights jurisprudence.

When the Nonhuman Rights Project (NhRP) filed three related lawsuits in New York courts in late 2013 arguing that chimpanzees should be considered legal persons and moved to sanctuaries that would allow them more bodily liberty, the *Times* published a substantial article setting forth the major issues.[2] The next week, the *Times* published an in-depth news analysis article on the cases, entitled *Considering the*

1. For the sake of brevity, this Article will refer to *New York Times* as "the *Times*," and to "nonhuman animals" as "animals."

2. *See* James Gorman, *Rights Group Is Seeking Status of 'Legal Person' for Captive Chimpanzee*, N.Y. TIMES, Dec. 2, 2013, at A19.

Humanity of Nonhumans.[3]

A few months later, the *New York Times Magazine* made the chimpanzee lawsuits its cover story with another in-depth article.[4] At the same time, it placed on its website an "Op-Doc," a short, opinionated documentary made by prominent filmmakers D. A. Pennebaker and Chris Hegedus, entitled *Animals Are Persons Too*.[5] The *Times* also published *Behind the Cover Story: Charles Siebert on the Fight for Animal "Personhood"* featuring questions and answers with the author of *The New York Times Magazine* cover story.[6] Other stories from the *Times* followed as the cases progressed through lower courts and appellate courts from 2014 to the present.[7]

The *Times* was hardly alone in providing a great deal of analysis and discussion regarding the cases. A large number of national and international news sources extensively reported on the cases. For a few of many available examples, *Time Magazine* reported on primatologist Jane Goodall's support for the lawsuits (she is a member of the NhRP Board of Directors);[8] Peter Singer, perhaps the best-known living academic philosopher, published at least two op-ed articles supporting the lawsuits;[9] the *Wall Street Journal* produced a short video explaining the lawsuits;[10] and the BBC World Service hosted a lengthy debate

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3. James Gorman, *Considering the Humanity of Nonhumans*, N.Y. TIMES, Dec. 9, 2013, at D1.

4. *See* Charles Siebert, *Should a Chimp Be Able to Sue Its Owner?*, N.Y. TIMES MAG., Apr. 23, 2014, at MM28.

5. Chris Hegedus & D.A. Pennebaker, *'Animals Are Persons Too,'* N.Y. TIMES (Apr. 23, 2014), http://www.nytimes.com/2014/04/23/opinion/animals-are-persons-too.html.

6. Rachel Nolan, *Behind the Cover Story: Charles Siebert on the Fight for Animal 'Personhood,'* N.Y. TIMES: 6TH FLOOR (Apr. 28, 2014, 5:30 AM), http://6thfloor.blogs.nytimes.com/2014/04/28/behind-the-cover-story-charles-siebert-on-the-fight-for-animal-personhood/.

7. *See, e.g.*, James C. McKinley Jr., *Arguing in Court Whether 2 Chimps Have the Right to 'Bodily Liberty,'* N.Y. TIMES (May 27, 2015), http://www.nytimes.com/2015/05/28/nyregion/arguing-in-court-whether-2-chimps-have-the-right-to-bodily-liberty.html; Jesse McKinley, *Chimps Don't Have Same Rights as Humans, Court Says*, N.Y. TIMES (Dec. 4, 2014), https://www.nytimes.com/2014/12/05/nyregion/chimps-dont-have-same-rights-as-humans-court-says.html.

8. *See About Us*, NONHUMAN RTS. PROJECT, http://www.nonhumanrightsproject.org/about-us-2/ (last visited Feb. 4, 2017); Bryan Walsh, *Do Chimps Have Human Rights?*, TIME (Dec. 2, 2013), http://science.time.com/2013/12/02/chimps-human-rights-lawsuit/.

9. *See* Peter Singer, *Chimpanzees Are People, Too*, N.Y. DAILY NEWS (Oct. 21, 2014, 6:35 PM), http://www.nydailynews.com/opinion/peter-singer-chimpanzees-people-article-1.1982262; Peter Singer, *There Is No Good Reason to Keep Apes in Prison*, WIRED (May 26, 2015, 12:53 PM), http://www.wired.com/2015/05/peter-singer-no-good-reason-keep-apes-prison/.

10. *See Are Chimps People Too? A Potential Legal Evolution*, WALL ST. J.: VIDEO (Oct. 9, 2014, 6:55 PM), http://www.wsj.com/video/are-chimps-people-too-a-potential-legal-evolution/B9EDDFA0-90EA-4B25-81F1-B84ECD90A17B.html.

inspired by the lawsuits.[11]

In July 2014, NhRP president and lead attorney Steven Wise appeared as a guest on *The Colbert Report* to discuss the lawsuits.[12] In March 2015, the nonprofit Technology, Entertainment, and Design (TED) invited Mr. Wise to give a TED Talk addressing chimpanzee legal personhood at the TED2015 conference in Vancouver, Canada, and TED selected his talk for release on Ted.com.[13] As of February 2017, the TED Talk had been viewed more than one million times.[14] In January 2016, a documentary about the lawsuits made by the Oscar-winning documentary filmmaker D. A. Pennebaker and Chris Hegedus (who also made the short Op-Doc featured on the *Times*'s website), premiered at the Sundance Film Festival.[15] The documentary aired on HBO, BBC Television, and other television outlets beginning later in 2016.[16]

Thus, the question of whether the law should consider particularly intelligent species of animals to be legal persons has developed roots as a matter of serious public debate. Further, the debate will likely span decades in courts, legislatures, and the public square.[17] In September 2015, Mr. Wise stated that "[w]e are still in the early stages of a long-term multi-state strategic litigation campaign to change the legal status of appropriate nonhuman animals."[18] The door to legitimacy as an issue has

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11. *See Nim the Chimp and Animal Rights*, BBC WORLD SERV. (May 21, 2015), http://www.bbc.co.uk/programmes/p02rf5pj.

12. *The Colbert Report*, COMEDY CENT. (July 17, 2014), http://www.cc.com/video-clips/70ezhu/the-colbert-report-steven-m--wise.

13. *See* Press Release, NonHuman Rights Project, NonHuman Rights Project President Steven M. Wise Advocates for Nonhuman Rights in New TED Talk (May 20, 2015), http://www.nonhumanrightsproject.org/2015/05/20/nonhuman-rights-project-president-steven-m-wise-advocates-for-nonhuman-rights-in-new-ted-talk/.

14. *See Chimps Have Feelings and Thoughts. They Should Also Have Rights*, TED (Mar. 2015), http://www.ted.com/talks/steven_wise_chimps_have_feelings_and_thoughts_they_should_also_have_rights.

15. *See* Peter Debruge, *Film Review: Unlocking the Cage*, VARIETY (Feb. 8, 2016), http://variety.com/2016/film/reviews/unlocking-the-cage-film-review-1201700001/ (reviewing the documentary and opining that it "essentially exposes the lawyer trying to trick a series of New York state judges into granting chimpanzees the same rights as humans," and noting that the review was based on a viewing at the Sundance Film Festival).

16. *Unlocking the Cage*, PENNEBAKER HEGEDUS FILMS, unlockingthecagethefilm.com/broadcast/ (last visited Jan. 3, 2017).

17. *See* STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 72 (2000). NhRP President Steven Wise has asserted that "[i]n the face of attacks upon core beliefs, knowledge tends to advance, in the words of the economist Paul Samuelson, 'funeral by funeral.'" *Id.*

18. Steven M. Wise, *Statement re: NY Court of Appeals Decision to Deny Motion to Appeal in Tommy's and Kiko's Cases*, NONHUMAN RTS. PROJECT (Sept. 1, 2015), http://www.nonhumanrightsproject.org/2015/09/01/statement-re-ny-court-of-appeals-decision-to-deny-motion-for-leave-to-appeal-in-tommys-and-kikos-cases/.

been opened, and it is not likely to be closed anytime soon, regardless of the fate of the initial New York cases.

A concept many philosophers refer to as the "argument from marginal cases" is a foundational pillar of equality arguments forwarded in support of rights or liberation for at least some animals.[19] This argument compares the cognitive abilities and autonomy of intelligent animals, such as chimpanzees, with humans who have low cognitive abilities and autonomy but are nevertheless treated as persons with legal rights.[20] For example, human infants and very young children may have less cognitive ability and autonomy than a typical adult chimpanzee.[21] Similarly, humans of all ages with severe cognitive impairments may have less cognitive ability and autonomy than a typical adult chimpanzee.[22] Perhaps the most extreme illustration is a human born in a persistent vegetative state.[23] That person presumably has no cognitive ability or capacity for autonomy, and in some cases may not even be capable of experiencing pain, but is still considered a legal person entitled to legal rights.[24] The argument from marginal cases asserts that if personhood and rights are granted to humans with very limited or no cognitive ability or autonomy, basic equality principles require that personhood and rights must also be given to nonhuman animals who possess stronger cognitive ability and capacity for autonomy.[25]

A 2013 law review article by the author was quoted and largely followed by a unanimous court in the 2014 New York case *People ex rel. Nonhuman Rights Project, Inc. v. Lavery* (*Lavery I*),[26] a prominent and controversial appellate court decision rejecting legal personhood for

19. *See* DANIEL A. DOMBROWSKI, BABIES AND BEASTS: THE ARGUMENT FROM MARGINAL CASES 1–2 (1997) (arguing against moral distinction of animals and humans). *See generally* PETER SINGER, ANIMAL LIBERATION (4th ed. 2009) (examining systematic disregard for animals and offering alternatives to current animal cruelty practices).

20. DOMBROWSKI, *supra* note 19, at 18–26; *see* TOM REGAN, THE CASE FOR ANIMAL RIGHTS 151–55 (1st ed. 1983); PETER SINGER, ANIMAL LIBERATION 18 (2d ed. 1990); WISE, *supra* note 17, at 243–48, 251–57, 270; STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS 7, 32–33, 47, 157–58, 205–06, 235–38 (2002).

21. DOMBROWSKI, *supra* note 19, at 18. There is a wealth of evidence that chimpanzees are particularly intelligent animals. FRANS DE WAAL, CHIMPANZEE POLITICS: POWER AND SEX AMONG APES 3–41 (2007); *see also* Stefan Lovgren, *Chimps, Humans 96 Percent the Same, Gene Study Finds*, NAT'L GEOGRAPHIC (Aug. 31, 2005), http://news.nationalgeographic.com/news/2005/08/0831_050831_chimp_genes.html (quoting primatologist Frans de Waal: "[w]e are apes in every way, from our long arms and tailless bodies to our habits and temperament").

22. *See* REGAN, *supra* note 20, at 151–55; SINGER, *supra* note 19, at 6–8.

23. *See* DOMBROWSKI, *supra* note 19, at 26 (citing Tom Regan, *The Moral Basis of Vegetarianism*, 5 CANADIAN J. PHIL. 191, 193 (1975)).

24. *See id.*

25. *See id.* at 94–101.

26. 998 N.Y.S.2d 248 (App. Div. 2015).

chimpanzees. In June 2017, another widely discussed and unanimous New York appellate decision, *In re Nonhuman Rights Project, Inc. v. Lavery* (*Lavery II*)[27] agreed with *Lavery I* in rejecting chimpanzee personhood lawsuits, and endorsed *Lavery I*'s reasoning.[28] *Lavery II* addressed an amicus curiae brief filed by the author in explaining its decision. The author's amicus curiae brief endorsed by the *Lavery II* court was inspired in part by the author's 2013 law review article.

In the 2013 law review article, the author addressed the argument from marginal cases for animal legal personhood in the context of comparisons with young children.[29] The author concluded that comparisons between young children and intelligent animals, such as chimpanzees, do not provide a viable basis for assigning legal personhood to intelligent animals.[30] However, comparisons between intelligent animals and typical young children differ from comparisons between intelligent animals and other humans with severe cognitive impairments.[31] In his previous article, the author indicated that a separate scholarly article should address these different comparisons in more depth.[32]

This Article takes that next step, addressing background and comparisons between intelligent animals and humans with severe cognitive impairments that are distinct from comparisons based on typical childhood cognitive limitations for purposes of equality arguments purportedly supporting animal legal personhood. To avoid frequently repeating the wordy descriptions provided in the preceding sentence, this Article will refer to distinguishing equality comparisons made between "children" and intelligent animals, and equality comparisons made between "cognitively impaired humans" and intelligent animals. However, this simplification requires defining "children" and "cognitively impaired humans" for purposes of this Article.

In this Article, "children" will generally refer only to typical infants and typical very young children. Although typically children will eventually develop much stronger cognitive abilities and much more autonomy than the most intelligent animals, at a very young age, they

27. 54 N.Y.S.3d 392 (App. Div. 2017).

28. *Id.* at 393–95.

29. Richard L. Cupp Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 ARIZ. ST. L.J. 1 (2013) [hereinafter Cupp, *Children and Chimps*]. The *Lavery I* court noted that under the reciprocity view, society extends rights in exchange for members fulfilling social responsibilities. *Lavery I*, 998 N.Y.S.2d at 250 (first quoting Cupp, *Children and Chimps*, *supra*, at 13; then citing Richard L. Cupp Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 69–70 (2009) [hereinafter Cupp, *Moving Beyond Animal Rights*]); *see also* discussion *infra* Section I.A.

30. Cupp, *Children and Chimps*, *supra* note 29, at 51–52.

31. *Id.* at 49.

32. *Id.* at 48–49.

undoubtedly have less autonomy than intelligent animals. The argument from marginal cases is not employed with typical older children, for example typical teenagers, because older children typically have stronger cognitive abilities and autonomy than intelligent animals.

This Article will use "cognitively impaired humans" to address all humans with cognitive impairments that are not a typical part of infancy or early childhood. This includes humans with temporary or permanent cognitive impairments, and it includes humans who have had these limitations from birth as well as humans who became cognitively impaired sometime later in their lives. Many people in this "cognitively impaired humans" description are adults, but in this Article, the term may include children with cognitive impairments that are not a typical part of infancy or early childhood. For example, both an infant born in a persistent vegetative state, and an adult who initially has typical cognitive abilities but who enters into a persistent vegetative state later in life because of an injury or medical condition, will be included in the "cognitively impaired humans" definition, because both of these individuals have cognitive impairments that are distinct from the cognitive impairments that are a typical aspect of infancy or early childhood. This Article also includes persons born with intellectual disabilities in its "cognitively impaired humans" definition. However, as shown in the illustration above, the term as used in this Article is broader than just persons born with intellectual disabilities.[33]

As addressed above, since the New York lawsuits were filed in late 2013, public interest in the concept of animal legal personhood has risen dramatically.[34] Also since late 2013, hundreds of pages of legal briefs have been filed by the parties to the lawsuits and by amici for New York lower courts, New York intermediate courts of appeal, and the State of New York Court of Appeals. Among other rulings, intermediate courts of appeal have issued three published opinions on the cases,[35] and the State of New York Court of Appeals has ruled on a motion for leave to appeal two of the intermediate appellate court published decisions.[36]

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33. "Cognitively impaired humans," as used in this Article, also includes persons with other cognitive limitations, such as autism spectrum disorder. *See infra* note 335 and accompanying text. This Article does not specifically address most mental illnesses, although mental illnesses may include cognitive limitations. *See* J.K. Trivedi, *Cognitive Deficits in Psychiatric Disorders: Current Status*, 48 INDIAN J. PSYCHIATRY 10, 10–20 (2006); *Cognitive Impairment: A Major Problem for Individuals with Schizophrenia and Bipolar Disorder*, MENTAL ILLNESS POL'Y ORG., http://mentalillnesspolicy.org/medical/cognitive-impairment.html (last visited Jan. 3, 2017).

34. *See supra* notes 1–18 and accompanying text.

35. *Lavery II*, 54 N.Y.S.3d 392 (App. Div. 2017); Nonhuman Rights Project, Inc. v. Presti, 999 N.Y.S.2d 652 (App. Div. 2015); *Lavery I*, 998 N.Y.S.2d 248 (App. Div. 2014).

36. *Lavery I*, 998 N.Y.S.2d at 248, *appeal denied*, 17 N.Y.S.3d 82 (table); Nonhuman Rights Project, Inc. v. Presti, 999 N.Y.S.2d 652 (App. Div. 2015), *appeal denied*, 17 N.Y.S.3d 81 (table).

Thus, in addition to considering the equality argument that granting legal personhood to cognitively impaired humans requires granting legal personhood to animals with stronger cognitive ability and autonomy, this Article will also analyze a broader range of issues litigated in the New York cases.

In Part I, this Article will review the pre-2017 New York animal legal personhood cases and courts' analyses of the cases, and will briefly reference the 2017 *Lavery II* decision. This Part will also critique some aspects of the cases not directly tied to comparisons between intelligent animals and humans with less cognitive ability. In Part II, this Article will elaborate on the argument from marginal cases and will demonstrate its centrality to equality arguments for intelligent-animal legal personhood. Part II will establish the significance of cognitive ability and autonomy to the liberty arguments for intelligent-animal legal personhood. Part III will review the history of the rights movement for humans with cognitive impairments and will demonstrate that courts and advocates have repeatedly and consistently emphasized the *humanity* of persons with cognitive impairments as the basis for recognizing their rights as legal persons. Part IV will argue that recognizing rights and legal personhood for cognitively impaired humans does not require, nor even support, granting legal personhood to intelligent animals. Part IV will also elaborate on challenges to the argument from marginal cases that are relevant both to comparisons with cognitively impaired humans and to comparisons with children. In concluding, this Article will emphasize that rejecting legal personhood for animals does not imply acceptance of the status quo regarding how we treat animals. Humans have weighty responsibilities regarding their treatment of animals, and society is appropriately evolving toward more thoughtful protections under an animal welfare paradigm.

I. ANIMAL LEGAL PERSONHOOD LAWSUITS

The first lawsuit in the United States that attracted significant attention in seeking a form of legal personhood for animals was *Tilikum v. Sea World Parks & Entertainment, Inc.*,[37] filed in a U.S. District Court in San Diego in 2011.[38] In *Tilikum*, an animal rights organization asserted protection from slavery and involuntary servitude for orcas at Sea World.[39] It based its claims on the Thirteenth Amendment to the U.S. Constitution.[40] In rejecting the lawsuit in 2012, the court held in a short

37. 842 F. Supp. 2d 1259 (S.D. Cal. 2012).
38. *Id.* at 1260.
39. *Id.*
40. *Id.*

opinion that the Thirteenth Amendment "applies to persons, and does not apply to non-persons such as orcas."[41] Probably few observers were surprised that the lawsuit seeking animal personhood under the federal Constitution failed. Indeed, although the NhRP agreed that orcas are enslaved, it believed that the constitutional claim was "dangerously premature," and that a negative decision on the merits would "damage future animal rights law cases."[42]

Rather than seeking legal personhood under the federal Constitution at this time, the NhRP has focused on seeking legal personhood for intelligent animals in state courts under the common law writ of habeas corpus.[43] After reviewing common law habeas corpus approaches and other matters for all fifty states,[44] it chose to bring its first lawsuits in New York.[45]

The three lawsuits the NhRP filed in late 2013, *Lavery I*,[46] *Nonhuman Rights Project v. Presti*,[47] and *Nonhuman Rights Project v. Stanley*,[48] are nearly or entirely identical in terms of their major legal theories.[49] They collectively involve four chimpanzees, two of which were kept by private individuals in New York,[50] and two of which were kept until recently for research on the evolution of bipedalism at Stony Brook University.[51]

The NhRP's attempt to apply the common law writ of habeas corpus on behalf of the chimpanzees was unusual, not only in that it brought the

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41. *Id.* at 1263.

42. Michael Mountain, *Federal Judge Allows NhRP to Appear as Friend of the Court in* PETA v. SeaWorld, NONHUMAN RTS. PROJECT (Jan. 26, 2012), http://www.nonhumanrightsproject.org/2012/01/26/judge-welcomes-nhrp-amicus-memorandum-in-peta-v-seaworld/. The NhRP filed an Amicus Curiae Memorandum "solely to assist the Court in understanding certain issues that were raised within the context of this litigation and to further the interests of the orcas." *Id.*

43. *See* Nonhuman Rights Project, Inc. v. Presti, 999 N.Y.S.2d 652, 653 (App. Div. 2015); *Lavery I*, 998 N.Y.S.2d 248, 249 (App. Div. 2014).

44. *See Introduction to the 50 States*, NONHUMAN RTS. PROJECT (May 16, 2013), http://states.nonhumanrights.org/category/about/.

45. *See* cases cited *infra* notes 46–48.

46. 998 N.Y.S.2d 248 (App. Div. 2014).

47. 999 N.Y.S.2d 652 (App. Div. 2015).

48. 16 N.Y.S.3d 898 (Sup. Ct. 2015).

49. Because the lawsuits are so similar, this Article will sometimes cite to the NhRP's initial brief for one as representative. Petitioner's Memorandum of Law in Support of Order to Show Cause and Writ of Habeas Corpus and Order Granting the Immediate Release of Tommy, *Lavery I*, 998 N.Y.S.2d 248 [hereinafter *Lavery I* Brief], http://www.nonhumanrightsproject.org/wp-content/uploads/2013/12/Memorandum-of-Law-Tommy-Case.pdf.

50. *See Presti*, 999 N.Y.S.2d at 653–54; *Lavery I*, 998 N.Y.S.2d at 249. In February 2016, the NhRP reported that Tommy, the chimpanzee in the *Lavery* lawsuits, had been moved to a "roadside zoo" in Michigan. Lauren Choplin, *Update: Tommy*, NONHUMAN RTS. PROJECT (Feb. 16, 2016), http://www.nonhumanrightsproject.org/2016/02/12/update-tommy/.

51. *See Stanley*, 16 N.Y.S.3d at 900.

claims on behalf of nonhumans, but also in that most common law habeas corpus claims involve persons seeking release from government custody in jails or prisons.[52] Although two of the lawsuits involved chimpanzees kept by private individuals rather than a government entity, the NhRP cited New York and other cases granting habeas corpus writs when a nongovernmental actor wrongfully imprisoned a person.[53] Further, the NhRP emphasized that New York has allowed human slaves to use the common law writ of habeas corpus to obtain freedom from their owners.[54]

The lawsuits did not claim violation of any existing laws in the chimpanzees' treatment.[55] Rather, they argued that the chimpanzees are entitled to legal personhood under liberty and equality principles, asserting that each chimpanzee 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."[56] The lawsuits also asserted that the chimpanzees are entitled to legal personhood under a New York statute allowing humans to create *inter vivos* trusts for the care of animals.[57] The lawsuits sought to have the chimpanzees moved to a sanctuary that confines chimpanzees but in a manner the lawsuits argued is preferable to the chimpanzees' living situations at the time NhRP filed the lawsuits.[58]

A. People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery (*Lavery I*)[59]

The *Lavery I* case has probably received the most attention of the related cases thus far, perhaps in part because it was the first of the cases to result in a published decision by an intermediate appellate court and in part because the appellate court directly addressed key issues. The more recent *Lavery II* decision also directly addressed key issues, and thus both *Lavery* decisions are likely to be cited and debated for many years as significant precedents regarding animals' legal status.

The *Lavery* cases involve a chimpanzee named Tommy who was kept by a private individual owner in upstate New York.[60] After a lower court rejected the *Lavery I* lawsuit, the NhRP appealed to the Appellate

52. *See* 20 AM. JUR. TRIALS § 1, Westlaw (database updated Dec. 2016) ("The increasing resort to the federal courts by state prisoners, claiming to be unlawfully held by state authorities, for release on habeas corpus, has been described as a 'tidal wave.'").

53. *See Lavery I* Brief, *supra* note 49, at 45.

54. *Id.* at 46.

55. *See Stanley*, 16 N.Y.S.3d at 901; *Presti*, 999 N.Y.S.2d at 653; *Lavery I*, 998 N.Y.S.2d at 249.

56. *Lavery I* Brief, *supra* note 49, at 77.

57. *Id.* at 49–52.

58. *Id.* at 1.

59. 998 N.Y.S.2d 248 (App. Div. 2014).

60. *Id.* at 249.

Division of the Supreme Court of New York, Third Department.[61]

In December 2014, the appellate court released its unanimous opinion rejecting the *Lavery I* lawsuit.[62] The court declined to base its ruling on deference to the legislature, asserting that the courts control the evolution of the writ of habeas corpus but stating that change is through "the slow process of decisional accretion."[63] In considering whether it should extend habeas corpus to chimpanzees, the court first noted that the law has never considered animals legal persons capable of asserting rights.[64] The lack of precedent "does not, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'"[65]

Quoting the author's 2013 law review article *Children, Chimps, and Rights Arguments from 'Marginal' Cases*, and citing an earlier article by the author entitled *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, the court based its rejection of the lawsuit on animals' inability to bear societal "obligations and duties."[66] The court noted that "[r]eciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government."[67] The court added, "[u]nder this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities."[68] In other words, "rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights."[69]

In addition to these primary arguments, the court also cited *Black's Law Dictionary* and other sources in concluding that "legal personhood has consistently been defined in terms of both rights *and duties*."[70] The court addressed the issue of corporations being granted legal personhood

61. *Id.* at 248.

62. *Id.* at 249–52.

63. *Id.* at 249 (quoting People *ex rel.* Keitt v. McMann, 220 N.E.2d 653, 655 (N.Y. 1966)).

64. *Id.* at 249–50.

65. *Id.* at 250 (quoting *McMann*, 220 N.E.2d at 655).

66. *Id.*

67. *Id.* (first citing Cupp, *Children and Chimps*, *supra* note 29, at 12–14; then citing Cupp, *Moving Beyond Animal Rights*, *supra* note 29, at 69–70); *see* United States v. Barona, 56 F.3d 1087, 1093–94 (9th Cir. 1995). Interestingly, John Locke, who is closely associated with the social contract ideals that strongly influenced the U.S. founders, expressly noted the connection between human ownership of animals and human responsibilities. He advocated giving dogs to children to care for "to develop tender feelings and a sense of responsibility for others." James A. Serpell, *Animal-Assisted Interventions in Historical Perspective*, *in* HANDBOOK ON ANIMAL-ASSISTED THERAPY 3, 25 (Aubrey H. Fine ed., 3d ed. 2015).

68. *Lavery I*, 998 N.Y.S.2d at 250.

69. *Id.* (alterations in original) (quoting Cupp, *Children and Chimps*, *supra* note 29, at 13).

70. *Id.*

by pointing out that they are associations of human beings and that they also bear duties.[71]

In rejecting the appeal, the court found it dispositive that, "unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions."[72] Without specifically referencing the philosophical concept of an argument from marginal cases, the court recognized that some humans are less able than others to bear duties or submit to societal responsibilities.[73] However, "[t]hese differences d[id] not alter [the court's] analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise."[74]

The *Lavery I* court concluded with an affirmation of the animal welfare paradigm's concern for the appropriate treatment of animals.[75] It emphasized that the ruling does not leave chimpanzees "defenseless,"[76] stating that legislatures have enacted many laws to protect animals in New York, including specific laws barring chimpanzees from being kept as pets in most circumstances.[77] The court noted that further evolution of laws protecting chimpanzees is possible through the legislative process.[78]

Although the *Lavery I* court's emphasis on the connection between rights and responsibilities is correct, elaborating on the nature of the connection would be useful in avoiding misunderstandings regarding the relationship of rights and duties for legal persons. This Article undertakes to elaborate on this connection recognized by the *Lavery I* court in Part III.[79]

The NhRP filed a motion with the State of New York Court of Appeals to appeal the intermediate court's decision.[80] Four amicus curiae briefs were filed in support of or in opposition to the motion, including an amicus curiae letter-brief by Professor Lawrence Tribe in support of the

71. *Id.* at 251.
72. *Id.*
73. *Id.* at 251 n.3.
74. *Id.*
75. *Id.* at 251–52.
76. *Id.*
77. *Id.* at 251.
78. *Id.* at 251–52.
79. *See infra* Part III.
80. *In "Tommy" Case, NhRP Seeks Appeal to New York's Highest Court*, NONHUMAN RTS. PROJECT (Dec. 8, 2014), http://www.nonhumanrightsproject.org/2014/12/18/in-tommy-case-nhrp-seeks-appeal-to-new-yorks-highest-court/.

motion.[81] Professor Tribe argued that the *Lavery I* intermediate 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."[82] He also asserted that habeas corpus 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."[83]

The common law writ of habeas corpus has indeed served as a vehicle for *humans* to test the legality of ongoing restraint.[84] However, humans are not simply "beings," they are human beings, and their legal personhood is anchored in the human community.[85] If courts were to grant habeas corpus jurisdiction 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 opening themselves up to habeas corpus claims for countless animals.

The New York habeas corpus statute states that a "*person*," or one acting on the person's behalf, may petition for the writ.[86] 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.[87]

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81. Letter Brief of Amicus Curiae Laurence H. Tribe in Support of Motion for Leave to Appeal at 3, *Lavery I*, 998 N.Y.S.2d 248 (No. 518336) [hereinafter Letter Brief of Amicus Curiae], http://www.nonhumanrightsproject.org/wp-content/uploads/2015/12/7.-Exhibit-6-Tribe-Amicus-Curiae-Letter-Brief.pdf. The court also allowed amicus curiae on the motion by The Center for the Study of the Great Ideas, Inc., by Professor Justin F. Marceau, and by the Center for Constitutional Rights. To view these orders individually, see *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 38 N.E.3d 801 (N.Y. 2015); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 38 N.E.3d 802 (N.Y. 2015); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 38 N.E.3d 802 (N.Y. 2015), respectively.

82. Letter Brief of Amicus Curiae, *supra* note 81, at 3.

83. *Id.* at 4.

84. *See generally id.* (discussing how humans have the ability to test ongoing restraint because of habeas corpus).

85. *See infra* Section III.B.

86. N.Y. C.P.L.R. 7002(a) (MCKINNEY 2016) (emphasis added). Section 7003, addressing "[w]hen the writ shall be issued," also indicates it is for a "person." N.Y. C.P.L.R. 7003(a) (MCKINNEY 2016).

87. This is not inconsistent with allowing habeas corpus and personhood for detainees held by the United States at Guantanamo Bay. The detainees are human. Although American courts have in some situations not granted full personhood to some subsets of humans (such as when the

The State of New York Court of Appeals denied the NhRP's motion to appeal the intermediate court's *Lavery I* decision without comment in September 2015.[88]

B. *In re* Nonhuman Rights Project v. Presti[89]

Like *Lavery I*, the NhRP filed the *Presti* case in late 2013.[90] It involved a single chimpanzee, named Kiko, who was kept in New York by a private owner.[91] The lawsuit was filed in Niagara County.[92] The trial court denied the NhRP's petition for a writ of habeas corpus on behalf of Kiko.[93]

In January 2015, approximately one month after the Third Department of the Appellate Division released its unanimous decision rejecting *Lavery I*, Fourth Department of the Appellate Division released a unanimous decision rejecting *Presti*.[94] The *Presti* decision was short, and it was less direct than *Lavery I* in addressing animal legal personhood issues.[95] The *Presti* court indicated that it did not need to address whether a chimpanzee could be a legal person.[96] The court held that a writ of

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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.

88. *Lavery I*, 998 N.Y.S.2d 248 (App. Div. 2014), *appeal denied*, 26 N.Y.3d 902 (2015) (table).

89. 999 N.Y.S.2d 652 (App. Div. 2015), *appeal denied*, 26 N.Y.3d 901 (2015) (table).

90. Michael Mountain, *New York Cases – Judges' Decisions and Next Steps*, NHRP (Dec. 10, 2013) http://www.nonhumanrightsproject.org/2013/12/10/new-york-cases-judges-decisions-and-next-steps/.

91. *Id.*

92. *Id.*

93. *Presti*, 999 N.Y.S.2d at 653.

94. *See id.* at 654.

95. *See id.*

96. *Id.* at 653. The NhRP has since argued that

> the *Presti* court twice suggested, without deciding, that it might agree with the NhRP's claim that Tommy was a "person" for the purpose of Article 70, stating, "[r]egardless of whether we agree with petitioner's claim that Tommy is a person within the statutory and common law definition of the writ . . ." and "even assuming, *arguendo*, that we agreed with petitioner that Tommy should be deemed a person for purpose of the application . . . ."

Memorandum of Law in Support of Petition for Habeas Corpus at 71, Nonhuman Rights Project, Inc. v. Lavery, No. 162358/2015 (N.Y. Sup. Ct. Dec. 2, 2015) [hereinafter *Lavery II* Brief] (alterations in original), http://www.nonhumanrightsproject.org/wp-content/uploads/2015/12/Memo-of-Law-Dec-2-2015.pdf.

There is nothing in the *Presti* decision that supports the NhRP's assertion that the court "suggested" that it might agree that the law should consider Tommy a legal person. By stating that "even assuming, *arguendo*," that it were to agree with NhRP on the personhood issue, the NhRP should lose, the court was simply highlighting its belief that it did not need to address the

habeas corpus is only available under New York law when, if successful, it would lead to "immediate release from custody."[97]

The court asserted that the NhRP was not seeking immediate release from custody for Kiko, but rather was seeking custody in a different facility that the NhRP viewed as more appropriate.[98] Confinement in a sanctuary, the court held, however preferable it might be to other forms of confinement, is not immediate release from confinement.[99] Therefore, the court did not need to confront questions of legal personhood or standing, because "this matter is governed by the line of cases standing for the proposition that habeas corpus does not lie where a petitioner seeks only to change the conditions of confinement rather than the confinement itself."[100] The NhRP filed a motion with the State of New York Court of Appeals to appeal the intermediate court's *Presti* decision, but the state's high court denied the motion without comment together with its denial of the motion to appeal in *Lavery I* in September 2015.[101]

C. The Nonhuman Rights Project, Inc. v. Stanley[102]

The NhRP also filed *Stanley* in late 2013. The case involves two chimpanzees, named Hercules and Leo, who were used in research on bipedalism at Stony Brook University.[103] In July 2015, the Associated Press reported that the research project involving the chimpanzees had ended and that "the chimps will be leaving the university . . . soon."[104] The NhRP initially filed *Stanley* in Suffolk County, New York, but after a lower court and an intermediate appellate court rejected it, the NhRP refiled it in New York County.[105]

The *Stanley* case caused a brief but intense media sensation in April 2015, when New York County Supreme Court Justice Barbara Jaffe scheduled a hearing on the case by signing a document entitled "Order to

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novel personhood issue, since the court believed it could dismiss the lawsuit on more mundane grounds. Avoiding a novel and explosive issue by relying on a more mundane basis for dismissal is hardly a suggestion that the court might agree with the party making the novel argument.

97. *Presti*, 999 N.Y.S.2d at 653.

98. *Id.*

99. *Id.* at 653–54.

100. *Id.* at 654.

101. Nonhuman Rights Project, Inc. v. Presti, 17 N.Y.S.3d 81 (App. Div. 2015) (table) (denying motion for leave to appeal).

102. 16 N.Y.S.3d 898 (Sup. Ct. 2015).

103. *Id.* at 900–01.

104. Associated Press, *Chimps Denied Legal Personhood Will Be Retired from Research*, TIMES FREE PRESS (July 31, 2015), http://www.timesfreepress.com/news/national/science/story/2015/jul/31/chimps-denied-legal-personhood-will-be-retire/317605/.

105. *Stanley*, 16 N.Y.S.3d at 901.

Show Cause & Writ of Habeas Corpus."[106] Several news accounts described the order as taking the groundbreaking step of issuing the first writ of habeas corpus for a nonhuman animal.[107] However, in the wake of these news stories, Justice Jaffe quickly amended the order to strike the words "Writ of Habeas Corpus."[108] A spokesperson for the judge announced, "She did not say that a chimpanzee is a person . . . . She just gave them the opportunity to argue their case."[109]

Following the hearing, which included oral arguments by the NhRP and by the Office of the State of New York Attorney General representing Stony Brook, Justice Jaffe ruled against the NhRP in July 2015.[110] Justice Jaffe determined that the *Lavery I* appellate decision was controlling under stare decisis.[111] Further, she believed the issue should be left to the legislature or to the State of New York Court of Appeals.[112]

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.[113] Rather, the decision in rather vague dicta seemed to imply support more generally for further consideration of the issue without staking out a position.[114] 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.[115]

In August 2015, the NhRP filed a notice of appeal regarding the lower court's *Stanley* in the Appellate Division of the Supreme Court, First

106. Amended Order to Show Cause, *Stanley*, 16 N.Y.S.3d 898 (No. 152736/2015) [hereinafter *Stanley* Order to Show Cause], https://www.nonhumanrights.org/content/uploads/Order-to-Show-Cause-Amended-4-21-15.pdf.

107. *See, e.g.*, Rachel Feltman, *Chimps Given Human Rights by U.S. Court for the First Time (Sort Of)*, WASH. POST (Apr. 22, 2015), https://www.washingtonpost.com/news/speaking-of-science/wp/2015/04/21/chimps-given-human-rights-by-u-s-court-for-the-first-time/; David Grimm, *Updated: Judge's Ruling Grants Legal Right to Research Chimps*, SCIENCE (Apr. 20, 2015, 11:45 PM), http://news.sciencemag.org/plants-animals/2015/04/judge-s-ruling-grants-legal-right-research-chimps; *New York Court Issues Habeas Corpus Writ for Chimpanzees*, BBC (Apr. 21, 2015), http://www.bbc.com/news/world-us-canada-32396497.

108. Barbara Ross & Rich Schapiro, *Chimpanzees Will Have Manhattan Court Hearing to Decide If They're 'Persons' with Rights*, N.Y. DAILY NEWS (Apr. 22, 2015, 2:36 PM), http://www.nydailynews.com/new-york/chimps-nyc-court-hearing-decide-persons-article-1.2193060.

109. *Id.*

110. *Stanley*, 16 N.Y.S.3d at 918.

111. *Id.* at 917.

112. *Id.*

113. *Id.* at 911–915.

114. *Id.*

115. *Id.* at 912.

Judicial Department.[116]Apparently no further appellate pleadings have been filed in that case. In January 2016, the magazine, *Science*, reported that the two chimpanzees had been returned to their owners in Louisiana, "effectively ending a 2-year legal battle to have the animals declared legal persons."[117]

D. Matter of Nonhuman Rights Project, Inc. v. Lavery (*Lavery II*)

After *Lavery I* was dismissed at the trial court and appellate levels, the NhRP filed *Lavery II* in New York County in late 2015. *Lavery II* is essentially the same as *Lavery I* in what it seeks: issuance of a writ of habeas corpus for the chimpanzee named Tommy and relocation of Tommy to a chimpanzee sanctuary favored by the NhRP.[118] The trial court dismissed *Lavery II* in December 2015, writing only: "Declined, 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."[119] The NhRP then announced that it would appeal the decision.[120]

The most notable distinction between NhRP's initial brief in *Lavery II* and its initial brief in *Lavery I* is that the *Lavery II* Brief utilized additions to previous expert affidavits and some new expert affidavits to

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116. Notice of Appeal, *Stanley*, 16 N.Y.S.3d 898 (No. 162736/2015) [hereinafter *Stanley* Notice of Appeal].

117. David Grimm, *'Personhood' Chimpanzees Returned to Owners, Ending Animal Rights Litigation*, SCIENCE (Jan. 8, 2016, 12:30 PM), http://www.sciencemag.org/news/2016/01/personhood-chimpanzees-returned-owners-ending-animal-rights-litigation. Earlier, in August 2015, the NhRP indicated that it was in negotiations with Stony Brook and with the New Iberia Research Center, which owns Hercules and Leo, regarding where they should transfer the chimpanzees given that the research project involving them had concluded. *Notice of Appeal Filed in Hercules and Leo Case*, NONHUMAN RTS. PROJECT (Aug. 20, 2015), http://www.nonhumanrightsproject.org/2015/08/20/notice-of-appeal-filed-in-hercules-and-leo-case/. The NhRP indicated at that time that it would seek a preliminary injunction "pending the outcome of all appeals" if an effort were made to place the chimpanzees somewhere other than one of the sanctuaries that the NhRP deemed to be appropriate. *Id.*

118. *See Lavery II* Brief, *supra* note 96, at 1–3.

119. Order to Show Cause & Writ of Habeas Corpus, Nonhuman Rights Project, Inc. v. Lavery, No. 162358/15 (N.Y. Sup. Ct. Dec. 23, 2015).

120. *See New York Trial Court Denies Tommy's Second Bid for Freedom*, NONHUMAN RTS. PROJECT (Jan. 7, 2016), http://www.nonhumanrightsproject.org/2016/01/07/new-york-court-denies-tommys-bid-for-freedom/. The trial court judge who dismissed *Lavery II*, Justice Barbara Jaffe, previously rejected the *Stanley* lawsuit that the NhRP also filed in New York County. *See Stanley*, 16 N.Y.S.3d at 918. Later, in February 2016, Justice Jaffe also rejected the second *Presti* lawsuit. *See infra* note 142. Many of the legal documents associated with the chimpanzee lawsuits are available at the Nonhuman Rights Project website. NONHUMAN RTS. PROJECT, http://www.nonhumanrightsproject.org/ (last visited Feb. 4, 2017).

seek to strengthen the argument already made in the *Lavery I* Brief that chimpanzees have some sense of moral responsibility and duty in their relationships.[121] This attempted buttressing was in response to the *Lavery I* court's unanimous decision recognizing that chimpanzees are not persons in the legal system because they are not capable of bearing legal duties.[122]

Whether chimpanzees have some quality that could be described as a sense of moral responsibility and duty 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 or duty 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 as a sense of responsibility or duty for their young offspring. Perhaps any type of mature animal that lives cooperatively in some kind of family 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 the law does not assign legal duties to ants or to any other animals. The pertinent question is not whether chimpanzees possess anything that could be characterized as a sense of responsibility and duty, but rather whether they possess sufficient moral responsibility to be held legally accountable and to possess legal rights under the 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, surely no authorities seriously contemplated charging the perpetrator in criminal court.[123] Similarly, in 2009, when a chimpanzee attacked a woman in a manner that police described as "unprovoked" and "brutal and lengthy," causing severe, life-threatening injuries, surely no authorities seriously considered bringing criminal battery charges against the chimpanzee.[124]

According to the NhRP website, its president Steven Wise has a poster at his home office that reads: "We may be the only lawyers on [E]arth

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121. *See, e.g.*, *Lavery II* Brief, *supra* note 96, at 113. Although the NhRP emphasizes the argument less in *Lavery I*, the *Lavery I* Brief also argues that chimpanzees have moral agency. *See, e.g.*, *Lavery I* Brief, *supra* note 49, at 32.

122. *Lavery I*, 998 N.Y.S.2d 248, 251 (App. Div. 2015).

123. *See Adult Chimpanzee Kills Baby Chimp in Front of Shocked Los Angeles Zoo Visitors*, CBS NEWS (June 27, 2012, 2:01 PM), http://www.cbsnews.com/news/adult-chimpanzee-kills-baby-chimp-in-front-of-shocked-los-angeles-zoo-visitors/.

124. 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.

whose clients are always innocent."[125] This makes the point. The 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.[126] Whether chimpanzees possess *some* degree of a quality that could be described as moral responsibility is irrelevant; they can only interact with our society in a manner that suggests they should be legal persons with rights and duties if they have sufficient moral responsibility to be held accountable under our laws.

The *Lavery II* Brief also argued that the two law review articles cited by the *Lavery I* court "merely set forth Professor Cupp's personal preference for an exceedingly narrow branch of philosophical . . . contractualism that arbitrarily excludes every nonhuman animal, while including every human being, in support of which he cites no cases."[127] 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."[128] But at an even more fundamental level, noting that courts do not feel bound to strictly adhere to *any* academic philosophical theories would be an understatement. Philosophical theories may be useful in some endeavors, such as seeking to understand or explain 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 and do not defer 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, the author's observations and analyses regarding our society and legal system, broadly connecting the concepts of rights and duties since this country's foundation as a nation, are not a call for judicial endorsement of any formal academic

125. Michael Mountain, *At Sundance, a Triumph for "Unlocking the Cage,"* NONHUMAN RTS. PROJECT (Jan. 29, 2016), http://www.nonhumanrightsproject.org/2016/01/29/at-sundance-a-triumph-for-unlocking-the-cage/.

126. Authorities restrain, confine, or even kill chimpanzees and other animals if they are a threat to humans or to other animals (whether 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). *See, e.g.*, Elizabeth Chuck, *Harambe, Gorilla Killed at Cincinnati Zoo, 'Had to Pay the Price': Experts*, NBC NEWS (June 1, 2016, 7:54 AM), http://www.nbcnews.com/news/us-news/harambe-gorilla-killed-cincinnati-zoo-had-pay-price-experts-n583146. But this is based on a perceived need to protect humans, animals, or property, rather than based on a conclusion that the animal is morally blameworthy. *See id.*

127. *Lavery II* Brief, *supra* note 96, at 76.

128. Brief of Amicus Curiae Bob Kohn Against Issuance of Writ of Habeas Corpus at 17, Nonhuman Rights Project Inc. v. Lavery, No. 518336 (N.Y. App. Div. May 14, 2014).

philosophical theories—or their branches—in all of their particulars. As articulated throughout this Article and the author's other writings, focusing legal personhood on humans and their proxies among the beings of which we are presently aware is not arbitrary, but is rather a recognition that requiring legal accountability to each other as the norm in a community of humans—in some sense a social compact—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 I* 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 U.S. Constitution to orcas held in captivity, a U.S. District Court dismissed the lawsuit in a short opinion because the Thirteenth Amendment "applies to persons, and [does not apply] to non-persons such as orcas."[129] Further, numerous courts, including the U.S. Supreme Court, have noted the significance of the concept of a social compact in our legal system.[130]

Finally, as explained by Justice Jaffe in rejecting *Lavery II* at the trial court level the *Lavery II* Brief and its affidavits failed to provide any "allegation or ground that is sufficiently distinct from those set forth in the first petition."[131] An argument that chimpanzees are capable of bearing some sorts of responsibilities appeared previously, albeit with less emphasis, in the *Lavery I* Brief that the court unanimously rejected in the *Lavery I* appellate decision.[132]

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

130. *See generally* Anita L. Allen, *Social Contract Theory in American Law*, 51 FLA. L. REV. 1, 2, 5–7 (1999) (discussing "Social Contract Theory" in case law). In a law review article analyzing U.S. cases addressing aspects of social contract theory, Professor Anita Allen wrote that "[t]he legal system of the United States has an important relationship to social contract theory," and that "[n]early six hundred years old, the early modern idea of the 'social contract' is going strong." *Id.* at 2, 39.

131. Order to Show Cause & Writ of Habeas Corpus, *supra* note 119, at 2.

132. 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. They ostracise individuals who violate social norms. They respond negatively to inequitable situations, e.g. when offered lower rewards than companions receiving higher ones, for the same task. 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.

Lavery I Brief, *supra* note 49, at 32 (citations omitted).

Shortly after the dismissal of the *Lavery II* case by the trial court in January 2016, the Nonhuman Rights Project filed its most recent lawsuit, *Presti II*, involving the same parties named in the *Presti I* case, in New York County, a different county in New York from where it filed the *Presti I* lawsuit.[133] The *Presti II* case and its initial brief are similar to the *Lavery II* case and initial brief. The same trial court judge who dismissed *Lavery II* dismissed *Presti II* in February 2016 with a short statement that it did not raise sufficient changed circumstances from the *Presti I* lawsuit; the NhRP then indicated it would appeal.[134]

In June 2017, the Appellate Division of the Supreme Court of New York, First Department, issued its *Lavery II* decision rejecting both the *Lavery II* and *Presti II* appeals.[135] The court recognized that the NhRP's new affidavits and additions to affidavits "cannot be said to be in response to or counter to" the *Lavery I* decision, because *Lavery I* "did not dispute the cognitive or social abilities of chimpanzees."[136] Rather, *Lavery I* simply observed that chimpanzees cannot bear *legal* duties or be held *legally* accountable.[137]

In a paragraph referencing an amicus curiae brief submitted by the author, the court pointed out that "[t]he asserted cognitive and linguistic capabilities of chimpanzees do not translate to a chimpanzee's capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions."[138] Further, the court rejected comparisons to an infant being recognized as a legal person despite lacking legal accountability. It noted that "[t]his argument ignores the fact that these are still human beings, members of the human community."[139] The court added that the issue of whether to grant fundamental rights to animals is "better suited to the legislative process."[140]

Thus, as of the writing of this Article, all of the courts making decisions on the chimpanzee personhood lawsuits have rejected them.[141] By the author's count, at least twenty-eight New York judges have

133. *See NhRP Re-Files Habeas Corpus Case on Behalf of Kiko in New York*, NONHUMAN RTS. PROJECT (Jan. 12, 2016), http://www.nonhumanrightsproject.org/2016/01/12/nhrp-re-files-habeas-corpus-case-on-behalf-of-kiko-in-new-york/.

134. *See New York Supreme Court Judge Denies Kiko's Second Habeas Corpus Bid*, NONHUMAN RTS. PROJECT (Feb. 11, 2016), http://www.nonhumanrightsproject.org/2016/02/11/new-york-trial-court-denies-kikos-latest-habeas-corpus-bid/.

135. 54 N.Y.S.3d 392 (App. Div. 2017).

136. *Id.* at 395.

137. *Id.*

138. *Id.* at 396.

139. *Id.*

140. *Id.* at 397.

141. *See supra* Sections I.A–D.

participated in ruling against the lawsuits thus far.[142] However, as noted above, lawsuits seeking intelligent-animal personhood are in their infancy, and regardless of whether any of the current lawsuits fail or succeed, the ultimate legal resolution of this issue over the course of time is far from certain.[143]

II. FOUNDATIONS OF LEGAL PERSONHOOD FOR COGNITIVELY IMPAIRED HUMANS

Regardless of whether the philosophical construct is formally labeled as such in legal briefs, the "argument from marginal cases" is a core element of assertions that the law should grant intelligent animals some form of personhood.[144] If the law considers humans with little or no cognitive ability legal persons with rights, the argument goes, justice demands also granting some form of personhood or legal standing through a guardian for animals that have stronger practical autonomy than the less intelligent human persons.[145] In the New York lawsuits, the NhRP used chimpanzees' significantly higher degree of practical autonomy than that possessed by some humans whom the law nonetheless considers legal persons to argue that justice demands granting legal personhood to the chimpanzees as well.[146]

A fundamental flaw in this reasoning is that the legal personhood of humans with cognitive impairments is not, nor should be, grounded in

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142. 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 I* and *Presti I* lawsuits, four intermediate appellate judges for the *Stanley* lawsuit, at least five judges of the New York Court of Appeals in the its decision denying the NhRP's motion to appeal the intermediate appellate rulings in *Lavery I* and in *Presti* I, and five unanimous intermediate appellate judges for the *Lavery II/Presti II* decision.

143. *See supra* notes 17–18 and accompanying text.

144. *See* Cupp, *Children and Chimps*, *supra* note 29, at 19–30. *See generally* DOMBROWSKI, *supra* note 19 (discussing the "argument from marginal cases").

145. *See supra* notes 19–25 and accompanying text.

146. The *Lavery I* Brief argues:

> The NhRP agrees that humans who have never been sentient nor conscious nor possessed of a brain *should* have 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 49, at 73. For a challenge questioning why the NhRP believes that humans with no cognitive abilities or sentience should have legal rights given the arguments in its briefs, see *infra* notes 268–73 and accompanying text.

individual cognitive capacity.[147] Indeed, this Part will demonstrate that the history of legal personhood and rights for humans with cognitive impairments is a history of emphasizing that cognitive impairments are not an appropriate excuse for withholding rights from human beings. Rather, this Part will show that courts and legislatures have appropriately based legal personhood for humans with cognitive impairments on their dignity interests as members of the human community. The level of cognitive capacity human beings possess counts in determining *which* specific rights and responsibilities the law might assign them, but cognitive capacity does not count at all in the more fundamental question of whether individual humans are legal persons whom the law should assign at least some fundamental rights. Shifting the focus from humanity to individual intelligence would run counter to both the foundations of personhood, as set forth in cases and statutes addressing cognitively impaired humans, and sound reasoning.[148]

Humans with cognitive impairments did not fare well in early recorded history. "The ancient Greeks and Romans felt that children with [intellectual disabilities] were born because the gods had been angered. Often children with severe [intellectual disabilities] would be allowed to die of exposure as infants rather than being permitted to grow up."[149] The Christian scriptures written during the Pax Romana reflect that people commonly believed sins committed by a person's parent caused that person's physical disabilities—although Jesus taught his followers that this belief was incorrect.[150] However, despite negative views about humans with cognitive impairments, Roman society recognized legal personhood for at least some children with cognitive impairments.[151] If they were from wealthy families, Roman children with cognitive impairments could have property rights and legal guardians.[152]

In Renaissance Europe, Spain began creating asylums for persons with cognitive impairments, mental illnesses, or both in the fifteenth and

147. For a discussion of whether cognitive capacity might be a distinctive basis for finding legal personhood in addition to other reasons beings might be considered legal persons, see *infra* notes 268–73 and accompanying text.

148. This focus on humanity as a foundation of legal personhood is not arbitrary because, as set forth below, human beings and their proxies are the only beings for whom the norm is to engage in human society with duties and rights. *See infra* Section III.B.

149. CATHERINE K. HARBOUR & PALLAB K. MAULIK, CTR. FOR INT'L REHAB. RESEARCH INFO. & EXCH., HISTORY OF INTELLECTUAL DISABILITY 1 (2010), http://cirrie.buffalo.edu/encyclopedia/en/pdf/history_of_intellectual_disability.pdf.

150. *John* 9:1–3.

151. HARBOUR & MAULIK, *supra* note 149, at 1.

152. *Id.*

sixteenth centuries.[153] Although similar asylums spread to the Americas in Canada and Mexico in the 1700s, they did not appear in the United States until the Jacksonian Era in the 1820s.[154]

In the early and mid-1800s in the United States, "optimism prevailed for the chances of rehabilitating, training, and reintegrating [people with intellectual disabilities] into 'normal' life."[155] Although these people increasingly lived in asylums, training was often undertaken through systematic programs.[156] Early asylums in the United States were sometimes, but not always, private, and the costs of private treatment "rendered them inadequate to meet the needs of the poorer classes, particularly the growing populations of urban poor in America's developing cities."[157]

Throughout the nineteenth century, asylums for people with cognitive impairments continued to grow,[158] but the early optimism that individuals with cognitive impairments could be trained into "normalcy" waned.[159] Overcrowding in asylums became commonplace.[160] Further, institutions were often segregated into different sections for the privileged and the poor classes.[161]

In addition to experiencing a large influx of poor immigrants, the United States was in the midst of rapid changes brought on by the Industrial Revolution.[162] Employment "increasingly depended on intellectual ability and less so on physical ability," and this transformation limited training and work options for people with cognitive impairments.[163] Overcrowded facilities, inadequate treatment resources (especially for the poor), and reduced societal need for manual labor perhaps combined to generate more negative societal attitudes toward people with cognitive impairments.[164] Increasingly, the "'feebleminded[]' were blamed for the poverty, illness, and crime that

153. 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, 83–84 (Stanley S. Herr et al. eds., 2003).

154. *Id.*

155. HARBOUR & MAULIK, *supra* note 149, at 2; *see* Braddock & Parish, *supra* note 153, at 85–86.

156. *Id.*

157. Braddock & Parish, *supra* note 153, at 85.

158. *Id.*

159. HARBOUR & MAULIK, *supra* note 149, at 2.

160. Braddock & Parish, *supra* note 153, at 86.

161. *Id.* at 85.

162. *Rise of Industrial America, 1876–1900*, LIBR. CONGRESS, http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/riseind/ (last visited Jan. 4, 2017).

163. HARBOUR & MAULIK, *supra* note 149, at 2.

164. *See id.*

accompanied urbanization."[165] Over time, a "fearful, alarmist attitude toward [persons with intellectual disabilities] developed."[166]

Against this backdrop, the eugenics movement started gaining prominence in the late 1800s.[167] This movement, which was related to social Darwinism, viewed intellectual disabilities as "inherited as a Mendelian characteristic that degraded the species."[168] "Those who supported the eugenics movement felt that medicine interfered with Darwinian natural selection and kept the weak alive."[169]

In the United States during the eugenics era, which lasted from about 1880 through the beginning of World War II, physicians often would not treat infants born with "disabilities and birth defects," leading to many deaths.[170] "Newspaper accounts publicized the withholding of lifesaving treatment of babies with disabilities during the decade after 1915, and movies propagating the eugenics agenda became quite common."[171]

Several states passed laws authorizing sterilization.[172] Indiana passed the first such law in 1907,[173] but Virginia's forced sterilization statute became particularly prominent in the United States because of *Buck v. Bell*,[174] a decision by the U.S. Supreme Court holding that the law was constitutional.[175] The sterilization statute in Virginia set forth that the superintendent of certain institutions, including "the State Colony for Epileptics and Feeble Minded," was empowered to "have the operation performed upon any patient afflicted with hereditary forms of insanity, imbecility, [etc.], on complying with the very careful provisions by which the act protects the patients from possible abuse."[176]

The statute indicated that the legislature intended it to serve the "best interests of the patients and of society."[177] It asserted that the state is burdened with caring for many "defective persons" who "would become a menace" if released into society without being sterilized, but who could safely be released into society if first rendered incapable of reproducing.[178] This would allow them to "become self-supporting with

165. *Id.*
166. *Id.*
167. *Id.* at 3.
168. Braddock & Parish, *supra* note 153, at 90.
169. HARBOUR & MAULIK, *supra* note 149, at 2.
170. Braddock & Parish, *supra* note 153, at 91.
171. *Id.*
172. HARBOUR & MAULIK, *supra* note 149, at 2.
173. *Id.* at 3.
174. 274 U.S. 200 (1927).
175. *Id.* at 207–08.
176. *Id.* at 205–06.
177. *Id.* at 206.
178. *Id.* at 205–06.

benefit to themselves and to society."[179]

Justice Oliver Wendell Holmes wrote the majority opinion upholding the statute.[180] He described a woman named Carrie Buck, who was chosen for sterilization at the institution, as a "feeble minded" eighteen year-old patient.[181] Ms. Buck had given birth to a child described by Justice Holmes as "illegitimate" and "feeble minded."[182] Ms. Buck's mother was also intellectually disabled and was also a patient at the institution.[183]

Ms. Buck challenged the order that she be sterilized as a violation of due process and equal protection under the Fourteenth Amendment.[184] Justice Holmes noted that "[t]he attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified."[185]

Justice Holmes's rejection of the constitutional challenge is infamous.[186] Perhaps remembering the bloody Civil War of which he was a veteran, he seemed exasperated by the challenge to forced sterilization:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.[187]

He thus dismissed the lawsuit with the statement that "[t]hree generations of imbeciles are enough."[188]

Nazi Germany wholeheartedly embraced the idea of sterilizing people it considered undesirable, initially modeling its approach on a statute

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179. *Id.* at 206.

180. *Id.* at 205.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 207.

186. Patricia Alten, *GINA: A Genetic Information Nondiscrimination Solution in Search of a Problem*, 61 FLA. L. REV. 379, 381 n.10 (2009) ("Some of the most famous words in America's history on genetic discrimination are found in a Supreme Court opinion upholding the eugenic sterilization of eighteen-year-old mentally-handicapped Carrie Buck in *Buck v. Bell*, 274 U.S. 200, 205, 208 (1927).").

187. *Buck*, 274 U.S. at 207.

188. *Id.*

enacted in California.[189] Later, Nazi Germany took a more direct approach, euthanizing many people with cognitive impairments, mental illness, or physical limitations.[190]

Following the horrors of World War II, social Darwinism and eugenics fell out of favor in the United States.[191] Although progress came in fits and starts, the Post-War Era was characterized by a new emphasis on human rights that gradually extended to persons with cognitive impairments.[192] This evolution has focused on human dignity as a basis of legal personhood and rights and has rejected individual intelligence or autonomy as a necessary foundation of legal personhood for humans. In his book *Rattling the Cage*, published in 2000, Steven Wise wrote that "[h]aving dignity-rights without autonomy is a little like being a bird without feathers or a Buddhist pope."[193] But he concedes that "a succession of post-World War II treaties, constitutions, and judicial decisions have created just such a category of rights-holders."[194] If Mr. Wise's book seeks to assert that assigning rights to human beings who lack autonomy is illogical, he is incorrect. But even if he finds it illogical, Mr. Wise is correct in observing that modern courts have divorced human rights from analyses of individual human intelligence or autonomy.

In 1948, the United Nations adopted The Universal Declaration of Human Rights (the Declaration).[195] The Declaration begins with the affirmation that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[196] It made clear that inalienable rights were based on inherent human dignity rather than on characteristics of individual beings.[197] Mary Robinson, the former President of Ireland and the United Nations High Commissioner for Human Rights, has lamented that although the Declaration "affirms that we are all born free and equal in dignity and in rights," discrimination against persons with disabilities was "virtually neglected" in the human rights movement's early years.[198] However, writing in 2003, she opined

189. *See* Edwin Black, *The Horrifying American Roots of Nazi Eugenics*, HIST. NEWS NETWORK (Sept. 2003), http://historynewsnetwork.org/article/1796.

190. *Id.*

191. Michael G. Silver, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 863 (2004).

192. *See id.*

193. WISE, *supra* note 17, at 244.

194. *Id.*

195. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

196. *Id.*

197. *Id.*

198. Mary Robinson, *Foreword* to THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES, *supra* note 153, at v, v.

that "this oversight has slowly been reversed."[199]

The Declaration, which as President Robinson noted has increasingly included a call to recognize human rights for persons with disabilities, is firmly and unapologetically grounded in notions of humanity. As Professors Harold Kho and Lawrence Gostin explained, "Since 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*."[200] Individual intelligence and individual autonomy are not factors in assigning human rights.

During the 1950s, many parents of persons with intellectual disabilities joined together to form the National Association for Retarded Children, which is now known as The ARC.[201] In 1950, The ARC's "constitution was drawn up with the broad purposes to promote the welfare of mentally retarded persons of all ages and to prevent mental retardation. These goals have remained constant."[202] However, the organization increased its action based explicitly on rights concepts over time.[203] "Beginning in the early 1970's NARC and state associations assisted in the preparation of court suits to defend the rights of the mentally retarded in state institutions. It became a strong supporter of 'deinstitutionalization' and 'normalization.'"[204]

In "1961, President Kennedy issued an unprecedented statement regarding the need for a national plan in the field of intellectual disabilities."[205] He created the President's Panel on Mental Retardation, which issued "broad and far-reaching" recommendations, including expanded civil rights protections.[206] Congress enacted many of the panel's recommendations into new laws.[207]

In the 1970s, legislative action and litigation protecting the rights of persons with cognitive limitations expanded significantly.[208] In 1971, Congress created the Intermediate Care Facilities/Mental Retardation (ICF/MR) program.[209] It supplied federal funding for facilities providing

199. *Id.*

200. Harold Hongju Koh & Lawrence O. Gostin, *Introduction* to THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES, *supra* note 153, at 1, 1 (emphasis added).

201. *See* Braddock & Parish, *supra* note 153, at 94.

202. Robert Segal, *The National Association for Retarded Citizens*, ARC, http://www.thearc.org/who-we-are/history/segal-account (last visited Jan. 4, 2017).

203. *Id.*

204. *Id.*

205. Braddock & Parish, *supra* note 153, at 95.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

services for intellectually disabled people provided the facilities complied with federal quality standards.[210] Federal government funding ran from fifty percent to seventy-eight percent of the institutional care costs, and these large subsidies strongly incentivized states to meet the federal standards.[211] Although Congress did not direct this law specifically at rights or legal personhood, it had a strong practical effect in improving conditions for persons with cognitive impairments.[212]

The 1971 case *Wyatt v. Stickney*,[213] decided by a U.S. District Court in Alabama, has also been described as a landmark development for the rights movement.[214] In *Wyatt*, mentally ill and intellectually disabled patients were kept in a state facility but did not receive appropriate treatment or therapy.[215] The court held that "[t]o deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."[216] In enforcing due process rights for people with mental illnesses and cognitive impairments, the court saw no need to address whether they were legal persons in light of their limited capacities.[217] It correctly assumed that as humans they are entitled to the same due process rights as other citizens, regardless of their limitations.[218]

The *Wyatt* ruling led to a "tidal wave" of federal class actions demanding appropriate conditions in institutions housing people with intellectual disabilities and also inspired similar class actions demanding the right to education for people with intellectual disabilities.[219]

In 1975, Congress passed the Education of All Handicapped Children Act[220] (now known as IDEA, the Individuals with Disabilities Education Act).[221] IDEA "guaranteed access to a free, appropriate, public education (FAPE) in the least restrictive environment to every child with a

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210. *Id.*

211. *Id.* at 95–96.

212. *Id.* at 96.

213. 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

214. Braddock & Parish, *supra* note 153, at 95.

215. *Wyatt*, 325 F. Supp. at 782–84.

216. *Id.* at 785.

217. *See id.*

218. *See id.*

219. Braddock & Parish, *supra* note 153, at 96.

220. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1405–06, 1415–20 (2000 & Supp. IV 2004)).

221. Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as amended at 20 U.S.C. § 1400 (2012)); Braddock & Parish, *supra* note 153, at 95; *IDEA—35 Years Later*, U.S. DEP'T EDUC., http://www2.ed.gov/about/offices/list/osers/idea35/index.html (last modified June 6, 2012).

disability."[222] As with the other post-World War II statutes expanding rights for persons with cognitive impairments, IDEA is grounded firmly in the *humanity* of such persons.[223] The current version of the Act states that "[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society."[224] Rather than basing rights on cognitive abilities or other abilities, the law, like other legislation extending rights to persons with cognitive impairments, expressly rejects the idea that disability diminishes full legal personhood.

Beginning in the mid-1980s and continuing to the present, "the trend in the U.S. has been for individuals with [intellectual disabilities] to live in inclusive community settings, with appropriate supports to facilitate their experience."[225] The language of legal rights has increasingly replaced the language of altruism in describing why society must consider the interests of these legal persons. Courts and activists increasingly recognize that humans with cognitive impairments have fundamental rights to, among other things, liberty, due process, and the pursuit of happiness.[226]

Recognizing that humans with cognitive impairments are full and equal legal persons based on their inalienable rights does not mean that it is inappropriate to consider their limitations in recognizing specific rights and responsibilities. A book addressing the human rights of persons with intellectual disabilities recognizes this principle in its subtitle, "Different but Equal."[227] Although the law must recognize full personhood for a human with severe cognitive impairments in recognition of their human dignity, the person may not be competent to, for example, drive an automobile or to personally manage their financial affairs.[228]

Regarding responsibilities, in 2002, the Supreme Court held in *Atkins*

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222. *IDEA—35 Years Later*, *supra* note 221.

223. *See id.*

224. 20 U.S.C. § 1400.

225. HARBOUR & MAULIK, *supra* note 149, at 5.

226. *See generally* Michael W. Smull & Luciene Parsley, *Liberty, Due Process, and the Pursuit of Happiness*, *in* THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES, *supra* note 153, at 185, 185–203 (citing Cruzan v. Mo. Dep't of Health, 497 U.S. 261 (1990) (protecting a competent person's right to refuse medical care); then citing Youngberg v. Romeo, 457 U.S. 307 (1982) (recognizing a due process protection from undue bodily restraint); and then citing Kelley v. Johnson, 425 U.S. 238 (1976) (discussing the balancing of State and individual interests)).

227. *See supra* note 153; *see also* Harold Hongiu Koh, *Different but Equal: The Human Rights of Persons with Intellectual Disabilities*, 63 MD. L. REV. 1, 8 (2004) ("Our book calls on the world to make concrete the principle of 'different but equal.' That task is easier said than done." (footnote omitted)).

228. *See* Myrna Stahman, *Legal Planning for the Mentally Retarded*, 10 IDAHO L. REV. 245, 246 (1974).

v. Virginia[229] that it is not constitutional to impose the death penalty on a person with an intellectual disability.[230] In *Atkins*, defendant Daryl Renard Atkins was convicted of robbing and murdering a man with an accomplice.[231] Atkins' prior felony convictions and other factors made this an aggravating circumstances case eligible for the death penalty.[232] However, in the penalty phase of the trial, a forensic psychologist identified Atkins as "mildly . . . retarded," with a "full scale IQ of 59."[233] The jury nonetheless sentenced Atkins to death.[234] After the Virginia Supreme Court ordered a second sentencing hearing, the State presented another psychologist as an expert witness testifying that Atkins was not mentally retarded.[235] The jury again sentenced Atkins to death.[236] The Virginia Supreme Court upheld the sentence, despite Atkins's claim that he should be spared the death penalty because of his intellectual disability.[237]

The U.S. Supreme Court analyzed whether imposing the death penalty on an intellectually disabled criminal violated the Eighth Amendment's prohibition of cruel and unusual punishment.[238] It noted a consistent trend among states and the federal government to enact legislation banning the death penalty for intellectually disabled criminals.[239] The court reasoned:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do

229. 536 U.S. 304 (2002).
230. *Id.* at 321.
231. *Id.* at 307.
232. *Id.* at 308.
233. *Id.* at 308–09.
234. *Id.* at 309.
235. *Id.*
236. *Id.*
237. *Id.* at 310.
238. *Id.* at 311–13.
239. *Id.* at 313–15.

diminish their personal culpability.[240]

The Court concluded that because of these limitations, both the deterrence and retribution rationales for the death penalty were compromised in cases involving defendants with intellectual disabilities.[241] Thus, under the Eighth Amendment's "evolving standards of decency," the court held "that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."[242]

The *Atkins* decision illustrates the concept of inalienable human rights for humans that are "different but equal." The court recognized that some persons with intellectual disabilities may have a significant degree of moral agency, and that to the extent that they do, they must be held accountable for their crimes.[243] However, it also recognized the reality that significant intellectual limitations call for limitations on the harshest punishments that society may inflict for crimes.[244] As human beings, persons with cognitive impairments must be treated with equality under the law, but the equality analysis may take into account capabilities or lack of capabilities.

The most powerful illustration of the primacy of humanity in the legal personhood of individuals with cognitive impairments involves the rights of humans who are in a persistent vegetative state. Several U.S. courts have recognized that even humans with virtually no cognitive functioning and humans with very low cognitive functioning are legal persons entitled to rights based on human dignity.[245] As a Kentucky court stated in 2004, "It is . . . universally accepted that the state may not deprive citizens of their constitutional rights solely because they do not possess the decisional capacity to personally exercise them."[246]

For example, in *In re Guardianship of L.W.*,[247] the Wisconsin Supreme Court addressed a case involving a seventy-nine-year-old man who had been institutionalized for thirty-eight years with "a long history of chronic undifferentiated schizophrenia."[248] The man then suffered a cardiac arrest that left him in a persistent vegetative state.[249] In holding that the man had a constitutional right to decide through the substituted

240. *Id.* at 318 (footnotes omitted).

241. *Id.* at 318–20.

242. *Id.* at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986) (addressing the death penalty for mentally ill defendants)).

243. *Id.* at 317–21.

244. *Id.*

245. *See infra* notes 247–60 and accompanying text.

246. Woods v. Commonwealth, 142 S.W.3d 24, 32 (Ky. 2004).

247. 482 N.W.2d 60 (Wis. 1992).

248. *Id.* at 63.

249. *Id.*

judgment of a guardian whether to refuse further medical treatment under certain conditions, the court reasoned:

> [B]y standards of logic, morality and medicine the terminally ill should be treated equally, *whether competent or incompetent*. Can it be doubted that the "value of human dignity extends to both"? What possible societal policy objective is vindicated or furthered by treating the two groups of terminally ill *differently*? What is gained by granting such a fundamental right only to those who, though terminally ill, have not suffered brain damage and coma in the last stages of the dying process? The very notion raises the spectre of constitutional infirmity when measured against the Supreme Court's recognition that incompetents must be afforded all their due process rights; indeed any State scheme which irrationally denies to the terminally ill incompetent that which it grants to the terminally ill competent patient is plainly subject to constitutional attack.[250]

Perhaps an even more dramatic affirmation of the legal personhood and rights of humans with even severe cognitive impairments arises when the person is an infant in a persistent vegetative state.[251] In this situation, not only does the human seemingly have no hope of any autonomy in the future, they also have not previously experienced significant autonomy.[252]

In 1992, the Massachusetts Supreme Court confronted these sad facts in the case of *Care & Protection of Beth*.[253] In this case, the infant named Beth was in an automobile accident when she was approximately three months old.[254] The straps in Beth's car seat wrapped around her neck, depriving her of oxygen and leaving her in "an irreversible coma."[255] A medical expert testified that "in his opinion, the child does not feel pain, or at least is not 'able to localize it.'"[256]

The child's guardian argued that efforts to resuscitate Beth should be taken if needed, and that such efforts cannot be an invasion of Beth's

250. *Id.* at 68–69 (first emphasis added) (quoting Eichner v. Dillon, 426 N.Y.S.2d 517, 542–43 (App. Div. 1980)). *In re Guardianship of L.W.* is cited and briefly quoted in WISE, *supra* note 17, at 244.

251. *See infra* notes 253–60 and accompanying text.

252. *See infra* notes 253–60 and accompanying text.

253. 587 N.E.2d 1377, 1378 (Mass. 1992). Steven Wise discusses this case both in WISE, *supra* note 17, at 244–45, and in WISE, *supra* note 20, at 237–38.

254. *Beth*, 587 N.E.2d at 1378.

255. *Id.*

256. *Id.* at 1379.

dignity.[257] The guardian stated "that the child 'has no cognitive ability and therefore will suffer no "indignity" that the medical care might be supposed to produce in a conscious person.'"[258]

The court bristled at this assertion, retorting that "[i]n the law of this jurisdiction, incompetent people are entitled to the same respect, dignity and freedom of choice as competent people."[259] The court concluded that under the substituted judgment doctrine as applicable to the facts of this case, Beth would choose not to be resuscitated if in cardiac arrest and thus upheld a "do not resuscitate" order imposed by a lower court.[260]

Every aspect of the history of legal rights for humans with cognitive impairments refutes the argument that individual cognitive ability should be a foundation of legal personhood and legal rights. Rather than supporting the supposed significance of individual cognitive ability to personhood, courts and legislatures have gone in the opposite direction, relying on inalienable human dignity rather than individual intelligence as the basis for rights. As Part III will demonstrate, the legal system has acted appropriately in maintaining its rights focus on human dignity and not on individual intelligence.

III. LEGAL PERSONHOOD FOR HUMANS WITH COGNITIVE IMPAIRMENTS DOES NOT SUPPORT LEGAL PERSONHOOD FOR INTELLIGENT ANIMALS

Radically restructuring our legal system to base personhood on individual cognitive ability would create dangerous societal threats. Furthermore, our recognition of legal personhood for humans with cognitive impairments does not present an equality dilemma in declining to assign personhood to intelligent animals such as chimpanzees. This Part will demonstrate that seeking to apply an equality principle between cognitively impaired humans and intelligent animals presents particularly serious risks for cognitively impaired humans. This Part also articulates why legal personhood is anchored only in the human community and its proxies. Finally, this Part explains why, even if an equality comparison under the argument from marginal cases were undertaken, cognitively impaired humans are distinct from intelligent animals in ways that would discredit the comparison.

257. *Id.* at 1382–83.
258. *Id.* at 1382.
259. *Id.*
260. *Id.* at 1383.

A. *Legal Personhood for Intelligent Animals Would Pose Threats to Humans with Serious Cognitive Impairments*

One of the most serious concerns about legal personhood for intelligent animals should be that it presents an unintended, long-term, and perhaps not immediately obvious threat to humans—particularly to humans with serious cognitive impairments. As set forth in the argument from marginal cases, humans with serious cognitive impairments may have no capacity for autonomy or less capacity for autonomy than some animals.[261] To be clear, supporting personhood based on animals' intelligence does not imply that one *wants* to reduce the protections afforded humans with cognitive impairments. Indeed, the New York chimpanzee lawsuits seem to advocate pulling smart animals up in legal consideration, rather than seeking to push humans with cognitive impairments down.[262]

For example, 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."
>
> . . .
>
> 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.[263]

Despite the NhRP's good intentions about maintaining basic legal rights for all humans regardless of the severity of their cognitive impairments, there should be deep concern that over a long horizon,

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261. *See supra* notes 19–25 and accompanying text. The argument from marginal cases is addressed more broadly in Cupp, *Children and Chimps*, *supra* note 26.

262. *See supra* Sections I.A–C.

263. *Lavery I* Brief, *supra* note 49, at 70, 73 (citation omitted) (quoting Daniel Wikler, *Concepts of Personhood: A Philosophical Perspective*, *in* DEFINING HUMAN LIFE: MEDICAL, LEGAL, AND ETHICAL IMPLICATIONS 13, 19 (Margery W. Shaw & A. Edward Doudera, eds., 1983)).

allowing animal legal personhood based on cognitive abilities could unintentionally lead to gradual erosion of protections for these especially vulnerable humans.[264] 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 to not only 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.[265]

Professor Laurence Tribe has expressed concern that the approach to legal personhood for intelligent animals—set forth in a much-discussed book by Steven Wise, the NhRP's president—might be harmful for humans with cognitive impairments. The book, *Rattling the Cage*, was published in 2000.[266] In 2001 Professor Tribe stated "enormous admiration for [Mr. Wise's] overall enterprise and approach," but cautioned that

> [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 all out, but the possibilities are genocidal and horrific and reminiscent of slavery and of the holocaust.[267]

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."[268] But Mr. Wise also noted that in his view entitlements to rights cannot be based only on being

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264. Richard L. Cupp, Jr., *Human Responsibility, Not Legal Personhood, for Nonhuman Animals*, ENGAGE, July 2015, at 29, 35. As noted above, certain excerpts and footnotes of Section III.A–B., *infra*, were first published in this shorter piece in July 2015.

265. *See* Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527, 535 (2000) (reviewing STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 72 (2000)) (providing a secular argument for dichotomizing between humans and animals that "if we fail to maintain a bright line between animals and human beings, we may end up by treating human beings as badly as we treat animals, rather than treating animals as well as we treat (or aspire to treat) human beings").

266. WISE, *supra* note 17.

267. 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 (unpublished manuscript) (on file with author).

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

human.[269]

This Article's author did not find in the NhRP's briefs an explanation 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 legal personhood based on dignity?

Further, if a rights-bearing but permanently comatose infant is not capable of suffering, would even animals that are *not* capable of suffering be entitled to dignity-based personhood under this position? In his 2002 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 Two" animals in terms of autonomy values, in addition to the animals who may be among the most intelligent, such as great apes.[270] In Category Two he includes animals such as dogs, African elephants, and African grey parrots, which are thought to have relatively high intelligence.[271] He also asserts that, with animals that are lower on the scale of the probability of practical autonomy, at a point 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 retarded man. And at some point, the psychological and political barriers to equality for a nonhuman animal with a low autonomy value become insuperable."[272]

But, again, 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 Mr. Wise's equality argument, if accepted, necessitate 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

269. *Id.* at 650–51. The author of this Article disagrees with Mr. Wise and believes that treating humans distinctively makes sense because the human community is in fact distinctive in important aspects. *See infra* Section III.B.

270. WISE, *supra* note 20, at 237–38, 241.

271. *Id.* at 241.

272. *Id.* at 238.

vegetative state, how many animals would *not* merit personhood if an equality argument between humans and animals based on individual autonomy were accepted? As with basing personhood on individual autonomy, the implications of an alternative non-cognitive approach to personhood that rejects drawing any lines related to humanity may be exceptionally expansive and problematic.[273]

Also, 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.[274] 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. Considering the interests of humans with cognitive limitations in terms of legal rights is relatively recent in the United States;[275] "[T]he vast majority of the world's intellectually disabled still live in horrifying conditions."[276] Progressive notions of legal rights for humans with cognitive limitations should not be viewed as safely established for the indefinite future.[277] 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 both humans as well as for animals, and later generations may well wish we had kept it closed.[278]

B. *Among Beings of Which We Are Aware, Appropriate Legal Personhood Is Anchored Only in the Human Community*

As explained by the philosopher Carl Cohen, "Animals 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."[279] Thus, grounding the rights of humans with severe cognitive impairments in their humanity is not only consistent with what courts and legislatures have done, it is appropriate.[280]

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273. *See, e.g.*, Cupp, *supra* note 264, at 30.

274. *Id.*

275. *See supra* Part II.

276. Koh & Gostin, *supra* note 200, at 3.

277. *See id.* at 3.

278. *See id.* at 12. 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* notes 304–11 and accompanying text.

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

280. *See id.*; *see also supra* Sections III.A–.C.

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.[281] 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.[282] We stand together with the ideal of a social compact—which we could also call a responsible community—to uphold all of our rights, including of course, our inalienable rights.[283] As stated in the Declaration of Independence, "[T]o secure these rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed."[284] One would be hard-pressed to convince most Americans that this is not important, as from childhood Americans learn this concept as a bedrock of our social structure. It is not surprising that the American Bar Association's section addressing civil liberties is called "The Section of Individual Rights and Responsibilities."[285]

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.[286]

It misses the point to argue, as the NhRP seems to do in its *Lavery I* brief that sought leave to appeal from the State of New York Court of Appeals, that personhood is unrelated to duties because we can call freedom from slavery a bodily liberty immunity right that does not require capacity.[287] First, as noted above, this is too narrow a

281. Alex Tuckness, *Locke's Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Nov. 9, 2005), http://plato.stanford.edu/entries/locke-political/.

282. *Id.*

283. *Id.* 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 noncitizen humans as they interact with our society in addition to recognizing that they have some rights as they interact with our society. *See supra* note 87.

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

285. *Sections*, A.B.A., http://www.americanbar.org/groups/view_all_groups.html (last visited Jan. 5, 2017).

286. *See, e.g.*, Cupp, *supra* note 264, at 31.

287. Memorandum of Law in Support of Appellant's Motion for Leave to Appeal to the Court of Appeals at 19–22, People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, No. 518335

conceptualization of connections between rights and duties.[288]

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 humans with cognitive impairments cannot make responsible choices themselves.[289] 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 impairments should be recognized as persons.[290]

Professor Wesley Hohfeld wrote about the form of rights and duties between persons in the early twentieth century,[291] and the NhRP's brief that sought leave to appeal the intermediate appellate court's *Lavery I* decision invoked his analysis to argue for chimpanzee legal personhood.[292] Perhaps the most basic problem with the NhRP's argument is that we are dealing with a question that must precede Hohfeldian analysis of the *forms* of rights granted to persons.[293] Professor Hohfeld's description of rights assumed it was dealing with the rights of *persons*.[294] Our issue revolves around determining 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.[295]

It is sometimes asserted that since we give corporations personhood, justice requires that we should give personhood to intelligent animals.[296] But this ignores that corporations are created by humans as a proxy for the rights and duties of their human stakeholders.[297] They are simply a

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(N.Y. Feb. 23, 2015) [hereinafter Memorandum of Law], http://www.nonhumanrightsproject.org/wp-content/uploads/2015/02/6.-Motion-for-Leave-to-Appeal-and-Affirmation-in-Support.pdf.

288. *See supra* notes 285–86 and accompanying text.

289. *See, e.g.*, Cupp, *supra* note 264, at 31.

290. *Id.*

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

292. Memorandum of Law, *supra* note 287, at 19.

293. *See* Hohfeld, *supra* note 291, at 721.

294. *Id.* 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." *Id.*

295. *See* 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) ("[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.").

296. *See, e.g.*, Cupp, *supra* note 264, at 31.

297. *Id.*

vehicle for addressing *human* interests and obligations.[298]

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 "marginal." The pervasive societal view that *all* humans have distinctive and intrinsic human dignity regardless of their capabilities may have cultural, religious, or even instinctual foundations.[299] 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.[300] Humans with cognitive impairments are a part of the human community, even if their own agency is limited or nonexistent.[301] 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 fit within our society's system of rights and responsibilities.[302] It may be added that no other beings of which we are presently aware living today, for example, the most intelligent of all chimpanzees, ever meet that norm.[303] Recognizing personhood in our fellow humans, regardless of whether they meet the norm, is a pairing of like "kind"[304] 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 with a legal system such as ours.[305]

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 *community* together.[306] Infants are human infants, and persons with severe cognitive impairments are humans who are other humans' parents, siblings, children, or spouses.[307] We have all been children, and we relate to children in a special way.[308] 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.

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298. *See Lavery I*, 998 N.Y.S.2d 248, 251 (App. Div. 2014); *see also* Cupp, *Moving Beyond Animal Rights*, *supra* note 29, at 52–63 (discussing corporations as artificial entities serving human interests).

299. *See, e.g.*, Cupp, *supra* note 264, at 31.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. Regarding animals and humans, Professor Cohen asserts that "[t]he critical distinction is one of kind." COHEN & REGAN, *supra* note 279, at 37.

305. *See, e.g.*, Cupp, *supra* note 264, at 31.

306. *Id.*

307. *Id.* at 31–32.

308. *Id.* at 32.

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.[309] As explained by Professor Cohen, "[T]his criticism mistakenly treats the essentially moral feature of humanity as though it were a screening function for sorting humans, which it most certainly is not."[310] It would be a serious misperception to view the appellate courts' decisions in *Lavery I* and *Lavery II* as actually threatening to humans with severe cognitive impairments in finding connections between rights and duties.[311]

This misperception would reflect an overly narrow view of how rights and duties are connected.[312] Regarding personhood, they are connected with human society in general, rather than on an individual-by-individual capacities analysis.[313] 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 society.[314] Indeed, the history of legal rights for children and, as set forth above, the history of legal rights for cognitively impaired humans is a history of increasing emphasis on their humanity.[315] The *Lavery I* court noted that "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."[316]

In May 2015, Professor Lawrence Tribe submitted an *amicus curiae* letter brief in support of NhRP's motion that sought leave to appeal the *Lavery I* case to the Court of Appeals of the State of New York.[317] Among the matters he addressed in the letter brief are two common theoretical

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* Of course, individual capacities are relevant to some specific rights, for example, the right to vote. They are not relevant to humans' personhood. *See id.* at 32 n.35.

314. *Id.* at 32. 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. *See id.* at 32 n.36.

315. *Id.*; *see, e.g.*, RICHARD FARSON, BIRTHRIGHTS 1 (1974) (asserting that denying rights to children denies "their right to full humanity").

316. *Lavery I*, 998 N.Y.S.2d 248, 251 n.3 (App. Div. 2014).

317. Letter Brief of Amicus Curiae, *supra* note 81. In September 2015, the Court of Appeals of the State of New York declined to grant leave to appeal for the *Lavery I* case and for the *Presti I* case, but as of the writing of this Article, the *Lavery II* and *Presti II* cases are still in the appellate pipeline, and the NhRP may still seek an appeal of the *Lavery II* decision to the Court of Appeals of the State of New York. *See supra* Part I.

conceptualizations of the function of human rights that academic philosophers and other theorists debate: the "interest theory" and the "will theory."[318] The interest theory maintains "that the function of a right is to further the right-holder's interests."[319] The will theory "asserts that the function of a right is to give its holder control over another's duty."[320]

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."[321] 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."[322] 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.[323] 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."[324]

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 paradigmatic legal persons. Yet they certainly do *not* possess what will theorists would deem rights.[325]

But this line of argument undervalues courts' consistent emphasis on humanity's centrality to personhood. Courts have appropriately recognized that there is something distinctive in humanity.[326] As

318. *See* Letter Brief of Amicus Curiae, *supra* note 81, at 8–10.

319. *Rights*, STAN. ENCYCLOPEDIA PHIL. § 2.2.2 (Sept. 9, 2015), http://plato.stanford.edu/entries/rights/#2.2.

320. *Id.*

321. *Id.*

322. *Id.*

323. *See* J. Raz, *On the Nature of Rights*, 93 MIND 194, 204 (1984).

324. *Id.*

325. Letter Brief of Amicus Curiae, *supra* note 81, at 9.

326. *See supra* Sections III.A–B.

discussed above, this perception of distinctiveness may have cultural, religious, or even instinctual foundations, but humans with severe cognitive impairments and infants should 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.[327] Further, courts appropriately do not tend to declare allegiance to either of these competing academic philosophical theories in addressing rights. As addressed in Section I.D, courts are, to say the least, not rigidly beholden to conflicting academic philosophical theories.[328]

C. *The Broad Range of Circumstances Related to Human Cognitive Impairments Further Undercuts Efforts to Make Autonomy Comparisons with Animals*

Humans experience cognitive impairments in a broad range of circumstances. For example, a typical infant has significant cognitive limitations, but they are temporary, and the infant will in most cases eventually become a fully accountable member of society with a great deal of autonomy.[329] As addressed in an earlier article, because they will likely develop a high degree of autonomy and for other reasons, the argument from marginal cases seeking to make equality comparisons with typical infants who bear rights is unsustainable.[330]

Humans born with significant cognitive impairments that do not allow them any degree of autonomy from birth, and that do not allow any realistic hope that they will ever attain any degree of autonomy, are at the other end of the extreme.[331] As analyzed above, courts and legislatures have considered these humans full legal persons, and their decision to do so is appropriate.[332] Between these extremes, humans may experience cognitive impairments in a variety of circumstances that present additional challenges to the argument from marginal cases.[333]

Among non-infant humans with cognitive limitations, those who have never had any degree of autonomy and likely never will have any degree of autonomy are a small subset.[334] More commonly, humans with cognitive impairments fall into other categories that include at least the following:

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327. *See supra* Sections III.A–B.

328. *See supra* Section I.D.

329. Cupp, *Children and Chimps*, *supra* note 29, at 31.

330. *Id.* at 31–32.

331. *See supra* Part II.

332. *See supra* Part II.

333. *See* Cupp, *Children and Chimps*, *supra* note 29, at 49.

334. *See* Van R. Silka & Mark J. Hauser, *Psychiatric Assessment of the Person with Mental Retardation*, 27 PSYCHIATRIC ANNALS 162, 163 tbl.1 (1997).

(1) Humans who previously had no cognitive impairments, and who may again in the future have no cognitive impairments. For example, a head injury might make a normally autonomous adult temporarily unconscious, but doctors may expect or reasonably hope for a full or substantial recovery in the future.

(2) Humans who previously had no cognitive impairments, but who sustain cognitive impairments that are expected to be permanent. For example, an adult who previously had a normal level of autonomy may experience an injury causing a coma that doctors expect to be permanent.

(3) Humans who have cognitive impairments that may or may not be permanent but that fall within a wide range of conditions that allow some meaningful level of autonomy. For example, many humans function with a high level of autonomy despite having an autism spectrum disorder,[335] and humans with intellectual disabilities usually are capable of some degree of autonomy despite their disability. Less than two percent of individuals with intellectual disabilities have conditions that may be described as "profound," whereas eighty-five percent of individuals with intellectual disabilities have conditions that may be described as only "mild."[336]

Humans in category one add to the other difficulties with the argument from marginal cases because, unlike animals, their cognitive impairment is probably only a temporary departure from a life of typical human autonomy.

Humans in category two also differ from animals in that they have previously experienced normal human autonomy. As addressed in Part II, members of society who currently have normal human autonomy know that they could become like the humans in category two.[337] Taking away rights and personhood that the law has already recognized is much different than declining to extend rights and personhood where they have never before existed.

Humans in category three illustrate the difficulties that would be inherent in determining how severe human cognitive impairments would have to be to employ the argument from marginal cases. How can we confidently compare the autonomy of a human with an autism spectrum disorder to the autonomy of a typical chimpanzee? Regarding humans with intellectual disabilities, most of whom do not have severe mental

335. *Autism Spectrum Disorder*, NAT'L INST. MENTAL HEALTH, http://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml (last visited Jan. 5, 2017) (stating the term "spectrum" refers to the wide range of symptoms, skills, and levels of impairment or disability that children with ASD can have. Some children are mildly impaired by their symptoms, while others are severely disabled).

336. Silka & Hauser, *supra* note 334, at 163 tbl.1.

337. *See supra* notes 308–09 and accompanying text.

limitations, how can we in most cases confidently compare their abilities with the abilities of chimpanzees?

Further complicating the argument from marginal cases regarding humans with cognitive impairments is the increasing scientific evidence that human brains may not be readily comparable to animal brains in an apples to apples manner.[338] Rather than simply considering intelligence on a simple spectrum that may be used both for humans and for animals, there is evidence that animal brains and human brains function in different ways.[339] A frequently cited 2008 article coauthored by Daniel Povinelli, who was the project director for the National Chimpanzee Observatory Working Group at the time the article was published, posited that "the profound biological continuity between human and nonhuman animals masks an equally profound discontinuity between the human and nonhuman minds."[340]

This assertion has critics as well as supporters, but it highlights that there is much we still do not know about animals' minds and that science has not yet brought us to a place where we can fully understand all aspects of how animals' mental processes compare to human mental processes. As another illustration, researchers recently discovered that human brains have an asymmetrical groove that is deeper on the right side of our brains than the left, whereas chimpanzees lack this asymmetry.[341] "The groove's function is unknown, but its location suggests it played a role in the evolution of our communication abilities."[342] A researcher not involved in the study said that "[o]ne day this will help us understand what makes us tick."[343] Humans with cognitive impairments may generally have some cognitive abilities that intelligent animals such as chimpanzees lack, and most humans lack other cognitive abilities that chimpanzees have evolved to survive in the wild.[344] Thus, although one can observe that

338. *See* Derek C. Penn et al., *Darwin's Mistake: Explaining the Discontinuity Between Human and Nonhuman Minds*, 31 BEHAV. & BRAIN SCI. 109, 110 (2008).

339. *See id.* at 110, 112.

340. *Id.* at 110. Some details of this theory are discussed in Cupp, *Children and Chimps*, *supra* note 29, at 40–41. For further elaboration on the theory, see JAMES V. PARKER, ANIMAL MINDS, ANIMAL SOULS, ANIMAL RIGHTS 66–69 (2010).

341. *See* Claire Wilson, *Human Brains Have a Groovy Feature That Chimps' Don't*, NEW SCIENTIST (Jan. 12, 2015), https://www.newscientist.com/article/dn26778-human-brains-have-a-groovy-feature-that-chimps-dont/#.VLZ343umBIR.

342. *Id.*

343. *Id.*

344. *Id.* Indeed, typical chimpanzees seem to have some cognitive abilities that very few humans possess. In one study, when the numbers one through nine appeared on a screen in a random order and then disappeared, chimpanzees were "able to recall the exact sequence and location of each number." Douglas Main, *Chimps Have Better Short-Term Memory Than Humans*, LIVE SCI. (Feb. 16, 2013, 5:30 PM), http://www.livescience.com/27199-chimps-smarter-memory-humans.html. Very few humans would be able to perform this task. *Id.* "This

even intelligent animals do not have the cognitive ability to function with legal rights and legal responsibilities in human society, engaging in more general comparisons of human versus animal intelligence as points on a shared continuum is not workable.

Finally, accountable members of society tend to perceive humanity as the most strongly defining characteristic of all cognitively impaired humans, despite their cognitive impairments. As a matter of common sense, a human with a typical level of autonomy does not look at a cognitively impaired person and perceive a nonhuman.[345] Humanity is humans' strongest self-identifying characteristic, and we perceive other characteristics, such as cognitive impairment, as part of a person's humanity rather than as something that makes them a nonhuman.[346]

This circles back to the fundamental point that membership in the human community or being a proxy for humans is at the core of rights and personhood.[347] The small percentage of humans who have never had any autonomy and who likely never will have any autonomy may present a scenario for the argument from marginal cases that is somewhat less unwieldy than other scenarios for comparison, but even with these humans, the argument is highly problematic and unworkable.[348] As addressed above, even humans who have never had any autonomy and

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incredible short-term (or 'working') memory helps chimpanzees survive in the wild, where they often must make rapid and complex decisions." *Id.*

345. "A growing body of evidence [shows] that [a certain] region of the human brain is heavily involved in processing and learning a wide variety of social cues, such as hand gestures and faces." Tudor Vieru, *How the Brain Responds to Viewing Human Faces*, SOFTPEDIA (Sept. 30, 2011), http://news.softpedia.com/news/How-the-Brain-Responds-to-Viewing-Human-Faces-224765.shtml. A study showed that humans fixated on other humans' faces in a manner that was "faster and more accurate" than fixations on primate faces. Elizabeth A. Simpson et al., *Visual Search Efficiency Is Greater for Human Faces Compared to Animal Faces*, 61 EXPERIMENTAL PSYCHOL. 439, 453 (2014). Further, "[i]n humans, there appears to be a domain specific mechanism for visually processing animals, perhaps due to the importance of detecting prey or threats, or as a consequence of animal domestication." *Id.* at 439 (citation omitted). The study's authors concluded that "[t]ogether, these results suggest that search efficiency for conspecifics' faces may be privileged. Faces are unquestionably one of the most important visual stimuli for humans and other vertebrates." *Id.* at 453. Interestingly, although humans located human faces the fastest, they located other primates' faces more quickly than they located other mammals' faces. *Id.*

346. This sense of connectedness with other human beings is different from odious racial preferences between humans. Racial preferences are illogical, whereas a special sense of connectedness with members of the human community is both logical and laudable given the centrality of humanity to the responsible human community. *See* Cupp, *Children and Chimps*, *supra* note 29, at 50. Simply put, race should not matter in society, but humanity should matter; among other possible distinctions from animals, humans are the only beings of which people are aware for whom ability to function responsibly in society is the norm. *See id.* at 13.

347. *See supra* Section III.B.

348. *See supra* Section III.B.

likely never will have any autonomy are, emphatically, humans first and foremost.[349] Their legal personhood and full humanity is anchored in the responsible human community despite their individual limitations; they are not "marginal" humans.

IV. CONCLUSION: FINDING A MIDDLE GROUND FOR EVOLVING ANIMAL PROTECTION IN A CHANGING SOCIETY

Among the other problems with expanding legal personhood starting with the most intelligent animals is that there is no predictable end point for its expansion, and the lack of a standard for expansion would magnify the potential harm that this radical change could cause.[350] Instead of dramatically restructuring our legal system with potentially disastrous consequences, our legal system should follow societal evolution that is emphasizing more thoughtful treatment of animals.[351]

A. *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.[352] 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.

The reason law does not fit perfectly with any single philosophical theory or other academic theory is that 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 a broad and intense proliferation 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 nonhumans comes down, that could serve as a stepping-stone for many who advocate a focus on the capacity to suffer as a basis for 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

349. *See supra* Section III.B.

350. *See infra* notes 353–55 and accompanying text.

351. *See infra* notes 360–63 and accompanying text.

352. Michael Mountain, *Lawsuit Filed Today on Behalf of Chimpanzee Seeking Legal Personhood*, NONHUMAN RTS. PROJECT (Dec. 2, 2013), http://www.nonhumanrightsproject.org/2013/12/02/lawsuit-filed-today-on-behalf-of-chimpanzee-seeking-legal-personhood/ ("Our goal is, very simply, to breach the legal wall that separates all humans from all nonhuman animals.").

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 starting with the smartest animals 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.[353] We do not have much economic reliance on chimpanzees, relatively few of them live in captivity compared to many other animals, and they are more intelligent and similar to humans than 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 unmanageable 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.[354]

Once the personhood door opens to the more intelligent animals, it would also encourage efforts to extend personhood on the basis of sentience rather than autonomy. Sentience is exceptionally important in ascertaining humans' responsibilities in our interactions with animals. When an animal is capable of suffering, humans should be exceptionally

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353. *See* Cupp, *Children and Chimps*, *supra* note 29, at 21. The *Stanley* ruling asserted in a footnote that "[t]he floodgates argument is not a cogent 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 (N.Y. 1991), which involved a proposed tort law expansion. *See Enright*, 570 N.E.2d at 201. Although the court provided no pinpoint citation, apparently the *Stanley* court was referencing the dissent in *Enright*. *Stanley*, 16 N.Y.S.3d at 917 n.2 (quoting *Enright*, 570 N.E.2d at 207 (Hancock, J., dissenting) (using the language quoted in *Stanley*)). 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 (majority opinion). 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.

354. Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 143, 154 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

thoughtful regarding how they treat the animal. However, the implications of much broader potential expansion of legal personhood based on either autonomy definitions or sentience are enormous, and society should carefully evaluate them. Any court that contemplates restructuring our legal system must also contemplate the practical consequences. Eventually extending legal personhood to all animals capable of suffering could open the courts to billions of potential plaintiffs.

B. *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.[355] One major reason for this evolution is our shift from an agrarian society to an urban and suburban society.[356] 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.[357] Now the United States is an urban and suburban society, and relatively few people are directly involved in owning animals for economic utility.[358] Rather, when most people in the United States now encounter living animals, they are most frequently companion animals kept for emotional utility.[359] Most people view the animals in their lives in terms of affection rather than financial assets.[360] As law gradually reflects changes in society, transformation in people's routine interactions with animals has doubtless 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.[361] We are continually learning more about animals' minds and capabilities.[362] As we have gained more understanding of animals, we

355. 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 (forthcoming 2016) (manuscript at 9), http://ssrn.com/abstract=2788309.

356. *Id.* (manuscript at 9).

357. *Id.* (manuscript at 10).

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* (manuscript at 11).

362. *See* Frances Gaertner, *New Research Sheds Light on Cognitive Abilities of Animals*, WORLD SOCIALIST WEB SITE (June 10, 2011), http://intsse.com/wswspdf/en/articles/2011/06/anim-j10.pdf.

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.[363]

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 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. 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 intermediate appellate court that unanimously dismissed the NhRP's *Lavery I* appeal, "Our rejection of a rights paradigm for animals does not, however, leave them defenseless."[364] When 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. The legislatures' role in legal evolution should be respected and embraced, and courts should refrain from adopting extreme legal theories that would not enhance justice and that would be contrary to the views of most citizens.

Recognizing that personhood is a fit for humans and not a fit for animals in our legal system does not limit us to considering animals as "mere things" with the same status as inanimate objects.[365] "Mere things" such as inanimate objects do not have laws protecting them. This is not an argument that we have done enough for animals. Based on shifting societal attitudes toward animals, quite a bit of evolution is likely still ahead even from an animal welfare perspective.

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

363. The reasons for evolution in societal views regarding animal protection addressed in the two preceding paragraphs are analyzed in more depth in Cupp, *supra* note 355 (manuscript at 9–11).

364. *Lavery I*, 998 N.Y.S.2d 248, 251 (App. Div. 2014).

365. Cupp, *supra* note 355 (manuscript at 6).

from humans and human proxies. Twenty-five years ago, few states made felony status available for serious animal cruelty.[366] 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.[367] 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.

366. *See* ANIMAL LEGAL DEF. FUND, JURISDICTIONS WITH FELONY ANIMAL ABUSE PROVISIONS (2012), http://aldf.org/downloads/Felony_Status_List%204-12.pdf. The Animal Legal Defense Fund has gathered information about the year each state adopted felony animal cruelty provisions. *Id.* According to their list, as of 1990 only six states had adopted felony animal cruelty provisions. *Id.*

367. *South Dakota Is Last State to Make Animal Cruelty a Felony*, 244 J. AM. VETERINARY MED. ASS'N 1357, 1357 (2014).