DOCKET NO. _____	:	SUPERIOR COURT
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In the matter of a Petition for a Common Law Writ of Habeas Corpus,	:	JUDICIAL DISTRICT OF LITCHFIELD
	:	
NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN,	:	AT TORRINGTON
Petitioner,	:	
v.	:	
	:	
R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC.,	:	
Respondents.	:	November 13, 2017

MEMORANDUM OF LAW IN SUPPORT OF
VERIFIED PETITION FOR COMMON LAW WRIT OF HABEAS CORPUS

I. Beulah, Minnie, and Karen are "persons" within the meaning the Connecticut common law of habeas corpus.

A. "Person" is not a synonym for "human being," but designates an entity with the capacity for legal rights.

The "significant fortune of legal personality is the capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). Upon "according legal personality to a thing the law affords it the rights and privileges of a legal person[.]" *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972) (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909) ("Gray"); Hans Kelsen, *General Theory of Law and State*, 93-109 (1945); George Whitecross Paton, *A Textbook of Jurisprudence* 349-356 (4th ed., G.W. Paton & David P. Derham eds. 1972) ("Paton"); Wolfgang Friedman, *Legal Theory* 521-523 (5th ed. 1967)). *See generally State v. Courchesne*, 296 Conn. 622 (2010); *Town of Colchester v. Town of Lyme*, 13 Conn. 274, 278 (1839).

"Legal persons" possess inherent value; "legal things," possessing merely instrumental value, exist for the sake of legal persons. 2 William Blackstone, *Commentaries on the Laws of England* *16 (1765-1769). In short, persons count in law; things don't. *See* Note, *What We Talk*

About When We Talk About Persons: The Language of a Legal Fiction, 114 HARV. L. REV. 1745, 1746 (2001). *Accord The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 912 (N.Y. Sup. Ct. 2015) (citing Note).

"Person" never has been, is not now, and never will be a synonym for "human being." *See* George Whitecross Paton, *A Textbook of Jurisprudence* 349-50 (3rd ed. 1964); *Salmond on Jurisprudence* 305 (12th ed. 1928) ("This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination"); IV Roscoe Pound, *Jurisprudence* 192-193 (1959)). It is not a biological concept nor does it "necessarily correspond" to the "natural order." *Byrn*, 31 N.Y.2d at 201; *Stanley*, 16 N.Y.S.3d at 916-17. Rather, it is a legal "term of art." *Wartelle v. Womens' & Children's Hosp.*, 704 So. 2d 778, 781 (La. 1997).

Who is deemed a "person" is a "matter which each legal system must settle for itself" in light of evolving public policy. *Byrn*, 31 N.Y.2d at 201-02 (quoting Gray, *supra*, at 3); *see also Stanley*, 16 N.Y.S.3d at 912 ("legal personhood, that is, who or what may be deemed a person under the law, and for what purposes, has evolved significantly since the inception of the United States."). "'If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.'" *Id.* (citing *Obergefell v. Hodges*, US, 135 S.Ct. 2602 (2015)).[1]

"Person" has been defined more narrowly than "human being." *See, e.g.*, *Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828) ("Slaves, although they are human beings . . . are not treated as a person, but (*negotium*), a thing."). Thus, human slaves were not "persons" in

[1] While Connecticut "public policy is often embodied in our statutory scheme, it can also be found in our common law[.]" *Journal Publ'g Co. v. Hartford Courant Co.*, 2014 WL 5094970, at *4 (Conn. Super. Ct. Sept. 4, 2014). *See also South Windsor v. South Windsor Police Union*, 41 Conn. App. 649, 654 (1996) ("Our statutes and case law are sources of public policy"); *Samuels v. Mgmt. Servs. of New England, Inc.*, 1999 WL 179622, at *1 (Conn. Super. Ct. Mar. 3, 1999) ("the plaintiff must allege and prove that his discharge violated public policy as set forth in either state or federal statutory, constitutional or common law.").

Connecticut until slavery was abolished in 1848,[2] women were not "persons" for many purposes until well into the twentieth century,[3] and human fetuses are not "persons" within the meaning of the Fourteenth Amendment to the United States Constitution.[4]

On the other hand, "[l]egal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol." Paton, *supra*, at 393. "There is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." Gray, *supra* Chapter II, 39 (1909). Precisely to the point, Gray noted, *id.* at 43, that there may be

> systems of law in *which animals have legal rights . . . animals may conceivably be legal persons* . . . when, if ever, this is the case, the wills of human beings must be attributed to the animals. There seems no essential difference between the fiction in such cases and those where, to a human being wanting in legal will, the will of another is attributed.

(emphasis added).

Adopting the NhRP's strategy, a petition for a writ of habeas corpus was filed on behalf of a chimpanzee named Cecilia in a Mendoza, Argentine court to secure her release from the Mendoza Zoo supported by expert affidavits demonstrating the autonomy and complex cognition of chimpanzees. On November 3, 2016, that court granted the writ and declared Cecilia a "non-human legal person" with "nonhuman rights" and ordered her transferred to a sanctuary.[5] Rejecting the claim that Cecilia could not avail herself of habeas corpus because she was not a human,[6] the court declared:

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[2] *E.g.*, *Town of Columbia v. Williams*, 3 Conn. 467, 471 (1820) (recognizing slaves as property); *Geer v. Huntington*, 2 Root 364 (Conn. Super. 1796) (same); *Pettis v. Warren*, 1 Kirby 426, 427 (Conn. Super. Ct. 1788) (same); *Cf. Jackson v. Bulloch*, 12 Conn. 38 (1837) (same, but granting habeas corpus to a manumitted slave). *Arabas v. Ivers*, 1 Root 92, 93 (Conn. Super. 1784) (same).

[3] *E.g.*, *Brown v. Brown*, *88* Conn. 42, 43 (1914) ("By the common law the husband might restrain the wife *of her liberty and* might chastise her.").

[4] *See Roe v. Wade*, 410 U.S. 113 (1973); *Courchesne*, 296 Conn. at 703-05; *Patel v. Norwalk Hosp.*, 2000 WL 226380, at *2 (Conn. Super. Ct. Feb. 9, 2000) (wrongful death).

[5] Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-2, 24 (as translated from original Spanish by attorney Ana Maria Hernandez), a certified copy of which is available at https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf (last accessed November 10, 2017).

[6] *Id.* at 5, 19.

> societies evolve in their moral conducts, thoughts, and values, and also in [their] legislations. More than a century ago most of the individual rights that are expressly recognized today in the constitutions of the different countries and by the Human Rights International Treaties were ignored and in some cases they were even overlooked, or worse, insulted like the rights related to gender perspective.
>
> At present, we can see an awareness of situations and realities that although . . . have been happening since unmemorable times, they were not recognized by social figures. That is the case of gender violence, marriage equality, equal voting rights, etc. There is an identical situation with the awareness of animal rights.

Id. at 19, 20. The *Mendoza* court further explained that classifying

> animals as things is not a correct standard … chimpanzees have the capacity to reason, they are intelligent, are conscientious of themselves, they have culture diversity, expressions of mental games, they manifest grief, use and construction of tools to access food or to solve simple problems of daily life, abstraction capacity, skills to handle symbols in communication, conscience to express emotions such as happiness, frustration, desires or deceit, planned organization for intraspecific battles and ambush for hunting, they have metacognitive capabilities, they have a moral, psychic, and physical status, they have their own culture, they have affectionate feelings (they caress and groom each other), they are capable of lying, they have symbols for human language and use tools.

Id. at 23-24.

Sister common law countries are designating an expanding number of nonhuman entities as "persons." In 2017, the New Zealand Parliament designated the New Zealand's Whanganui River Iwi as a "person" that owns its riverbed.[7] In 2014, New Zealand's Te Urewara park was designated a "legal entity, having all the rights, powers, duties, and liabilities of a person."[8] In 2000, the Indian Supreme Court designated the Sikh's sacred text, the Sri Guru Granth Sahib, a "person,"[9] thereby permitting it to own and possess property. Pre-Independence Indian courts

[7] New Zealand Parliament, "Innovative bill protects Whanganui River with legal personhood," March 28, 2017, *available at:* https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/ (last visited September 25, 2017).

[8] Te Urewara Act 2014, Subpart 3, sec, 11(1), *available at*: http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183705.html (last accessed November 10, 2017).

[9] *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass,* A.I.R. 2000 S.C. 421.

designated certain Punjab mosques as legal persons,[10] to the same end, as well as designating a Hindu idol as a "person" with the capacity to sue.[11]

The historic struggles over the legal personhood of human fetuses,[12] human slaves,[13] Native Americans,[14] women,[15] Jews,[16] and nonhuman entities[17] have never been over whether they are human, but whether justice requires that they count in law. That Beulah, Minnie, and Karen are elephants does not mean they may never count as "persons" for any purpose.

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[10] *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369, ¶15 (Lahore High Court, Full Bench).

[11] *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925).

[12] *Roe*, 410 U.S. 113; *Courchesne*, 296 Conn. at 704-05; *In re Valerie D.*, 25 Conn. App. 586, 591 (1991) *rev'd*, 223 Conn. 492 (1992); *State v. Anonymous (1986-1*), 40 Conn. Supp. 498, 499-500 (Super. Ct. 1986); *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 360-61 (Super. Ct. 1966).

[13] *Compare Town of Columbia v. Williams*, 3 Conn. 467, 470 (1820) (recognizing slave as property); *Town of East Hartford v. Pitkin*, 8 Conn (1831) (same) *with Jackson*, 12 Conn. at 54 (slaves are free); *id.* at 40 ("slavery is contrary to the principles of natural right"); and *Somerset*, 1 Lofftt at 18, 98 Eng. Rep. at 510 (slavery is "so odious that nothing can be suffered to support it but positive law"). *See also* David Menschel, "Abolition Without Deliverance: The Law of Connecticut Slavery 1784-1848," 111 YALE L.J. 183, 185 (2001). In *Pitkin*, 8 Conn. 393, Justices Daggett, Hosmer, and John T. Peters, "showed little or no moral outrage while deciding a technical financial issue concerning a particular slave, while the two newer judges appointed in 1829, Williams and Clark Bissell, expressed their moral outrage in dissent." Wesley W. Horton, *The Pre-Civil War Connecticut Supreme Court*, 34 CONN. L. REV. 1209, 1210 (2002).

[14] *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (over the objection of the US Attorney, Court held Native Americans were "persons" within the meaning of the Federal Habeas Corpus Act).

[15] *In re Goodell*, 39 Wis. 232, 240 (1875) (women could not be lawyers); Blackstone, *Commentaries on the Law of England* *442 (1765-1769) ("By marriage, the husband and wife are one person in law: that is the very being or legal existence of the woman is suspended during the marriage . . . "). *But see In re Hall*, 50 Conn. 131, 131 (1882) (interpreting Connecticut statute as permitting women to be members of the bar).

[16] RA Routledge, "The Legal Status of the Jews in England," 3 The Journal of Legal History 91, 93, 94, 98, 103 (1982) (13th century Jews were chattels of the King).

[17] An entity such as a corporation is a Fourteenth Amendment "person," *Santa Clara*, 118 U.S. 394, but is not protected by the Fifth Amendment's Self-Incrimination Clause. *Bellis v. United States*, 417 U.S. 85 (1974). *See also Lieberman v. Reliable Refuse Co.*, 212 Conn. 661, 667-71 (1989) (corporation lacks privilege against self-incrimination); *Benjamin v. Bailey*, 234 Conn. 455, 473-76 (1995) (corporation is person for constitutional equal protection purposes); *Costco Wholesale Corp. v. Dep't of Consumer Prot.*, No. CV02076768S, 2004 WL 1557962, at *5 (Conn. Super. Ct. June 18, 2004) (same); *Brophy Ahern Dev. Co. v. City of W. Haven*, 1993 WL 214630, at *2 (Conn. Super. Ct. June 11, 1993) (corporation is person entitled to protection under § 1983).

B. Who is a "person" for purposes of Connecticut common law habeas corpus is a common law determination exclusively for Connecticut courts to decide.

As public policy determines personhood, and as the writ of habeas corpus in Connecticut is solely a common law remedy, it is for the courts *alone* to decide whether Beulah, Minnie, and Karen are "persons" for purposes of the common law of habeas corpus. *E.g*., *Craig v. Driscoll*, 262 Conn. 312, 330 n.15 (2003) (Supreme Court long ago refused to relinquish matters of public policy "to the legislature in an area in which this court has common-law authority[.]"); *Courchesne*, 296 Conn. at 673-75 (common law determines whether infant born alive who dies of injuries sustained *in utero* is "person" under murder statute); *see also State v. Guess*, 244 Conn. 761, 778 (1998) (Court rejected "defendant's contention that only the legislature can determine whether brain death should be recognized in law," reasoning that while the "legislature clearly has the authority to define by statute the standards by which a hospital may determine death," the Court is "confident in our *parallel authority, as a matter of common law*, to determine what constitutes death and to embrace the advances made in medical science and technology during the last three decades.") (citations omitted, emphasis added)).

This Court has "common law power to declare the law in the absence of legislative action." *Bartholomew v. Schweizer*, 217 Conn. 671, 679 (1991). No legislative action precludes this Court from declaring Beulah, Minnie, and Karen to be common law persons for the purpose of habeas corpus. The statutes governing the common law writ of habeas corpus, C.G.S.A. § 52-466(a)(1) and Practice Book § 23-21 *et seq*., are purely procedural and do not control substantive entitlement to the writ.

As "persons" for purposes of common law habeas corpus, Beulah, Minnie, and Karen are necessarily "persons" within the meaning of the procedural statutes and rules governing habeas corpus, because: (1) these provisions solely govern procedure, (2) the legislature did not define "person" for purposes of habeas corpus; and (3) CONN. CONST. ART. I, § 12 provides that the legislature may suspend the writ of habeas corpus only in cases of rebellion or invasion.

The court in *Stanley* properly observed:

> "Person" is not defined in CPLR article 70, or by the common law of habeas corpus. Petitioner agrees that there exists no legal precedent for defining "person" under article 70 or the common law to include chimpanzees or any other nonhuman animals, or that a writ of habeas corpus has ever been granted to any being other than a human being. Nonetheless, as the Third Department noted in *People ex rel Nonhuman Rights Project, Inc. v. Lavery* (124 A.D.3d at 150-51), the lack of precedent does not end the inquiry into whether habeas corpus relief may be extended to chimpanzees.

16 N.Y.S.3d at 911. The same is true in Connecticut. Connecticut habeas corpus is a substantive common law cause of action that exists independently of any statutes governing its procedure. *E.g.*, *Weidenbacher v. Duclos*, 234 Conn. 51, 64-65 (1995) (though father could not meet statutory requirements for establishing paternity, he could seek common law writ of habeas corpus); *Hudson v. Groothoff*, 10 Conn. Supp. 275, 278 (Conn. C.P. 1942) (citing *Swift's Digest* at 569).

The "precise nature of the writ, and the relief which may be granted to a successful habeas petitioner, have been shaped by decisional law." *Miller v. Warden*, 1996 WL 168004, at *42 (Conn. Super. Ct. Mar. 27, 1996), *aff'd sub nom.*, *Miller v. Comm'r of Correction*, 242 Conn. 745 (1997). Moreover, "'[i]t must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.'" *Fine v. Comm'r of Correction*, 147 Conn. App. 136, 142-43 (2013) (citation omitted). Therefore, the common law controls the parties' substantive rights, including who is entitled to the common law writ. *See Lebron v. Comm'r of Corr.*, 274 Conn. 507, 530 n.17 (2005) (looking to the common law to construe the term "custody" as used in the habeas corpus statutes).[18] A "'substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress.'" *D'Eramo v. Smith*, 273 Conn. 610, 621 (2005) (citations omitted). Thus, Connecticut courts interpret the "'provisions of the Practice Book through the lens of the common law.'" *Rosado v. Bridgeport Roman Catholic*

[18] *See also Craig*, 262 Conn. at 330 n.15; *Carpenter v. Meachum*, 229 Conn. at 199; *Vincenzo v. Warden*, 26 Conn. App. 132, 136 (1991).

Diocesan Corp., 292 Conn. 1, 44 (2009) (citation omitted).[19] As C.G.S.A. § 52-466(a)(1) only prescribes the methods of enforcing the common law of habeas corpus, it too must be interpreted through the lens of the common law.

Even in non-common law proceedings that turn on statutory interpretation, determining personhood is not merely a matter of ascertaining who the legislature was considering when it used the word "person" in a statute. *In re Hall*, 50 Conn. at 132 (that the legislature had neither women nor blacks in mind when it enacted a statute permitting "persons" to practice law is irrelevant to whether they may now become attorneys). When the legislature does not define a term, the Court may, "as a matter of common-law adjudication, define that term." *Guess*, 244 Conn. at 771, 778 ("Because the legislature did not provide a definition of death in the Penal Code, we interpret the term in accordance with," *inter alia*, the "common law").[20] When the legislature intends to define a word, it does. *See Town of New Hartford v. Connecticut Resources Recovery Auth*., 2007 WL 824562, at *4 (Conn. Super. Ct. Feb. 22, 2007) ("A corporation is included in the definition of a 'person' in C.G.S.A. § 52-278a et seq. If the Legislature wished to exempt a town from the attachment statutes, it easily could have done so by excluding either a municipal corporation or quasi-public entity from the definition.").[21] Here, the legislature did not define the word "person" for purposes of habeas corpus.

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[19] *Accord Wiseman v. Armstrong*, 295 Conn. 94, 110-11 (2010) (quoting C.G.S.A. § 51–14(a); *In re Samantha C*., 268 Conn. 614, 639 (2004)). *See* Conn. Gen. Stat. § 51-14 ("Such rules shall not abridge, enlarge or modify any substantive right or the jurisdiction of any of the courts.").

[20] *See also Faulkner v. Solazzi*, 79 Conn. 541, 545 (1907); *Gorke v. Le Clerc*, 23 Conn. Supp. 256, 257 (Super. Ct. 1962) ("In the absence of such [survival] statutes the common law governs."); *Red Rooster Const. Co. v. River Associates, Inc*., 224 Conn. 563, 569-70 (1993); *Simon v. Mullin*, 34 Conn. Supp. 139, 147 (Super. Ct. 1977); *Hatala*, 26 Conn. Supp. at 360-61 (looking to common law to determines whether a fetus injured through negligence has a cause of action against the wrongdoer); *see also Courchesne*, 296 Conn. at 674-75 (in determining whether a fetus was a "person" under the statute, the Court noted "[w]e also look for interpretive guidance to common-law principles governing the same general subject matter").

[21] *See, e.g.*, C.G.S.A. § 1-1(k) ("The words 'person' and 'another' may extend and be applied to communities, companies, corporations, public or private, limited liability companies, societies and associations."). C.G.S.A. § 1-1(k) poses no barrier to the NhRP's *common law* habeas corpus petition. This case does not require statutory construction implicating § 1-1(k) because habeas corpus is a substantive common law proceeding that exists in Connecticut independently of any

Statutes cannot abrogate the substantive right to the common law writ. *See Lebron*, 274 Conn. at 529 n.17; *Weidenbacher*, 234 Conn. at 64-65 ("It does not necessarily follow, however, that unless the petitioner qualifies under the terms of that statute [§ 46b–172a], he cannot demonstrate paternity for purposes of petitioning a court for a common law writ of habeas corpus for custody of a child."). *See also* CONN. CONST. ART. I, § 12 ("The privileges of the writ of habeas corpus shall not be suspended, unless, when in case of rebellion or invasion, the public safety may require it; nor in any case, but by the legislature."). Because "the writ is intended to safeguard 'individual freedom . . . ,' it must be 'administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.'" *Luurtsema v. Comm'r of Correction*, 299 Conn. 740, 757 (2011) (citation omitted). Its "scope and flexibility . . . its capacity to reach all manner of illegal detention - 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). Accordingly, neither procedural rules nor statutes may abridge Beulah's, Minnie's, and Karen's substantive common law habeas corpus rights. This necessarily includes the threshold determination of whether they are "persons" within the meaning of the Connecticut common law of habeas corpus.

C. Connecticut common law is broad and flexible.

Beulah's, Minnie's, and Karen's thinghood derives from the common law. Connecticut common law is

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statutes governing its procedure. *See Negron v. Warden, Hartford Cmty. Corr. Ctr.*, 180 Conn. 153, 157 (1980) (noting the statutes just cover "procedures governing habeas corpus proceedings."); *Hoppenstein v. McCarthy*, 2001 WL 1029002, at *1 (Conn. Super. Ct. Aug. 10, 2001) (habeas provisions are "procedural as opposed to a substantive law"). As a common law cause of action, no statute, procedural or otherwise, is necessary for its invocation in this Court. *E.g.*, *Weidenbacher*, 234 Conn. at 64-65. Not only is § 1-1(k) inapplicable to common law habeas corpus, but it is also inapplicable to the entire practice book. *See F.D.I.C. v. Peabody N.E. Inc.*, 1996 WL 57010, at *7 (Conn. Super. 1996) (rejecting argument that the State could not be impleaded since "none of the definitions would include the State" on the grounds that § 1-1(k) was inapplicable to the practice book rules). As the court explained, "§ 1-1(k) by its own terms only applies to the 'construction of the statutes' not to the language of the Practice Book." *Id.* Further, "Rule 6 of the Practice Book states the rules should be liberally interpreted." *Id.*

> the prevailing sense of the more enlightened members of a particular community, expressed through the instrumentality of the courts, as to those rules of conduct which should be definitely affirmed and given effect under the sanction of organized society, in view of the particular circumstances of the time, but with due regard to the necessity that the law should be reasonably certain and hence that its principles have permanency and its development be by an orderly process. Such a definition necessarily implies that the common law must change as circumstances change.

Dacey v. Connecticut Bar Association, 184 Conn. 21, 25-26 (1981) (quoting *State v. Muolo,* 118 Conn. 373, 378 (1934)). Its "adaptability … to the changing needs of passing time has been one of its most beneficent characteristics." *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184, 196 (1996) (internal quotation marks omitted). It "is not a frozen mold of ancient ideas, but such law is active and dynamic and thus changes with the times and growth of society to meet its needs." *Guess*, 244 Conn. at 775 (citation and internal quotation marks omitted).[22]

Connecticut courts are "charged with the ongoing responsibility to revisit our common-law doctrines when the need arises." *State v. Brocuglio*, 264 Conn. 778, 793 (2003) (emphasis added). Courts "must have and exert the capacity to change a rule of law when reason so requires," *State v. Vakilzaden*, 251 Conn. 656, 663-64 (1999) (citation and internal quotation marks omitted), and overturn "'precedent it thinks is unjust.'" *State v. Miranda*, 274 Conn. 727, 734-35 (2005) (citation omitted). *See also Craig*, 262 Conn. at 330 n.15; *Guess*, 244 Conn. at 778; *Conway v. Town of Wilton*, 238 Conn. 653, 659 (1996). They have the duty to "make a principled declaration of the common law as it now is, not as it might have been had it been declared at the birth of this State more than two centuries ago." *Rosado v. Bridgeport Roman Catholic Diocesan Corp*., 1995 WL 348181, at *11 (Conn. Super. Ct. May 31, 1995).[23] Connecticut courts never hesitate to discard outmoded common law rules or create common law rights when justified by changing experience, morality, and scientific discovery. In *Goodrich v.*

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[22] *Accord Swentusky v. Prudential Ins. Co*., 116 Conn. 526, 531 (1933) (common law "can never be static, but it must be everlastingly developing . . .").

[23] *See Baker v. Comm'r of Corr*., 281 Conn. 241, 250-52 (2007) (observing Connecticut courts' "expansion of the writ beyond its initial objective of securing immediate release from illegal detention"). See also Footnote 39, citing decisional law expanding the scope of the writ in Connecticut.

Waterbury Republican-Am., Inc., 188 Conn. 107, 126 (1982), the Court criticized other states that had refused to recognize a common law right to privacy on the grounds that "this issue was more properly one for legislative determination." It has never been the policy of the Connecticut Supreme Court "to close its eyes to change or to disregard reality." *Guess*, 244 Conn. at 776 (citing *Clohessy v. Bachelor*, 237 Conn. 31, 56 (1996) (recognizing cause of action for bystander emotional distress for person closely related to injury victim).[24]

In short, "'[w]hen these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred.'" *Tursi v. New England Windsor Co.*, 19 Conn. Supp. 242, 248 (Super. Ct. 1955) (quoting *United Australia, Ltd., v. Barclay's Bank, Ltd.*, (1941) A.C. 1, 29); *Utica First Ins. Co. v. McGuire*, 1998 WL 867375, at *5 (Conn. Super. Ct. Dec. 4, 1998) (same).[25]

D. Common law liberty requires that Beulah, Minnie, and Karen be recognized as "persons" for the purpose of habeas corpus.

Habeas corpus is "the great writ of liberty." *Lozada v. Warden*, 223 Conn. 834, 840 (1992). Chief Justice Swift wrote that "this writ furnishes the strongest security for the liberty of

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[24] *See also Craig*, 262 Conn. 312 (recognizing common law cause of action for negligent infliction of emotional distress on a bystander against purveyor of alcohol); *Bohan v. Last*, 236 Conn. 670, 680-81 (1996) (changing common law rule to "hold that it is appropriate to limit the common law liability of purveyors of alcohol"); *Fahy v. Fahy*, 227 Conn. 505, 509, 513-16 (1993) ("We also conclude, [apart from the statute] . . . that as a matter of common law the modification of alimony orders should be treated the same as support orders are required to be treated"); *Westchester Fire Ins. Co. v. Allstate Ins. Co.*, 236 Conn. 362, 370-73 (1996) (changing common law rule of subrogation to avoid "unjust results"); *Goodrich v. Waterbury Republican-Am., Inc.*, 188 Conn. 107, 126-27 (1982) (creating common law cause of action for invasion of privacy); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 477 (1980) (recognizing new common law cause of action for wrongful discharge based on violation of public policy).

[25] *See also Brunswick v. Inland Wetlands Commission*, 222 Conn. 541, 554-55 (1992) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid have vanished long since, and the rule simply persists from blind imitation of the past," quoting Oliver Wendell Holmes, Jr., "The Path of the Law," 10 *Harv. L. Rev.* 457, 469 (1897); *Rumsey v. New York and New England Railway Co.*, 133 N.Y. 79, 85 (1892) (quoting 1 *Kent's Commentaries* 477 (13th edition 1884) ("cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error")).

the citizen, and constitutes the most prominent distinction between a free and absolute government." 1 Zephaniah Swift, *A Digest of the Laws of the State of Connecticut* 568 (1822). "Indeed, there is nothing more critical than the denial of liberty, even if the liberty interest is one day in jail." *Gonzalez v. Comm'r of Corr*., 308 Conn. 463, 483-84 (2013).

A deprivation of autonomy[26] is a deprivation of dignity. *See, e.g*., *Indiana v., Edwards*, 554 U.S. 164, 187 (2008) ("if the Court is to honor the particular conception of "dignity" that underlies the self-representation right, it should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made); *State v. Connor,* 292 Conn. 483, 516 (2009). This "fundamental legal tradition of self-determination prevails throughout the United States." *McConnell v. Beverly Enterprises–Connecticut, Inc.,* 209 Conn. 692, 701 (1989).

> That common law right, and its roots in our legal tradition, have a long and impressive pedigree. More than one century ago, the United States Supreme Court recognized that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestioned authority of law." *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891).

Stamford Hospital v. Vega, 236 Conn. 646, 664 (1996). "The right to one's person may be said to be a right of complete immunity: to be let alone." *Botsford, 141 U.S. at 251* (quoting *Cooley on Torts* 29). *See Stanley,* 16 N.Y.S.3d at 903-04 (common law of habeas corpus "is deeply rooted in our cherished ideas of individual autonomy and free choice.") (citations omitted).[27]

Connecticut common law so supremely values autonomy that it permits competent adults to decline life-saving treatment. *Vega*, 236 Conn. at 665-66; *McConnell*, 209 Conn. at 701. Even the permanently comatose possess common law autonomy equal to the competent. *Foody,* 40 Conn. Supp. at 132-33 ("The courts have recognized the right of a guardian of the person to vicariously assert the right of an incompetent or unconscious ward to accept or deny medical

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[26] The word "autonomy" derives from the Greek "auto" ("self") and "nomos" (law"). Michael Rosen, *Dignity – Its History and Meaning* 4-5 (2012).

[27] *See Nitin Singhvi v. Union of India & Others*, W.P. No. 6/2016, ¶12 at 7-8 (High Court of Chhattisgarh Aug. 18, 2017) ("It is a salutary principle . . . to uphold the right of the animals to say, "Let Us Alone.").

care.") (citations omitted). To "deny the exercise because the patient is unconscious or incompetent would be to deny the right. . . . It is incumbent upon the state to afford an incompetent the same panoply of rights and choices it recognizes in competent persons." *Id.* (citing *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728 (1977)). *See also McConnell*, 209 Conn. at 710 (citing *Foody* and *Botsford* and adopting their rationale); *id.*. at 718-19 (Healey, J., concurring) ("this case is governed by the common law right to self-determination of one's bodily integrity. There being clear and convincing evidence that it is McConnell's wish never to have her body and dignity invaded in order to provide extraordinary treatment that would maintain her in this tragic and terminal condition, and there being no state interests that outweigh the exercise of this right, McConnell's gastrostomy tube must be removed.").

The Expert Affidavits demonstrate Beulah's, Minnie's, and Karen's autonomy and that their interest in exercising their autonomy is as fundamental to them as it is to us.[28] *See Commissioner of Correction v. Coleman*, 303 Conn. 800, 811-12 (2012); *Sherwood v. Danbury Hospital*, 278 Conn. 163, 180 (2006) (quoting *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (1914) ("'[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.'")); *Vega*, 236 Conn. at 664-65; *McConnell*, 209 Conn. at 701. They should therefore be recognized as common law "persons" with the right to bodily liberty protected by the common law of habeas corpus.

E. Common law equality requires that Beulah, Minnie, and Karen be recognized as "persons" for the purpose of habeas corpus.

Equality is enshrined in Connecticut common law, protecting against discrimination in the absence of statutory law, with the Supreme Court declaring "there exists a *general public policy* in this state to eliminate all forms of invidious discrimination[.]" *Thibodeau v. Design Grp. One Architects, LLC*, 260 Conn. 691, 706 (2002) (emphasis added). For more than a

[28] Bates & Byrne Aff. ¶30, ¶34, ¶37, ¶47, ¶50, ¶60; McComb Aff. ¶24, ¶31, ¶41, ¶44, ¶54; Poole Aff. ¶22, ¶26, ¶29, ¶39, ¶42, ¶53; Moss Aff. ¶18, ¶22, ¶25, ¶35, ¶38, ¶48.

century, Connecticut common law has prohibited such entities as common carriers, victualers, and innkeepers from discriminating unreasonably or unjustly. *See, e.g., Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on Human Rights & Opportunities*, 204 Conn. 287, 296 (1987) ("Public accommodation statutes in general have their origins in the common law duties of innkeepers and common carriers to offer their services to the general public without discrimination."); *Bilton Mach. Tool Co. v. United Illuminating Co.*, 110 Conn. 417, 425-26, 430 (1930) (utility charges "must be equal and impartial, reasonable and uniform. It must be free from arbitrary imposition and every trace of favoritism. Discrimination in charges and rates may at times exist to some extent, but its inevitableness or incidentalness must appear, as must the reasonable basis for it . . ."); *Turner v. Connecticut Co.*, 91 Conn. 692, 697-98 (1917) ("as a general principle the service of a public utility should be equal to all patrons"); *Faulkner v. Solazzi*, 79 Conn. 541, 542-43 (1907).

Similarly, a basic concern for individual autonomy recognizes the vulnerability of individuals to arbitrary and unreasonable detention that can be remedied by the common law writ of habeas corpus. Chief Justice Peters observed that in "Connecticut constitutional law, it is well established that several rights now denominated as constitutional had well-recognized common law antecedents." E. Peters, *Common Law Antecedents of Constitutional Law in Connecticut*, 53 ALB. L. REV. 259, 261 (1989).[29] *See also State v. Joyner*, 225 Conn. 450, 467-68 (1993) ("As we have noted on other occasions, our common law history is an important source of enlightenment about the meaning to be ascribed to open-ended constitutional provisions guaranteeing due process . . . Contrary to our federal constitutional heritage, our constitutional tradition in Connecticut has not historically drawn hard lines of separation between constitutional, statutory and common law precepts.").

[29] *See also* Christopher Collier, *The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights*, 76 Conn. B.J. 1 (2002); Christopher Collier, *The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition*, 15 Conn. L. Rev. 87, 94 (1982).

It is therefore unsurprising that equality is embodied in Connecticut constitutional and statutory law. *See Hall*, 50 Conn. at 137 ("all statutes are to be construed, as far as possible, in favor of equality of rights."); *State v. Conlon*, 65 Conn. 478, 489 (1895) ("[n]o legislative act is law that clearly and certainly is obnoxious to the principle of equality in rights thus solemnly made the condition of all exercise of legislative power."); CONN. CONST. Article 1, § 1 (Equal Protection Clause similar to Fourteenth Amendment to the United States Constitution); Article 1, § 20 (anti-discrimination clause that has no federal counterpart.).[30]

The United States and Connecticut Supreme Courts agree 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.'" *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 261 (2008) (quoting *Lawrence v. Texas*, 539 U.S. 558, 579 (2003)). *See also id.* at 262 ("Like these once prevalent views, our conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection."); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L.Rev. 1161, 1163 (1988) ("A classification persists until a new understanding of equal protection is achieved."). *See Varnum v. O'Brien*, 763 N.W. 2d 862, 877-78 (Iowa 2009).

Connecticut courts expand and define common law equality based on a public policy that "can be found in express statutory or constitutional provisions, or in judicially conceived notions of public policy." *Curry v. Community Sys., Inc*., 1993 WL 383281, at *3 (Conn. Super. Sept. 17, 1993). For example, in *Thibodeau v. Design Group One Architects, LLC*, 64 Conn. App. 573, 589, *rev'd on other grounds*, 260 Conn. 691 (2002), the court found a public policy against gender discrimination in the Connecticut Constitution, Article 1, § 20, as well as in the United States Constitution's Equal Protection Clause. Likewise, in *Int'l Bhd., Local 361 v. Town of New*

[30] *See* CONN. CONST. ART. 1, § 20 ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.").

Milford, 81 Conn. App. 726, 735 (2004), the court stated: "It is axiomatic that Connecticut adheres to a public policy prohibiting discrimination on the basis of disabilities. Such a policy is embodied in General Statutes § 46a-60(a)(1)."[31]

There exists no standard for evaluating common law equality claims. However, because Connecticut common, statutory, and constitutional law and federal constitutional law are mutually reinforcing sources of equality, constitutional equal protection analysis can provide a useful analytical tool for evaluating common law equality claims. *See generally*, E. Peters, *supra*, 53 ALB. L. REV. at 264 ("In defining and enacting constitutional bills of rights, state and national constituencies would, of course, have drawn upon the experience of the common law. . . . Just as the precepts of the common law influence the style of constitutional adjudication in common law courts, so common law case law itself is part of our 'usable past.'" [Footnote omitted.]); Judith S. Kaye, *Forward: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L. J. 727, 730 (1992) (common law has long been "viewed as a principle safeguard against infringement of individual rights" *and* the "two-way street" that runs between common law decision-making and constitutional decision-making has resulted in a "common law decision making infused with constitutional values.").

Traditional constitutional equal protection analysis focuses on three elements: (1) a classification that treats one group differently from others similarly situated, (2) the purpose of the classification, and (3) the fit between the classification and the purpose. *Kerrigan*, 289 Conn. at 157-58; *Romer v. Evans*, 517 U.S. 620, 632 (1996). As discussed below, Beulah, Minnie, and Karen are entitled to common law personhood for the purpose of seeking a common law writ of habeas corpus, as their classification as "things" has an illegitimate purpose.

The first part of the equality analysis looks to whether individuals are similarly situated for purposes of the challenged classification. *Kerrigan*, 289 Conn. at 158. A court can eschew

[31] *See also Morin v. Athena Health Care*, CV166033956S, 2017 WL 1240411, at *2 (Conn. Super. Mar. 6, 2017) ("Connecticut's Supreme Court recognizes a common-law cause of action for wrongful termination, so long as it is derived from an important public policy.")

this step when, as here, a classification identifies a class of persons by a single trait, then denies that class protection across the board, as fundamental equality is violated. *See Romer*, 517 U.S. at 633. The *Romer* Court found that a state constitutional provision that repealed all existing anti-discrimination law based upon sexual orientation was so "obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violated basic equal protection values." *Equal. Found. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997) (citing *Romer*, 517 U.S. at 632) (Colorado Amendment 2 "defies" conventional equal protection analysis)). Thus, "the Supreme Court directed that the ordinary three-part equal protection query was rendered irrelevant." *Id.*

The Supreme Court specifically found that "Amendment 2 *confounds* this normal process of judicial review." *Romer*, 517 U.S. at 633 (emphasis added) ("[i]t is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."). *See Goodridge v. Dep't of Public Health*, 440 Mass. 309, 330, 333 (2003) (Court rejected argument that legislature could refuse same-sex couples the right to marry based on procreation grounds, as it "singles out the one unbridgeable difference between same-sex and opposite sex couples, and transforms that difference into the essence of legal marriage.").

Beulah, Minnie, and Karen are imprisoned solely because they are immutably not human, then. "denie[d] . . . protection across the board." *Romer*, 517 U.S. at 633. But no rational reason exists to deny autonomous beings the protection of habeas corpus simply because they are, immutably, not human. The immutability of an allegedly determinative characteristic "has been deemed to be a relevant consideration because it 'make[s] discrimination more clearly unfair.'" *Kerrigan*, 289 Conn. at 183 (citation omitted). To decide against Beulah, Minnie, and Karen solely because they are not human "would be to penalize someone for being unable . . . to 'change . . . a central aspect of individual and group identity.'" *Id.* at 186-88 (citation omitted).

But the determinative characteristic in the case at bar is not that Beulah, Minnie, and Karen are not human, but that they are autonomous, the central quality that habeas corpus protects.

Although a similarly-situated analysis is unnecessary because Beulah, Minnie, and Karen are denied all legal protection merely because they are not human in violation of fundamental equality, their classification as "things" readily satisfies this requirement. The relevant question is not whether two persons are similarly situated generally, but "whether they are similarly situated for the purposes of the law challenged." *State v. Dyous*, 307 Conn. 299, 315-16 (2012) (quoting *Kerrigan*, 289 Conn. at 157-58).[32] The determinative characteristic in the case at bar is autonomy. Because Beulah, Minnie, and Karen are autonomous, they are similarly situated to human beings for the relevant purpose of having their bodily liberty protected by habeas corpus.

Even humans who have always, and will always, lack the ability to choose, to understand, or make a reasoned decision about, for example, medical treatment, possess the common law right to bodily liberty. *See generally Foody*, 40 Conn. Supp. at 132-33 ("The courts have recognized the right of a guardian of the person to vicariously assert the right of an incompetent or unconscious ward to accept or deny medical care."). *See also Anonymous v. Superintendent of Hosp.*, 33 Conn. Supp. 191, 191 (1980) (discharging fourteen-year-old deaf-mute confined in state mental hospital on habeas corpus); *Sullivan v. Ganim*, 2009 WL 4916520, at *1 (Conn. Super. Nov. 30, 2009) (87-year-old conserved woman in nursing home entitled to habeas corpus). As humans bereft of consciousness are entitled to personhood, courts must either recognize an elephant's just equality claim to bodily liberty or reject the principle of equality.

The second element of the equality analysis looks to the legitimacy of the classification's purpose. *See Kerrigan*, 289 Conn. at 153 (the "very existence of the classification gives credence to the perception that separate treatment is warranted for the same *illegitimate reasons* that gave rise to the past discrimination in the first place."); *Goodridge*, 440 Mass. at 330; *Cleburne*, 473 U.S. at 452 (Stevens, J., concurring). This Court must examine the *reasons* underlying the

[32] *See Thomas v. West Haven*, 249 Conn. 385, 402 (1999), *cert. den.*, 528 U.S. 1187 (2000).

classification of elephants as "things"; it should not blindly accept history, tradition, moral disapproval, or legislative preference. *Kerrigan*, 289 Conn. at 257.

The *Romer* Court, after concluding that Colorado Amendment 2 literally offended basic equal protection standards without the necessity of performing the three-tiered equal protection analysis, nevertheless mandated that, even under traditional equal protection strictures, the amendment could not survive minimum rational review because it sought to repeal all existing anti-discrimination law based upon sexual orientation. *Equal. Found. v. City of Cincinnati*, 128 F.3d at 299 (citing *Romer*, 517 U.S. at 626). There is likewise no legitimate purpose for the classification of Beulah, Minnie, and Karen as "things" unable to possess the common law right to bodily liberty. This classification rests wholly upon the illegitimate end of depriving an autonomous being of her liberty. Connecticut supremely values and respects the autonomy whose protection is the reason the common law of habeas corpus exists. Connecticut therefore has no legitimate interest in permitting the arbitrary confinement of autonomous beings, human or not.

In determining whether a classification's purpose contravenes equality, moreover, the Court must "'consider the changing needs and expectations of the citizens of our state.'" *Kerrigan*, 289 Conn. at 261 (citation omitted). And as "a matter of common-law adjudication," the Court must make that evaluation in tandem with "science and technology as they have evolved in recent years." *Guess*, 244 Conn. at 771. It must also be remembered that, unlike a court reviewing an equal protection claim, "courts have the common law power to declare what the common law is." *Rosado*, 1995 WL 348181, at *11.

The legal thinghood of elephants with respect to their right to bodily liberty protected by a common law writ of habeas corpus has become an anachronism. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1683 (2017) (certain statutes the Court struck down under the Equal Protection Clause "date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are" and are today "stunningly anachronistic"). All nonhuman animals were once thought unable to think, believe, remember, reason, and

experience emotion. Richard Sorabji, *Animal Minds & Human Morals – The Origins of the Western Debate* 1-96 (1993). Today, the Expert Affidavits confirm elephants' complex cognitive abilities — most especially autonomy — and expose those ancient, pre-Darwinian prejudices as false.

The third part of the equality analysis looks to whether the fit between the classification and the legitimate purpose is rationally related. But in the case at bar, this step "is unnecessary and not feasible," as there is "no concrete problem" or legitimate interest to try to fit. *Awad v. Ziriax*, 670 F.3d 1111, 1130-31 (10th Cir. 2012).

> Without . . . a requirement of legitimate public purpose it would seem useless to demand even the most perfect congruence between means and ends, for each law would supply its own indisputable - and indeed tautological - fit: if the means chosen burdens one group and benefits others, then the means perfectly fits the end of burdening just those whom the law disadvantage and benefitting just those it assists.

Laurence H. Tribe, *American Constitutional Law* 1440 (2nd ed. 1988). As in *Romer*, the breadth of the classification of all non-human animals as things, and the denial of all rights across the board, is "so far removed" from any legitimate state interest that it would be "impossible to credit them." 517 U.S. at 635. "It is a status-based enactment divorced from any factual context . . .; it is a classification of persons undertaken for its own sake," something equality "does not permit." *Id.*

F. A "person" illegally confined in Connecticut is entitled to release pursuant to a common law writ of habeas corpus.

The "essential purpose of habeas as a vehicle to free a person whose confinement is unlawful is a constant thread in Connecticut jurisprudence." *Miller*, 1996 WL 168004, at *42. All common law natural persons are presumed entitled to personal liberty (*in favorem libertatis*). *See Scott v. Crane*, 1 Conn. 255, 258 (1814) ("In all suits, it is the object of the law in favor of the liberty of the citizen"). *See also State v. Oquendo*, 223 Conn. 635, 650 (1992) ("no man can be restrained of his liberty; be prevented from removing himself from place to place, as he choses; be compelled to go to a place contrary to his inclination, or be in any way imprisoned, or

confined, unless by virtue of the express laws of the land.") (quoting Zephaniah Swift, *A Digest of the Laws of Connecticut* 180 (1795)); *Miller v. Burlingame*, 4 Conn. Supp. 186, 194 (Super. Ct. 1936) (in the absence of positive law, detention in a state mental hospital was unlawful); *In re Hall*, 50 Conn. at 137 (restrictions upon liberty "can only be sustained by the clear expression or clear implication of the law."); *Jackson*, 12 Conn. at 40 (resolving slave's habeas corpus petition in favor of freedom); *Hall v. Hall*, 1 Root 120, 121 (Conn. Super. Ct. 1789). As Beulah, Minnie, and Karen are "persons" for the purpose of common law habeas corpus, the deprivation of their bodily liberty is presumptively illegal. Their remedy is to secure their freedom through the common law of habeas corpus.

Habeas corpus is "one of the most extraordinary and unique legal remedies in the procedural armory of our law." *Lebron*, 274 Conn. at 530 n.17 (quoting *McNally v. Hill*, 293 U.S. 131, 136 (1934)), *overruled on other grounds, Peyton v. Rowe*, 391 U.S. 54 (1968)). It is "a writ antecedent to statute, and throwing its root deep into the genius of our common law. . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement." *Ortega v. Myers*, 2002 WL 31440756, at *2 (Conn. Super. Ct. Oct. 3, 2002), quoting 3 *Blackstone Commentaries* *129. It is "a remedy for illegal restraint, is a prerogative common-law writ providing a special and extraordinary legal remedy." *Wojcuulewicz v. Cummings*, 143 Conn. 624, 627 (1956).

Habeas corpus has been extended to: slaves,[33] minors in reform schools,[34] infants,[35] the incompetent elderly,[36] and mental incompetents.[37] As *Stanley* observed, "given the 'great

[33] *Jackson*, 12 Conn. at 40-42 (citing *Somerset*); *Arabas*, 1 Root at 93 (granting habeas relief to slave based on his service in Continental Army).
[34] *See Cinque v. Boyd*, 99 Conn. 70, 93-95 (1923); *Dart v. Mecum*, 19 Conn. Supp. 428, 434 (Super. Ct. 1955) (minor held under illegal commitment order ordered released then returned to parents); *see also Buster v. Bonzagni*, 1990 WL 272742, at *2 (Conn. Super. Ct. Apr. 5, 1990) *aff'd sub Comm'r of Correction*, 26 Conn. App. 48 (1991).
[35] *e.g.*, *Weidenbacher*, 234 Conn. at 64-65; *Doe v. Doe*, 163 Conn. 340, 342 (1972); *Hudson*, 10 Conn. Supp. at 278-79.
[36] *E.g.*, *Sullivan*, 2009 WL 5303781; *Rodd v. Norwich State Hosp.*, 5 Conn. Supp. 360, 363 (Super. Ct. 1937); *Burlingame*, 4 Conn. Supp. at 194.

flexibility and vague scope' of the writ of habeas corpus," the writ of habeas corpus may be issued on behalf of nonhuman animals to determine whether they are common law persons entitled to their freedom. 16 N.Y.S.3d at 905.

II. As Beulah, Minnie, and Karen are "persons" under the Connecticut common law of habeas corpus, their confinement is illegal and they are entitled to habeas corpus relief.

The NhRP challenges the lawfulness of the Respondents' detention of Beulah, Minnie, and Karen and the deprivation of their bodily liberty. As the NhRP demonstrates in its Petition (¶¶54-103) the "specific facts upon which each specific claim of illegal confinement is based" which entitle it to the issuance of the writ, Practice Book § 23-22, the Court must promptly issue it. Practice Book § 23-24. The burden then shifts to Respondents to prove the confinement is lawful. Practice Book § 23-30. *See Fasulo*, 173 Conn. at 483.

A. Beulah, Minnie, and Karen need not be unconditionally released to be entitled to habeas corpus relief.

Upon this Court's determination that the detention of Beulah, Minnie, and Karen is unlawful, it should order their release to an appropriate sanctuary rather than onto the streets of Connecticut. *See Stanley*, 16 N.Y.S.3d at 917 n.2 (in which the court rejected the respondents' argument that because the NhRP sought the chimpanzees' "transfer to a chimpanzee sanctuary, it has no legal recourse to habeas corpus" reasoning that habeas corpus has been used to "secure [the] transfer of [a] mentally ill individual to another institution.") (citation omitted);[38] *In re*

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[37] *E.g.*, *Fasulo v. Arafeh*, 173 Conn. 473, 483 (1977); *Blackburn v. Normandin*, 1993 WL 394312, at *5 (Conn. Super. Ct. Sept. 27, 1993); *Anonymous v. Superintendent of Hosp.*, 33 Conn. Supp. 191, 194 (Super. Ct. 1977); *Melville v. Sabbatino*, 30 Conn. Supp. 320, 320 (Super. Ct. 1973); *Rodd*, 5 Conn. Supp. at 363; *Burlingame*, 4 Conn. Supp. at 194.

[38] The conclusions reached by two New York Appellate Divisions (the Fourth and First Departments) that habeas corpus in New York is limited to unconditional release and that the NhRP is not challenging the legality of the chimpanzees' detention were clearly wrong for three obvious reasons. *See Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 80 (1st Dept. 2017) ("*Tommy*"); *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*, 999 N.Y.S.2d 652, 653–54 (N.Y. App. Div. 4th Dept. 2015), *leave to appeal denied*, 3 N.Y.S.3d 698 (N.Y. App. Div. 4th Dept. 2015), *and leave to appeal denied*, 38 N.E.3d 827 (N.Y. 2015) ("*Presti*"). First, the NhRP only challenged the legality of the chimpanzees' detentions and repeatedly sought an order for their complete release from their unlawful confinement. Only after making

Cecilia, File No. P-72.254/15 at 22-23 (Argentina). In the case of minors, for example, a court must first release the individual from her illegal detention, then determine into whose care and custody she should be placed. *Dart*, 19 Conn. Supp. at 434 (minor held under illegal commitment order ordered released then returned to parents); *Buster v. Bonzagni*, 1990 WL 272742, at *2 (Conn. Super. Ct. Apr. 5, 1990) *aff'd sub Comm'r of Correction*, 26 Conn. App. 48 (1991) ("It is the duty of the court, in such cases, *to set them free from any improper restraint*; they are not bound to deliver them over to any body, or give them any privilege. They will dispose of them in such manner as in their discretion they shall judge best, according to the particular circumstances of each case") (quoting 1 Zephaniah Swift, *A Digest of the Laws of the State of Connecticut* 568 (1822)) (emphasis added). *See also Weidenbacher*, 234 Conn. at 61.

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such an order would the court determine where the chimpanzees should live, as they need to live somewhere, since they are neither competent nor indigenous to North America. The NhRP has never challenged the *conditions* of the chimpanzees' confinement nor sought a transfer to a different confinement. The First Department itself recognized that the NhRP merely "requests that respondents be ordered to show 'why [the chimpanzees] should not be discharged, and thereafter, [the court] make a determination that [their] detention is *unlawful* and order [their] *immediate release* to an appropriate primate sanctuary,'" then appeared not to understand the import of its own statement. *Id.* (emphasis added). Both the Third Department in *Lavery*, 124 A.D.3d at 149, and the New York County Supreme Court in *Stanley*, 16 N.Y.S.3d at 901, had no trouble understanding this, *supra.* Second, New York courts have for two centuries used the writ of habeas corpus to order the release of such incompetent humans as child slaves, child apprentices, child residents of training schools, child residents of mental institutions, and mentally incapacitated adults, from the custody of one entity that was illegally detaining them and into the custody of another. *E.g.*, *Lemmon*, 20 N.Y. at 632 (five slave children discharged); *People ex rel. Margolis v. Dunston*, 174 A.D.2d 516, 517 (1st Dept. 1991) (juvenile); *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996) (elderly and ill woman); *State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982) (elderly sick woman). Third, in New York it is well-settled that habeas corpus can be used to challenge conditions of confinement. *E.g.*, *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961) (habeas corpus was proper remedy to test the validity of a prisoner's transfer from a state prison to a state hospital for the insane); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943) ("that the appellant is still under a legal commitment to Elmira Reformatory does not prevent him from invoking the remedy of habeas corpus as a means of avoiding the further enforcement of the order challenged.") (citation omitted); *People ex rel. Berry v. McGrath*, 61 Misc. 2d 113, 116 (N.Y. Sup. Ct. 1969) (an "individual . . . is entitled to apply for habeas corpus" upon a "showing of a course of cruel and unusual treatment").

Before the Civil War, slave children were discharged through common law writs of habeas corpus despite ultimately being placed in another's care. *Lemmon*, 20 N.Y. 562 (discharged slaves included two seven-year-olds, a five-year-old, and a two-year-old); *Commonwealth v. Taylor*, 44 Mass. 72, 72-74 (1841) (seven- or eight-year old slave discharged into care of the Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Aves*, 35 Mass. 193 (1836) (seven-year-old girl discharged into custody of Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Holloway*, 2 Serg. & Rawle 305 (Pa. 1816); *State v. Pitney*, 1 N.J.L. 165 (N.J. 1793). Connecticut courts have long discharged free minors from industrial training schools and reform schools through the common law writ of habeas corpus, despite the fact that such minors remained subject to the custody of parents or guardians. *Cinque*, 99 Conn. at 93-95 (plaintiff illegally detained at Connecticut School for Boys delivered to father); *Dart*, 19 Conn. Supp. at 434 (girl released from custody of Long Lane School to parents). Incapacitated and mentally ill adults have been discharged from illegal confinements pursuant to the writ and placed into the care and custody of another. *E.g.*, *Rodd*, 5 Conn. Supp. at 363; *Burlingame*, 4 Conn. Supp. at 194 (same, ordering that because there was no authority for the detention). *See also Murray v. Lopes*, 205 Conn. 27, 38 n.10 (1987).

The relief sought in the case at bar is analogous to the relief accorded to child slaves, juveniles, and the incapacitated elderly. In those cases, as here, the petitioners challenged the legality, not the conditions, of their confinement. The courts then discharged the detained individuals from their unlawful confinement and placed them elsewhere. *E.g. Dart*, 19 Conn. Supp. at 434.

Connecticut has even expanded the relief afforded by the common law writ of habeas corpus to situations where a petitioner is not seeking immediate release but is merely challenging the conditions of confinement.[39] Significantly, however, the NhRP does not challenge the

[39] *See Baker v. Comm'r of Corr.*, 281 Conn. 241, 250-52 (2007) (observing Connecticut courts' "expansion of the writ beyond its initial objective of securing immediate release from illegal detention"). *E.g.*, *id.* at 250-52 (habeas corpus used "to challenge illegal confinement, even when the remedy would not be immediate release") (prisoner); *Lozada*, 223 Conn. at 840 ("habeas

conditions of Beulah, Minnie, and Karen's current confinement. It seeks their release from illegal confinement to an elephant sanctuary that recognizes their liberty and autonomy, such as PAWS.

B. The ability to bear correlative duties and responsibilities is not required for personhood.

Connecticut has never limited the ability to bear any legal right, much less the fundamental right to invoke the common law writ of habeas corpus, to entities able to bear correlative duties and responsibilities. Otherwise fetuses, children, the comatose, and those humans otherwise mentally unable to bear duties and responsibilities would be mere "things" that lacked the capacity for any legal right. Yet these were the outlier holdings of New York's Third Judicial Department ("Third Department") in *Lavery*, 124 A.D.3d at 150-53 and, in implicit reliance upon *Lavery*, New York's First Judicial Department ("First Department") in *Tommy*, 152 A.D.3d at 78.[40] These two New York intermediate appellate decisions do not bind this Court. Nonetheless, the NhRP addresses them in detail because they are so clearly erroneous, even as a matter of New York law, and because reliance upon them would prove dangerous both to the rights of humans and nonhuman animals.

Lavery ruled that a chimpanzee, Tommy, could not be a "person" for *any* purpose, including habeas corpus, solely because he was, according to the court, allegedly unable to bear duties and responsibilities. 124 A.D.3d at 150-53.[41] *Lavery* thereby marked the *first time* in

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corpus is available as a remedy for a 'miscarriage of justice or other prejudice.'") (citations omitted); *Safford v. Warden*, 223 Conn. 180, 191 n.13 (1992) (habeas corpus available to challenge "a miscarriage of justice or other prejudice, not involving a constitutional violation"); *Murray v. Lopes*, 205 Conn. 27, 31 (1987); *Arey v. Warden*, 187 Conn. 324 (1982) (conditions of confinement); *Roque v. Warden*, 181 Conn. 85 (1980) (First Amendment violations); *Delevieleuse v. Manson*, 184 Conn. 434, 441 (1981) (right to appropriate "jail credit" rather than complete release); *Doe*, 163 Conn. 340 (custody and visitation disputes).

[40] A motion for leave for review by the Court of Appeals is pending before the First Department. Should it be denied, the NhRP will file a similar motion before the Court of Appeals.

[41] As no evidence of a chimpanzee's ability to bear duties and responsibilities was before the court in *Lavery*, the court erred in taking judicial notice of the alleged fact that chimpanzees are unable to do so. In response, the NhRP demonstrated this alleged fact to be untrue by filing 60 pages of -Supplemental Expert Affidavits in the First Department *Tommy* case (these affidavits are attached). Strangely, that court in turn failed to recognize that the Supplemental Expert Affidavits specifically stated that chimpanzees routinely bear duties and responsibilities. Rather,

Anglo-American legal history that a court ruled that the ability to bear duties and responsibilities was necessary for personhood, except in the interests of that individual.

In reaching its flawed ruling, the *Lavery* court substantially and erroneously relied upon John Chipman Gray's *The Nature and Sources of the Law*, ch. II at 27 (Quid Pro Books 2012) (2nd ed. 1921), *Black's Law Dictionary* (10th ed. 2014), which cited to *Black's Law Dictionary* (7th ed. 1999), and cases that cited *Black's Law Dictionary* to support the proposition that the capacity to bear legal rights *and* duties is a *necessary* condition for personhood, rather than the capacity for legal rights *or* duties, which the NhRP has consistently argued is a *sufficient* condition for personhood. 124 A.D.3d at 152 (emphasis added).

To the contrary, Gray's *Nature and Sources of the Law* expressly stands for the *opposite* proposition than that for which it was cited by the First Department and supports the NhRP's argument that a legal person may be the subject of rights *or* duties. Gray states that "[o]ne who has rights but not duties, or has duties but no rights, is . . . a person." Gray at 27. Recall that Gray also addresses nonhuman animal personhood directly:

> animals may conceivably be legal persons. . . . [There may be] systems of Law in which animals have legal rights. . . . When, if ever, this is the case, the will of human beings must be attributed to animals. There seems no essential difference between the fiction in such cases and in those where, to a human being wanting in legal will, the will of another is attributed.

Id. at 42-43. Rather than blindly relying upon *Black's Law Dictionary* to support the sweeping proposition that a "person" *must* be capable of bearing rights *and* duties, the *Lavery* court should have checked the single source to which *Black's* in turn cited, *Salmond on Jurisprudence* (10th edition). Had it done so, it would have found that every edition of *Salmond*

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the court asserted that they merely continue "to support its basic position that chimpanzees exhibit many of the same social, cognitive and linguistic capabilities as humans and therefore should be afforded some of the same fundamental rights as humans." 152 A.D.3d at 76. This statement is not only untrue but demonstrates the court's failure to grasp the NhRP's legal argument that the evidence presented in its initial round of expert affidavits established that chimpanzees have the capacity for autonomy sufficient for common law habeas corpus personhood and had nothing whatsoever to do with a chimpanzees' ability to bear duties and responsibilities.

on Jurisprudence states that "a person is any being whom the law regards as capable of legal rights *or* duties."[42] When the NhRP brought this error to the attention of the chief editor of *Black's Law Dictionary*, he immediately agreed to make the correction in the upcoming 11th edition.[43] The NhRP then filed a motion with the First Department asking it to review the NhRP's exchange with *Black's Law Dictionary* and recognize that the major support for the Third Department's decision had been recanted by the source itself. Inexplicably, the First Department denied the motion only to robotically perpetuate the Third Department's error.

This was not *Lavery*'s only major error. It misunderstood the difference between the immunity-right to bodily liberty that the NhRP was demanding on behalf of Tommy and the claim-right the NhRP was *not* demanding. The great Yale jurisprudential professor Wesley N. Hohfeld's conception of the comparative structure of rights has, for a century, been employed as the overwhelming choice of courts, jurisprudential writers, and moral philosophers when they discuss what rights are. *See generally* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913).

In his famous article, Hohfeld noted, *id*. at 28, 30, that:

> One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit

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[42] John Salmond, *Salmond on Jurisprudence* (Patrick John Fitzgerald, Sweet & Maxwell, 12th ed. 1966) 299; John Salmond, *Salmond on Jurisprudence* (Glanville Williams, London, Sweet & Maxwell, Limited, 11th ed. 1957) 350; Glanville L. Williams, *Salmond on Jurisprudence* 318 (10th ed. 1947); John Salmond, *Jurisprudence* (C.A.W. Manning, London: Sweet & Maxwell, Limited, 8th ed. 1930) 329; John Salmond, *Jurisprudence*, 7th ed. (London: Sweet & Maxwell, Limited, 1924) 329; John Salmond, *Jurisprudence*, 6th ed. (London: Sweet & Maxwell, Limited, 1920) 272; John Salmond, *Jurisprudence*, 4th ed. (London, Stevens and Haynes, 1913) 272; John Salmond, Jurisprudence, 2nd ed. (London: Stevens and Haynes 1907) 275; and John Salmond, *Jurisprudence or The Theory of the Law* (London, Stevens & Haynes 1902) 334 (emphasis added).

[43] *See* letter and email from Kevin Schneider to Bryan Garner dated April 6, 2017 and Garner's email reply of the same date, attached to the annexed Affidavit of Kevin Schneider, Esq. as "Exhibit 1" and "Exhibit 2," respectively. *See also* James Trimarco, "Chimps Could Soon Win Legal Personhood," YES! Magazine, April 28, 2017, *available at*: http://www.yesmagazine.org/peace-justice/chimps-could-soon-win-legal-personhood-20170428 (last accessed November 10, 2017).

> assumption that all legal relations may be reduced to "rights" and "duties" and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests," and that the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense . . .

Basing personhood upon an ability to bear duties and responsibilities is particularly inappropriate in the context of demanding a common law writ of habeas corpus to enforce the fundamental common law immunity-right to bodily integrity, for it commits a serious "category of rights" error by mistaking an "immunity-right" for a "claim-right," as Hohfeld pointed out, *id*. at 27.[44] The reason is that a claim-right, which is *not* being sought in the case at bar, is comprised of a claim and a correlative duty. Steven M. Wise, "Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy," 22 VERMONT L. REV. 807-810 (1998). The fundamental immunity-right to bodily liberty the NhRP seeks on behalf of Beulah, Minnie, and Karen is what the United States Supreme Court was referring to when it famously stated that "[t]he right to one's person may be said to be a right of complete immunity: to be let alone." *Botsford*, 141 U.S. at 251. An immunity-right correlates *not* with a duty, but with a *disability.*[45] Steven M. Wise, "Hardly a Revolution," at 810-15. Other examples of fundamental immunity-rights are the right not to be enslaved guaranteed by the Thirteenth Amendment to the United States Constitution, in which all others are *disabled* from enslaving those covered by that Amendment, and the First Amendment right to free speech, which the government is *disabled* from abridging. One obviously is not required to have the capacity to bear duties or responsibilities in order not to be enslaved or to exercise free speech. *See Harris v. McRea*, 448

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[44] Even Gray misunderstood this in his *Nature and Sources of the Law*.

> In [Gray's] chapter on "Legal Rights and Duties," the distinguished author takes the position that a right always has a duty as its correlative; and he seems to define the former relation substantially according to the more limited meaning of 'claim.' Legal privileges, powers, and immunities are *prima facie* ignored, and the impression conveyed that all legal relations can be comprehended under the conceptions 'right' and 'duty.'

Hohfeld, at 27.

[45] The *Lavery* court's error becomes even more obvious when one considers that when one party has a right, it is the *other* party that bears the correlative duty.

U.S. 297, 316-18, 331 (1980) (illustrating the difference between a claim-right and an immunity-right).

Beulah's, Minnie's, and Karen's fundamental common law immunity-right therefore correlates solely with the Respondents' *disability* to imprison them. The existence or nonexistence of their ability to bear duties and responsibilities is *entirely irrelevant* and is not a prerequisite for the immunity-right that nonhuman animals such as Beulah, Minnie, and Karen enjoy in Connecticut pursuant to C.G.S.A. § 45a-489a.[46]

The *Lavery* court also mistakenly rested its decision partially on "principals of social contract." 124 A.D.3d at 151.[47] But social contract had nothing to do with the NhRP's claim as it traditionally addresses the authority of the State over the individual, an issue not presented in *Lavery*. J.W. Gough, *The Social Contract* 2-3 (Oxford Clarendon Press 1936). At its most elementary, social contract is *not* about the participation of individuals, but *is* about the idea that individuals submit some freedoms to the power of the State in exchange for the State's protection of their other freedoms. *See, e.g.¸ Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874) ("There are limitations on [State] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name").

Social contract theorist John Locke argued that individuals are bound morally by the law of nature not to harm each other, but that an individual's rights are not secure without government to defend them. Under the social contract, as Locke imagined it, "the State has an interest in protecting its citizens. . . . [T]his surely is at the core of the Lockean 'social contract' idea." *Roberts v. Louisiana*, 431 U.S. 633, 646 (1977). To this end, fundamental rights impede

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[46] That nonhuman animals in Connecticut are "persons" within the meaning of the C.G.S.A. § 45a-489a does not necessarily mean they are persons for any other reason, just as Minnie, Karen, and Beulah's being a "person" for the purpose of the common law writ of habeas corpus would not necessarily mean they are a "person" for any other purpose.

[47] "The ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principals of social contract. . . ." *Lavery*, 124 A.D.3d at 151.

and temper the exercise of *State* power. Thus, rights cases invoke a breach of *State* responsibilities, not social responsibilities of the individual.[48] Social contract does *not* require the correlative holding of rights and duties. The holder of the right is the individual while the holder of the responsibility is the government. Moreover, any reliance on social contract specifically to deny all rights to Beulah, Minnie, and Karen would ignore the fact that the United States Supreme Court has long recognized that the social contract lies "among the great juristic myths of history. . . . *As a practical concept, from which practical conclusions can be drawn, it is valueless.*" *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 605 n.6 (1942) (emphasis added) (citing Henderson, *Railway Valuation and the Courts*, 33 HARV. L. REV. 1031, 1051 (1920)).

Habeas corpus has long been available to those who are not part of any fictitious "social contract." In *Rasul v. Bush*, 542 U.S. 466, 481-82 & n.11 (2004), the Supreme Court permitted Guantanamo petitioners, who were not part of any "social contract" – indeed the United States alleged they desired to destroy any social contract that may exist – to seek habeas corpus, stating:

> Application of the habeas statute to person detained at the base (in Guantanamo) is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm. . . .[Citing, *inter alia*, *Somerset* and *Case of the Hottentot Venus*]

[48] *E.g.*, *Moore v. Ganim*, 233 Conn. 557, 598 (1995) ("social compact theory posits that all individuals are born with certain natural rights and that people, in freely consenting to be governed, enter a social compact with their government by virtue of which they relinquish certain individual liberties in exchange 'for the mutual preservation of their lives, liberties, and estates.'") (quoting J. Locke, "Two Treatises of Government," book II (Hafner Library of Classics Ed.1961) ¶ 123, p. 184); see also 1 Z. Swift, *A System of the Laws of the State of Connecticut* (1795) pp. 12-13); *State v. Santiago*, 318 Conn. 1, 354–55, *reconsideration denied*, 319 Conn. 912 (2015) ("A social compact is an agreement 'between the people and the government they create [that] binds the agencies of government to respect the blueprint of government and the rights retained by the people."); *State v. Hine*, 59 Conn. 50, 21 A. 1024, 1025–26 (1890); *State v. Culmo*, 43 Conn. Supp. 46, 69-70 (Super. Ct. 1993) ("Providing protection from stalking conduct is at the heart of the state's social contract with its citizens").

See, e.g., United States v. Villato, 2 Dall. 379 (CC Pa. 1797) (granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States) (citations omitted). In *Jackson*, a slave was freed pursuant to habeas corpus despite being excluded from the social compact. 12 Conn. at 42-43. Because of culture or disability, many are unable to be part of a social compact, as elephants may be; others may loathe our social compact and seek to destroy it. Nevertheless, as autonomous beings they may avail themselves of habeas corpus.

Finally, *Lavery* mistakenly ignored the statement of the New York Court of Appeals in *Byrn* that personhood decisions should be based upon public policy and not biology. 31 N.Y.2d at 201. In accordance with *Byrn*, a determination of personhood necessarily entails a mature weighing of public policy and moral principle, in which the capacity to bear duties and responsibilities plays no part.

Appearing to recognize the obvious frailty of the Third Department's reasoning as stated in footnote 3 of *Lavery*,[49] the First Department in *Tommy* noted that: "Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights." 152 A.D.3d at 78. Then the First Department threw off any pretense at reasoned argument and simply declared that the NhRP "ignores the fact that these are still human beings, members of the human community." *Id.*

Similar examples of such a bias have constituted lasting errors of historic proportions. Before the United States Supreme Court in 1857, Dred Scott's lawyers "ignore[d] the fact" that he was not white. *Dred Scott v. Sandford*, 60 U.S. 393 (1857). The lawyers for the Native

[49] "To be sure, some humans are less able to bear legal duties or responsibilities than others. These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise." *Lavery*, 124 A.D.3d at n.3.

American, Chief Standing Bear, "ignore[d] the fact" that Standing Bear was not white when, in 1879, the United States Attorney argued that a Native American could never be a "person" for the purpose of habeas corpus after Standing Bear was jailed for returning to his ancestral lands. *Crook*, 25 F. Cas. at 700-01. The California Attorney General "ignore[d] the fact" that a Chinese witness to a murder was not white when he insisted, in 1854, without success before the California Supreme Court, that a Chinese person could testify against a white murderer in court. *People v. Hall*, 4 Cal. 399 (1854). The lawyer for Ms. Lavinia Goodell "ignore[d] the fact" that she was not a man before the Wisconsin Supreme Court that, in 1876, denied her the right to practice law because she was a woman. *In re Goodell*, 39 Wis. 232.

In light of the obvious errors in *Lavery* and *Tommy*, as well as the fact that either New York's First Department or its Court of Appeals may grant review of *Tommy*, both decisions should be disregarded. That is what New York's Fourth Judicial Department did in *Presti*, when it disregarded *Lavery* despite the fact that it involved the identical issue of whether a chimpanzee (Kiko) was entitled to common law habeas corpus relief. 999 N.Y.S.2d at 653-54. Not only did the Fourth Department ignore *Lavery*, it twice assumed, without deciding, that a chimpanzee could be a "person" for habeas corpus purposes. *See id.* ("even assuming, arguendo, that we agreed with petitioner that Kiko should be deemed a person for the purpose of this application, . . .") and ("Regardless of whether we agree with petitioner's claim that Kiko is a person within the statutory and common-law definition of the writ . . ."). [50]

The thoughtful decision by the Supreme Court in *Stanley*, which was also decided *after Lavery*, is more persuasive. As a trial court, it reluctantly concluded it was bound by *Lavery*, because New York "trial courts must follow a higher court's existing precedent '*even though they may disagree*.'" 16 N.Y.S.3d at 916. (citations omitted, emphasis added). Nonetheless, *Stanley* recognized, contrary to the implicit holding in *Lavery* that personhood is a biological concept, that "the parameters of legal personhood . . . will not be focused on semantics or

[50] Ultimately, the court held, however, that Kiko would not be entitled to habeas corpus because he could not literally be released onto the streets of New York. *Id*. *See supra*, footnote 38.

biology, or even philosophy, but on the proper allocation of rights under the law, asking, in effect, who counts under our law." *Id.* at 912. Additionally, unlike *Lavery*, which created an impenetrable barrier to personhood for any non-human species regardless of autonomy, *Stanley* understood that "[e]fforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed," and that although courts "are slow to embrace change, and occasionally seem reluctant to engage in broader, more inclusive interpretations of the law, if only to the modest extent of affording them greater consideration," the "pace may now be accelerating." *Id.* at 917-18. It concluded that "[f]or now, however, given the precedent to which I am bound," habeas corpus could not lie. *Id.* Unlike in *Stanley*, there is no precedent standing in this Court's way that would preclude a finding of personhood for Beulah, Minnie, and Karen.

III. Conclusion

Elephants are autonomous beings who can choose how to live their rich and fulfilling lives. The core purpose of the common law writ of habeas is to release autonomous beings from illegal detention. Beulah, Minnie, and Karen should be recognized as "persons" with the common law right to bodily liberty protected by the common law of habeas corpus, as a matter of common law liberty and equality. Their confinement by Respondents is therefore illegal and this Court should order their immediate discharge. As Beulah, Minnie, and Karen cannot safely be released to Africa, Asia or onto the streets of Connecticut, this Court should order them into the care of the Performing Animal Welfare Society.

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