[*1]In re the Nonhuman Rights Project, Inc., on behalf of Tommy, Petitioner-Appellant,

v

Patrick C. Lavery, etc., et al., Respondents-Respondents. Laurence H. Tribe, Richard L. Cupp Jr. and Samuel R. Wiseman, Amici Curiae.

In re the Nonhuman Rights Project, Inc., on behalf of Kiko, Petitioner-Appellant,

v

Carmen Presti, etc., et al., Respondents. Justin Marceau, Samuel R. Wiseman and Laurence H. Tribe, Amici Curiae.

Petitioner appeals from the judgment (denominated an order) of the Supreme Court, New York County (Barbara Jaffe, J.), entered January 29, 2016, declining to sign an order to show cause seeking the transfer of Kiko, a chimpanzee, to a primate sanctuary, and the judgment (denominated an order) of the same court and Justice, entered July 8, 2016, effective nunc pro tunc as of December 23, 2015, declining to sign an order to show cause seeking such relief on behalf of Tommy, a chimpanzee.

Law Office of Elizabeth Stein, New Hyde Park (Elizabeth Stein of counsel), and Steven M. Wise, Coral Springs, FL, of the bar of the State of Massachusetts, admitted pro hac vice, of counsel, for appellant.

Justin Marceau, Denver, CO, amicus curiae pro se.

Samuel R. Wiseman, Tallahasse, FL, amicus curiae pro se.

Laurence H. Tribe, Cambridge, MA, amicus curiae pro se.

Richard L. Cupp, Jr., Malibu, CA, amicus curiae pro se.

WEBBER, J.*

Petitioner seeks reversal of the motion court's[1] judgment declining to extend habeas corpus relief to two adult male chimpanzees, Tommy and Kiko.

Petitioner is a Massachusetts nonprofit corporation whose stated mission is "to change the common-law status of at least some nonhuman animals from mere things,' which lack the capacity to possess any legal rights, to persons,' who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them" to certain fundamental rights which include entitlement to habeas relief.

The petition as to Tommy was brought in December 2015. It is alleged that Tommy, who is owned by respondents Circle L Trailer Sales, Inc. and its officers, is in a cage in a warehouse in Gloversville, New York. The petition as to Kiko was brought in January 2016. Kiko, who is owned by respondents the Primate Sanctuary, Inc. and its officers and directors, is allegedly in a cage in a cement storefront in a crowded residential area in Niagara Falls, New York.

These are not the first petitions for habeas relief filed by petitioner on behalf of Tommy and Kiko. In December 2013, petitioner filed a petition on behalf of Kiko, in Supreme Court, Niagara County. There, the trial court declined to sign an order to show cause seeking habeas relief and the Fourth Department affirmed (*Matter of Nonhuman Rights Project, Inc. v Presti*, 124 AD3d 1334 [4th Dept 2015], *lv denied* 26 NY3d 901 [2015]).

Also in December 2013, petitioner brought a habeas proceeding on behalf of Tommy, in Supreme Court, Fulton County. There, the trial court declined to sign an order to show cause and the Third Department affirmed the decision (*People ex rel. Nonhuman Rights Project, Inc. v Lavery*, 124 AD3d 148 [3d Dept 2014], *lv denied* 26 NY3d 902 [2015]).

Petitioner has also brought a habeas petition seeking the release of two chimpanzees not at issue here, Hercules and Leo, who, according to petitioner are confined for research purposes, at the

---

* On July 28, 2016, Justice Webber converted a Motion to Appeal as a Matter of Right, which the NhRP had filed after the clerk said it had no right to appeal in Kiko's case, into a Motion for Leave to Appeal, which the NhRP had no intention of filing, then denied it. The NhRP then filed a Motion to Reargue or, alternatively, for Leave to Appeal to the Court of Appeals. On October 25, 2016, a five-judge panel, which included including Justice Webber, unanimously affirmed Justice Webber's denial of the Motion. On November 1, 2016, the NhRP filed a petition for a writ of mandamus with the First Department that demanded that the court order Justice Webber to grant Kiko his statutory right to appeal. In response, on November 10, 2016, the five-judge panel, which again included Justice Webber, unanimously reversed itself and reversed Justice Webber's denial of the Motion.

[1] From the outset and throughout its opinion, the First Department demonstrated its misunderstanding of the nature of the NhRP's habeas corpus proceeding by referring to the lower court as a "motion court." The NhRP did not file a "motion." It filed petitions for a common law writ of habeas corpus and order to show cause, which is a special proceeding pursuant to CPLR 7001. The most serious ramifications of the court's misunderstanding are set forth in Annotation 10.

State University of New York at Stony Brook. In that proceeding, Supreme Court, Suffolk County, declined to sign an order to show cause and in 2014, the Second Department dismissed petitioner's appeal (*Matter of Nonhuman Rights Project, Inc. v Stanley*, 2014 NY Slip Op 68434(U) [2d Dept 2014]).[2]

Without even addressing the merits of petitioner's arguments,[3] we find that the motion court properly declined to sign the orders to show cause since these were successive habeas proceedings which were not warranted or supported by any changed circumstances (*see People ex rel. Glendening v Glendening*, 259 App Div 384, 387 [1st Dept 1940], *affd* 284 NY 598 [1940]; *People ex rel. Woodard v Berry*, 163 AD2d 759 [3d Dept 1990], *lv denied* 76 NY2d 712, 715 [1990]; *see also People ex rel. Lawrence v Brady*, 56 NY 182, 192 [1874]).[4]

CPLR 7003(b) permits a court to decline to issue a writ of habeas corpus if "the legality of the detention has been determined by a court of the state on a prior proceeding for a writ of habeas

---

[2] The First Department failed to note the NhRP's success in seeking a second petition and order to show cause on behalf of the chimpanzees, Hercules and Leo, in the Supreme Court, New York County in 2015. That court issued the requested order to show cause that required Stony Brook University to appear and justify its detention of Hercules and Leo. After oral argument the court failed to decide the issue of personhood or the legality of the chimpanzees' detention solely because it believed itself bound by *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014), *lv denied* 26 N.Y.3d 902 (2015), in which the Third Department held that an entity is required to bear duties and responsibilities to be deemed a legal person for any purpose and that chimpanzees are unable to do so.

[3] By stating it is not "addressing the merits of petitioner's arguments," the First Department suggests its holding does not reach the merits of the chimpanzees' personhood claims or the legality of their detentions, but only whether they may bring second petitions for habeas corpus. Anything else the court states is *dicta,* statements extraneous to the court's holding and not binding authority.

[4] None of the three cases the First Department cited, *People ex rel. Glendening v Glendening*, 259 App. Div. 384, 387 [1st Dept 1940], *aff'd.* 284 NY 598 [1940]; *People ex rel. Woodard v Berry*, 163 AD2d 759 [3d Dept 1990], *lv. denied* 76 NY2d 712, 715 [1990]; or *People ex rel. Lawrence v. Brady*, 56 NY 182, 192 [1874]), support the statement that the lower court properly declined to sign the orders to show cause since these were successive habeas proceedings which were not warranted or supported by any changed circumstances. In *Brady*, at 192, the Court of Appeals stated, "'[i]n this case the relator is restrained of his liberty; and a decision under one writ refusing to discharge him, did not bar the issuing of a second writ by another court or officer." In *Glendening*, at 387, the First Department provided the appropriate standard: "parties to the same habeas corpus proceeding may not continually relitigate *de novo* issues that were fully litigated between them in prior applications in the same proceeding in which long and exhaustive hearings were held where there has been no change in the facts and circumstances determining such issues." *Woodward* simply cited *Glendening* for this applicable standard.

corpus and the petition presents no ground not theretofore presented and determined and the court is satisfied that the ends of justice will not be served by granting it."[5]

Petitioner has filed four identical petitions in four separate state courts in four different counties in New York.[6] Each petition was accompanied by virtually the same affidavits,[7] all attesting to

[5] The First Department quotes, then relies upon, CPLR 7003(b), which provides that a court may decline to issue a writ of habeas corpus from a successive petition *only* when three factors are present: "the legality of the detention has been determined by a court of the state on a prior proceeding for a writ of habeas corpus *and* the petition presents no ground not theretofore presented and determined *and* the court is satisfied that the ends of justice will not be served by granting it" (emphasis added). The First Department then failed to address any factor other than whether the second habeas petitions brought on behalf of Tommy and Kiko contained new grounds not previously presented in the first petitions. However, the legality of the chimpanzees' detention was never determined; both lower courts merely refused to issue the requested orders to show cause. *See The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S. 3d 898, 909 (Sup. Ct. 2015) ("[r]espondents cite no authority for the proposition that a declined order to show cause constitutes a determination on the merits, that is has any precedential value, or that a justice in one county is precluded from signing an order to show cause for relief previously sought from and denied by virtue of a justice in another county refusing to sign the order to show cause."). On appeal in Tommy's case, the Third Department in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery,* 124 A.D.3d 148 (3d Dept. 2014*)*, *lv denied* 26 N.Y.3d 902 (2015) affirmed the lower court ruling, without reaching the legality of Tommy's detention, on the ground that chimpanzees are unable to bear duties and responsibilities and therefore are not legal persons. On appeal in Kiko's case, the Fourth Department in *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti,* 124 A.D.3d 1334 (4th Dept. 20150, *lv denied* 26 N.Y.3d 901 (2015), affirmed the lower court ruling, without deciding the legality of Kiko's detention, on the ground that Kiko's immediate release and subsequent placement in a sanctuary was inappropriate habeas corpus relief. Without previous adjudications on the legality of their detention, the First Department had no authority to deny either second petition, regardless of whether it presented new grounds. Moreover, the ends of justice will only be served if the NhRP is given a full and fair opportunity to litigate the legality of Tommy and Kiko's detentions. *See Allen v. New York State Div. of Parole*, 252 A.D.2d 691 (3d Dept. 1998). Otherwise they will be condemned to a lifetime of imprisonment.

[6] The First Department's statement that "Petitioner has filed four identical petitions in four separate state courts in four different counties in New York" contains the following two errors. (1) In December 2013, the NhRP commenced its habeas corpus litigation on behalf of Tommy, Kiko, Hercules, and Leo by simultaneously filing three nearly identical petitions for writs of habeas corpus and orders to show cause in the three different counties of their detention. (2) In March 2015, the NhRP filed a second petition on behalf of Hercules and Leo in a fourth county, New York County. That petition was not identical to the first three petitions but made substantial additions to the original petition as set forth in Annotations 5, 7, and 9.

[7] The First Department's statement that "Each petition was accompanied by virtually the same affidavits" contains the following error. When the NhRP filed its original Petitions in December 2013 on behalf of Tommy, Kiko, Hercules, and Leo (see Annotations 6 and 9), none of the eleven supporting affidavits, and therefore none of the Petitions, addressed whether a

the fact that chimpanzees are intelligent, and have the ability to be trained by humans to be obedient to rules,[8] and to fulfill certain duties and responsibilities.[9] Petitioner has failed to

---

chimpanzee could shoulder duties and responsibilities. This was because the NhRP had no way of knowing that the Third Department in Tommy's case, *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014), would, for the first time in history, rule that an entity is required to have the capacity to bear duties and responsibilities to be a "person" for any purpose. The most important additions to the second group of Petitions for Habeas Corpus the NhRP filed on behalf of the four chimpanzees were therefore the Supplemental Affidavits by Jane Goodall and five other highly respected chimpanzee cognition experts. The second Petitions for Habeas Corpus stated that the affidavits "demonstrate that chimpanzees such as [Tommy, Kiko, Hercules, or Leo] possess the capacity to shoulder duties and responsibilities within chimpanzee societies and chimpanzee/human societies. These include, but are not limited to, the ability to understand and carry out duties and responsibilities while knowingly assuming obligations and then honoring them, behave in ways that seem both lawful and rule-governed, have moral inclinations and a level of moral agency, ostracize individuals who violate social norms, respond negatively to inequitable situations, have a social life that is cooperative and represents a purposeful and well-coordinated social system, routinely enter into contractual agreements, keep promises and secrets, prefer fair exchanges, perform death-related duties, and show concern for others' welfare."

Moreover, the Third Department's novel ruling that no nonhuman animal, including chimpanzees, could be a "person" for any purpose, as personhood requires one to have the capacity to bear both rights *and* responsibilities and chimpanzees lack that capacity, was wrong. The NhRP had argued that an entity is a "person" if she can bear rights *or* responsibilities. In its decision, the Third Department, *Lavery*, at 151-152, principally relied upon the definition of "person" found in *Black's Law Dictionary* and several cases that relied upon *Black's Law Dictionary.* It defined a "person" as one with the capacity for both duties *and* responsibilities. For this definition *Black's Law Dictionary* relied solely upon the 10th edition of *Salmond on Jurisprudence*. But, when the NhRP located the 10th edition of *Salmond on Jurisprudence,* it found that *Salmond's* definition of "person" actually supported the NhRP's definition of "person" as an entity that can bear rights *or* responsibilities. When the NhRP pointed out its error, *Black's Law Dictionary* promptly promised to correct it in its next edition. (http://www.yesmagazine.org/peace-justice/chimps-could-soon-win-legal-personhood-20170428). The NhRP then asked the First Department, by motion, to consider the NhRP's exchange with *Black's Law Dictionary* and recognize that a major support for the Third Department's decision had collapsed. But the First Department denied the NhRP's motion and perpetuated the Third Department's error.

[8] The First Department's statement that each habeas corpus petition was accompanied by affidavits "all attesting to the fact that chimpanzees are intelligent, and have the ability to be trained by humans to be obedient to rules" committed two errors. First, the court erred by omitting mention of "autonomy"; it was the quality of autonomy, and not intelligence, that girded the NhRP's arguments: see Annotation 10. Second, this statement implies that chimpanzees are only "intelligent" because they have the "ability to be trained by humans and to be obedient to rules." The NhRP's expert affidavits make clear that chimpanzees' autonomy exists independently of any human training.

present any new information or new ground not previously considered. The "new" expert testimony presented by petitioner continues 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. [10]

---

[9] The First Department's statement that *every* petition for habeas corpus filed by the NhRP was accompanied by affidavits demonstrating that chimpanzees possess the ability "to fulfill certain duties and responsibilities" is an error. The NhRP filed no such affidavits attesting to "duties and responsibilities" in any of its first three petitions filed on behalf of Tommy, Kiko, Hercules, and Leo in December 2013, because there was no reason for the NhRP to anticipate the novel ruling of the Third Department that only entities able to bear duties and responsibilities can be "persons" for any purpose. *People ex rel. Nonhuman Rights Project, Inc. v. Laver*y, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den*., 26 N.Y.3d 902 (2015). The Third Department court then took judicial notice that chimpanzees lack this capacity. *Id*. Only in the second round of habeas corpus petitions did the NhRP submit such affidavits – in response to *Lavery* – and argue first, that subsequent courts were not bound by the Third Department's ruling that legal personhood is contingent upon the ability to bear duties and responsibilities and, second, in the alternative, present approximately sixty pages of supplemental expert affidavits directed *solely* to demonstrating that chimpanzees routinely bear duties and responsibilities within chimpanzee communities and mixed chimpanzee/human communities.

[10] The following three statements demonstrate that the First Department failed to grasp *any* of the NhRP's personhood and legal rights arguments: (1) "The 'new" expert testimony presented by petition continues 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" (Annotation 10); (2) "The gravaman of petitioner's argument that chimpanzees are entitled to habeas relief is that the human-like characteristics of chimpanzees render them 'persons'…" (Annotation 13); and (3) "While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees …" (Annotation 16). Instead the First Department substituted a superficial straw man argument – one the NhRP itself rejects as overly broad – then, unsurprisingly, demolished it. The NhRP's actual legal arguments were constructed after first determining what fundamental legal values and principles New York and American courts generally claim to believe in as reflected in their judicial decisions. These included common law liberty, *Union Pacific Railway Co. v. Botsford,* 141 U.S. 250, 251 (1891)("No rights 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 from others, unless by clear and unquestionable authority of law … 'The right to one's person may be said to be a right of complete immunity: to be let alone"); *Rivers v. Katz*, 67 N.Y. 2d 485, 493 (1986)("the greatest possible protection is accorded (one's) autonomy and freedom from unwanted interference with the furtherance of his own desires"), and equality, *Affronti v. Crosson*, 95 N.Y. 2d 713, 719 (2001); *Romer v. Evans*, 517 U.S. 620, 633 (1996)(equal protection prohibits both discrimination based upon either irrational means or illegitimate ends, with illegitimate end being the unlawful detention of a autonomous being, and the identification of persons "by a single trait then deny[ing] them protection across the board").

The NhRP rested both its liberty and equality arguments upon "autonomy," the ability freely to choose how to live one's life. In support of its arguments, the NhRP invoked "liberty" thirty-

Any new expert testimony/affidavits cannot be said to be in response to or counter to the reasoning underlying the decision of the Court in *People ex rel. Nonhuman Rights Project, Inc. v Lavery* (124 AD3d at 148).[11] In declining to extend habeas relief to chimpanzees, the Court in *Lavery*. The Third department did not dispute the cognitive or social capabilities of chimpanzees. Nor, did it, as argued by petitioner, take judicial notice that chimpanzees cannot bear duties and responsibilities. [12] Rather, it concluded:

---

three times, "equality" twenty-two times, and "autonomy" sixteen times in its supporting Memorandum to the lower court, and attached 100 pages of unopposed affidavits from the leading chimpanzee cognition experts in the world, who used the word "autonomy" or "autonomous" twenty-three more times in the course of demonstrating that chimpanzees are autonomous.

Despite the fact that three words "liberty," "equality," and "autonomy" constituted the heart of the NhRP's legal arguments, the First Department failed to mention either "equality" or "autonomy," not even once, and did not use the word "liberty" in the context of the NhRP's arguments.

[11] The First Department's statement "Any new expert testimony/affidavits cannot be said to be in response to or counter to the reasoning underlying the decision of the Court in *People ex rel. Nonhuman Rights Project, Inc. v Lavery* (124 AD3d at 148)" is erroneous. As discussed in Annotation 9, while the NhRP disagreed with *Lavery*'s novel personhood standard, it filed sixty pages of Supplemental (or "new") Expert affidavits for the sole purpose of providing facts intended to counter the *Lavery* court's claim that chimpanzees lack the capacity for duties and responsibilities, facts that had never been presented to any New York court. These new and uncontroverted affidavits demonstrated that chimpanzees routinely bear duties and responsibilities both in chimpanzee communities and within human/chimpanzee communities and therefore can be "persons" even under the flawed *Lavery* holding.

As the first Tommy and Kiko petitions were filed prior to the *Lavery* decision, the NhRP could not then have anticipated its novel holding that, for the first time in history, held that a capacity to bear duties and responsibilities was required for legal personhood. Consequently, the NhRP did not argue that issue or include facts relevant to that issue in its original expert affidavits filed in the First Kiko Petition and First Tommy Petition.

[12] The First Department's statement that "Nor, did (the Third Department), as argued by petitioner, take judicial notice that chimpanzees cannot bear duties and responsibilities" commits an error. No evidence was presented to either the Third Department or the lower court in the *Lavery* case on the factual question of whether chimpanzees could bear any legal duties or submit to societal responsibilities. Instead the Third Department simply took judicial notice that: "[U]nlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights — such as the fundamental right to liberty protected by the writ of habeas corpus — that have been afforded to human beings." But a New York court may only take judicial notice of indisputable facts. *TOA Construction Co. v. Tsitsires*, 54 A.D. 3d 109, 115 (1st Dept. 2008). And when it may properly take judicial notice, a court must first notify the parties of its intention to do so, which the Third Department did not do, *Brown v. Muniz*, 61 A.D.

"[U]nlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights — such as the fundamental right to liberty protected by the writ of habeas corpus — that have been afforded to human beings" (*id.* at 152).

The gravamen of petitioner's argument that chimpanzees are entitled to habeas relief is that the human-like characteristics of chimpanzees render them "persons" for purposes of CPLR article 70. [13] This position is without legal support or legal precedent.

In support of its argument, petitioner submits several expert affidavits, including one by Dr. Jane Goodall, the well-known primatologist, purportedly showing, based on academic research and hands-on experience, that chimpanzees have many human-like capabilities. These include recognizing themselves in reflections; setting and acting toward goals such as obtaining food; undergoing cognitive development with brains having similar structures to those of humans; communicating about events in the past and their intentions for the future, such as by pointing or using sign language; exhibiting an awareness of others' different visual perspectives, such as by taking food only when it is out of their competitors' line of sight; protecting others in risky situations, such as when relatively strong chimpanzees will examine a road before guarding more vulnerable chimpanzees as they cross the road; deceiving others (implying that they are able to anticipate others' thoughts); making and using complex tools for hygiene, socializing, communicating, hunting, gathering, and fighting; counting and ordering items using numbers; [*2]engaging in moral behavior, such as choosing to make fair offers and ostracizing chimpanzees who violate social norms; engaging in collective behavior such as hunting in groups of chimpanzees adopting different roles; showing concern for the welfare of others, particularly their offspring, siblings, and even orphans they adopt; protecting territory and group security; resolving conflicts; and apologizing.

"The common law writ of habeas corpus, as codified by CPLR article 70,[14] provides a summary procedure by which a person' who has been illegally imprisoned or otherwise restrained in his or

---

3d 526, 528 (1st Dept. 2009). Not only was the fact that chimpanzees cannot bear duties and responsibilities not indisputable, it was scientifically false.

[13] See Annotation 10.

[14] The First Department's statement that "The common law writ of habeas corpus, as codified by CPLR article 70" (quoting the Third Department in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery,* 124 A.D.3d 148, 150 (3d Dept. 2014*)*, *lv denied* 26 N.Y.3d 902 (2015)) is erroneous. CPLR Article 70 merely provides the procedure for *using* the common law writ of habeas corpus. It does not codify the substantive law. As stated by the Court of Appeals, the common law writ of habeas corpus "is not the creature of any statute … and exists as a part of the common law of the State." *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875). *E.g*., *People ex rel Lobenthal v. Koehler*, 129 A.D.2d 28, 30 (1st Dept. 1987) ("The 'great writ', although regulated procedurally by article 70 of the CPLR, is not a creature of statute, but a part of the common law of this State"); *People ex rel. Patrick v. Frost*, 133 A.D. 179, 187-88 (2d Dept. 1909); *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 40 (Sup. Ct. 1907) ("A writ of habeas corpus is a common law writ and not a statutory one. If every provision of statute respecting it were repealed, it

her liberty can challenge the legality of the detention" (*id*. at 150, quoting CPLR 7002 [a]). While the word "person" is not defined in the statute, there is no support for the conclusion that the definition includes nonhumans, i.e., chimpanzees.[15] While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees,[16] petitioner does not cite any sources indicating that the United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty,[17] or that the Legislature intended the term "person" in CPLR article 70 to expand the availability of habeas protection beyond humans.[18] No precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a

---

would still exist and could be enforced."), *aff'd*, 195 N.Y. 610 (1909). *See* Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013) ("The drafters of the CPLR made no attempt to specify the circumstances in which habeas corpus is a proper remedy. This was viewed as a matter of substantive law").

[15] The First Department's statement that "While the word 'person' is not defined in the statute, there is no support for the conclusion that the definition includes nonhumans, i.e., chimpanzees," is flawed for two reasons. First, the statement is internally inconsistent: the court concedes that the word "person" in CPLR Article 70 is undefined, then states that the "definition" does not include nonhumans. Second, because CPLR Article 70 only governs the procedure for the common law writ of habeas corpus, and not substantive entitlement to the writ, the issue of whether "person" in Article 70 is solely a common law determination and not a legislative one. See Annotations 14 and 18.

[16] See Annotation 10.

[17] The First Department's statement that "[P]etitioner does not cite any sources indicating that United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty" again demonstrates that it failed to understand that the NhRP brought its habeas corpus petitions solely under New York's *common law* and not under the law of either the New York Constitution or the United States Constitution. The first sentence of the first paragraph of the second round of NhRP's habeas corpus petitions is clear: "This is the second Verified Petition for a *common law* Writ of Habeas Corpus and Order to Show Cause filed by the NhRP …" while the fourteenth paragraph stated that the chimpanzee "is a 'person' within the meaning of the New York *common law* of habeas corpus …" (emphases added).

[18] The First Department erred in stating: "or that the Legislature intended the term 'person' in CPLR article 70 to expand the availability of habeas protection beyond humans," for the word "person" in CPLR Article 70 refers only to the *common law* definition of "person," and not to any Legislative definition. CPLR means "Civil Practice Law and Rules." By definition, it solely governs procedure – *how* a lawsuit proceeds – and not who is a common law "person" for the purpose of habeas corpus. CPLR 102, CPLR 101. Moreover, when the legislature fails to define a word in the CPLR a court must look to its common law definition. *Siveke v. Keena,* 441 N.Y. S 2d 631, 633 (Sup. Ct. 1981); *P.F. Scheidelman & Sons, Inc. v. Webster Basket Co*., 257 N.Y.S. 552, 554-555 (Sup. Ct. 1932), *aff'd*, 236 A.D. 2d 774 (4th Dept. 1932). Finally, to the extent CPLR Article 70 might have been intended to limit who is a "person" under the common law, it would violate the Suspension Clause of the New York Constitution, Art. I, sec. 4. *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 566 (1875)("The remedy afforded by this writ ... is placed beyond the pale of legislative discretion").

"person" and entitled to habeas relief. [19] In fact, habeas relief has never been found applicable to any animal (*see e.g. United States v Mett*, 65 F3d 1531 [9th Cir 1995], *cert denied* 519 US 870 [1996]; *Waste Mgt. of Wisconsin, Inc. v Fokakis*, 614 F2d 138 [7th Cir 1980], *cert denied* 449 US 1060 [1980]; *Sisquoc Ranch Co. v Roth*, 153 F2d 437, 441 [9th Cir 1946]).[20]

The asserted cognitive and linguistic capabilities of chimpanzees do not translate to a chimpanzee's capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions.[21] Petitioner does not suggest that any chimpanzee charged with a crime in New York could be deemed fit to proceed, i.e., to have the "capacity to understand the proceedings against him or to assist in his own defense" (CPL 730.10[1]). While in an amicus brief filed by Professor Laurence H. Tribe of Harvard Law School, it is suggested that it is

---

[19] The First Department's statement that "[n]o precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a 'person' and entitled to habeas relief" is irrelevant to common law adjudication. "The lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope' (*People ex rel. Keitt v. McMann,* 18 N.Y.2d at 263, 273 N.Y.S.2d 897, 220 N.E.2d 653) [internal quotation marks and citation omitted]), *People ex rel. Nonhuman Rights Project, Inc. v. Lavery,* 124 A.D.3d 148, 150-151 (3d Dept. 2014*)*, *lv denied* 26 N.Y.3d 902 (2015)). Moreover, "[i]f 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." *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898, 912 (Supr. Cut, 2015), citing *Obergefell v. Hodges*, 135 S.Ct. 2602 (2015)). Until the NhRP began litigating the issue no one had demanded that a chimpanzee be considered a "person" for the purpose of habeas corpus or any other purpose. Finally, "person" is not a biological concept nor does it necessarily correspond to the natural order. *Byrn v. New York City Health and Hospitals Corp*., 31 N.Y 2d. 194, 201 (1972). No entities' personhood depends upon whether they are presently persons or not. Once the demand for personhood is made, the court must engage in a mature weighing of public policy and moral principle. *Id.*

[20] *None* of the three cases that the First Department cites in the sentence, "In fact, habeas relief has never been found applicable to any animal (*see e.g. United States v Mett*, 65 F3d 1531 [9th Cir 1995], *cert denied* 519 US 870 [1996); *Waste Mgt. of Wisconsin, Inc. v Fokakis*, 614 F2d 138 [7th Cir 1980], *cert denied* 449 US 1060 [1980; *Sisquoc Ranch Co. v Roth*, 153 F2d 437, 441 [9th Cir 1946)" have *anything whatsoever* to do with nonhuman animals. In *Mett*, the federal court merely permitted a corporation to invoke the writ of coram nobis. In *Waste Management,* the federal court simply refused to grant habeas corpus to a corporation "because a corporation's entity status precludes it from being incarcerated or ever being held in custody," *id*. at 140. In *Sisquoc Ranch,* the federal court only held that the fact that a corporation has a contractual relationship with a human being did not give it standing to seek habeas corpus on its own behalf.

[21] As noted in Annotation 10, the characteristic the NhRP asserts as being sufficient for personhood is "autonomy," which it argues in the context of common law liberty and equality. Moreover, the NhRP attached sixty uncontroverted pages of Supplemental Affidavits to the second round of habeas corpus petitions filed on behalf of Tommy and Kiki that specifically stated that chimpanzees can bear duties and responsibilities.

possible to impose legal duties on nonhuman animals, noting the "long history, mainly from the medieval and early modern periods, of animals being tried for offenses such as attacking human beings and eating crops," none of the cases cited took place in modern times or in New York. Moreover, as noted in an amicus brief submitted by Professor Richard Cupp, nonhumans lack sufficient responsibility to have any legal standing, which, according to Cupp is why even chimpanzees who have caused death or serious injury to human beings have not been prosecuted.

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. This argument ignores the fact that these are still human beings, members of the human community.[22]

[22] The First Department states: "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." But, according to the First Department, the NhRP "*ignores the fact* that these are still human beings, members of the human community." The NhRP fully supports the principle that human infants and comatose have, and should have, legal rights. However, that the very young and the comatose are "persons" who cannot bear duties and responsibilities, yet have the capacity to possess legal rights, explodes any claim that the capacity to bear duties and responsibilities is a necessary condition for personhood and legal rights. Instead of entering into the required mature weighing of public policy and moral principle that determines personhood in New York, *Byrn v. New York City Health and Hospitals Corp*., 31 N.Y 2d. 194, 201 (1972), the First Department simply pronounced that humans, and only humans, can have legal rights, without providing any justification. This is merely a naked bias. We have seen such naked biases in other contexts. 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 American, Chief Standing Bear, also "ignore(d) the fact" that Standing Bear was not white when, in 1879 the United States Attorney argued that a Native American could not be a "person" for the purpose of habeas corpus after Standing Bear was jailed for returning to his ancestral lands. *United States ex. rel Standing Bear v. Crook*, 25 F. Cas. 695, 700-01 (C.C.D. Neb. 1879) (No. 14,891). The California Attorney General also "ignore[d] the fact" that a Chinese person was not white when he insisted, in 1854, without success before the California Supreme Court, that a Chinese person could testify against a white man 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 (1875). In 1985 Professor Laurence Tribe "ignore[d] the fact" that Michael Hardwick was gay when he unsuccessfully urged the United States Supreme Court to declare that the criminalization of sodomy was unconstitutional. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Let us not return to these dark places. Chimpanzees are autonomous. Habeas corpus protects autonomy. An autonomous being's species should be irrelevant to whether she should have the fundamental right to the bodily liberty – the autonomy – that habeas corpus protects.

Similarly, petitioner's argument that the word "person" is simply a legal term of art is without merit.[23] As evidence, petitioner points to the doctrine of corporate personhood. In support of this argument, petitioner cites *Santa Clara County v South Pac. RR. Co.* (118 US 394 [1886]), where the United States Supreme Court reaffirmed that a corporation is a person for purposes of the Fourteenth Amendment and, thus, its property cannot be taxed differently from the property of individuals. The underlying reasoning was that the corporation's property was really just the property of the individual shareholders who owned the corporation, and therefore should be protected in the same manner. Again, an acknowledgment that such laws are referenced to humans or individuals in a human community.[24]

---

[23] The First Department's statement that "[s]imilarly, petitioner's argument that the word "person" is simply a legal term of art is without merit" is wrong. "'Person' is a term of art (used) … in a technical sense to signify a subject of rights or duties." *Wartelle v. Women's & Children's Hospital*, 704 So. 2d 778, 781 (La. 1997)(quotation omitted). *See Fifth Ave. Bldg. Co. v. Kernochan,* 178 A.D. 19, 22 (1st Dept. 1917)(terms of art have technical meanings). The New York Court of Appeals noted forty-five years ago that the word "person" in its technical sense i.e., as a legal term of art, designates which entities have the capacity for legal rights. *Byrn v. New York City Health and Hospitals Corp*., 31 N.Y 2d. 194, 201 (1972)("[U]pon according legal personality to a thing the law affords it the rights and privileges of a legal person [.]"), citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909), Hans Kelsen, *General Theory of Law and State* 923-109(1945); George Whitcross Paton, *A Textbook of Jurisprudence* 349-356 (4th ed. G.W. Paton & David P Derham eds. 1972). "[T]he significant fortune of legal personality is the capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). Paton, at 393, noted that idols may be persons. Gray said, at 39, that "[t]here is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person" and, at 43, that "animals may conceivably be legal persons." Moreover, the NhRP cited many more cases than *Santa Clara County v South Pac. RR. Co.*, 118 U.S. 394 (1886). Some of them may be found in Annotations 22 and 24.

[24] The First Department erroneously believes that "human" and "person" are synonyms. But no court has ever so held. Moreover, there is no nonarbitrary reason for the First Department to ignore not just the scholars to which the Court of Appeals cited in *Byrn v. New York City Health and Hospitals Corp*., 31 N.Y 2d. 194 (1972)(set forth in Annotation 19), but the following examples of sister common law (English-speaking) countries and to dismiss them all, without any justification, as being "not relevant to the definition of 'person' in the United States and certainly … of no guidance to the entitlement of habeas relief by nonhumans in New York." These include New Zealand, which bestowed personhood upon a river, *WHANGANUI IWI and THE CROWN* (August 30, 2012), available at http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CWhanganuiRiverAgreement.pdf (last viewed September 3, 2015), and a national park in 2016, http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183705.html, and India, which bestowed personhood upon a river and a glacier in 2017, *Mohd. Salim v. State of Uttarakhand & Others*, (PIL) 126/2014 (High Court Uttarakhand, 03/20/2017), a mosque, *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369, ¶15 (Lahore High Court, Full Bench), an idol, *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian

Petitioner's additional argument that "person" need not mean "human," as evidenced by a river in New Zealand designated as a legal person owning its own riverbed pursuant to a public agreement with indigenous peoples of New Zealand and pre-independence Indian court decisions recognizing various sacred entities as legal persons is not relevant to the definition of "person" [*3]here in the United States and certainly is of no guidance to the entitlement of habeas relief by nonhumans in New York.[25]

Even assuming, however, that habeas relief is potentially available to chimpanzees, the common-law writ of habeas corpus does not lie on behalf of the two chimpanzees at issue in these proceedings. Petitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that "there are no adequate facilities to house [them] in proximity to the [c]ourt."[26] Instead, petitioner 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." Petitioner submits an affidavit from the

---

Appeals 245, 264 (1925), and the holy books of the Sikh religion, *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, A.I.R. 2000 S.C. 421, in earlier cases. Most relevant, an Argentine civil law court in 2016 recognized a chimpanzee named Cecilia as a "non-human person" and ordered her released from a Mendoza Zoo and sent to a sanctuary in Brazil. *Third Court of Guarantees, Mendoza, Argentina,* File No. P-72.254/15 at 22-23. Some of these cases cite to the same secondary sources as did the Court of Appeals in *Byrn.* These cases, as well as *Byrn* and the numerous sources it cited, make clear that "person" and "human" are not synonymous and never have been. Moreover, more than twenty years ago, the New York Legislature designated certain nonhuman animals, including chimpanzees, *In re Fouts,* 677 N.Y.S. 2d 699 (Sur. 1998)(five chimpanzees), as "persons" by enacting a Pet Trust Statute, EPTL 7-8.1, which allows nonhuman animals to be trust beneficiaries and therefore "persons" as only "persons" may be trust beneficiaries in New York. *Lenzner v. Falk*, 68 N.Y.S 2d 699, 703 (Sup Ct. 1947); *Gilman v. McCardle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883), *rev. on other grds*., 99 N.Y. 451 (1885). "Human" and "person" obviously are not synonyms.

[25] See Annotation 24.

[26] The fact that "[p]etitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that 'there are no adequate facilities to house [them] in proximity to the [c]ourt'" is irrelevant to the determination of whether Tommy and Kiko are entitled to habeas corpus relief. CPLR 7003(a) specifically provides for those situations "where the petitioner does not demand production of the person detained" and requires the court to "order the respondent to show cause why the person detained should not be released." The NhRP followed that statute, as have other petitioners. *E.g. State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982). As there is no legal requirement that a detained party be brought before the court, the failure to do so may not be held against the petitioner and is irrelevant to the determination of whether habeas corpus relief should be granted. Bringing Tommy and Kiko to court would have been dangerous to both the chimpanzees and the public and unnecessary to the adjudication of personhood and the legality of their detention. The NhRP followed the statute by bringing the petition as an order to show cause and must not be penalized for doing so.

Executive Director of Save the Chimps stating that this organization agrees to provide a permanent sanctuary to any and all chimpanzees released by court order. Save the Chimps maintains that the warm, humid climate in southern Florida is "ideal for chimpanzees," as it is similar to the species' native Africa.

Since petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court (*see Matter of Nonhuman Rights Project, Inc. v Presti*, 124 AD3d at 1334; *compare People ex rel. Dawson v Smith*, 69 NY2d 689 [1986], *with People ex rel. Brown v Johnston*, 9 NY2d 482 [1961]).[27]

Seeking transfer of Kiko and Tommy to a facility petitioner asserts is more suited to chimpanzees as opposed to challenging the illegal detention of Kiko and Tommy does not state a cognizable habeas claim. Petitioner's reliance upon *Brown v Johnston* (9 NY2d at 482) as standing for an opposite result is misplaced. In *Brown*, the Court of Appeals found that the writ was properly sought by an inmate who had been transferred from prison to "an institution for custody of prisoners who are declared insane," based on his contention that he was "sane" and should accordingly be returned to prison (*Dawson v Smith*, 69 NY2d at 691). "The confinement in *People ex rel. Brown v Johnston* . . . was in an institution separate and different in nature from the correctional facility to which petitioner had been committed pursuant to the sentence of the court, and was not within the specific authorization conferred on the Department of Correctional Services by that sentence" (*id.*). By contrast, in *Dawson*, the Court found that habeas relief was properly denied as petitioner did "not seek his release from custody in the facility, but only from confinement in the special housing unit, a particular type of confinement within the facility which the Department of Correctional Services [was] expressly authorized to impose on lawfully sentenced prisoners committed to its custody" (*id.*). This is analogous to the situation here.[28]

---

[27] See Annotation 28.

[28] The First Department's statement, "Since petitioner does not challenge the legality of the chimpanzee' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court" reflects its misunderstanding of the relief the NhRP seeks and a misunderstanding of New York law for the following reasons.

First, the First Department confused the NhRP's challenge to the legality of Tommy and Kiko's detentions with a challenge to the conditions of their confinement. At one point the First Department recognized that the NhRP "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.'" (emphasis added). But, in the next paragraph, the First Department states that the NhRP "does not challenge the legality of the chimpanzees' detention," then states that "[s]eeking transfer of Kiko and Tommy to a facility petitioner asserts is more suited to chimpanzees as opposed to challenging the illegal detention of Kiko and Tommy does not state a cognizable habeas claim."

The NhRP's *entire case* was a challenge to the legality of the detentions of Tommy and Kiko and an attempt to obtain an order for their release. Only after making such an order, the court would

necessarily have to determine where the chimpanzees should live, as they need to live somewhere, since they are neither competent nor indigenous to North America. The courts of New York 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 v. People*, 20 N.Y. 562, 632 (1860)(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). The NhRP's briefs to the First Department argued that Tommy and Kiko were "illegally imprisoned," that their "detention is unlawful," that they are "unlawfully detained." The term "unlawful" appears six times in the NhRP's briefs, which concluded with the NhRP asking the court to "issue the order to show cause for a hearing to determine the legality of [the chimpanzees'] detention." Both the Third Department in *Lavery* and the New York County Supreme Court in *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898 (Sup. Ct. 2015) had no trouble understanding this. The Third Department stated, "Notably, we have not been asked to evaluate the quality of Tommy's current living conditions in an effort to improve his welfare." 124 A.D.3d at 149 (citation omitted). The Supreme Court stated, "The conditions under which Hercules and Leo are confined are not challenged by petitioner… [T]he sole issue is whether Hercules and Leo may be legally detained at all." 16 N.Y.S.3d at 901.

Second, the NhRP *could* have used the writ of habeas corpus to challenge the conditions of confinement of the chimpanzees had it wished, though it did not. *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); *Matter of MHLS ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989) (mental patient transferred from secure to non-secure facility); *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 251 (2d Dept. 1993)(habeas corpus "available to challenge conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. LaBelle v. Harriman*, 35 A.D.2d 13, 15 (3d Dept. 1970) (same); *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").

In ruling that the NhRP could not use the writ of habeas corpus to challenge the conditions of the chimpanzees' confinement, the First Department relied solely upon two inapt cases, *Nonhuman Rights Project, Inc.*, *ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), and *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 691 (1986), even asserting *Dawson* is "analogous to the situation here." There the First Department was mistaken. The Fourth Department in *Presti* was wrong then for the same reasons the First Department is wrong now. In *Dawson*, the Court of Appeals *reaffirmed* the notion that habeas corpus *can* be used to seek a transfer to an "institution *separate and different in nature* from the correctional facility to which petitioner had been committed[.]" (emphasis added) (citing *Johnston*). In distinguishing *Johnston*, the Court of Appeals in *Dawson* explained, "[h]ere, by contrast, petitioner *does not seek his release from*

While petitioner's avowed mission is certainly laudable, the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process (*see Lewis v Burger King,* 344 Fed Appx 470, 472 [10th Cir 2009], *cert denied* 558 US 1125 [2010]).[29]

---

custody in the facility, but only from confinement in the special housing unit, a particular type of confinement within the facility which the Department … is expressly authorized to impose on lawfully sentenced prisoners[.]" *Id.* (citations omitted, emphasis added). Just as in *Johnston* and unlike *Dawson*, the NhRP seeks complete release of Tommy and Kiko from their imprisonments in small cages to an appropriate chimpanzee sanctuary, an environment obviously completely "separate and different in nature." And unlike the habeas corpus petitioner in *Dawson*, Kiko and Tommy are not inmates properly convicted of a crime. They can be legally ordered released from their allegedly illegal detention.

[29] Relying solely upon the case of *Lewis v. Burger King*, 344 Fed. Appx. 470 (10th Cir. 2009), the First Department states that "according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process." But the *Lewis* case does not support this assertion.

The NhRP filed its petitions in state court, not federal court, and sought a common law, not a statutory and not a constitutional remedy. The *Lewis* case has nothing to do with the common law, but merely rejects the *pro se* plaintiff's claim that her service dog has standing under Article III of the United States Constitution to sue under the Americans with Disabilities Act of 1990, a ruling with which the NhRP agrees. However, the question of who is a *common law* person for the purpose of the *common law* writ of habeas corpus is *by definition uniquely* a question for the courts. The Legislature, *by definition*, does not make the common law.

Kiko and Tommy's thinghood derives from the common law. However, when justice requires, New York courts refashion the common law – especially the common law of habeas corpus – with the directness Lord Mansfield displayed in *Somerset v. Stewart*, when he held human slavery "so *odious* that nothing can be suffered to support it but positive law." 98 Eng. Rep. at 510 (emphasis added). Slaves employed the common law writ of habeas corpus to challenge their status as things. *Lemmon*, 20 N.Y. at 604-06, 618, 623, 630-31 (citing *Somerset*); *In re Belt*, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848); *In re Kirk*, 1 Edm. Sel. Cas. 315 (citing *Somerset* and *Forbes v. Cochran, 107 Eng. Rep. 450, 467 (K.B. 1824)*; *In re Tom*, 5 Johns. 365). The New York Court of Appeals has long rejected the claim that "change…should come from the Legislature, not the courts." *Woods v. Lancet*, 303 N.Y. 349, 355 (1951)("We abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.").

Common law is "lawmaking and policymaking by judges…in principled fashion, to fit a changing society." 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, 729 (1992). In response to the question in *Woods* whether the Court should bring "the common law of this state, on this question [of whether an infant could bring suit for injuries suffered before birth] into accord with justice[,]" it answered: "we should make the law conform to right." "Chief Judge Cardozo's preeminent work *The Nature of Judicial Process* captures our role best if judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of

Accordingly, the judgment (denominated an order) of the Supreme Court, New York County (Barbara Jaffe, J.), entered January 29, 2016, declining to sign an order to show cause seeking the transfer of Kiko to a primate sanctuary,[30] and the judgment (denominated an order) of [*4]the same court and Justice, entered July 8, 2016, effective nunc pro tunc as of December 23, 2015, declining to sign an order to show cause seeking such relief on behalf of Tommy,[31] should be affirmed, without costs.

All concur.

Judgment (denominated an order), Supreme Court, New York County (Barbara Jaffe, J.), entered January 29, 2016, and judgment, same court and Justice, entered July 8, 2016, affirmed, without costs.

Opinion by Webber, J. All concur.

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 8, 2017

CLERK

Footnotes

Footnote 1: Assuming habeas relief may be sought on behalf of a chimpanzee, petitioner undisputedly has standing pursuant to CPLR 7002(a), which authorizes anyone to seek habeas relief on behalf of a detainee.

---

ours, they ought not to tie, in helpless submission, the hands of their successors." *Caceci v. Do Canto, Const. Corp.*, 72 N.Y.2d 52, 60 (1988)(citing Cardozo, *Nature of Judicial Process*, at 152).

In sum, New York courts have "not only the right, but the duty to re-examine a question where justice demands it" to "bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.'" *Woods*, 303 N.Y. at 355 (citation omitted).

[30] As noted in Annotation 28, the NhRP did not seek Kiko's transfer to a primate sanctuary.

[31] As noted in Annotation 28, the NhRP did not seek Tommy's transfer to a sanctuary.