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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

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

Petitioner-Appellant,

against

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

BRIEF OF *AMICUS CURIAE* LAURENCE H. TRIBE IN SUPPORT OF PETITIONER-APPELLANT

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I. Preliminary Statement

On January 7, 2016, Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP") filed a verified petition for a common law writ of habeas corpus and order to show cause on behalf of a chimpanzee named Kiko in the New York State Supreme Court, New York County pursuant to New York Civil Practice Law and Rules ("CPLR") Article 70.[2] This was the second petition filed by the NhRP on Kiko's behalf ("Kiko II"), the first having been filed on December 3, 2013 in the New York State Supreme Court, Niagara County ("Kiko I"). Both lower courts refused to issue the requested order to show cause.[3]

The New York County Supreme Court refused to issue the order to show cause in Kiko II, in part, because it believed itself bound by *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015) in which the New York State Supreme Court Appellate Division, Third Judicial Department ("Third Department") stated that chimpanzees are not "persons" for the purpose of

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[2] CPLR Article 70 governs the procedure applicable to all writs of habeas corpus.

[3] The New York State Supreme Court Appellate Division, Fourth Judicial Department, affirmed the decision of the Supreme Court, Niagara County in Kiko I on the ground that the NhRP was seeking Kiko's transfer to a sanctuary rather than his unconditional release onto the streets of New York. *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334, PAGE (4th Dept. 2015), *leave to appeal den.*, 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015).

demanding a common law writ of habeas corpus because they are unable to bear duties and responsibilities.[4]

Both Kiko I and Kiko II alleged that the scientific evidence contained in accompanying affidavits demonstrated that chimpanzees are autonomous beings entitled to be recognized as "persons" under the common law of habeas corpus and within the meaning of CPLR Article 70. In addition, and in response to the *Lavery* holding, Kiko II alleged that the scientific evidence contained in accompanying supplemental affidavits demonstrated that chimpanzees possess the abilities to assume duties and responsibilities both within a chimpanzee community and within a chimpanzee-human community.

The lower court and the *Lavery* court's rulings are erroneous. First, the lower court fundamentally misunderstood the purpose of the common law writ of habeas corpus, which is to allow courts of competent jurisdiction to consider arguments challenging restraint or confinement as contrary to governing law. New York courts have long allowed such challenges even when other areas of law did not recognize the underlying substantive rights at issue, while the lower court's reasoning would summarily shut the doors of the state's judicial system to any consideration of such challenges.

[4] This appeal was taken from the refusal of the New York State Supreme Court, Fulton County to issue a petition for a writ of habeas corpus and order to show cause filed by the NhRP on behalf of a chimpanzee named Tommy.

Second, the court in *Lavery* reached its conclusion on the basis of a fundamentally flawed definition of legal personhood. The court reasoned that habeas corpus applies only to legal persons and essentially *assumed* that chimpanzees cannot be legal persons – Q.E.D. *Lavery*, 124 A.D.3d at 150-52. But that line of reasoning begged vital questions by relying on a classic but deeply problematic – and, at the very least, profoundly contested – definition of "legal personhood" as turning on an entity's present capacity to bear "both rights *and duties*." *Id.* at 151-52. This definition, which would appear on its face to exclude third-trimester fetuses, children, and comatose adults (among other entities whose rights as persons the law protects), importantly misunderstood the relationship among rights, duties, and personhood.

II. THE THIRD DEPARTMENT'S REASONING UNJUSTIFIABLY CURTAILS THE SCOPE OF HABEAS CORPUS

For centuries, the New York Court of Appeals has recognized that the common law writ of habeas corpus "lies in all cases of imprisonment by commitment, detention, confinement or restraint, for whatever cause, or under whatever pretence." *People v. McLeod*, 3 Hill 635, 647 note j (N.Y. 1842).[5] In a similar spirit, the United States Supreme Court has emphasized that the writ's "scope and flexibility" and "its capacity to reach all manner of illegal detention,"

[5] *See also People ex rel. Pruyne v. Walts*, 122 N.Y. 238, 241-42 (1890) ("The common-law writ of habeas corpus was a writ in behalf of liberty, and its purpose was to deliver a prisoner from unjust imprisonment and illegal and improper restraint.").

as well as "its ability to cut through barriers of form and procedural mazes . . . have always been emphasized and jealously guarded by courts and lawmakers." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

By foreclosing any inquiry into whether the detention alleged in this case was unlawful, the lower court's reasoning confused the issue of habeas corpus *jurisdiction* (the question of whether and when a court has authority to entertain a detainee's petition at all) with the analytically separate issue of habeas corpus *relief* (the question of what substantive rights, if any, the detainee may invoke, and what remedy or remedies the detainee may properly seek).

The court's refusal even to examine the character of Kiko's detention rested on a misunderstanding of the crucial role the common law writ of habeas corpus has played throughout history: providing a forum to test the legality of someone's ongoing restraint or detention. This forum for review has been available even when the ultimate conclusion is that the detention is lawful, given all the circumstances. While the Third Department accurately observed that nonhuman beings like chimpanzees have never before been provided habeas corpus *relief* by New York courts,[6] the court was wrong to assume that a state court's doors must be slammed

[6] *Lavery*, 124 A.D.3d at 150 ("Petitioner does not cite any precedent-and there appears to be none-in state law, or under English common law, that an animal could be considered a 'person' for the purposes of common-law habeas corpus relief. In fact, habeas corpus relief has never been provided to any nonhuman entity."). Since *Lavery* was decided, the Supreme Court, New York County has ordered officials at a state university to show cause for detaining two chimpanzees in another habeas case brought by the NhRP under Article 70 of the CPLR. *See*

shut to the plea, made on a chimpanzee's behalf, that the detention complained of is contrary to law – an assumption the court made on the basis of an unexamined presumption that chimpanzees lack the requisite attributes of personhood.

Throughout history, the writ of habeas corpus has served 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.[7] For example, human slaves famously used the common law writ of habeas corpus in New York to challenge their bondage, even when the law otherwise treated them as mere things.[8] Holding that Kiko and others like him are not welcome in habeas courts is akin to holding that detained slaves, infants, or comatose individuals cannot invoke the writ of habeas corpus to test the legality of their detention, based on an initial and largely unexamined conclusion about what kinds of substantive legal rights and responsibilities those individuals might properly be deemed to bear in various contexts. Contrary to that holding, New York courts have throughout the state's history entertained petitions for writs of habeas corpus from a wide variety of beings considered at the time to be incapable of bearing the same rights and

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The Nonhuman Rights Project, Inc. v. Stanley Jr., M.D., 2015 WL 1804007 (Sup. 2015) *amended in part*, 2015 WL 1812988 (Sup. 2015), 16 N.Y.S.3d 898, 903 (Sup. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015).

[7] *E.g.*, *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772).

[8] *See In re Tom*, 5 Johns. 365 (N.Y. 1810) (per curiam) (holding, at a time when slavery was legal in New York, that a slave could bring a habeas corpus action against a man that he alleged was illegally detaining him); *see also Lemmon v. People*, 20 N.Y. 562, 604-06, 618, 623, 630-31 (1860); *In re Belt*, 2 Edm. Sel. Cas. 93 (N.Y. Sup. 1848); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846).

responsibilities as most members of society – including infants and young children,[9] incompetent elderly persons,[10] and persons deemed insane.[11]

Cases like these recognize that the danger habeas corpus confronts – forceful but unjustified restraint and detention arguably in violation of applicable law – can exist even where the habeas petitioner lacks other legal rights and responsibilities. The Third Department's misguided focus on the character of these legal rights and responsibilities, to which the Supreme Court, New York County believed itself bound, would immunize many forms of illegal detention from any judicial examination whatsoever.

That court's failure to distinguish between habeas *jurisdiction* and entitlement to habeas *relief* also conflicts with the historical role of habeas corpus in the jurisprudence of the U.S. Supreme Court. In a series of landmark cases gradually extending federal habeas corpus jurisdiction to detainees held at Guantanamo Bay, for example, that Court clarified this distinction.[12] In the 2004

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[9] *People v. Weissenbach*, 60 N.Y. 385 (1875) (hearing a habeas petition and concluding that the constraint was lawful); *People ex rel. Intner on Behalf of Harris v. Surles*, 566 N.Y.S.2d 512, 515 (Sup. Ct. 1991); *In re M'Dowle*, 8 Johns. 328 (N.Y. Sup. Ct. 1811); *In re Conroy*, 54 How. Pr. 432 (N.Y. Sup. Ct. 1878); *People v. Hanna*, 3 How. Pr. 39 (N.Y. Sup. 1847).

[10] *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996); *State v. Connor*, 87 A.D. 2d 511, 511-12 (1st Dept. 1982).

[11] *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961); *People ex rel. Ledwith v. Bd. of Trustees*, 238 N.Y. 403, 408 (1924); *Sporza v. German Sav. Bank*, 192 N.Y. 8, 15 (1908); *People ex rel. Morrell v. Dold*, 189 N.Y. 546 (1907); *Williams v. Dir. of Long Island Home, Ltd.*, 37 A.D. 2d 568, 570 (2d Dept. 1971); *Matter of Gurland*, 286 A.D. 704, 706 (2d Dept. 1955); *People ex rel. Ordway v. St. Saviour's Sanitarium*, 34 A.D. 363 (N.Y. App. Div. 1898).

[12] *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2034 (2007) (drawing analytical

case of *Rasul v. Bush*, 542 U.S. 466, 470 (2004),[13] the Court limited its inquiry to whether the federal courts are endowed with statutory jurisdiction under 28 U.S.C. § 2241 to consider habeas challenges to the detention of noncitizens captured abroad and held at the Guantanamo Bay Naval Base. Without deciding whether the Constitution requires full judicial review of detentions or indeed whether the detainees in question were entitled to any substantive relief, the Court held that habeas jurisdiction over the petitioners' challenges to their detention was proper and the habeas petitioners were at least entitled to a decision on the "merits" of their challenge. *Id.* at 485; *see also* LAURENCE TRIBE AND JOSHUA MATZ, UNCERTAIN JUSTICE 194 (2014) (hereafter "Tribe and Matz").

Four years later in *Boumediene v. Bush*, 552 U.S. 723, 771 (2008), the Supreme Court held that the Suspension Clause entitled "aliens designated as enemy combatants and detained" to use habeas corpus to challenge their detention. While this decision extended constitutional protection to detainees' *jurisdictional* right to habeas review, the Court again made no decision as to the substantive legality of the detentions at issue or as to whether habeas *relief* was proper. *Id.* at 795.[14] As in these cases, the jurisdictional question of whether Kiko's detention

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distinction between jurisdictional questions, involving the authority of a court to entertain a detainee's petition at all" and "substantive questions, involving whether the Executive has lawful authority to detain particular categories of prisoners.")

[13] Fallon and Meltzer, *supra* note 9, at 2048.

[14] The Court remanded to the Court of Appeals with "instructions that it remand the cases to the District Court" for a decision on the merits of the habeas petition. *Id.* at 798. Five of the six

can be challenged in the first place must not be conflated or confused with the substantive merits of his habeas petition and the ultimate legality of his detention.

III. THE *LAVERY* COURT'S "RECIPROCITY" BARRIER TO HABEAS JURISDICTION IS DOUBLY UNSOUND

At the threshold, the *Lavery* decision stemmed from that court's mistaken view that Article 70's[15] limitation of habeas protection to legal "persons" should be read to exclude all beings not "capable of rights and duties." *Lavery*, 124 A.D.3d at 150-52 (internal citations omitted). It was that supposed incapacity that the *Lavery* court, and thus the lower court in this case, treated as disqualifying chimpanzees as a matter of law from entitlement to the protection of the habeas writ. One need not address the court's assumption that these great apes are automatically incapable of being held accountable for their choices in order to challenge the court's underlying conception of the "[r]eciprocity between rights and responsibilities," *id.* at 151, a conception that fundamentally misunderstands the relationship among rights, duties, and legal personhood.

A. Legal Personhood Cannot Be Equated with the Capacity To Bear Rights

The Third Department's conclusion that the inability of chimpanzees to bear legal duties rendered it "inappropriate to confer upon chimpanzees . . . legal

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detainees in *Boumediene* were granted writs of habeas corpus and released. *See Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (D.D.C. 2008); *see also* Tribe & Matz, *supra*.

[15] Article 70 of the CPLR sets forth the procedure for common law writ of habeas corpus proceedings. *See* CPLR 7001 (". . . the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention. A proceeding under this article is a special proceeding.")

rights," *id.* at 152, is a *non sequitur*. Professor Visa Kurki has applied the classical Hohfeldian analysis[16] of rights and duties to challenge the assumption that a "legal person" can be defined simply as "the subject of legal rights and duties."[17] Legal theorists have developed two competing explanations of the nature of Hohfeldian rights: the "interest theory" and the "will theory."[18]

Under the interest theory, rights may properly be attributed to "entities that have interests and whose interests are furthered by duties in a certain manner,"[19] where "interests" refer to benefits flowing from the enforcement of the correlative duty.[20] Nonhuman animals *can* and in fact *do* hold many interest-theory rights, as the lower court's opinion conceded,[21] even though such nonhuman animals are not conventionally described as legal persons.[22]

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[16] Professor Wesley Newcomb Hohfeld's seminal article on the nature of jural relations noted the "ambiguity" and "looseness of usage" of the word "right" to cover several distinct jural relations. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 30 (1913). Hohfeld defined a "right" as a legal claim, the correlative of a legal duty: "In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place." *Id.* at 32.

[17] Visa Kurki, *Why Things Can Hold Rights: Reconceptualizing the Legal Person*, LEGAL STUD. RES. PAPER SERIES 3 (2015) (citing *Lavery*, 124 A.D.3d 148).

[18] *See, e.g.*, Matthew Kramer, *Refining the Interest Theory of Rights*, 55 AM. J. JURISPRUDENCE 31, 32 n.4 (2010) (identifying both will theory and interest theory as attempts to define the directionality of legal duties).

[19] Kurki, *supra* note 14, at 17.

[20] Kramer, *supra* note 15, at 32.

[21] *Lavery*, 124 A.D.3d at 152-53 ("Our rejection of a rights paradigm for animals does not, however, leave them defenseless. The Legislature has extended significant protections to animals . . . .").

[22] *Id.* at 250 – 51; Kurki, *supra* note 14, at 2-3. *But see* Jessica Berg, *Of Elephants and Embryos*, 59 HASTINGS L.J. 369, 404 (2007) ("Thus far no state has chosen to provide any legal rights directly to animals; animal welfare laws protect the interests of natural persons in preventing

Even from the perspective of a will theorist, the court's view that rights-holding and duty-bearing are necessary preconditions of legal personhood in the sense relevant to habeas corpus jurisdiction is unsustainable. Under the will theory, an entity holds a "right" if it has "competence and authorization to waive/enforce some legal duty."[23] Therefore, the class of rights-holders under the will theory is limited to "rational beings with mental faculties that correspond to adult human beings of sound minds."[24] If one accepts the will theory's narrow definition of rights, it becomes 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.[25] Will-theory rights are not *necessary* conditions for legal personhood, nor are they *sufficient*. For example, during the era when our Constitution employed various euphemisms to express its toleration of the benighted institution of chattel slavery, even those who were lawfully enslaved by others possessed will theory rights, such as the right to appeal criminal convictions, but they were for most purposes

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harm to animals."). Berg's position on the nonexistence of animal rights seems to derive from a will-theory conception of rights.

[23] *Id.*

[24] Kurki, *supra* note 14, at 11; *see also* Kramer, *supra* at 35 (identifying adult human beings with sound rational faculties as only class of rights-holders under will theory).

[25] *See* Kurki, *supra* note 14, at 11.

considered to be legal things rather than persons.[26] Thus neither an interest- nor will-theory conception of rights supports the court's reciprocity argument.

B. There Are Further Problems with the Supposed Relationship Between Duty-bearing and Legal Personhood.

The Third Department's reasoning that chimpanzees cannot be legal persons because legal personhood is equivalent to the capacity to bear rights *and* duties is flawed for other reasons as well.

First, even the court's unexamined premise that chimpanzees are inherently incapable of bearing any legal duties is open to serious question. Professor Matthew Kramer has plausibly criticized the view that "chimpanzees and other non-human animals cannot be endowed with legal rights, because they are incapable of complying with legal obligations."[27] Kramer argues that the ability to comprehend a duty might be necessary for regular compliance with obligations but is not conceptually necessary for *bearing* duties: "To bear a legal obligation is simply to be placed under it," and meaningful comprehension of the obligation is a "separate matter."[28]

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[26] *See id.* at 11.
[27] Kramer, *Getting Rights Right*, *in* RIGHTS, WRONGS AND RESPONSIBILITIES 28, 42 (Matthew Kramer ed., 2001).
[28] *Id.*

Kramer acknowledges that it might be *unfair* to impose legal duties upon animals incapable of fully understanding them, but it is "far from infeasible."[29] Given that "deterrence-oriented sanctions can be used to convey to animals that a certain type of conduct is prohibited," it is surely possible (though admittedly controversial) to conceive of animals bearing duties.[30] At any rate, to treat this issue as a pure question of law that the court could properly dispose of without hearing evidence or looking at factual information seems indefensible.

Second, even if chimpanzees were indeed unable to bear duties, it is not the case, as a conceptual matter, that the possession of a right necessarily entails the right-holder's bearing of a legal duty. Instead, as envisioned in Hohfeld's classic scheme, the possession of a right entails the "bearing of a legal duty *by someone else*."[31] For instance, infants are "paradigmatic" legal persons but bear no legal duties to anyone.[32] The Third Department acknowledges in a footnote that "[t]o be sure, some humans are less able to bear legal duties or responsibilities than others," but the court justifies the legal personhood of such impaired classes of humans on the ground that "collectively, human beings possess the unique ability to bear legal responsibility." *Lavery*, 124 A.D.3d at 152 n.3. This normative justification that

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[29] *Id.* In fact, "[t]here is a long history, mainly from the medieval and early modern periods, of animals being tried for offenses such as attacking human beings and eating crops." Katie Sykes, *Human Drama, Animal Trials: What the Medieval Animal Trials Can Tell Us About Justice for Animals*, 17 ANIMAL L. 273, 276 (2011).
[30] Kurki, *supra* note 14, 22 – 23.
[31] Kramer, *supra* note 24, at 43 (emphasis added).
[32] Kurki, *supra* note 14, at 12.

humans are a duty-bearing *species* and thus that any human *should* be deemed a legal person is highly tendentious and is logically "irrelevant for the *conceptual* point that [infants][33] do not bear duties yet they are legal persons."[34] Likewise, the possibility that chimpanzees may not be capable of bearing legal duties – even assuming that to be the case – would not justify denying them legal personhood.

In the end, whether Kiko should be deemed a legal "person" requires attention not just to some conventional set of formal definitions but to "the social meaning and symbolism of law."[35] The ways in which courts have approached questions of personhood in such "borderline cases" as human embryos and fetuses have obviously been marked by "doctrinal discord,"[36] raising questions about the wisdom of replicating that discordant struggle in a context where it might end up being irresolvable or even irrelevant.

To the degree that competing conceptions of personhood are nonetheless deemed at least pertinent even if not decisive, it is important to remember that legal definitions of what and who constitutes a "person" do much "more than just regulate behavior" when it comes to "America's most divisive social issues": they

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[33] Kramer also points out that "senile people and lunatics and comatose people" have legal rights and yet cannot bear duties. Kramer, *supra* note 14, at 45.
[34] Kurki, *supra* note 14, at 12.
[35] Note, *What We Talk About When We Talk About Persons: The Language of A Legal Fiction*, 114 HARV. L. REV. 1745, 1760 (2001).
[36] *See generally* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 115-125 (1992) (discussing moral and legal difficulties in defining personhood in the abortion debate and questioning the link between fetal personhood and the rights of the fetus-bearing woman).

express "conceptions of [the] relative worth of the objects included and excluded by personhood," and these expressions of "law's values" in turn shape social norms and values.[37]

Much like the debate over the legal personhood of human fetuses, the question of Kiko's legal personality is thus invariably entwined with the broader debate about the "rights" of nonhuman animals and, even if they have no "rights" as such, about the "wrongs" to which they should not be subjected by a decent society.[38] Courts cannot render defensible decisions about the meaning of legal personhood "without expressing certain values, whether they want to or not."[39] The question of Kiko's legal personhood implicates a "powerfully divisive social issue" as well as "the uncomfortable but inescapable place of status distinctions" in our legal system,[40] but this Court should not "allow the philosophical conundrum of this eternal question to paralyze its analysis," given the "immensely important pragmatic interests" at stake in the case.[41]

III. CONCLUSION

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[37] *See Note, supra* note 32, at 1761.

[38] *See, e.g.*, PETER SINGER, ANIMAL LIBERATION 8 (2d. ed. 1990) (arguing that question of whether animals are capable of bearing rights is "irrelevant" to the case for Animal Liberation); ROGER SCRUTON, ANIMAL RIGHTS AND WRONGS 61 (2d. ed. 1998) (making the case that humans bear "duties and responsibilities" to animals even though animals might have no rights).

[39] *Note*, *supra* note 32, at 1764.

[40] *Id.* at 1767.

[41] Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 ARIZ. ST. L.J. 1, 34 (2013) (identifying *Roe v. Wade* as the most important modern legal decision addressing the question of legal personhood and arguing that the Court was forced to put philosophical interests to the side in addressing pressing practical concerns at stake).

This Court should recognize that Kiko is an autonomous being who is currently detained and who is therefore entitled to challenge the lawfulness of his detention by petitioning for the writ, even if that court ultimately concludes that Kiko's detention is lawful.

This Court should make clear its view that the *Lavery* court, upon which the lower court relied, wrongly conflated the procedural and institutional question of habeas corpus jurisdiction with the substantive question of entitlement to habeas relief, seriously misunderstood the logical relationships among rights, duties, and personhood and superimposed an overly rigid and formalistic notion of personhood on an inquiry that should have turned on the fundamental role of habeas corpus as a bulwark against forms of physical detention that our law should be understood to condemn.

The relief that would be legally appropriate in this case would presumably involve not simple release but transfer to a facility more compatible with Kiko's capacities and better designed to enhance his quality of life. But, whatever the precise relief might entail, it would be premature for the Court to make assumptions about that matter before affirming the existence of habeas corpus jurisdiction as a first step.

Even if a decision granting jurisdiction while ultimately denying the relief sought would not help Kiko concretely, this kind of gradually and selectively

evolving recognition of the varying forms of legal protection that beings of varying kinds deserve would recognize, as the Supreme Court put it in *Lawrence v. Texas*, 539 U.S. 558, 579 (2003), that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[42] If a being like Kiko is presumptively entitled to *none* of the benefits sometimes associated with legal personhood unless and until courts are ready to extend all arguably similar beings *every* benefit of that legal status, the evolution of common law writs like habeas corpus will remain chained to the prejudices and presumptions of the past and will lose their capacity to nudge societies toward more embracing visions of justice.[43]

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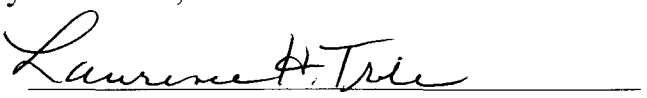
[42] *See also Woods v. Lancet*, 303 N.Y. 349, 355 (1951) ((quoting *United Australia, Ltd., v. Barclay's Bank, Ltd.*, (1941) A.C. 1, 29) ("'When the ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.' We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.")). Some commentary on the recent New York Supreme Court order to show cause in the detention of two chimpanzees, *see Stanley*, No. 152736/2015 (N.Y.S. Apr. 20, 2015), *supra* note 3, has characterized the order as a "modest" development. Noah Feldman, *Habeas Corpus When You're Not Homo Sapiens?*, BLOOMBERG VIEW, Apr. 21, 2015, *http://www.bloombergview.com/articles/2015-04-21/habeas-corpus-when-you-re-not-homo-sapiens-*. While Professor Feldman is correct in characterizing the issue addressed by this decision as "the more preliminary one of whether the courts will be open to nonhuman litigants," rather than the question of whether chimpanzees possess inherent rights to bodily liberty, his analysis affirms the symbolic significance of the judge's order in the broader evolution of legal principles.

[43] *See* Laurence H. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1338–39 (1974) (describing how legal principles evolve and build on their past development, like "a multidimensional spiral along which the society moves by successive stages, according to laws of motion which themselves undergo gradual transformation as the society's position on the spiral, and hence its character, changes"); *see also id.* at 1340 ("Partly because it seems plausible to believe that the processes we embrace must from the beginning prefigure something of [a] final vision if the vision itself is to be approximated in history, and partly because any other starting point would drastically and

Respectfully submitted,



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arbitrarily limit the directions in which the spiral might evolve, it follows that the process with which we start should avoid a premise of human domination, or indeed a premise of the total subservience of any form of being to any other.").

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