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 and Order to Show Cause,

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

Petitioner-Appellant,

– against –

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

Respondents-Respondents.

Appellate Case No.: 2020-02581

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

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Supreme Court, Appellate Division, First Department

STATE OF NEW YORK

THE NONHUMAN RIGHTS PROJECT, INC., ON BEHALF OF HAPPY,

Petitioner-Appellant,

—against—

JAMES J. BREHENY, IN HIS OFFICIAL CAPACITY AS THE EXECUTIVE VICE PRESIDENT AND GENERAL DIRECTOR OF ZOOS AND AQUARIUMS OF THE WILDLIFE CONSERVATION SOCIETY AND DIRECTOR OF THE BRONX ZOO, AND WILDLIFE CONSERVATION SOCIETY,

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BRIEF OF *AMICUS CURIAE* LAURENCE H. TRIBE[1] IN SUPPORT OF PETITIONER-APPELLANT

[1] Laurence H. Tribe is the Carl M. Loeb University Professor at Harvard University and Professor of Constitutional Law at Harvard Law School. University affiliation is noted for identification purposes only. This amicus brief reflects only the views of Professor Tribe as a scholar, not the views of Harvard or any other institution. He was granted leave to file amicus briefs in this Court and other appellate courts in New York State in the chimpanzee habeas appeals referenced herein, including the Court of Appeals.

I. Preliminary Statement

Happy is an autonomous and sentient Asian elephant who evolved to lead a physically, intellectually, emotionally, and socially complex life. Every day for forty years, her imprisonment by the Bronx Zoo has deprived her of this life. Free she would travel ten or twenty miles a day. She would live in a herd led by a matriarch (perhaps she would now even be a matriarch herself) along with her mother, sisters, and calves, with whom she would regularly communicate, engage in discussions and group decision-making, plan coordinated actions, and practice cooperative problem-solving. She would use her ability to self-determine, to understand theory of mind, and to plan. She would display empathy and grieve upon the death of a family member.

The Supreme Court, Bronx County recently ruled that Happy is not a "person" for purposes of habeas corpus relief. This Brief argues that this Court should reject recent precedent (including its own dictum) and recognize that Happy is indeed a legal person for purposes of habeas corpus in New York and is entitled to the right to bodily liberty which that great writ protects.

Happy sought an order to show cause under the New York habeas corpus statute[2] in October 2018 when the Nonhuman Rights Project, Inc. ("NhRP") filed a

[2] Article 70 of the New York Civil Practice Law and Rules ("CPLR") sets forth the procedure for common law writ of habeas corpus proceedings and requires that a petitioner file an order to show cause when the imprisoned party is not being brought to court. *See* CPLR 7001, 7003(a).

common law habeas corpus petition on her behalf in the Supreme Court, Orleans County and demanded that the court recognize her as a legal person, grant her the right to bodily liberty, and order her immediate release from captivity and to an appropriate sanctuary. The petition alleged that the scientific evidence contained in the affidavits attached thereto demonstrated that elephants are autonomous, sentient beings who, pursuant to New York common law jurisprudence, are "persons" for purposes of common law habeas corpus and within the meaning of Article 70 of the Civil Practice Law and Rules ("CPLR"), New York's habeas corpus procedural statute. The Orleans court granted Happy a hearing in November 2018, making her the first elephant in history to be the subject of a habeas corpus proceeding. The court subsequently transferred Happy's case to the Supreme Court, Bronx County. After three days of hearings, the court "regrettably" ruled against her petition on the ground it was bound by a decision of the Appellate Division, Third Department ("Third Department") which had denied habeas relief to a chimpanzee named Tommy on the novel ground that the capacity to bear "social duties and responsibilities" is a prerequisite for the capacity to possess legal rights, and that this capacity is absent in chimpanzees (and presumably all other nonhuman animals) and is unique to human beings. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dep't 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015) (referred to herein as "*Lavery*").

In 2017, this Court was presented with appeals from the denial of second habeas petitions for Tommy and another chimpanzee, Kiko. In its decision, this Court cited *Lavery* but declined to rely on it. The Court nonetheless denied habeas relief to the chimpanzees on the grounds that the petitions were "successive" and therefore barred. Although the Court thereby disposed of the matter, it went on gratuitously to express the opinion, obviously not necessary to the result in the case, that chimpanzees and all other nonhuman animals are not fit candidates for personhood on the mere ground that they are not human. *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73 (1st Dep't 2017) (referred to herein as "*Lavery II*").[3]

The Third Department's *Lavery* ruling, which the Supreme Court felt bound by in this case and upon which this Court partially relied in dictum in *Lavery II*, was erroneous. The Third Department reached its conclusion on the basis of a fundamentally flawed definition of legal personhood. It 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 152-153. But that line of reasoning begged vital questions by relying on a classic but deeply problematic—and, at the

[3] Notably, the Supreme Court in this case chose to base its decision on the precedent of the Third Department and not that of this Court, despite the fact that Bronx County falls within this Court's appellate jurisdiction, implying that the court recognized the personhood discussion in *Lavery II* to be dictum.

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 indisputably protects), importantly misunderstood the relationship among rights, duties, and personhood.[4] This Court, in turn, made the test for personhood wholly arbitrary by basing it solely on membership of the human species in *Lavery II*.

Lavery and *Lavery II* both rest on the manifestly unjust and myopic premise that human beings are the only species entitled to legal personhood and therefore the only beings on earth capable of possessing legal rights. These decisions run counter to New York's common law of habeas corpus, which has a noble tradition of expanding the ranks of rights holders (see *infra*). Rejecting *Lavery* and *Lavery II* would be in concert with the concurring opinion of Justice Eugene M. Fahey of the New York Court of Appeals in *Nonhuman Rights Project, Inc., on Behalf of Tommy*

[4] For its erroneous conception of legal personhood as being contingent on the capacity to shoulder legal duties, the Third Department relied in part upon Black's Law Dictionary, which in turn relied on the definition of "person" from the 10th edition of Salmond's *Jurisprudence*. In 2017, the NhRP unearthed the 10th edition of *Jurisprudence* in the Library of Congress and determined that Black's Law Dictionary had misquoted it. Salmond actually supported the NhRP's rights or duties argument. The NhRP then asked the Editor-in-Chief of Black's Law Dictionary in writing to correct the error, which he said he would do. The NhRP immediately sought to bring this development to the attention of this Court by motion after oral argument but before the rendering of the decision at issue, but this Court denied the motion and thereupon, in its ruling, perpetrated the same "rights and duties" mistake as the Third Department in *Lavery*. Notably, this crucial error was corrected in the current edition of Black's Law Dictionary, the 11th, which was released in 2019.

v. Lavery et al., 31 N.Y.3d 1054 (2018), as well as a growing international trend towards courts recognizing the personhood and rights of at least some nonhuman animals, including their entitlement to habeas corpus.

Thus the court in *Lavery,* 124 A.D.3d at 150, said that "Petitioner" had not "cite[d] any precedent . . . 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" and claimed that such "relief has never been provided to any nonhuman entity." Whether that was accurate at the time is immaterial inasmuch as, in the six years since *Lavery,* several nonhuman animals have been granted writs of habeas corpus (or their civil law equivalent) and have been declared persons for that purpose. Among them, a chimpanzee named Cecilia was ordered released from an Argentine zoo and sent to a Brazilian sanctuary.[5] An orangutan named Sandra in Buenos Aires was similarly declared a person for purposes of habeas corpus and now lives at a sanctuary in Florida (though her personhood determination was overturned by an appellate court).[6] In another case, the Colombian Supreme Court ordered that an endangered Andean bear named Chucho be released from a zoo and

[5] *In re Cecilia*, File No. P-72.254/15 at 32 (Nov. 3, 2016) (referring to Cecilia as a "nonhuman legal person"), translation *available at*: https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf.

[6] *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA, Sobre Amparo* (Association of Officials and Attorneys for the Rights of Animals and Others v. GCBA, on Amparo), EXPTE. A2174-2015 (October 21, 2015).

relocated to a natural reserve pursuant to habeas corpus (though it was later overturned on appeal by the Colombian Constitutional Court).[7] Earlier this year in Pakistan, the Islamabad High Court, citing Happy's case, ruled that an Asian elephant named Kaavan must be released from the Islamabad zoo and sent to a sanctuary (though this case was brought about by a writ of mandamus, not habeas corpus). *Islamabad Wildlife Mmgt. Bd*, W.P. No.1155/2019, at 62. The court noted that "an elephant has exceptional abilities and one such member of the species, 'Happy,' an inmate of the Bronx Zoo [. . .], has even passed the 'mirror test,'" *id.* at 12, and cited Justice Fahey's concurring opinion approvingly. *Id.* at 59.[8]

II. The Third Department's Reasoning in *Lavery* and this Court's Adoption of that Reasoning in Dictum in *Lavery II* Unjustifiably Curtails the Scope of Habeas Corpus

For centuries, this Court 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

[7] *Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 (July 26, 2017), translation *available at*: https://www.nonhumanrights.org/content/uploads/Translation-Chucho-Decision-Translation-Javier-Salcedo.pdf. The Colombian Constitutional Court reversed the Colombian Supreme Court's ruling by a vote of 7-2. Translation of the Court's official press release *available at*: https://www.nonhumanrights.org/content/uploads/English-Chucho-the-Bear-FINAL.pdf.

[8] *Available at*: https://www.nonhumanrights.org/content/uploads/Islamabad-High-Court-decision-in-Kaavan-case.pdf.

635, 647 note j (N.Y. 1842).[9] 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," 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).

Throughout history, the writ of habeas corpus has served as a crucial guarantor of liberty by providing a judicial forum to beings some of whom the law might not (yet) recognize as having legal rights and responsibilities on a footing equal to others.[10] In a time that is becoming acutely aware of the four-century history of racial discrimination and its enduring legacy, it cannot pass notice that African Americans who had been enslaved famously used the common law writ of habeas corpus in New York to challenge their bondage and to proclaim their humanity, even when the law otherwise treated them as mere things.[11] In a similar fashion, women in England were once considered the property of their husbands and had no legal recourse against abuse until the Court of King's Bench began in the 17th century to permit

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[9] *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.").

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

[11] *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).

women and their children to utilize habeas corpus to escape abusive men.[12] Indeed, the overdue transition from thinghood to personhood through the legal vehicle of habeas corpus must be deemed among the proudest elements of the heritage of that great writ of liberation.

Stating—as did the Third Department and this Court in dictum—that nonhuman animals are not welcome in habeas courts solely because of the fact they are not human is a stark and sad reminder of the shameful era in which some human beings were not granted personhood or legal rights because they were not of the same race or gender as those who then were rights-bearers. Contrary to these holdings, 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 responsibilities as most members of society, including infants and young children,[13] incompetent elderly persons,[14] and persons deemed insane.[15]

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[12] Paul D. Halliday, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 121-32 (2010).

[13] *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).

[14] *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dep't 1996); *State v. Connor*, 87 A.D. 2d 511, 511-12 (1st Dep't 1982).

[15] *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 Dep't 1971); *Matter of Gurland*, 286 A.D. 704, 706 (2d Dep't 1955); *People ex rel. Ordway v. St. Saviour's Sanitarium*, 34 A.D. 363 (N.Y. App. Div. 1898).

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 still lacks other legal rights and responsibilities or does not resemble contemporary rights holders. This Court's erroneous reliance on *Lavery* and its misguided focus on the degree to which the habeas-seeker has already achieved full recognition of personhood and rights-bearing capacity would immunize many forms of allegedly illegal detention from any judicial examination whatsoever, including Happy's decades-long imprisonment at the Bronx Zoo.

The trial courts of New York have now twice taken the monumental first step of granting a habeas corpus hearing to a nonhuman animal.[16] Happy's liberty was the subject of three days of hearings before the Supreme Court. It appears clear from the decision that, but for *Lavery*, the court would have ordered Happy freed to sanctuary as a "person" under the New York habeas provision. This Court has the opportunity to correct its own error and provide some measure of justice to Happy by repudiating *Lavery* and the dictum of *Lavery II* and ruling that Happy is indeed a

[16] Prior to the second filing on behalf of Tommy and Kiko (which culminated in *Lavery II*), the Supreme Court, New York County entertained a second petition filed by the NhRP on behalf of two chimpanzees named Hercules and Leo, issued the requested order to show cause, and held a hearing requiring the State to justify their detention. The court refused to recognize the chimpanzees' as legal persons and grant their release because it, like the Bronx court in the instant case, believed itself bound by *Lavery* regarding the necessary showing of duties and responsibilities. *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898 (Sup. Ct. 2015).

person within the meaning of the habeas corpus provision and that she is entitled to enjoy the right to bodily liberty.

III. *Lavery's* "Reciprocity" Barrier to Habeas Jurisdiction is Doubly Unsound

The Third Department's rejection of the chimpanzee's habeas petition in *Lavery* at the threshold stemmed from that court's mistaken view that Article 70's limitation of habeas protection to legal "persons" should be read to exclude all beings not "capable of rights and duties." 124 A.D.3d at 150-52 (internal citations omitted). It was that supposed incapacity that the *Lavery* court 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 (and presumably all other nonhuman animals) 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 Duties

The Third Department's conclusion that the inability of chimpanzees (and presumably every other species of nonhuman animal) to bear legal duties rendered it "inappropriate to confer upon chimpanzees . . . legal rights," *id.* at 152, is a non sequitur and not worthy of adoption by any court. Professor Visa Kurki has applied

the classical Hohfeldian analysis[17] of rights and duties to challenge the assumption that a "legal person" can be defined simply as "the subject of legal rights and duties."[18] Legal theorists have developed two competing explanations of the nature of Hohfeldian rights: the "interest theory" and the "will theory."[19]

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,"[20] where "interests" refer to benefits flowing from the enforcement of the correlative duty.[21] Nonhuman animals can and in fact do hold many interest-theory rights, as the *Lavery* court's opinion conceded,[22] even though such nonhuman animals are not conventionally described as legal persons.[23] Not to put too fine a point on it, it defies

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[17] 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.

[18] 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).

[19] *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).

[20] Kurki, *supra* note 18, at 7.

[21] Kramer, *supra* note 19, at 32.

[22] *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 . . . .").

[23] *Id.* at 250-51; Kurki, *supra* note 18, 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 harm to animals."). Berg's position on the nonexistence of animal rights seems to derive from a will-theory conception of rights.

common sense and ordinary linguistic usage to deny that something can fail to be in the "interest" of a nonhuman being like a chimpanzee or an elephant, whereas it would be nonsensical to say that something is not in the "interest" of a rock or a dining table.

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."[24] 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."[25] 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.[26] Will-theory rights are not necessary conditions for legal personhood, nor are they

[24] Kramer, *supra* note 19, at 33.
[25] Kurki, *supra* note 18, at 11; *see also* Kramer, *supra* note 19, at 35 (identifying adult human beings with sound rational faculties as only class of rights-holders under will theory).
[26] *See* Kurki, *supra* note 18, at 11.

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 considered to be legal things rather than persons.[27] 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 (and all other nonhuman animals) 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 (and presumably all other nonhuman animals) 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."[28] 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:

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

"To bear a legal obligation is simply to be placed under it," and meaningful comprehension of the obligation is a "separate matter."[29]

Kramer acknowledges that it might be unfair to impose legal duties upon animals incapable of fully understanding them, but it is "far from infeasible."[30] Given that "deterrence-oriented punishments" 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.[31] 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. Again, a reference to common sense and ordinary usage seems illuminating. It might be unfair to punish a puppy for its incontinence or a cat for stealing the toy of a pet canine with which it had been raised, but it would be entirely normal for the custodian of the puppy or the cat to admonish the pet and withhold a reward to change the unwanted behavior.

Second, even if all nonhuman animals 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

[29] *Id.*
[30] *Id.*
[31] Visa Kurki, A THEORY OF LEGAL PERSONHOOD 80 (2019).

else."[32] For instance, infants are "paradigmatic" legal persons but bear no legal duties to anyone.[33] 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 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][34] do not bear duties yet they are legal persons."[35] Likewise, the possibility that elephants and other nonhuman animals may not be capable of bearing legal duties—even assuming that to be the case—would not justify denying them legal personhood.

When the NhRP challenged the Third Department's erroneous ruling on the requirements for personhood in a habeas corpus case, this Court in *Lavery II* implicitly acknowledged the Third Department's error by refusing to repeat it – and then based its decision on an even more fundamentally flawed definition of legal personhood, stating, at 152 A.D. 3d, at 78, that:

Petitioner argues that the ability to acknowledge a legal duty or legal

[32] Kramer, *supra* note 28, at 43.
[33] Kurki, *supra* note 18, at 10.
[34] Kramer also points out that "senile people and lunatics and comatose people" have legal rights and yet cannot bear duties. Kramer, *supra* note 28, at 43.
[35] Kurki, *supra* note 18, at 12 (emphasis in original).

> responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community.

At least the Third Department's decision, while erroneous, left open the possibility that an entity able to demonstrate the ability to assume duties could have some form of limited personhood. In contrast, this Court made the test a wholly arbitrary one, completely dependent upon the identity of one's species no matter the prisoner's cognitive abilities or demonstrated autonomy.

In the end, whether Happy and other nonhuman animals should be deemed legal "persons" requires attention not just to some conventional set of formal definitions but to "the social meaning and symbolism of law."[36] 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,"[37] raising questions about the wisdom of replicating that discordant struggle in a context where it might end up being irresolvable or even irrelevant. The issue is, at bottom, a normative one rather than a merely descriptive one: In deciding whether to extend habeas protection to a particular being, courts do not merely describe the

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[36] Note, *What We Talk About When We Talk About Persons: The Language of A Legal Fiction*, 114 HARV. L. REV. 1745, 1760 (2001).

[37] *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).

assumed capacities and characteristics of that being; they decide how the law should treat that being.

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 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.[38]

Much like the debate over the legal personhood of human fetuses, the question of Happy'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.[39] Courts cannot render defensible decisions about the meaning of legal personhood "without expressing certain values, whether they want to or not."[40] The question of

[38] *See Note, supra* note 36, at 1761.
[39] *See* Justice Fahey's concurrence, 31 N.Y.3d at 1057 ("being a "moral agent" who can freely choose to act as morality requires is not a necessary condition of being a "moral patient" who can be wronged and may have the right to redress wrongs"). *See also*, *e.g.*, Sherry F. Colb and Michael C. Dorf, BEATING HEARTS: ABORTION AND ANIMAL RIGHTS (2016); Peter Singer, ANIMAL LIBERATION 8 (2d. ed. 1990) (arguing that the 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).
[40] *Note*, *supra* note 36, at 1764.

Happy's legal personhood implicates "the uncomfortable but inescapable place of status distinctions" in our legal system,[41] 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.[42] This is particularly so where, as in this instance, there is no powerfully competing right that clashes with the recognition that Happy seeks. The contrast with the context of abortion could hardly be more striking.[43] In the words of Justice Fahey in his concurrence, "Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention." 31 N.Y.3d at 1058.

IV. By Rejecting Rights Claims on the Basis of Species Alone, *Lavery I* and *Lavery II* Violate Common Law Equality

This Court opined in *Lavery II* about a species-membership conception of personhood, the "human community," which denies rights to all nonhuman animals on the mere ground they are not members of the species *Homo Sapiens*. As noted

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[41] *Id.* at 1767.

[42] 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).

[43] *See* Laurence H. Tribe, ABORTION: THE CLASH OF ABSOLUTES (1990).

above, this kind of across-the-board disqualification for rights harkens back to dark days in our past, when race, gender, national origin, religion, and other inherited or immutable characteristics later understood to be arbitrary were used to justify the denial of rights to whole swaths of humanity.

Constitutional jurisprudence provides a useful window into how this Court should properly respond to the argument that to deny personhood on the basis of species alone violates the spirit of equality that inspired and pervades our Constitution's deepest aspirations – aspirations obviously not honored at the Founding (given our history of systematically enslaving or slaughtering African Americans and American Indians), but aspirations expressed initially in the Declaration of Independence; then incorporated in the Civil War Amendments (the Thirteenth, Fourteenth, and Fifteenth); later embodied in the enfranchisement of women through the Nineteenth Amendment, of non-propertied individuals through the Twenty-Fourth, and of individuals who had reached age eighteen through the Twenty-Sixth. This spirit of "common law equality" is evident in Supreme Court cases such as *Romer v. Evans*, 517 U.S. 620 (1996), which invalidated a state constitutional amendment that singled out LGBT individuals for denial of rights

which the Court rightly described as making each LGBT individual a "stranger to its laws," *id*. at 635.[44]

The fact that, at the time the Constitution of the United States was adopted and even at the times these amendments were added, as well as at the time the relevant provisions of New York State law were enacted, the authors and ratifiers of the relevant language would not have anticipated its extension to nonhuman creatures like Happy cannot be dispositive in a legal universe that does not make the necessarily limited understanding and expectations of past generations dispositive in the interpretation of law. The recent decision of the U.S. Supreme Court in *Bostock* v. *Clayton County*,[45] though of course dealing with an altogether different question, the meaning of Title VII of the Civil Rights Act of 1964, is nonetheless instructive in its reminder that the task of a common-law court, even in performing the comparatively modest task of construing a statute, requires the attribution of meaning to positive law, not the excavation of unenacted expectations or intentions, which may well reflect the unenlightened premises of a bygone era.

Just as the U.S. Supreme Court in *Lawrence* v. *Texas* declined to follow what it deemed a benighted precedent upon recognizing that "*Stare decisis* is not an

[44] *See also* Laurence H. Tribe, *Equal Dignity: Speaking its Name*, A Response to Kenji Yoshino, Comment, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015), HARV. L. REV. FORUM, Vol. 129, pp. 16-32 (2015).
[45] 590 U.S. ___ (2020).

inexorable command,"[46] so this Court should decline to follow the *Lavery* line. It is worth recalling here the observation made by the *Lawrence* Court in reaching its judgment: Had our forebears "known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew 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. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[47] What was true in 2003 in *Lawrence* is true in 2020 in this case. And what was true of the dimensions of liberty in *Lawrence* is true of the bearers of liberty-affirming rights in the case of Happy, the Asian elephant at the heart of this habeas application.

V. Conclusion

This Court has a unique opportunity to correct its own erroneous dictum in a rapidly evolving area of the law, specifically, the entitlement of autonomous and sentient nonhuman animals to the right to bodily liberty protected by habeas corpus. This Court should make clear its view that both the Third Department and the Court itself wrongly conflated the procedural and institutional question of habeas corpus jurisdiction with the substantive question of entitlement to habeas relief; seriously

[46] 539 U.S. 558, 560 (2003) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).
[47] *Id.* at 579.

misunderstood the logical relationships among rights, duties, and personhood; and myopically superimposed an overly rigid and formalistic notion of personhood onto 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 in which Happy may fully express her extraordinary capacities, without being confined to a small space as she is now at the Bronx Zoo, and without being forced to stand on public display.

The courts of New York are rapidly evolving towards seeing at least some nonhuman animals as rights bearers. This kind of gradually and selectively evolving recognition of the varying forms of legal protection that beings of varying kinds deserve would recognize, to repeat what the Supreme Court said in *Lawrence v. Texas*, 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."[48]

If a being like Happy—whom the trial court recognized as undeniably autonomous and exquisitely cognitively complex—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

[48] 539 U.S. at 579.

evolution of common law writs like habeas corpus will remain chained to the prejudices and presumptions of the past and will lose their vital and rightly celebrated capacity to nudge societies toward more embracing visions of justice.[49] As this State's highest court wrote in *Woods v. Lancet*, 303 N.Y. 349, 355 (1951), "'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." (quoting *United Australia, Ltd., v. Barclay's Bank, Ltd.*, (1941) A.C. 1, 29). This Court can likewise act in the "finest common-law tradition" by revising its own precedent and ordering that Happy is a legal person entitled to the protections of habeas corpus.

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Respectfully submitted,

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[49] *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 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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