

Court of Appeals

STATE OF NEW YORK



IN RE NONHUMAN RIGHTS PROJECT, INC.,
ON BEHALF OF TOMMY,

Petitioner-Appellant,

against

PATRICK C. LAVERY, individually and as an officer of
Circle L Trailer Sales, Inc., DIANE LAVERY,
and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents.

(Additional Caption on the Reverse)

PROPOSED BRIEF BY *AMICI CURIAE* PHILOSOPHERS IN SUPPORT OF THE PETITIONER-APPELLANT

MARY JEAN MEZZINA, ESQ.
3434 Milburn Avenue
Baldwin, New York 11510
516-319-9239

Attorney for Amici Curiae Philosophers
Kristin Andrews (York University);
Gary Comstock (North Carolina State
University); G.K.D. Crozier (Laurentian
University); Sue Donaldson (Queen's
University); Andrew Fenton (Dalhousie
University); Tyler M. John (Rutgers
University); L. Syd M Johnson (Michigan
Technological University); Robert Jones
(California State University, Chico); Will
Kymlicka (Queen's University); Letitia
Meynell (Dalhousie University); Nathan
Nobis (Morehouse College); David Peña-
Guzmán (California State University, San
Francisco); James Rocha (California State
University, Fresno); Bernard Rollin
(Colorado State); Jeffrey Sebo (New York
University); Adam Shriver (University of
British Columbia); Rebecca L. Walker (Uni-
versity of North Carolina at Chapel Hill)

Date Completed: February 23, 2018

IN RE NONHUMAN RIGHTS PROJECT, INC.,
ON BEHALF OF KIKO,

Petitioner-Appellant.

against

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

Respondents.

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—against—

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OF CIRCLE L TRAILER SALES, INC., DIANE LAVERY, AND
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CARMEN PRESTI, INDIVIDUALLY AND AS AN
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CHRISTIE E. PRESTI, INDIVIDUALLY AND AS AN OFFICER AND
DIRECTOR OF THE PRIMATE SANCTUARY, INC., AND
THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

BRIEF OF *AMICI CURIAE* PHILOSOPHERS¹ IN SUPPORT OF PETITIONER-APPELLANT

¹ Kristin Andrews (York University); Gary Comstock (North Carolina State University); G.K.D. Crozier (Laurentian University); Sue Donaldson (Queen's University); Andrew Fenton (Dalhousie University); Tyler M. John (Rutgers University); L. Syd M Johnson (Michigan Technological University); Robert Jones (California State University, Chico); Will Kymlicka (Queen's University); Letitia Meynell (Dalhousie University); Nathan Nobis (Morehouse College); David Peña-Guzmán (California State University, San Francisco); James Rocha (California State University, Fresno); Bernard Rollin (Colorado State); Jeffrey Sebo (New York University); Adam Shriver (University of British Columbia); Rebecca L. Walker (University of North Carolina at Chapel Hill).

I. Interest of the *Amici Curiae*

We the undersigned submit this brief as philosophers with expertise in animal ethics, animal political theory, the philosophy of animal cognition and behavior, and the philosophy of biology in support of the Nonhuman Rights Project's efforts to secure *habeas corpus* relief for the chimpanzees Kiko and Tommy.² The Appellate Division, First Department's ruling in *Matter of Nonhuman Rights Project, Inc. v. Lavery* (2017 NY Slip Op 04574), declining to issue an order to show cause seeking *habeas corpus* relief and their transfer to a primate sanctuary, uses a number of incompatible conceptions of person which, when properly understood, are either philosophically inadequate or in fact compatible with Kiko and Tommy's personhood. The undersigned have long-standing active interests in our duties to other animals and reject arbitrary distinctions used to (rightly) protect humans while denying adequate protections for other animals given their relevantly similar vulnerabilities to harms and relevantly similar interests in avoiding such harms. We submit this brief in our shared interest in ensuring a more just co-existence with other animals who live in our

² The authors thank Andrew Lopez for his invaluable research assistance.

communities. We strongly urge this Court, in keeping with the best philosophical standards of rational judgment and ethical standards of justice, to recognize that, as nonhuman persons, Kiko and Tommy should be granted a writ of *habeas corpus* and their detainers should have the burden of showing the lawful justification of their current confinement.

II. Summary of the Argument

The Nonhuman Rights Project (NhRP) is pursuing common law writs of *habeas corpus* that challenge the lawfulness of the captivity of chimpanzees Kiko and Tommy. As recently noted by the First Department of the Appellate Division of the New York Supreme Court, the NhRP's goal 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 (*Matter of Nonhuman Rights Project, Inc. v. Lavery* (2017 NY Slip Op 04574)).

To date, the courts have decided against the NhRP, although without fully addressing whether Kiko and Tommy are the sorts of beings who can enjoy *habeas corpus* relief. As noted by the First Department, the central issue is whether the concept of ‘personhood’ applies to chimpanzees (*Pan troglodytes*). In denying writs of *habeas corpus* for Kiko and Tommy the court does not contest the scientific evidence of chimpanzee agential and psychological capacities that has been presented by NhRP, nor the facts of the cases. They maintain, rather, that the concept of ‘personhood’ cannot refer to nonhuman beings.

We write as a diverse group of philosophers who share the conviction that if the concept of ‘personhood’ is being employed by the courts to determine whether to extend or deny the writs of *habeas corpus*, they should employ a *consistent* and *reasonable* definition of ‘personhood’ and ‘persons.’ We believe that the previous judgements offered by the Third, Fourth, and First Departments of the Appellate

Division of the New York Supreme Court applied inconsistent definitions of ‘personhood.’

In this brief, we argue that there is a diversity of ways in which humans (*Homo sapiens*) are ‘persons’ and there are no non-arbitrary conceptions of ‘personhood’ that can include all humans and exclude all nonhuman animals. To do so we describe and assess the four most prominent conceptions of ‘personhood’ that can be found in the rulings concerning Kiko and Tommy, with particular focus on the most recent decision, *Nonhuman Rights Project, Inc v Lavery* (2017 NY Slip Op 04574):

1. **Species Membership.** This conception is arbitrary because it picks out one level of biological taxonomic classification, *Homo sapiens*, and confers moral worth and legal status on its members. Various attempts in the literature to justify this approach are self-defeating because they demonstrate that the criteria defending the choice of a specific biological group are actually doing the moral work, and these criteria invariably leave out some humans or include some nonhuman animals. This is because our species, like every other, is the product of

gradual evolutionary processes that create an array of similarities between species and an array of differences within them.

2. **Social Contract.** This conception has been misconstrued by previous Courts as endowing personhood on contractors; instead, social contracts make citizens out of persons. The exclusion of an individual (or species) from the contract does not strip that individual (or species) of personhood.
3. **Community Membership.** This conception rests on the idea that personhood has a social dimension and is importantly linked to membership in the human community. On a *Wide* view, to be a person is to be embedded in social relationships of interdependency, meaning, and community. Kiko and Tommy clearly meet this criterion: we have made them a part of our human community of persons. On a *Narrow* view, to be a person requires not just social embedding, but also the possession of certain psychological capacities, such as beliefs, desires, emotions, rationality and autonomy. Again, these

capacities are reasonably ascribed to Kiko and Tommy. On either view, they are members of our community.

4. **Capacities.** This conception, which is endorsed by the NhRP, maintains that personhood rests on having certain capacities. Autonomy is typically considered a capacity sufficient (though not necessary) for personhood. Violations of autonomy constitute a serious harm. The affidavits from primatologists support our view that chimpanzees are autonomous beings, entailing that Kiko and Tommy are persons.

Each of these different conceptions supports different reasoning regarding personhood. The first, species membership, is morally weak due to its arbitrary character. The other three, when properly understood, entail that Kiko and Tommy can qualify as persons. On these grounds we agree with the NhRP that it is unjust to deny Kiko and Tommy *habeas corpus* relief.

III. Argument

1. Species Membership

The First Department offers a Species Membership argument for denying the NhRP's claim that Kiko and Tommy are entitled to *habeas*

relief when it argues that, while infants or comatose persons have legal rights despite their inability to bear social and legal duties or responsibilities, they are nonetheless “human beings, members of the human community” (*Matter of Nonhuman Rights Project, Inc. v. Lavery* (2017 NY Slip Op 04574)). Further, the First Department argues that in decisions under which nonhumans, such as corporations, have been treated as ‘persons,’ the “laws are referenced to humans or individuals in a human community” (*Matter of Nonhuman Rights Project, Inc. v. Lavery* (2017 NY Slip Op 04574)). Thus, the First Department argues that all and only members of the human species are recognized as persons by the law, and exceptions can be justified solely on the basis of some unspecified relation to members of that species.

In their appeal to species membership, the First Department is using a biological classification to determine the proper scope of legal rights and protections. Historically, U.S. law, and in particular the ascription of rights and privileges, has been informed by biological theories. The biological traits and classifications that have been considered legally salient have changed significantly over time (e.g., race or sex), keeping pace with both scientific and moral progress, and

correcting some of the egregious errors of earlier scientific theories and political regimes.

We endorse the idea that the biological sciences must inform legal practice, but we maintain that species membership alone cannot rationally be used to determine who is a person or a rights holder. The concept of ‘personhood,’ with all its moral and legal weight, is not a biological concept and cannot be meaningfully derived from the biological category *Homo sapiens*. Moreover, species are not ‘natural kinds’ with distinct essences; therefore, there is no method for determining an underlying, biologically robust, and universal ‘human nature’ upon which moral and legal rights can be thought to rest. Any attempt to specify the essential features of ‘human nature’ either leaves out a considerable number of humans—often the most vulnerable in our society—or includes members of other species.

1.1 Species as a biological category

Species is only one level of biological classification that reflects what is sometimes called the ‘Tree of Life.’ While chimpanzees (*Pan troglodytes*) and humans (*Homo sapiens*) are different species and have been placed in different genera (*Homo* and *Pan*, respectively), they

belong to the same family, Hominidae, and so share every level of classification above (order, Primates; class, Mammalia; etc.). The basic form of this system of classification was introduced by Carl Linnaeus in 1735. His system helped to bring order to the descriptive work of early modern biologists who were endeavoring to discover and specify the essential characteristics that made each organism a member of its kind.

The great insight of Charles Darwin (more than 100 years after Linnaeus) was that the differences between species did not reflect the existence of essential characteristics, but instead were the product of a gradual process of natural selection. Darwin (1859) emphasized the diversity of organic populations, due to a slow accumulation of changes producing distinct varieties within a population and eventually new species.

The gradualism of evolution suggests there are no species essences, no set of properties both necessary and jointly sufficient for an organism to be a member of a particular species. In other words, species are not natural kinds, at least as natural kinds are commonly understood. There are three central reasons for this:

1. There is a great deal of similarity across species because all organisms on the planet are more or less closely related to each other; it is often the case that the more closely two species are related, the more similar they tend to be.
2. There tends to be a substantial degree of natural variation among organisms within a particular species—a feature of populations ‘exploited’ by natural selection.
3. Species change over time—they evolve—so even if all members of a species shared some characteristic at one time, this would probably not be true of all their descendants, and was definitely not true of all their ancestors.

1.2 The ‘Species Problem’

These facts about the process of evolution and the character of living organisms create a fundamental problem for scientists studying the classification of organisms, referred to as the ‘Species Problem.’ Although evolutionary theory facilitates the grouping aspect of classification, offering a principled criterion for grouping organisms together—shared ancestry—it offers no clear criteria for the level at which to rank them. Whether an ancestral grouping should be

considered a variety, subspecies, species, superspecies, subgenus, or genus can be an open question. While, among sexual species, interbreeding has often been used to define the boundaries of species groups, this is controversial and leads to its own set of problems and counterexamples (e.g., Neanderthals and our own species).

When understood as a biological classification, it is difficult to see why species, or indeed any other taxonomic category, should bear any moral weight. Certainly, there are capacities or relationships that may typically be shared by the members of a particular species that are morally relevant (as we discuss in Section 4), but then it is the capacities that are doing the ethical work—not species. Species membership is at best a heuristic that aids a superficial assessment of moral status.

1.3 Implications for human nature

The use of the term ‘human nature’ typically implies the existence of a core essence universally shared by all and only human beings; however, the biological category *Homo sapiens* cannot offer a sufficiently stable or consistent foundation for ‘human nature’ (Hull 1986).

The significant similarity between humans and our closest living relatives might be difficult to see because our evolutionary proximity has often been overlooked. In fact, chimpanzees are about as closely related to humans as African elephants are to Indian elephants (Langergraber et al. 2010; Rohland et al. 2010). This suggests that a kind of prejudice might be responsible for our tendency to perceive our species as radically distinct from others in the animal kingdom. Indeed, a number of theorists (e.g., Diamond 1993, p. 97; Goodman et al. 1998; Wildman et al. 2003) have argued that chimpanzees and bonobos (*Pan paniscus*) ought to be reclassified, alongside humans, in the genus *Homo*. This thought is not new; in the 18th century, Linnaeus wrote to a colleague that his reasons for placing ‘Man’ in a distinct genus had more to do with placating theologians than with the principles of natural history (Frängsmyr et al. 1983, 172).

Using species membership to determine who has legal status requires a justification of why species membership should be preferred over genus membership, which we share with Neanderthals and other hominins, or over family membership, which we share with chimpanzees and the other great apes. After all, the lesson of

Darwinism is that there are no hard and fast distinctions among any of the categories in the Tree of Life, but only a nested organizational hierarchy.

1.4 Conclusions regarding Species Membership

Efforts to identify a set of diagnostic traits both universal and unique to *Homo sapiens* invariably fail. Either they leave out some humans, or they include members of other species. Using the biological category *Homo sapiens* to define ‘personhood’ and to determine who has legal status is arbitrary and makes little sense given what we know of evolutionary processes and our evolutionary history.

The NhRP seeks to have Kiko and Tommy classified as persons based on the capacities they share with other persons. If persons are defined as ‘beings who possess certain capacities,’ and humans usually possess those capacities, then being human can be used to predict with a degree of accuracy that a particular individual will also have those capacities, and be a person. But it is an arbitrary decision to include species membership alone as a condition of personhood, and it fails to satisfy a basic requirement of justice: that we treat like cases alike. It

picks out a single characteristic as the one that confers rights, without providing any reason for thinking it has any relevance to rights.

2. A Social Contract Conception

The Third Department, citing Cupp, argues that “Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of the US system of government. Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, ‘rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights’” (*People ex rel. Nonhuman Rights Project, Inc. v. Lavery* (2014 NY Slip Op 08531)).

The influential social contract theories that emerged in Europe in the 17th and 18th centuries, and which inspired the language and ideals found in the US Constitution, would disagree for at least three reasons. These reasons are: (1) not all rights depend on the existence of a social contract, (2) the social contract does not produce ‘persons,’ and (3) personhood is not conditional on bearing duties and responsibilities.

2.1 Not all rights depend on the existence of a social contract

Among the most influential of social contract philosophers are Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, who maintain that all persons have ‘natural rights’ that they possess independently of their willingness or ability to take on social responsibilities (Hobbes 1651; Locke 1689, 1698; Rousseau 1762). These rights, which we possess in the state of nature, include the right to absolute freedom and liberty. Upon contracting with our fellows, we do not become ‘persons’, but rather ‘citizens’; and we do not suddenly acquire rights, but rather give up our natural rights, sometimes in exchange for civil and legal rights.

The Third Department, citing Cupp, appears to advance an argument that persons are those who have rights by virtue of their capacity to bear responsibilities. They acquire those responsibilities the moment they assent to an “express or implied” (*People ex rel. Nonhuman Rights Project, Inc. v. Lavery* (2014 NY Slip Op 08531)) social contract. The social contract, according to this line of thought, is the mechanism whereby persons take up societal duties and responsibilities, receiving rights in exchange. But this is not how political philosophers have understood the meaning of the social

contract historically or in contemporary times. In effect, the Third Department, and in turn the First Department, has it backwards.

Rousseau explicitly rejected the idea that the social contract gives rights to persons, proclaiming, “Man is born free, and everywhere he is in chains” (Rousseau 1762, Book 1, Chapter 1). These chains, for Rousseau, are self-imposed, forged by ourselves, when we give up our natural rights and freedoms and place ourselves under the authority of another. The social contract ‘chains’ us. We find a similar argument in Hobbes. What we acquire with a social contract, according to Hobbes, are law and morality, not rights. In fact, in the act of creating a social contract, we give up nearly all of our rights, save one: the right to life. And what we receive in exchange for giving up all these rights are not new rights, but rather security in the form of the protection of the sovereign.

Locke believed that we form societies to protect the institution of private property. We make a compact to leave the state of nature and form a society because we have a shared interest in protecting our property, including our own bodies. In this transition from the state of nature to the state of civil society, we gain some valuable things,

including laws, the executive power needed to enforce the laws, and judges to adjudicate property disputes. But we lose our previously held rights, including the right to protect ourselves by any means necessary and punish those who transgress against our property.

We ought not understand the social contract, therefore, in terms of the acquisition of rights, *per se*. Rather, we should think about it in terms of the acquisition of a single duty: to obey the law.

2.2 The social contract does not produce ‘persons’

In the philosophies of Hobbes and Rousseau, with the advent of the social contract we see the creation of an ‘artificial man’ (the sovereign or Leviathan), not a ‘person.’ This artificial man is an abstraction since no real person could be literally composed of the rights and powers of others. Rousseau describes this ‘new person’ as a collective created only by a truly democratic social contract. Locke describes a ‘body politic’ to which contractors submit. The sole person created by the social contract, while important, is a mere abstraction, and by no interpretation an actual person.

The upshot of this is that social contracts create citizens, not persons. Citizens are individuals who are subject to the laws authorized

by the contract. Notably, the U.S. Constitution mentions the term ‘persons’ fifty-seven times, but does not define it. The 14th Amendment, however, distinguishes between persons and citizens. This is consistent with social contract theory, which holds that only persons can bind themselves through a contract and, in so doing, become citizens. While persons do not depend on a social contract, the social contract depends on persons who will be its ‘signatories.’

It follows from social contract theory that all contractors must be persons, but not that all persons must necessarily be contractors. There can be persons who are not contractors—either because they choose not to contract (e.g., adults who opt for life in the state of nature) or because they cannot contract (e.g., infants and some individuals with cognitive disabilities).

Social contract philosophers have never claimed—not now, not in the 17th century—that the social contract can endow personhood on any being. The contract can only endow citizenship on persons who exist prior to the contract and agree to it. If persons did not exist before the contract, there would be no contract at all since only persons can

contract. Personhood, therefore, must be presupposed as a characteristic of contractors in social contract theories.

2.3 Personhood is not conditional on bearing duties and responsibilities

The First Department, citing Cupp, claims that “nonhumans lack sufficient responsibility to have any legal standing” (*Matter of Nonhuman Rights Project, Inc. v. Lavery* (2017 NY Slip Op 04574)). The Third Department has also argued that chimpanzees, unlike human beings, “cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions” (*People ex rel. Nonhuman Rights Project, Inc. v. Lavery* (2014 NY Slip Op 08531)), and thus cannot have legal rights. Further, citing Gray, it is stated that “the legal meaning of a ‘person’ is ‘a subject of legal rights and duties’” (*People ex rel. Nonhuman Rights Project, Inc. v. Lavery* (2014 NY Slip Op 08531)).

In contrast, the NhRP has argued that an entity is a ‘person’ if she can bear rights *or* responsibilities. The reason for this broader understanding of ‘person’ is that not all persons can be held accountable for their actions and bear societal duties. Infants, children, and those

found not guilty by reason of insanity cannot be held accountable and cannot bear legal or societal duties. They are, nonetheless, persons.

The writ of *habeas corpus* challenges the status of ‘things’ currently ascribed to Kiko and Tommy. At issue in the cases of Kiko and Tommy is not whether they can bear legal duties or be held legally accountable for their actions, but rather whether they are persons and have legal rights. Among individuals, only those who are persons can have legal duties and responsibilities. Non-persons cannot. But the personhood of chimpanzees cannot be conditional on bearing legal duties and responsibilities, because being legally recognized as a person is and must be logically prior to bearing legal duties and responsibilities.

2.4 Conclusions regarding the Social Contract

While legal duties, legal accountability, and societal responsibilities are acquired by citizens under social contracts, neither the status of citizenship nor personhood depend on the ability to bear those duties and responsibilities. Many humans who are uncontroversially legally recognized as persons and citizens cannot bear those duties and responsibilities and cannot be held legally accountable

for their actions. Therefore, whether or not Kiko and Tommy can bear legal duties and responsibilities, or be held legally accountable, is irrelevant to their legal status as persons. Secondly, social contracts do not create the rights associated with personhood. In agreeing to a social contract, we give up our natural rights in exchange for other societal benefits. Finally, social contract philosophers have consistently maintained that social contracts do not make us persons, but rather create citizens out of existing persons. Social Contract theory, therefore, cannot and does not rule out the personhood of Kiko and Tommy.

3. A Community Membership Conception

As already mentioned, the First Department in *Lavery* held that the ability to acknowledge legal duties and responsibilities is required for personhood, and entitlement to *habeas* relief. In response, NhRP argued that this cannot be the right standard for personhood, since it would imply that humans who cannot acknowledge such duties and responsibilities, such as infants and comatose individuals, are not persons. In addition to presenting a species conception of persons, the First Department addressed this objection by asserting that such

individuals are members of “the human community” (*Matter of Nonhuman Rights Project, Inc. v. Lavery* (2017 NY Slip Op 04574)).

One interpretation of ‘human community’ puts the exclusive emphasis on ‘human,’ understood as a biological category, so that ‘human community’ is a synonym for ‘members of the species *Homo sapiens*.’ This interpretation collapses into the species membership view addressed in Section 1. A second interpretation puts the emphasis on ‘community,’ referring to membership in a community of which humans are members. On this view, personhood is not grounded in discrete traits or capacities of individuals; rather, personhood is something that we achieve through development and recognition within a community of persons. In Ubuntu philosophy, this is captured in the saying “a person is a person through other people” (Eze, 2010, 190).

There are different ways of interpreting the idea of membership in a community of persons. We discuss two such views below—which we call *Wide* and *Narrow*—and show that on both of them, Kiko and Tommy should be seen as members of a community of persons.

3.1 The *Wide* view

According to the *Wide* view, someone is a member of a community of persons because they are embedded in interpersonal webs of interdependency, trust, communication, and normative responsiveness (i.e., our behavior is informed by various norms). Persons do not exist as independent islands, floating free of each other.

On this view, children and individuals with cognitive disabilities are clearly persons even if they cannot enter into contracts or bear certain legal responsibilities. The fact that they have guardians for certain legal purposes, far from disqualifying them from personhood, confirms that they are members of these webs of social connection. We all are dependent on others at some points in our lives, and interdependent at all times. Infants depend on their parents and caretakers to feed them, teach them a language, and help them to see the world from others' perspectives. Adolescents and some individuals with cognitive disabilities may not have all of the capacities of mature, developmentally typical adults, and may not have all of the moral duties and citizenship responsibilities that come with them, but they are embedded in the web of interpersonal relationships on which personhood rests.

The *Wide* view recognizes the psychological reality that our individual capacities and identities are formed in social interaction (and, by implication, it recognizes the profound harm caused by unlawful detention and denial of society). It also avoids the exclusionary tendencies of conceptions of personhood that require high thresholds of individual capacity. The *Wide* view has been endorsed in particular by philosophers of disability, who emphasize that individuals with cognitive disabilities, like everyone else, are persons because of their embeddedness in social relations (Kittay 2005; Silvers and Francis 2015; Arneil and Hirschman 2016). Personhood rights help to ensure that individuals are able to form and maintain appropriate social bonds, while protecting individuals from the arbitrary power of others to detain, confine, neglect, or isolate them.

Kiko and Tommy are embedded in interpersonal webs of dependency, meaning, and care with other human persons, and so are part of human communities. We have brought Kiko and Tommy into our community and embedded them in social relationships, and so they too should be protected when others exercise arbitrary power over those social ties. Kiko and Tommy remain members of a community with

humans because, however inadequate their care, they are dependent on their keepers for food, water and shelter, and, as evidenced by the NhRP lawsuit and this brief, there are those who recognize them as part of the community. The fact that Kiko and Tommy are simultaneously the subject of instrumentalization and the subject of legal advocacy shows that their membership is disputed. Recall, however, that this has also been true for many humans seeking *habeas corpus* relief. Indeed, this is one of the functions of *habeas corpus*: to protect members of the community who are being treated as things.

In short, the *Wide* view accepts the link between personhood and community, but denies that community membership is exclusive to human beings, not least because we have in fact brought other individuals, such as Kiko and Tommy, into our community. Rather, it is available to any sentient individual who is embedded in the relevant relationships of interdependency and who would suffer if excluded from those relationships.

3.2 The *Narrow* view

One could adopt a less inclusive conception of community. On the *Narrow* conception, ‘personhood-as-community-membership’ requires

persons to have traits that are more than sentience or vulnerability, but less than the capacity to bear legal responsibilities. These traits may be biological or psychological.

Biological traits are physical properties: having forty-six chromosomes, for example, or having human parents. This would be a return to the view that only members of the species *Homo sapiens* qualify for personhood, and, as argued in Section 1, restriction of personhood on the basis of species is arbitrary and unsupported by biological science.

Psychological traits are mental capacities: having beliefs and desires, for example, or emotions, autonomy, and rationality. We will have more to say about such capacities in Section 4, where we will discuss the psychological capacities sufficient for personhood.

The key point for our purposes is that, as will be shown in Section 4, this *Narrow* view will include Kiko and Tommy as persons. They are clearly the kind of psychological beings found in our community. While Kiko and Tommy are not members of the species *Homo sapiens*, they are clearly relevantly similar to humans in the kind of psychological beings they are, as it is reasonable to ascribe to them such psychological

traits as beliefs, rationality, desires, emotions of care, as well as the capacity for autonomy.

3.3 Conclusions regarding Community Membership

The idea that personhood has a social dimension, and is importantly linked to membership in the human community, is familiar and plausible. However, we cannot simply assume that it excludes Kiko and Tommy.

If one accepts either the *Wide* or *Narrow* view of human community, Kiko and Tommy are persons. On the *Wide* view, to be a person is to be embedded in social relationships of interdependency, meaning, and community. Kiko and Tommy clearly meet this criterion: we have made Tommy and Kiko part of our human community of persons by embedding them within relations of care and intersubjective response, and rendering them vulnerable to forms of exclusion from this community. On the *Narrow* view, to be a person requires not just social embedding, but also the possession of certain basic, powerful, and familiar psychological capacities, such as beliefs, desires, emotions, rationality, and autonomy. It is reasonable to think that Kiko and Tommy have these capacities.

On either the *Wide* or *Narrow* view, Tommy and Kiko are members of our community, and so are owed protection from the arbitrary power of others to define their social conditions.

4. A Capacities Conception

The rulings from the Third and First Departments do not dispute the fundamental claim made by the NhRP that the capacity for autonomy is sufficient (though not necessary) for personhood. To defend the NhRP's claim about autonomy, we provide a brief analysis of personhood that is consistent and ensures that all those human beings commonly regarded as persons remain so, but does not introduce ad hoc exclusions of other beings who meet the criteria. If chimpanzees possess the same relevant capacities that qualify humans as persons, then the reasonable conclusion should be that chimpanzees are also persons.

4.1 Conditions of personhood

John Locke, already mentioned in Section 2, described what it is to be a person this way: “a thinking intelligent being that has reason and reflection and can consider itself as itself, the same thinking thing in different times and places; which it does only by that consciousness which is inseparable from thinking and...essential to it” (Locke 1689, II.

XXVII .9, p.280). Though Locke's view is still influential, contemporary philosophical discussions of personhood tend to provide a more explicit breakdown of core capacities. Of those commonly listed, we find reference to autonomy (minimally, to act voluntarily or to control our behavior in light of our preferences or goals), emotions, linguistic mastery, sentience (the capacity for conscious awareness, sensation, pleasure, and pain), rationality, reflective self-awareness (that is, being aware of ourselves as 'selves'), and reciprocity (e.g., Andrews 2017; DeGrazia 2007; Dennett 1988). There is no disputing the personhood of individuals who possess all of these capacities. However, there is no way to hold that possessing all of these properties is necessary for personhood without excluding some humans who lack one or more of these properties. Furthermore, most of these properties develop gradually in humans, so possession of them is not a clear-cut matter. Instead, to be a person one must have multiple personhood-making properties, although which properties cannot be non-arbitrarily specified. Conceiving personhood in this way means that there is no defensible minimum threshold of capacities that can definitively draw a

line separating persons from near-persons or non-persons (DeGrazia 2007).

Both the Third and the First Department rulings acknowledge the affidavits submitted by a number of respected primatologists in support of the view that chimpanzees share many relevantly similar characteristics with humans. Self-awareness is mentioned by Christophe Boesch (Boesch Aff. 12), Tetsuro Matsuzawa (Matsuzawa Aff. 15), and Matthias Osvath (Osvath Aff. 12). Evidence for this includes chimpanzees' mirror self-recognition and awareness of where they fit into their social hierarchy (see de Waal 2016). There is growing evidence that chimpanzees plan their foraging activities, as mentioned by James Anderson (Anderson Aff. 16) and Osvath (Osvath Aff. 12), that they have preferred community members or 'friends,' as mentioned by Boesch (Boesch Aff. 17) and Jennifer Fugate (Fugate Aff. 14), and even favored tools, as mentioned by Anderson (Anderson Aff. 16). These observations, if correct, point to the presence of goals, desires to satisfy goals, and preferences. That chimpanzees can delay gratification (refuse a smaller reward and wait for a larger one), as mentioned by Osvath (Osvath Aff. 14), suggests a capacity for voluntary behavior and self-

control. Given the evidence that chimpanzees are autonomous, emotional, self-aware, sentient beings who have beliefs and desires, chimpanzees fulfill the requirements for personhood on a capacities conception.

4.2 Personhood and autonomy

The NhRP's case is based on one particular capacity—autonomy—and this is for good reason. For one, it is a capacity that philosophers have historically associated with personhood. Immanuel Kant's conception of persons is framed in terms of autonomy, such that we can be ends in ourselves. However, Kant's conception of autonomy requires a great deal of cognitive sophistication, as it requires the ability to abstractly consider principles of action and judge them according to prudential values or rationality (see Johnson and Cureton 2017). His conception has been criticized given that few humans engage in abstract reflection before every action, and yet we are still acting autonomously (as opposed to acting under the influence of a mind-altering substance or acting because of a compulsion). On the Kantian view humans are rarely autonomous, and young children and some cognitively disabled humans would fail to be autonomous actors, despite

appearances to the contrary. To address this worry, the well-known US bioethicist and philosopher, Tom Beauchamp, together with the comparative psychologist, Victoria Wobber, have suggested that an act is autonomous if an individual self-initiates an “action that is (1) intentional, (2) adequately informed...and (3) free of controlling influences” (Beauchamp and Wobber 2014). Beauchamp and Wobber contend that chimpanzees fit their conception and the submitted affidavits previously referenced provide evidence to this effect. Chimpanzees can act intentionally (they can plan and act to achieve goals), and so satisfy (1). They learn how to navigate quite complex physical and social worlds, reflecting a “richly information-based and socially sophisticated understanding of the world” (Beauchamp and Wobber 2014), and so satisfy (2). Whether chimpanzees act free of controlling influences will depend on their environment and the options available to them, but there is no doubt that chimpanzees can so act when they find themselves in contexts without autonomy-depriving controlling influences.

A second reason to focus on autonomy is that it is a cluster concept. As highlighted by Beauchamp and Wobber, it brings together

capacities to act intentionally (which assumes capacities to form goals and direct one's behavior) and to be adequately informed (which assumes capacities to learn, to make inferences, and acquire knowledge through rational processes), each of which requires sentience. This means that an autonomous capacity requires other personhood capacities, namely sentience and rationality. So understood, evidence of autonomy is sufficient evidence of personhood. Thus, chimpanzees qualify as persons on autonomy grounds alone.

4.3 Why chimpanzee autonomy matters

A final reason for the NhRP's focus on autonomy is due to the concept's direct connection to ethics. Violating someone's autonomy is widely regarded as a harm. After all, autonomous individuals have a basic interest in exercising their autonomy, and to violate it is to violate a basic interest (Beauchamp and Childress 2001). This brings us to another point of contention in the rulings handed down by the Fourth and First Departments. The Fourth Department ruled, and the First Department concurred, that "*habeas corpus* relief...is unavailable" (*Matter of Nonhuman Rights Project, Inc v. Presti* (2015 NY Slip Op 00085)) to Kiko or Tommy because the NhRP is not seeking their

release from captivity but rather their relocation to a suitable sanctuary. The judgment lumps together markedly different kinds of captivity. Our discussion of autonomy provides a way to usefully distinguish Kiko and Tommy's current captive conditions from those afforded them in sanctuary. Both Kiko and Tommy are currently housed alone and in small enclosures. A sanctuary like Chimp Haven, which resides on 200 acres, is currently home to over 200 chimpanzees. Save the Chimps is currently home to 248 chimpanzees residing on twelve three-acre islands. Should Kiko and Tommy be relocated to sanctuaries such as these several things change: they will no longer be housed alone, they will no longer be confined indoors, they will have markedly more freedom to roam, explore, and forage, they will have the opportunity to develop and exercise more typical chimpanzee social capacities, all the while expanding their goals and preferences to reflect the greater opportunities afforded them. In their current conditions of captivity their interests in acting autonomously are profoundly violated. A sanctuary such as Chimp Haven or Save the Chimps promises not only much greater freedom, but a setting where chimpanzees' autonomous capacities are respected.

4.4 Conclusions regarding Capacities

The NhRP is arguing that chimpanzees are persons under a capacities approach to the concept of personhood. This reflects their view that this concept of personhood is already enshrined in law and that, as it stands, it applies to chimpanzees just as it does to humans. Affidavits by numerous eminent primatologists have attested to the fact that chimpanzees possess the relevant capacities to qualify as persons, and the First and Third Departments have not disputed the facts regarding chimpanzee capacities. Importantly, despite appeals to considerations like being human or being a member of a human community, that either have no relevance to personhood or are actually friendly to chimpanzee personhood, previous courts have never disputed the capacities account of personhood. They have, however, resisted the conclusion that obviously follows from those facts, and from our discussion above: that chimpanzees such as Kiko and Tommy qualify as persons.

IV. Conclusion

Of the four conceptions that have been employed by the courts, Species Membership is arbitrary and must be rejected, while the other three suggest that Kiko and Tommy are persons. This Court should recognize that when criteria for personhood are reasonable and consistently applied, Kiko and Tommy satisfy the criteria and are entitled to *habeas corpus* relief.

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Respectfully submitted,

Mary Jean Mezzina, Esq.
Attorney for *Amici Curiae*

Kristin Andrews (York University);
Gary Comstock (North Carolina State
University); G.K.D. Crozier (Laurentian
University); Sue Donaldson (Queen's
University); Andrew Fenton (Dalhousie
University); Tyler M. John (Rutgers
University); L. Syd M Johnson (Michigan
Technological University); Robert Jones
(California State University, Chico); Will
Kymlicka (Queen's University); Letitia
Meynell (Dalhousie University); Nathan
Nobis Morehouse College); David Peña-
Guzmán (California State University, San
Francisco); James Rocha (California State
University, Fresno); Bernard Rollin
(Colorado State); Jeffrey Sebo (New York
University); Adam Shriver (University of
British Columbia); Rebecca L. Walker
(University of North Carolina at Chapel
Hill)

3434 Milburn Avenue
Baldwin, New York 11510
516-319-9239

Bibliography

Anderson, James R. (2013). Affidavit in support of chimpanzee personhood. *Nonhuman Rights Project, Inc. v. Lavery* (Nov. 20, 2013), available at: <https://www.nonhumanrights.org/content/uploads/Ex-4-Anderson-Affidavit-Tommy-Case.pdf>.

Andrews, Kristin (2017). "Life in a cage." *The Philosophers' Magazine*, 76: 72-77.

Arneil, Barbara; Hirschman, Nancy (eds.) (2016). *Disability and Political Theory*. Cambridge: Cambridge University Press.

Beauchamp, Tom L.; Childress, James L. (2001). *Principles of Biomedical Ethics* (5th ed.). New York: Oxford University Press.

Beauchamp, Tom L.; Wobber, Victoria (2014). "Autonomy in chimpanzees." *Theoretical Medicine and Bioethics*, 35(2): 117-132.

Boesch, Christophe (2013). Affidavit in support of chimpanzee personhood. *Nonhuman Rights Project, Inc. v. Lavery* (Nov. 19, 2013), available at: <https://www.nonhumanrights.org/content/uploads/Ex-5-Boesch-Affidavit-Tommy-Case.pdf>.

Curry, Andrew (2013). "Archeology: The milk revolution." *Nature*, 500: 20-22. Available at: <http://www.nature.com/news/archaeology-the-milk-revolution-1.13471>.

Darwin, Charles (1859). *On the Origin of Species by means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life*. London: John Murray. Available at: <http://www.gutenberg.org/ebooks/1228>.

de Waal, Frans (2016). *Are We Smart Enough to Know How Smart Animals Are?* New York: W.W. Norton and Company, Inc.

DeGrazia, David (2007). "Human-animal chimeras: Human dignity, moral status, and species prejudice." *Metaphilosophy*, 38(2-3): 309-329.

Dennett, Daniel (1988). "Conditions of personhood." In *What Is a Person?* Michael F. Goodman (Ed.). New Jersey: Humana Press, pp.145-167.

Diamond, Jared (1993). "The third chimpanzee." In *The Great Ape Project: Equality Beyond Humanity*, Paola Cavalieri and Peter Singer (Eds.). New York: St. Martin's, pp. 88-101.

Eze, Michael Onyebuchi (2010). *Intellectual history in contemporary South Africa*. New York: Palgrave Macmillan.

Frängsmyr, Tore; Lindroth, Sten; Eriksson, Gunnar; Broberg, Gunnar (1983). *Linnaeus, the Man and His Work*. Berkeley and Los Angeles: University of California Press.

Fugate, Jennifer M.B. (2013). Affidavit in support of chimpanzee personhood. *Nonhuman Rights Project, Inc. v. Lavery* (Nov. 23, 2013), available at: <https://www.nonhumanrights.org/content/uploads/Ex-6-Fugate-Affidavit-Tommy-Case.pdf>.

Goodman, Morris; Porter, Calvin A.; Czelusniak, John; Page, Scott L.; Schneider, Horacio; Shoshani, Jeheskel; Gunnell, Gregg; Groves, Colin P. (1998). "Toward a phylogenetic classification of primates based on DNA evidence complemented by fossil evidence." *Molecular Phylogenetics and Evolution*, 9(3): 585-598.

Hobbes, Thomas (1651). *Leviathan, Or The Matter, Forme and Power of a Common-Wealth Ecclesiasticall and Civil*, Edwin Curley (Ed.). Indianapolis: Hackett Publishing, 1994. Original text available at: <https://www.gutenberg.org/ebooks/3207>.

Hull, David (1986). "On human nature," *PSA: Proceedings of the Biennial Meeting of the Philosophy of Science Association*, Volume Two: "Symposia and Invited Papers": 3-13. Johnson, Robert; Cureton, Adam (2017). "Kant's moral philosophy," *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N. Zalta (Ed.), available at: <https://plato.stanford.edu/archives/fall2017/entries/kant-moral/>.

Kittay, Eva Feder (2005). “At the margins of moral personhood.” *Ethics*, 116(1): 100-131.

Langergraber, K.E., Prüfer, K., Rowney, C., Boesch, C., Crockford, C., Fawcett, K., Inoue, E., Inoue-Muruyama, M., Mitani, J.C., Muller, M.N. and Robbins, M.M., 2012. “Generation times in wild chimpanzees and gorillas suggest earlier divergence times in great ape and human evolution.” *Proceedings of the National Academy of Sciences*, 109(39): 15716-15721. Available at: <https://doi.org/10.1073/pnas.1211740109>.

Linnaeus, Carl (1735). *Systema Naturæ per regna tria naturæ, secundum classes, ordines, genera, species, cum characteribus, differentiis, synonymis, locis* (Translates from Latin as *System of nature through the three kingdoms of nature, according to classes, orders, genera and species, with characters, differences, synonyms, places*). Available at: <http://www.biodiversitylibrary.org/item/15373>.

Locke, John (1689). *An Essay Concerning Human Understanding, Volume I*. John Yolton (Ed.). London: Dent and Sons, 1965 Original text available at: <https://www.gutenberg.org/ebooks/10615>.

Locke, John (1698). *Second Treatise of Government*. Hackett Publishing; Indianapolis 1980. Original text available at: <http://www.gutenberg.org/ebooks/7370>.

Matsuzawa, Tetsuro (2013). Affidavit in support of chimpanzee personhood. *Nonhuman Rights Project, Inc. v. Lavery* (Nov. 23, 2013), available at: <https://www.nonhumanrights.org/content/uploads/Ex-9-Matsuzawa-Affidavit-Tommy-Case.pdf>.

Matter of Nonhuman Rights Project, Inc. v. Lavery (2017 NY Slip Op 04574).

Matter of Nonhuman Rights Project, Inc v. Presti (2015 NY Slip Op 00085).

Osvath, Matthias (2013). Affidavit in support of chimpanzee personhood. *Nonhuman Rights Project, Inc. v. Lavery* (Nov. 19, 2013), available at: <https://www.nonhumanrights.org/content/uploads/Ex-11-Osvath-Affidavit-Tommy-Case.pdf>.

People ex rel. Nonhuman Rights Project, Inc. v. Lavery (2014 NY Slip Op 08531).

Rohland, Nadin; Reich, David; Mallick, Swapan; Meyer, Matthias; Green, Richard E.; Georgiadis, Nicholas J.; Roca, Alfred L.; Hofreiter, Michael (2010). “Genomic DNA sequences from mastodon and woolly mammoth reveal deep speciation of forest and savanna elephants.” *PLOS Biology*, 8(12). Available at: <http://journals.plos.org/plosbiology/article?id=10.1371/journal.pbio.1000564>.

Rousseau, Jean-Jacques (1762). *On The Social Contract, Or Principles of Political Right* in *The Basic Political Writings*, Donald A. Cress (Trans. & Ed.) Indianapolis: Hackett Publishing, 2011. Original texts available at: <http://www.gutenberg.org/ebooks/author/1286>.

Silvers, Anita; Francis, Leslie Pickering (2015). “Human and civil models of rights: Healthy and ill disabled and access to health care.” In *Human Rights and Disability: Interdisciplinary Perspectives*, John-Stewart Gordon, Johan-Christian Pöder, and Holger Burckhart (Eds.). New York: Routledge, pp. 132-153.

Wildman, Derek E.; Uddin, Monica; Liu, Guozhen; Grossman, Lawrence I.; Goodman, Morris (2003). “Implications of natural selection in shaping 99.4% nonsynonymous DNA identity between humans and chimpanzees: Enlarging genus *Homo*” *PNAS*, 100(12): 7181-7188. Available at: <http://www.pnas.org/content/100/12/7181>.

CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 500.13(c)

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Mary Jean Mezzina, Esq.
3434 Milburn Avenue
Baldwin, New York 11510
(516) 319-9239
mjmezzina@gmail.com