New York County Clerk's Index Nos. 162358/15 and 150149/16

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

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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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STATE OF NEW YORK

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

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

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.,

CARMEN PRESTI, INDIVIDUALLY AND AS AN OFFICER AND DIRECTOR OF THE PRIMATE SANCTUARY, INC., CHRISTIE E. PRESTI, INDIVIDUALLY AND AS AN OFFICER AND DIRECTOR OF THE PRIMATE SANCTUARY, INC., AND THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

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

[1] Laurence H. Tribe is the Carl M. Loeb University Professor at Harvard University and Professor of Constitutional Law at Harvard Law School.

I. Preliminary Statement

A state intermediate appellate court in New York recently held that the ancient writ of habeas corpus is unavailable to test the legality of the confinement of two captive chimpanzees named Tommy and Kiko. *Nonhuman Rights Project ex rel. Tommy v. Lavery*, 152 A.D. 3d 73 (1st Dept. 2017). This Brief argues that the Court of Appeals should grant the motion of the Nonhuman Rights Project, Inc. ("NhRP") to review and set aside that lower court's misguided conclusion.

Tommy and Kiko first sought an order to show cause under the New York habeas corpus statute[2] in December, 2015 when the NhRP filed common law habeas corpus petitions on their behalf in the New York State Supreme Court, Fulton County and Niagara County respectively, and demanded that the courts recognize the chimpanzees as legal persons, grant them the right to bodily liberty and order their immediate release from captivity. The petitions alleged that the scientific evidence contained in the affidavits attached thereto demonstrated that chimpanzees are autonomous beings who, pursuant

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

to New York common law jurisprudence, are "persons" for purposes of common law habeas corpus and within the meaning of Article 70 of the New York Habeas Corpus Act.[3]

Both Supreme Courts refused to issue the requested order to show cause and both decisions were affirmed on appeal. In Tommy's case, the New York State Supreme Court Appellate Division, Third Judicial Department ("Third Department") held that Tommy is not a "person" entitled to a common law writ of habeas corpus because he is unable to bear duties and responsibilities. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015). In Kiko's case, the New York State Supreme Court Appellate Division, Fourth Judicial Department ("Fourth Department") held that the NhRP's demand for Kiko's release to a chimpanzee sanctuary was not cognizable habeas corpus relief. *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den.*, 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015).[4]

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[3] I was granted leave to file a Letter Brief in this Court in both cases.

[4] Prior to the second filing on behalf of Tommy and Kiko, the same Supreme Court entertained a second petition filed by the NhRP on behalf of two chimpanzees named Hercules and Leo, issued the requested order to show cause, and held a

The NhRP then filed second habeas corpus petitions on behalf of Tommy and Kiko in the New York State Supreme Court, New York County. The refusal of that court to issue the requested orders to show cause is the basis of this appeal. Attached to both petitions were approximately sixty pages of new expert affidavit evidence directed solely to demonstrating that chimpanzees routinely bear duties and responsibilities within chimpanzee communities and mixed chimpanzee/human communities.

The Third Department's court's rulings, upon which both the First Department and the Supreme Court relied, were erroneous. First, the court fundamentally misunderstood the purpose of the common law writ of habeas corpus, which is to allow courts of competent jurisdiction to consider arguments challenging restraint or confinement as contrary to governing law. New York courts have long allowed such challenges even when other areas of law did not recognize the underlying substantive rights at issue, while the lower court's reasoning would summarily shut

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hearing requiring the State to justify their detention. The court refused to recognize the chimpanzees' as legal persons and grant their release because it believed itself bound by *Lavery* regarding the necessary showing of duties and responsibilities. *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898 (Sup. Ct. 2015).

the doors of the state's judicial system to any consideration of such challenges.

Second, the Third Department reached its conclusion on the basis of a fundamentally flawed definition of legal personhood. That court reasoned that habeas corpus applies only to legal persons and essentially *assumed* that chimpanzees cannot be legal persons – Q.E.D. *Lavery*, 124 A.D.3d at 152-153. But that line of reasoning begged vital questions by relying on a classic but deeply problematic – and, at the very least, profoundly contested – definition of "legal personhood" as turning on an entity's present capacity to bear "both rights *and duties*." *Id.* at 151-52. This definition, which would appear on its face to exclude third-trimester fetuses, children, and comatose adults (among other entities whose rights as persons the law protects), importantly misunderstood the relationship among rights, duties, and personhood.[5]

[5] For its erroneous conception of legal personhood as being contingent on the capacity to shoulder legal duties, the Third Department primarily relied upon *Black's Law Dictionary*, whose definition of "person" was based on a single obscure source, and cases that cited to *Black's Law Dictionary*. In 2017 Petitioner-Appellant unearthed that source, the 10th edition of Salmond's *Jurisprudence*, in the Library of Congress and determined that *Black's Law Dictionary* had grossly misinterpreted it. Salmond actually supported Petitioner-Appellant's rights *or* duties argument. Petitioner-Appellant then asked the Editor-in-Chief of *Black's Law Dictionary* in writing to alter its definition of "person," to which he said he would. Petitioner-Appellant immediately sought to bring this development to the attention of the First Department by motion after oral argument but before the rendering of the

II. THE THIRD DEPARTMENT'S REASONING IN *LAVERY* AND THE FIRST DEPARTMENT'S ADOPTION OF THAT REASONING UNJUSTIFIABLY CURTAILS THE SCOPE OF HABEAS CORPUS

For centuries, this Court has recognized that the common law writ of habeas corpus "lies in all cases of imprisonment by commitment, detention, confinement or restraint, for whatever cause, or under whatever pretence." *People v. McLeod*, 3 Hill 635, 647 note j (N.Y. 1842).[6] In a similar spirit, the United States Supreme Court has emphasized that the writ's "scope and flexibility" and "its capacity to reach all manner of illegal detention," as well as "its ability to cut through barriers of form and procedural mazes . . . have always been emphasized and jealously guarded by courts and lawmakers." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

By foreclosing any inquiry into whether the detention alleged in this case was unlawful, both the Third Department and the First Department confused the issue of habeas corpus *jurisdiction* (the question of whether and when a court has authority to entertain a

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decision at issue, but that court denied the motion, then, in its ruling, perpetrated the same "rights and duties" mistake as the Third Department in *Lavery*.

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

detainee's petition at all) with the analytically separate issue of habeas corpus *relief* (the question of what substantive rights, if any, the detainee may invoke, and what remedy or remedies the detainee may properly seek).

The court's refusal even to examine the character of Kiko and Tommy's detentions rested on a misunderstanding of the crucial role the common law writ of habeas corpus has played throughout history: providing a forum to test the legality of someone's ongoing restraint or detention. This forum for review has been available even when the ultimate conclusion is that the detention is lawful, given all the circumstances. While the Third Department accurately observed that nonhuman beings like chimpanzees have never before been provided habeas corpus *relief* by New York courts,[7] that Court and the First Department were wrong to assume that a state court's doors must be slammed shut to the plea, made on a chimpanzee's behalf, that the detention complained of is contrary to law – an assumption that both courts made on the basis of an unexamined presumption that

[7] *Lavery*, 124 A.D.3d at 150 ("Petitioner does not cite any precedent-and there appears to be none-in state law, or under English common law, that an animal could be considered a 'person' for the purposes of common-law habeas corpus relief. In fact, habeas corpus relief has never been provided to any nonhuman entity.").

chimpanzees lack the requisite attributes of personhood, despite the fact that the NhRP presented unrebutted evidence from five experts that established that chimpanzees routinely assume duties and responsibilities both within chimpanzee communities and within human-chimpanzee communities in their second petition to the New York Supreme Court, which was part of the record on appeal to the First Department.

Throughout history, the writ of habeas corpus has served as a crucial guarantor of liberty by providing a judicial forum to beings the law does not (yet) recognize as having legal rights and responsibilities on a footing equal to others.[8] For example, human slaves famously used the common law writ of habeas corpus in New York to challenge their bondage, even when the law otherwise treated them as mere things.[9]

Holding, as did the Third Department, that Tommy and Kiko and others like them are not welcome in habeas courts is akin to holding that detained slaves, infants, or comatose individuals cannot invoke the

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

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

writ of habeas corpus to test the legality of their detention, based on an initial and largely unexamined conclusion about what kinds of substantive legal rights and responsibilities those individuals might properly be deemed to bear in various contexts.

Holding, as did the First Department, that Tommy and Kiko and others like them are not welcome in habeas courts solely because of their species reminds us that, at one time, some human beings were not granted personhood or legal rights because they were not of the same race or gender as those who then were rights-bearers. Contrary to these holdings, New York courts have throughout the state's history entertained petitions for writs of habeas corpus from a wide variety of beings considered at the time to be incapable of bearing the same rights and responsibilities as most members of society – including infants and

young children,[10] incompetent elderly persons,[11] and persons deemed insane.[12]

Cases like these recognize that the danger habeas corpus confronts – forceful but unjustified restraint and detention arguably in violation of applicable law – can exist even where the habeas petitioner lacks other legal rights and responsibilities or does not resemble present-day rights holders. The First Department's erroneous reliance on *Lavery* and misguided focus on the character of these legal rights and responsibilities would immunize many forms of illegal detention from any judicial examination whatsoever.

The failure to distinguish between habeas *jurisdiction* and entitlement to habeas *relief* also conflicts with the historical role of habeas corpus in the jurisprudence of the U.S. Supreme Court. In a

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

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

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

series of landmark cases gradually extending federal habeas corpus jurisdiction to detainees held at Guantanamo Bay, for example, that Court clarified this distinction.[13] In the 2004 case of *Rasul v. Bush*, 542 U.S. 466, 470 (2004),[14] the Court limited its inquiry to whether the federal courts are endowed with statutory jurisdiction under 28 U.S.C. § 2241 to consider habeas challenges to the detention of noncitizens captured abroad and held at the Guantanamo Bay Naval Base. Without deciding whether the Constitution requires full judicial review of detentions or indeed whether the detainees in question were entitled to any substantive relief, the Court held that habeas jurisdiction over the petitioners' challenges to their detention was proper and the habeas petitioners were at least entitled to a decision on the "merits" of their challenge. *Id.* at 485; *see also* LAURENCE TRIBE AND JOSHUA MATZ, UNCERTAIN JUSTICE 194 (2014) (hereafter "Tribe and Matz").

Four years later in *Boumediene v. Bush*, 552 U.S. 723, 771 (2008), the Supreme Court held that the Suspension Clause entitled "aliens

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[13] *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2034 (2007) (drawing analytical distinction between jurisdictional questions, involving the authority of a court to entertain a detainee's petition at all" and "substantive questions, involving whether the Executive has lawful authority to detain particular categories of prisoners.").

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

designated as enemy combatants and detained" to use habeas corpus to challenge their detention. While this decision extended constitutional protection to detainees' *jurisdictional* right to habeas review, the Court again made no decision as to the substantive legality of the detentions at issue or as to whether habeas *relief* was proper. *Id.* at 795.[15] As in these cases, the jurisdictional question of whether Tommy and Kiko's detentions can be challenged in the first place must not be conflated or confused with the substantive merits of their habeas petitions and the ultimate legality of their detentions.

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

The Third Department's rejection of Tommy's and Kiko's habeas petitions at the threshold stemmed from that court's mistaken view that Article 70's limitation of habeas protection to legal "persons" should be read to exclude all beings not "capable of rights and duties." *Lavery*, 124 A.D.3d at 150-52 (internal citations omitted). It was that supposed incapacity that the *Lavery* court treated as disqualifying

[15] The Court remanded to the Court of Appeals with "instructions that it remand the cases to the District Court" for a decision on the merits of the habeas petition. *Id.* at 798. Five of the six detainees in *Boumediene* were granted writs of habeas corpus and released. *See Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (D.D.C. 2008); *see also* Tribe & Matz, *supra*.

chimpanzees as a matter of law from entitlement to the protection of the habeas writ. One need not address the court's assumption that these great apes are automatically incapable of being held accountable for their choices in order to challenge the court's underlying conception of the "[r]eciprocity between rights and responsibilities," *id.* at 151, a conception that fundamentally misunderstands the relationship among rights, duties, and legal personhood.

A. Legal Personhood Cannot Be Equated with the Capacity to Bear Duties.

The Third Department's conclusion that the inability of chimpanzees to bear legal duties rendered it "inappropriate to confer upon chimpanzees . . . legal rights," *id.* at 152, is a *non sequitur* and not worthy of adoption by any court. Professor Visa Kurki has applied the classical Hohfeldian analysis[16] of rights and duties to challenge the assumption that a "legal person" can be defined simply as "the subject

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

of legal rights and duties."[17] Legal theorists have developed two competing explanations of the nature of Hohfeldian rights: the "interest theory" and the "will theory."[18]

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

Even from the perspective of a will theorist, the court's view that rights-holding and duty-bearing are necessary preconditions of legal

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

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

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

[20] Kramer, *supra* note 18, at 32.

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

[22] *Id.* at 250 – 51; Kurki, *supra* note 17, at 2-3. *But see* Jessica Berg, *Of Elephants and Embryos*, 59 HASTINGS L.J. 369, 404 (2007) ("Thus far no state has chosen to provide any legal rights directly to animals; animal welfare laws protect the interests of natural persons in preventing harm to animals."). Berg's position on the nonexistence of animal rights seems to derive from a will-theory conception of rights.

personhood in the sense relevant to habeas corpus jurisdiction is unsustainable. Under the will theory, an entity holds a "right" if it has "competence and authorization to waive/enforce some legal duty."[23] Therefore, the class of rights-holders under the will theory is limited to "rational beings with mental faculties that correspond to adult human beings of sound minds."[24] If one accepts the will theory's narrow definition of rights, it becomes unsustainable to equate legal personhood with rights-holding because the class of potential rights-holders under that definition would exclude what our culture universally regards as legal persons.

Needless to say, infant children and comatose adults are paradigmatic legal persons. Yet they certainly do *not* possess what will theorists would deem rights.[25] Will-theory rights are not *necessary* conditions for legal personhood, nor are they *sufficient*. For example, during the era when our Constitution employed various euphemisms to express its toleration of the benighted institution of chattel slavery, even those who were lawfully enslaved by others possessed will theory

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[23] *Id.*

[24] Kurki, *supra* note 17, at 11; *see also* Kramer, *supra* note 18, at 35 (identifying adult human beings with sound rational faculties as only class of rights-holders under will theory).

[25] *See* Kurki, *supra* note 17, at 11.

rights, such as the right to appeal criminal convictions, but they were for most purposes considered to be legal things rather than persons.[26] Thus neither an interest- nor will-theory conception of rights supports the court's reciprocity argument.

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

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

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

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

simply to be placed under it," and meaningful comprehension of the obligation is a "separate matter."[28]

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

Second, even if chimpanzees were indeed unable to bear duties, it is not the case, as a conceptual matter, that the possession of a right necessarily entails the right-holder's bearing of a legal duty. Instead, as envisioned in Hohfeld's classic scheme, the possession of a right entails the "bearing of a legal duty *by someone else*."[31] For instance, infants are "paradigmatic" legal persons but bear no legal duties to anyone.[32] The Third Department acknowledges in a footnote that "[t]o be sure, some

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[28] *Id.*
[29] *Id.*
[30] Kurki, *supra* note 17, 22 – 23.
[31] Kramer, *supra* note 27, at 43 (emphasis added).
[32] Kurki, *supra* note 17, at 12.

humans are less able to bear legal duties or responsibilities than others," but the court justifies the legal personhood of such impaired classes of humans on the ground that "collectively, human beings possess the unique ability to bear legal responsibility." *Lavery*, 124 A.D.3d at 152 n.3. This normative justification that humans are a duty-bearing *species* and thus that any human *should* be deemed a legal person is highly tendentious and is logically "irrelevant for the *conceptual* point that [infants][33] do not bear duties yet they are legal persons."[34] Likewise, the possibility that chimpanzees may not be capable of bearing legal duties – even assuming that to be the case – would not justify denying them legal personhood.

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

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[33] Kramer also points out that "senile people and lunatics and comatose people" have legal rights and yet cannot bear duties. Kramer, *supra* note 18, at 45.
[34] Kurki, *supra* note 18, at 12.

> 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.

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

In the end, whether Tommy and Kiko should be deemed legal "persons" requires attention not just to some conventional set of formal definitions but to "the social meaning and symbolism of law."[35] The ways in which courts have approached questions of personhood in such "borderline cases" as human embryos and fetuses have obviously been marked by "doctrinal discord,"[36] raising questions about the wisdom of

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

[36] *See generally* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 115-125 (1992) (discussing moral and legal difficulties in defining personhood in the abortion debate and questioning the link between fetal personhood and the rights of the fetus-bearing woman).

replicating that discordant struggle in a context where it might end up being irresolvable or even irrelevant.

To the degree that competing conceptions of personhood are nonetheless deemed at least pertinent even if not decisive, it is important to remember that legal definitions of what and who constitutes a "person" do much "more than just regulate behavior" when it comes to "America's most divisive social issues": they express "conceptions of [the] relative worth of the objects included and excluded by personhood," and these expressions of "law's values" in turn shape social norms and values.[37]

Much like the debate over the legal personhood of human fetuses, the question of Tommy and Kiko's legal personality is thus invariably entwined with the broader debate about the "rights" of nonhuman animals and, even if they have no "rights" as such, about the "wrongs" to which they should not be subjected by a decent society.[38] Courts cannot render defensible decisions about the meaning of legal

[37] *See Note, supra* note 35, at 1761.

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

personhood "without expressing certain values, whether they want to or not."[39] The question of Tommy and Kiko's legal personhood implicates a "powerfully divisive social issue" as well as "the uncomfortable but inescapable place of status distinctions" in our legal system,[40] but this Court should not "allow the philosophical conundrum of this eternal question to paralyze its analysis," given the "immensely important pragmatic interests" at stake in the case.[41]

III. CONCLUSION

This Court should recognize that Tommy and Kiko are autonomous beings who are currently detained and who are therefore entitled to challenge the lawfulness of their detentions by petitioning for the writ, even if that court ultimately concludes that Tommy and Kiko's detentions are lawful.

This Court should make clear its view that both the First Department and the Third Department wrongly conflated the procedural and institutional question of habeas corpus jurisdiction with

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[39] *Note*, *supra* note 35, at 1764.
[40] *Id.* at 1767.
[41] Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 ARIZ. ST. L.J. 1, 34 (2013) (identifying *Roe v. Wade* as the most important modern legal decision addressing the question of legal personhood and arguing that the Court was forced to put philosophical interests to the side in addressing pressing practical concerns at stake).

the substantive question of entitlement to habeas relief, seriously misunderstood the logical relationships among rights, duties, and personhood and superimposed an overly rigid and formalistic notion of personhood on an inquiry that should have turned on the fundamental role of habeas corpus as a bulwark against forms of physical detention that our law should be understood to condemn.

The relief that would be legally appropriate in this case would presumably involve not simple release but transfer to a facility in which Tommy and Kiko may fully express their extraordinary capacities. But, whatever the precise relief might entail, it would be premature for the Court to make assumptions about that matter before affirming the existence of habeas corpus jurisdiction as a first step.

Even if a decision granting jurisdiction while ultimately denying the relief sought would not help Tommy and Kiko concretely, this kind of gradually and selectively evolving recognition of the varying forms of legal protection that beings of varying kinds deserve would recognize, as the Supreme Court put it in *Lawrence v. Texas*, 539 U.S. 558, 579 (2003), that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only

to oppress."[42] If a being like Tommy or Kiko is presumptively entitled to *none* of the benefits sometimes associated with legal personhood unless and until courts are ready to extend all arguably similar beings *every* benefit of that legal status, the evolution of common law writs like habeas corpus will remain chained to the prejudices and presumptions of the past and will lose their capacity to nudge societies toward more embracing visions of justice.[43]

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[42] *See also Woods v. Lancet*, 303 N.Y. 349, 355 (1951) ((quoting *United Australia, Ltd., v. Barclay's Bank, Ltd.*, (1941) A.C. 1, 29) ("'When the ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.' We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.")). Some commentary on the recent New York Supreme Court order to show cause in the detention of two chimpanzees, *see Stanley*, No. 152736/2015 (N.Y.S. Apr. 20, 2015), *supra* note 4, has characterized the order as a "modest" development. Noah Feldman, *Habeas Corpus When You're Not Homo Sapiens*?, BLOOMBERG VIEW, Apr. 21, 2015, *http://www.bloombergview.com/articles/2015-04-21/habeas-corpus-when-you-re-not-homo-sapiens-*. While Professor Feldman is correct in characterizing the issue addressed by this decision as "the more preliminary one of whether the courts will be open to nonhuman litigants," rather than the question of whether chimpanzees possess inherent rights to bodily liberty, his analysis affirms the symbolic significance of the judge's order in the broader evolution of legal principles.

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

Respectfully submitted,

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domination, or indeed a premise of the total subservience of any form of being to any other.").

CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 500.13(c)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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