STATE OF NEW YORK
SUPREME COURT COUNTY OF SUFFOLK

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus, THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HERCULES and LEO, Petitioners, v. SAMUEL L. STANLEY JR., M.D., as President of State University of New York at Stony Brook a/k/a Stony Brook University and STATE UNIVERSITY OF NEW YORK AT STONY BROOK a/k/a STONY BROOK UNIVERSITY, Respondents.	)	Index No.:

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE & WRIT OF HABEAS CORPUS AND ORDER GRANTING THE IMMEDIATE RELEASE OF HERCULES AND LEO

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I. INTRODUCTION

Chimpanzees are autonomous, self-determined, self-aware, intelligent, and emotionally complex. Cognitively they resemble human beings. They recall their past and anticipate their future, and when their future is never-ending incarceration, they suffer the pain of being unable to fulfill their goals or move around as they wish.

In the last eight months, three of the seven of these extraordinary beings detained in the State of New York have died. The Nonhuman Rights Project, Inc. ("NhRP") is filing a common law writ of habeas corpus in each of the three counties in which a survivor remains. Each suit demands the prisoner's release and removal to a sanctuary designated by the North American Primate Sanctuary Alliance ("NAPSA"). There he will live the rest of his life with other chimpanzees and receive the specialized and comprehensive care necessary to satisfy his complex social and physical needs in a setting as close to his native Africa as can be had in North America.

The Petitioners in this case are two chimpanzees known as Hercules and Leo. New York has always recognized the common law writ of habeas corpus and there is no question this Court would release Hercules and Leo if they were human beings, for their detention grossly interferes with their exercise of bodily liberty. The question before this Court is not whether Hercules and Leo are human beings – they are not – but whether, like human beings, they are "legal persons" under the law of New York, possessed of the common law right to bodily liberty protected by the common law writ of habeas corpus.

"Legal person" has never been a synonym for "human being." It designates Western law's most fundamental category by identifying those entities capable of possessing a legal right. "Legal personhood" determines who counts, who lives, who

dies, who is enslaved, and who is free. Beings, such as Hercules and Leo, who possess autonomy, self-determination, self-awareness, and the ability to choose how to live their lives, must be recognized as common law "persons" in New York, entitled to the common law right to bodily liberty protected by the common law writ of habeas corpus.

A dozen of the world's most prominent working primatologists have submitted affidavits in support of the NhRP's claim that Hercules and Leo each possess the autonomy, self-determination, self-awareness, and ability to choose how he lives the emotionally rich and intellectually complex life of which he is capable, sufficient for common law "personhood." Because they are being deprived of their ability to exercise their autonomy, Hercules and Leo are entitled to invoke the common law writ of habeas corpus, and be discharged to that sanctuary chosen by NAPSA for which they are best suited.

The New York legislature has already designated Hercules and Leo "legal persons," as they are beneficiaries of a trust created by the NhRP pursuant to § 7-8.1 of the Estates, Powers and Trusts Law ("EPTL"). Hercules and Leo possess the statutory right to own the trust corpus and have it used solely for their benefit. The NhRP now demands that this Court recognize Hercules and Leo's additional common law right to the bodily liberty protected by the common law writ of habeas corpus.

In addition to Hercules and Leo's status as legal persons as trust beneficiaries, this Court must recognize that Hercules and Leo are common law persons entitled to the common law right to bodily liberty protected by the common law writ of habeas corpus, as a matter of common law liberty, pursuant to a New York common law that keeps abreast of evolving standards of justice, morality, experience, and scientific discovery.

The New York common law of liberty begins, as does the common law of every American state, with the premise that the autonomy, self-determination, self-awareness, and freedom of choice that Hercules and Leo, as well as human beings, possess is protected as a fundamental common law right, and vindicated through a common law writ of habeas corpus.

In addition, this Court must recognize that Hercules and Leo are entitled to a writ of habeas corpus, as a matter of common law equality. New York common law equality forbids discrimination founded upon unreasonable means or unjust ends, and protects Hercules and Leo's common law right to bodily liberty free from unjust private discrimination. Hercules and Leo's common law classification as "legal things," rather than "legal persons," rests upon the illegitimate end of enslaving them. Simultaneously, it classifies Hercules and Leo by their single trait of being a chimpanzee and then denies them every legal right, even the capacity to have a legal right. This discrimination is so fundamentally inequitable it violates basic common law equality.

Hercules and Leo are classified as a legal thing for the sole, illegitimate, and odious purpose of enslaving them. But New York courts have openly loathed slavery for over one hundred and fifty years. Placed alongside the mountain of scientific evidence the NhRP attaches to its Petition for a Writ of Habeas Corpus (the "Habeas Petition") establishing that Hercules and Leo are autonomous, self-determined, self-aware beings, with the ability to choose, their anachronistic classification as legal things is revealed as irrational, immoral, biased, unjust, illegitimate, and dangerous.

Hercules and Leo are therefore entitled to be recognized as legal persons, either because the legislature has already granted them personhood as beneficiaries under EPTL

§7-8.1, or because they are entitled to common law personhood, or both. The autonomy, self-determination, self-awareness, and ability to choose that entitles them to common law personhood equally entitles them to the right to bodily liberty protected by the New York common law writ of habeas corpus. This Court should therefore issue a common law writ of habeas corpus forthwith, and discharge Hercules and Leo to NAPSA, which will evaluate them and place them in its most appropriate member sanctuary.

In the following Statement of Facts, the NhRP will begin by setting out facts that demonstrate that Hercules and Leo's genetics and physiology have produced a brain that allows each of them the capacities of autonomy, self-determination, self-awareness, and the ability to choose how to live his life, as well as the generally cognitive and emotional complexity sufficient for common law personhood and the possession of the common law right to bodily liberty protected by the common law writ of habeas corpus. The Statement of Facts then sets out the facts that demonstrate that Hercules and Leo actually possess these cognitive abilities.

II. STATEMENT OF FACTS

The affidavits submitted in support of this Petition, summarized below, demonstrate that chimpanzees possess those complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty, as a matter of liberty, equality, or both. Their most significant cognitive ability is "autonomy," which subsumes many of their other cognitive abilities. These include, but are not limited to, their possession of an autobiographical self, episodic memory, self-determination, self-consciousness, self-knowingness, self-agency, referential and intentional communication, empathy, a working memory, language, metacognition, numerosity, and material, social,

and symbolic culture, their ability to plan, engage in mental time-travel, intentional action, sequential learning, mediational learning, mental state modeling, visual perspective-taking, cross-modal perception, their ability to understand cause-and-effect, the experiences of others, to imagine, imitate, engage in deferred imitation, emulate, to innovate and to use and make tools.

Humans and chimpanzees share almost 99% of their DNA (Affidavit of Tetsuro Matsuzawa ("Matsuzawa Aff."), at ¶10; Affidavit of Emily Sue Savage-Rumbaugh ("Savage-Rumbaugh Aff."), at ¶11). Chimpanzees are closely related to human beings, more closely than they are to gorillas (Affidavit of William McGrew ("McGrew Aff."), ¶11; Affidavit of James King ("King Aff.), at ¶12; Affidavit of Mathias Osvath ("Osvath Aff."), at ¶11). They resemble human beings physiologically and anatomically (McGrew Aff. at ¶12). No other species comes so close to humans in self-awareness and language abilities, and in diversity of behaviors such as tool-use, gestural communication, social learning, and reactions to death (Affidavit of James Anderson ("Anderson Aff."), at ¶11). Even our blood is interchangeable; transfusions can go in both directions so long as the blood groups are properly matched (McGrew Aff. ¶12).

More importantly, human and chimpanzee brains are similar (Matsuzawa Aff. at ¶10). The volume of a chimpanzee brain is comparable to that of the most recent extinct member of the human evolutionary lineage, *Homo floresiensis*, which lived as recently as 18,000 years ago (McGrew Aff. at ¶13). Both modern humans and chimpanzees have larger brains than expected for their body size (Matsuzawa Aff. at ¶10). This means they both evolved to possess above-average mental abilities compared with other species of the same body size (Matsuzawa Aff. at ¶10).

Both chimpanzee and human brains and behavior are highly plastic, flexible, and nearly completely dependent upon learning (Savage-Rumbaugh Aff. at ¶11a). Humans and chimpanzees share similar brain circuits involved in language and communication (Matsuzawa Aff. at ¶10). Both evolved the large frontal lobes of the brain that are intimately involved in the capacities for insight and foreplanning (Matsuzawa Aff. at ¶10). Indeed, many shared brain characteristics are relevant to such capacities as self-awareness, autonomy, and general intelligence (Matsuzawa Aff. at ¶10). Broca's Area and Wernicke's Area are brain regions that enable symbolic communication. The areas that correspond to Broca's Area and Wernicke's Area in chimpanzees correspond to those parts of the human brain that enable symbolic communication (Savage-Rumbaugh Aff. at ¶13).

A hallmark of sophisticated communication and language-like capacities is brain asymmetry (Matsuzawa Aff. at ¶12). Chimpanzees possess a similar asymmetry to humans (Matsuzawa Aff. at ¶12). The left and right parts of the human brain have different shapes that are related to language capacities and correlate with handedness (Matsuzawa Aff. at ¶12). Both chimpanzees and humans possess "population-level right-handedness," in that they are right-handed and process language in the left hemisphere (Matsuzawa Aff. at ¶12). These overall findings point to a key similarity in the way chimpanzee and human brains are structured, particularly in ways relevant to language and communication (Matsuzawa Aff. at ¶12).

Both humans and chimpanzees share highly specific cell types involved in higher-order thinking, as well as important functional characteristics related to sense of self (Matsuzawa Aff. at ¶10; Affidavit of Jennifer M.B. Fugate ("Fugate Aff."), at ¶14). Both

brains possess a specialized type of cell – known as a spindle cell (or von Economo neuron) – in the same area of the brain (Matsuzawa Aff. at ¶14). This area, known as the anterior cingulate cortex, is involved in emotional learning, the processing of complex social information, decision-making, awareness, and, in humans, speech initiation (Matsuzawa Aff. at ¶14). The presence of spindle cells in both chimpanzees and humans strongly suggest they share many of these higher-order brain functions (Matsuzawa Aff. at ¶14). The chimpanzee brain is also activated in the same areas and networks as the human brain during activities associated with planning and episodic memory, that is, memories for autobiographical events and foresights for personal situations (Osvath Aff. at ¶12, ¶¶15-16).

Since Darwin, biologists have emphasized the slow, gradual changes inherent in evolutionary development (King Aff. at ¶12). The close evolutionary relationship between chimpanzees and humans is evident in terms of physical structure, behaviour and mental processes (King Aff. at ¶12). The presence of any complex cognitive-behavioral process in humans therefore implies the likelihood of a similar, perhaps more rudimentary, process in chimpanzees (King Aff. at ¶12).

Human and chimpanzee brains develop and mature in similar ways, which indicates they pass through similar cognitive developmental stages (Matsuzawa Aff. at ¶10). For example, the development in chimpanzees of their use and understanding of sign language, along with their natural communicative gestures and vocalizations, parallels the development of language in children; this points to deep similarities in the cognitive processes that underlie communication in chimpanzees and humans (Jensvold Aff. at ¶9). The development of both chimpanzees and humans also involve increasing

levels of consciousness, awareness, and self-understanding throughout adulthood, through culture and learning (Savage-Rumbaugh Aff. at ¶11d).

Numerous parallels in the way chimpanzee and human communication skills develop also suggest a similar unfolding of cognitive processes and an underlying neurobiological continuity (Jensvold Aff. at ¶10). Although children develop a natural syntactic language, chimpanzees show some of the same early developmental tendencies and changes in their communication skills as young children (Jensvold Aff. at ¶10). For instance, both children (who eventually learn a spoken and written language) and language-trained chimpanzees (who learn a symbol-based vocabulary) begin communicating using natural gestures before moving on to more frequent use of symbols (Jensvold Aff. at ¶10). In both, the ratio of symbol to gestures increases with age, and in both the overwhelming majority of gestures serve a communicative purpose (Jensvold Aff. at ¶10). Both humans and chimpanzees also show a primacy of natural gestures in development over learning a symbolic system of communication (Jensvold Aff. at ¶¶9-10). While humans develop a complex symbolic, syntactic language, the foundational stages of communication suggest striking similarities between human and chimpanzee cognition (Jensvold Aff. at ¶¶10-11).

Developmental delay (a long protracted period of brain development over many years) is a key feature of both chimpanzee and human prefrontal cortex brain evolution and plays a role in the emergence of complex cognitive abilities, such as self-awareness, creativity, foreplanning, working memory, decision making and social interaction (Matsuzawa Aff. at ¶11). Delayed development of the brain, and specifically the prefrontal cortex, provides a longer period in which this part of the brain may be shaped

by experience and learning (Matsuzawa Aff. at ¶11; Savage-Rumbaugh Aff. at ¶11a, ¶12).

Consistent with these similar functions in humans and chimpanzees, chimpanzee infants share mental features and patterns with human infants (Matsuzawa Aff. at ¶11). These include the ways in which mothers and infants interact and use social smiling and looking into each other's eyes as ways of strengthening their bond, as well as how and when they begin to manipulate objects, which is related to their shared capacity for tool-making and use (Matsuzawa Aff. at ¶11).

The evidence that chimpanzees and humans share the capacity for "autonomy" is strong (King Aff. at ¶¶11; Osvath Aff. at ¶11). Autonomous behavior demonstrates that a choice was made; it is not based on reflexes, innate behaviors, or any conventional categories of learning such as conditioning, discrimination learning, or concept formation (King Aff. at ¶¶3-4). It implies an individual is directing her behavior based on an internal cognitive process (King Aff. at ¶11). Chimpanzee autonomy is consistent with phylogenetic parsimony in that the simplest explanation for chimpanzee behaviors that look autonomous is that they are based on similar human psychological capacities (King Aff. at ¶12).

The concept of "self" is an integral part of autonomy, being able to have goals and desires, intentionally act towards those goals, and understand whether they are satisfied (Matsuzawa Aff. at ¶15). There is abundant and robust evidence that chimpanzee possess this sense of self (Matsuzawa Aff. at ¶15). For example, chimpanzees respond differently to their own name rather than to other sounds and show specific brain wave responses to

the sound of their own name; this response signifies self in chimpanzees, as for humans (Matsuzawa Aff. at ¶13).

More importantly, chimpanzees reliably recognize themselves in mirrors (Matsuzawa Aff. at ¶15), an ability widely accepted as a marker of self-awareness (Anderson Aff. at ¶12; Savage-Rumbaugh Aff. at ¶16). They also recognize themselves on television, in videos, and photographs, and they use a flashlight to examine the interior of their own mouths (Savage-Rumbaugh Aff. at ¶16). Chimpanzee adults recognize pictures of themselves, and others, when they were very young (Savage-Rumbaugh Aff. at ¶16).

To recognize oneself one must be able to hold a mental representation of what one looks like from another visual perspective (Anderson Aff. at ¶12). This capacity to "step-outside" the self and reflect upon one's behavior, as one might reflect on the behavior of another, allows one to become the objects of one's own thought (Savage-Rumbaugh Aff. at ¶16). The developmental emergence of self-recognition in chimpanzees is similar to that in humans (Anderson Aff. at ¶12). As in humans, the capacity for self-recognition in adult chimpanzees is highly stable across time, with some decline in old age (Anderson Aff. at ¶12).

Chimpanzees show many related capacities that stem from self-awareness, such as self-monitoring, self-reflection, and metacognition (Matsuzawa Aff. at ¶15). Metacognition is the ability to think about, and reflect upon, one's own thoughts and memories (Matsuzawa Aff. at ¶15). For instance, when given a task in which the identity of a food item is a critical piece of information needed to obtain a reward, chimpanzees, like humans, first check a container they are unfamiliar with before making their choice

(Matsuzawa Aff. at ¶15). This efficient information-seeking behavior strongly suggests they are aware of what they know and do not know (Matsuzawa Aff. at ¶15). Like children, chimpanzees know when they have enough visual information to complete a task and also know that they could be wrong about the information they have and, like human children, will check if they are uncertain (Matsuzawa Aff. at ¶15).

"Self-agency" is the ability to distinguish actions and effects caused by oneself from events occurring in the external environment; it is a fundamental component of autonomy (Matsuzawa Aff. at ¶16). For instance, chimpanzees distinguish between movement of an object, such as a computer cursor, controlled by themselves, and motion caused by someone else (Matsuzawa Aff. at ¶16). These, and many similar findings, demonstrate that chimpanzees and humans share the fundamental cognitive processes underlying the sense of being an independent agent (Matsuzawa Aff. at ¶16; Savage-Rumbaugh Aff. at ¶11e).

When humans recollect a specific event or plan for a new situation, they experience these events mentally, using their "inner eyes and ears" (Osvath Aff. at ¶12). Both share the sophisticated cognitive capacity necessary for a "mental time travel" that is enabled by an episodic system that chimpanzees and humans share (Osvath Aff. at ¶10, ¶12, ¶15; Jensvold Aff. at ¶10).

Chimpanzees have a self-concept, are aware of their personal past, and see a personal future ahead of them (Osvath Aff. at ¶16). So-called "autonoetic consciousness," or "self-knowing consciousness," is a necessary correlate of the episodic system (Osvath Aff. at ¶12). Without understanding that one is an individual who exists through time, one cannot recollect past events in one's life and plan future events (Osvath Aff. at ¶12).

Autonoetic consciousness allows the autobiographical sense of a self with a past and future (Osvath Aff. at ¶12).

Chimpanzees possess an autobiographical self (Osvath Aff. at ¶12). The similar brain structures of humans and chimpanzees support the behavioral and cognitive evidence for both human and chimpanzee autobiographical selves (Osvath Aff. at ¶15). Chimpanzees demonstrate a capacity for episodic memory (Osvath Aff. at ¶12). Chimpanzees can delay a strong current drive for a better future reward, generalize a novel tool for future use, select objects for a much-delayed future task, and do all of this while keeping in mind several different elements of a situation (Osvath Aff. at ¶14). They remember highly specific contextual elements, the "what, where and when" of events, hours, weeks, even years later (Osvath Aff. at ¶12). They can prepare themselves for future actions, such as future tool use, a day in advance (Osvath Aff. at ¶12). Wild chimpanzees have demonstrated such long-term planning for tool use as transporting stones to different locations to be used later as hammers with which to crack nuts, while a captive chimpanzee calmly and routinely collected, stockpiled, and concealed stones that he would hurl at visitors later, when he was in an agitated state (Osvath Aff. at ¶13; Anderson Aff. at ¶16). The ability to plan for events where one is in a different psychological state from the current situation strongly signals the presence of an episodic system (Osvath Aff. at ¶13). This showed that chimpanzees are not only able to prepare for an upcoming event, but able mentally to construct a new situation to alter the future (in this case the behaviors of human zoo visitors) (Osvath Aff. at ¶13).

Part of being an autonomous individual is having self-control (Osvath Aff. at ¶14). Chimpanzees, like humans, can delay gratification for a future reward; they possess

a high level of self-control under many circumstances (Osvath Aff. at ¶14). Chimpanzees plan for future exchanges with humans (Osvath Aff. at ¶14). They may use self-distraction (playing with toys) to cope with the impulse of grabbing immediate candies instead of waiting for more (Osvath Aff. at ¶14).

Self-control depends upon the episodic system (Osvath Aff. at ¶14). The perceptual simulations made possible by episodic memory function as a motivational "brake" on current drives in favor of delayed rewards (Osvath Aff. at ¶14). The sensory simulation evokes a motivation related to the simulated episode (Osvath Aff. at ¶14). This motivation competes with whatever other motivations existed prior to the simulation (Osvath Aff. at ¶14). This brings the future into the present. For example, a choice between immediate and delayed satisfaction becomes a choice between two current motivations. It is a trick of the brain allowing for delay of gratification only available to humans and nonhumans with a sufficiently sophisticated sense of self and autobiographical memory (Osvath Aff. at ¶14). Thus, chimpanzees can disregard a small piece of food in favor of a tool that will allow them to obtain a larger piece of food in the future (Osvath Aff. at ¶14). And they can select a tool they have never seen, guess its function, and use it appropriately in the future (Osvath Aff. at ¶14). This ability to perceive the function of a novel tool in the future would be impossible without being able to mentally represent the details of the future event (Osvath Aff. at ¶14).

This all means that chimpanzees re-experience past pains and pleasures as well as anticipate them (Osvath Aff. at ¶16). This in turn implies that, like humans, they can experience pain about an anticipated future event (Osvath Aff. at ¶16). Confining someone in a prison or cage for a set time, or for life, loses much of its power as

punishment if the individual had no self-concept (Osvath Aff. at ¶16). Every moment will be a new moment with no conscious relation to the next (Osvath Aff. at ¶16). As chimpanzees have a concept of their personal past and future and therefore suffer the pain of not being able to fulfill their goals or move around as they wish, like humans they experience the pain of anticipating a never-ending situation (Osvath Aff. at ¶16).

Language, a volitional process that involves creating intentional sounds for the purpose of communication, also reflects autonomous thinking and behavior (Matsuzawa Aff. at ¶13). Certain sounds are selectively produced by chimpanzees to capture the attention of an inattentive audience (Matsuzawa Aff. at ¶13). These sounds are produced almost exclusively in the presence of an audience and are therefore under volitional control, as they serve the purpose of informing others about the presence of various items, such as food or a play object or tool (Matsuzawa Aff. at ¶13).

Chimpanzees' development of their use and understanding of sign language, along with their natural communicative gestures and vocalizations, parallels the development of language in children, which points to deep similarities in the cognitive processes that underlie communication in chimpanzees and humans (Jensvold Aff. at ¶9).

Chimpanzees exhibit referential and intentional communication (Anderson Aff. at ¶15). They point and vocalize when they want humans and other chimpanzees to notice something and adjust their gesturing to insure they are noticed (Anderson Aff. at ¶15). In tasks requiring cooperation, chimpanzees recruit partners they know to be the most skilled and take turns as appropriate when requesting and giving help to a partner (Anderson Aff. at ¶15). Chimpanzees communicate intentionally and purposefully when they want to inform naïve chimpanzees about something, such as a predator (Anderson

Aff. at ¶15). Wild chimpanzees presented with a model of a python direct alarm calls to friends just arriving on the scene, who could not see the snake, and stopped calling once the others were far enough to be safe from the predator (Anderson Aff. at ¶15).

Chimpanzees demonstrate purposeful communication, conversation, understanding of symbols, perspective-taking, imagination, and humor (Jensvold Aff. at ¶9; Savage-Rumbaugh Aff. at ¶¶14-15). They learn symbols for hundreds of items, events and locations, and remember them for decades; they learn new symbols without being taught, by observing others using them (other apes or humans) (Savage-Rumbaugh Aff. at ¶20). They can master syntax (Savage-Rumbaugh Aff. at ¶20). They understand conditional "if/then" clauses, such as, "if you share your cereal with Sherman, you can have some more" (Savage-Rumbaugh Aff. at ¶21). They announce important social events, what that they are about to do, where they are going, what assistance they want from others, and how they feel (Savage-Rumbaugh Aff. at ¶25). They announce what they are going to retrieve from an array of objects that they've seen in another room (Savage-Rumbaugh Aff. at ¶25). They announce that they have seen important social events such as when they have seen another chimpanzee that has been anesthetized rolled by on a cart (this is extremely upsetting to them), or when they see that a gorilla has attacked another chimpanzee on television (Savage-Rumbaugh Aff. at ¶25). They recount what happened yesterday to an unknowing listener (Savage-Rumbaugh Aff. at ¶27).

Chimpanzees understand there is no one-to-one relationship between utterances and events, that there are infinite linguistic ways of communicating the same or similar things (Savage-Rumbaugh Aff. at ¶22). They use their symbols to comment about other individuals as well as about past and future events (Jensvold Aff. at ¶10). Both child and

chimp purposefully create declarative sentences (Jensvold Aff. at ¶10). Both combine gestures with pointing to refer to objects (Jensvold Aff. at ¶10).

In short, there is no essential difference between what words chimpanzees learn mean to them, and what words humans learn mean to them (Savage-Rumbaugh Aff. at ¶20).

Language-trained chimpanzees spontaneously use their language to communicate with each other (Jensvold Aff. at ¶12; Savage-Rumbaugh Aff. at ¶15). Those who comprehend spoken English communicate complex things through their response to "yes/no" answers (Savage-Rumbaugh Aff. at ¶15). They can answer "yes/no" questions about their thoughts, plans, feelings, intentions, dislikes and likes if they trust the researcher and believe that this knowledge will not be employed against them (Savage-Rumbaugh Aff. at ¶15). They can answer questions about the likes and dislikes of their companions and will tell researchers what other apes, who cannot comprehend English, want and/or think (Savage-Rumbaugh Aff. at ¶15). They use their symbols to express themselves, and to state what they are going to do, in advance of acting, then carry out their stated action (Savage-Rumbaugh Aff. at ¶17). An example is statements made by two language-trained chimpanzees trained with abstract computer symbols, Sherman and Austin, who told each other the foods they intended to share, and told experimenters which items they were going to give to them (Savage-Rumbaugh Aff. at ¶17). With the emergence of the ability to state their intentions, Sherman and Austin revealed that not only did they recognize and understand differential knowledge states between themselves, but that language allows separate beings to bring their different knowledge states into accord with their own imminent intentions and thus to coordinate their actions

(Savage-Rumbaugh Aff. at ¶18). Coordinated actions can take place between two minds when both have come to an agreement prior to action (Savage-Rumbaugh Aff. at ¶19).

Sherman and Austin would say "Go outdoors," then head for the door, or "Apple refrigerator," then take an apple from the refrigerator (rather than any of the other foods that were located in the refrigerator). These were not requests, but statements of intent (Savage-Rumbaugh Aff. at ¶18). In order to produce statements about intended action, for the purpose of co-coordinating future actions with others, one must be able to form a thought and hold it in mind until agreement is reached between two parties (Savage-Rumbaugh Aff. at ¶20).

Loulis, a male chimpanzee, was not raised with humans and was not taught ASL by humans (Jensvold Aff. at ¶12). Nor did humans use ASL in his presence (Jensvold Aff. at ¶12). But he was the adopted son of another signing chimpanzee, Washoe, and Loulis acquired his signs from observing Washoe and other signing chimpanzees, as well as when Washoe molded his hands into the appropriate signs (Jensvold Aff. at ¶12). Not only did Washoe's behavior toward her adopted son show she was aware of his shortcomings in the use of signs as a communication skill, but she took steps to change that situation (Jensvold Aff. at ¶12).

True purposeful communication is based on conversational interaction in which each of the participants takes turns communicating in a give and take manner and participants respond appropriately to the communicative actions of each other (Jensvold Aff. at ¶11). When a conversation becomes confusing, participants make contingent adjustments, such as offering a revised or alternative utterance/gesture or repeating a gesture or sign in order to continue the conversation (Jensvold Aff. at ¶11). ASL-using

chimpanzees demonstrate contingent communication with humans at the same level as young human children (Jensvold Aff. at ¶11).

When humans feel a conversation has broken down, they repeat their utterance and add information (Jensvold Aff. at ¶11). Chimpanzees conversing in sign language with humans respond in the same way, reiterating, adjusting, and shifting their signs to create conversationally appropriate rejoinders; their reactions to and interactions with a conversational partner resemble patterns of conversation found in studies of human children (Jensvold Aff. at ¶11). When their request is satisfied, they cease signing it (Jensvold Aff. at ¶11). When their request is misunderstood, refused or not acknowledged, they repeat and revise their signing until they get a satisfactory response (Jensvold Aff. at ¶11). As in humans, this pattern of contingency in conversation is a key demonstration of volitional and purposeful communication and thought (Jensvold Aff. at ¶11).

Chimpanzees understand that conversation involves turn-taking and mutual attention and will intentionally try to alter the attentional state of the human (Jensvold Aff. at ¶11). If they wish to communicate with a human whose back is turned to them they will make attention-getting sounds, such as using only signs with a noisy sound component, such as smacking the hand (Jensvold Aff. at ¶11). If the human is turned to them, they then switch to conversational sign language with few sounds (Jensvold Aff. at ¶11).

Both language-using and wild chimpanzees understand conversational give-and-take and adjust their communication to the attentional state of the individual with whom they want to communicate (Jensvold Aff. at ¶11). Even wild and captive chimpanzees

untutored in American Sign Language string together multiple gestures to create gesture sequences (Jensvold Aff. at ¶11). They may combine gestures into long series, within which gestures may overlap, be interspersed with bouts of response waiting or be exchanged back and forth between individuals (Jensvold Aff. at ¶11). Both ASL-trained and wild chimpanzees adjust their gestures and gestural sequences to the attention state of the individual they are trying to communicate with, using visual gestures towards an attentive partner and tactile and auditory gestures more often toward inattentive partners. If the partner does not respond, they repeat the gesture (Jensvold Aff. at ¶11).

When Sherman and Austin communicated with each other, a variety of spontaneous communicative gestures arose that indicated they were paying close attention to the visual regard of the other (Savage-Rumbaugh Aff. at ¶22). For example, if Austin were looking away when Sherman selected a symbol, Sherman would wait until Austin looked back. He would then point to the symbol he had used. If Austin still hesitated, Sherman would point to the food that the symbol symbolized. If Austin's attention wandered further, Sherman would turn Austin's head toward the keyboard. If Sherman was not attending to Austin's request, Austin would gaze at the symbol until Sherman took note (Savage-Rumbaugh Aff. at ¶22). Both recognized that the speaker had to monitor the listener, watch what he was doing, make judgments about his state of comprehension and decide how to proceed with conversational repair (Savage-Rumbaugh Aff. at ¶22).

In a manner similar to children from ages two through seven, sign-language trained chimpanzees sign amongst themselves, as do chimpanzees trained to use arbitrary computer symbols to communicate, and exhibit a telltale sign of volitional use of

language, that is, private signing or signing to themselves, also known as "private speech" (Jensvold Aff. at ¶12; Savage-Rumbaugh Aff. at ¶14). Private speech has many functions, including self-guidance, self-regulation of behavior, planning, pacing, and monitoring skill, and is a part of normal development of communication (Jensvold Aff. at ¶13). It helps children control and regulate their emotions and thoughts by focusing them on their own concerns and providing a buffer from external distractions (Jensvold Aff. at ¶13).

Children use private speech during creative and imaginative play, often talking to themselves when playing imaginative and pretend games (Jensvold Aff. at ¶14). The more frequently children engage in private speech, the more creative, flexible, and original thought they display (Jensvold Aff. at ¶14).

Imagination is a key component of mental representation, metacognition, and the ability to mentally create other realities (Jensvold Aff. at ¶15). Both captive and wild chimpanzees engage in at least six forms of imaginary play that are similar to the imaginary play of children ages two through six (Jensvold Aff. at ¶15). These include Animation, Substitution, and imaginary private signing (Jensvold Aff. at ¶15). Animation is pretending that an inanimate object is alive, such as talking to a teddy bear, while substitution is pretending an object has a new identity, such as placing a block on the head as a hat (Jensvold Aff. at ¶15). In imaginary private signing, chimpanzees create word-play, or transform a sign or its referent to a different meaning, whether it is present or not (Jensvold Aff. at ¶14). An example is placing a wooden block on one's head and referring to it, in sign, as a "hat" (Jensvold Aff. at ¶14).

Chimpanzees use their imagination to engage in pretend-aggression (Savage-Rumbaugh Aff. at ¶31). Sherman pretended that a King Kong doll was biting his fingers and toes and would startle his caretakers by pretending to be in pain, as he poked a needle in his skin and out the other side, being careful to just pierce the thick outer layer of skin (Savage-Rumbaugh Aff. at ¶31).

Deception and imaginary play require behaviors directed toward something that is not there and often involve modeling mental states (Jensvold Aff. at ¶16). They are closely related and by age three chimpanzees engage in both (Jensvold Aff. at ¶15; Savage-Rumbaugh Aff. at ¶16). For example, a chimpanzee who cached stones to later throw at zoo visitors engaged in deception by constructing hiding places for his stone caches, then inhibiting those aggressive displays that signal upcoming throws (Osvath Aff. at ¶13).

Chimpanzees also have a sense of humor, and are known to laugh under many of the same circumstances humans laugh (Jensvold Aff. at ¶17). Together these findings provide further evidence for cognitive similarities between humans and chimpanzees in the domains of mental representation, intentionality, imagination, and mental state modeling – all fundamental components of autonomy (Jensvold Aff. at ¶17).

Chimpanzees are highly attuned to the experiences, visual perspectives, knowledge states, emotional expressions and states of others (Anderson Aff. at ¶15; Fugate Aff. at ¶16; Matsuzawa Aff. at ¶¶17, 18). They possess "mirror neurons," which allow for the ability to share and relate to another's emotional state (Fugate Aff. at ¶14). These specialized cells respond to actions performed by oneself, but also when one watches the same action performed by another, which forms the basis for empathy, the

ability to put oneself in another's situation (Fugate Aff. at ¶14; Matsuzawa Aff. at ¶17). They have some "theory of mind;" they know they have minds, they know humans have minds, thoughts, intentions, feelings, needs, desires, and intentions and they know that their minds and state of knowledge differ from what their minds know (Savage-Rumbaugh Aff. at ¶32). They know when another chimpanzee does not know something and inform the other about facts he does not know (Savage-Rumbaugh Aff. at ¶32).

For instance, chimpanzees cannot only imitate the actions of others but anticipate the intentions of others when watching a human or another chimpanzee try to complete a task (Matsuzawa Aff. at ¶17). Chimpanzees know what others can and cannot see (Matsuzawa Aff. at ¶17). Chimpanzees know when another's behavior is accidental or intentional (Matsuzawa Aff. at ¶17). And chimpanzees use their knowledge of others' perceptions tactically to deceive another chimpanzee and obtain hidden food (Matsuzawa Aff. at ¶17). In situations where two chimpanzees are in competition for hidden food they show a number of strategies and counter-strategies to throw each other "off the trail" and obtain the food for themselves (Matsuzawa Aff. at ¶17). This kind of complexity in understanding others' minds is key evidence of being aware of one's own mind and that of others, as chimpanzees clearly are (Matsuzawa Aff. at ¶17).

When placed in a situation where they need to compete for food placed at various locations around visual barriers, subordinate chimpanzees will only approach food that they infer dominant chimpanzees cannot see (Anderson Aff. at ¶15). They take the visual perspective of the chimpanzee competitor, and understand that what they themselves see is not the same thing as what their competitor sees (Anderson Aff. at ¶15). When ASL-trained and wild chimpanzees adjust their gestures and gestural sequences to the attention

state of the individual they are trying to communicate with, using visual gestures towards an attentive partner and tactile and auditory gestures more often toward inattentive partners. If the partner does not respond, they repeat the gesture, demonstrating visual perspective-taking and mental state modeling (Jensvold Aff. at ¶11).

The capacity for self-recognition has been linked to empathic abilities (Anderson Aff. at ¶13). "Empathy" is defined as identifying with and understanding another's situation, feelings and motives and several lines of evidence indicate that chimpanzees are capable of highly developed empathic abilities (Anderson Aff. at ¶13). Contagious yawning in chimpanzees demonstrates they possess very complex levels of self-awareness and empathic abilities (Matsuzawa Aff. at ¶18; Fugate Aff. at ¶14, ¶16).

When tested in similar experimental situations using video stimuli, chimpanzees show contagious yawning in much the same way as humans do (Anderson Aff. at ¶18; Matsuzawa Aff. at ¶18). The finding that chimpanzees yawn more frequently in response to seeing familiar individuals yawning compared to unfamiliar others provides support for a link between contagious yawning and empathy (Anderson Aff. at ¶18; Matsuzawa Aff. at ¶18). Chimpanzees who were shown videos of other chimpanzees yawning or just showing open-mouth facial expressions that were not yawns, showed higher levels of yawning in response to the yawn videos but not to the open-mouth displays but not the other (Matsuzawa Aff. at ¶18). These findings are similar to contagious yawning effects observed in humans, and are thought to be based on the capacity for empathy, (Matsuzawa Aff. at ¶18).

In the wild and in captivity, chimpanzees engage in sophisticated forms of tactical deception that require attributing mental states and motives to others (Anderson Aff. at

¶14). This is shown, for example, when individuals console an unrelated victim of aggression by a third-party (Anderson Aff. at ¶14). They show concern for others in risky situations, such as when a chimpanzee group crosses a road, the stronger and more capable adult males will investigate the situation before more vulnerable group-members cross, and will take up positions at the front and rear of the procession (Anderson Aff. at ¶14). Knowledge of one's own and others' capabilities is probably also at the origin of some instances of division of labor (Anderson Aff. at ¶14). This includes sex differences in cooperative hunting for live prey, and crop-raiding; these activities often lead to individuals in possession of food sharing it with those who do not (Anderson Aff. at ¶14).

One consequence of self-awareness may be awareness of death; chimpanzees demonstrate compassion, bereavement-induced depression, and an understanding of the distinction between living and non-living, in a manner similar to humans when a close relative passes away, which strongly suggests that chimpanzees, like humans, feel grief and compassion when dealing with mortality (Anderson Aff. at ¶19).

One of the most important indicators of intelligence is the capacity for tool-making and use (McGrew Aff. at ¶15). Chimpanzees' performance on intelligence tests is equivalent to that of three and four year-old human children, especially in physical intelligence, which involves object manipulation (McGrew Aff. at ¶14). Tool-making implies complex problem-solving skills and is further evidence of an understanding of means-ends relations and causation, as it requires making choices, often in a specific sequence, towards a predefined goal, which is a key aspect of intentional action (McGrew Aff. at ¶15; Fugate Aff. at 17).

Chimpanzees demonstrate intelligent tool-making and use in both nature and captivity. In nature they make and use tools of vegetation and stone in daily life for hunting, gathering, fighting, play, communication, courtship, hygiene and socializing (McGrew Aff. at ¶15). Tool-making and tool-use are chimpanzee species universals, found in all populations studied over the long-term (McGrew Aff. at ¶15).

Chimpanzees make and use complex tools that require them to utilize two or more objects towards a single goal (McGrew Aff. at ¶16). An example is using one stone as a hammer and another as an anvil for cracking hard nuts (McGrew Aff. at ¶16). Chimpanzees make compound tools, in which two or more components are combined as a single working unit (McGrew Aff. at ¶16). Examples include the leaf sponge in which several fresh leaves are compressed into a single absorbent mass that allows water to be extracted from tree holes, and the wedge stone, in which chimpanzees insert a stone under an anvil to level its working surface to increase its efficiency (McGrew Aff. at ¶16). Such composite tool use reflects the fact that chimpanzees have the mental capacity to combine components of their environment in appropriate ways to attain a desired outcome (McGrew Aff. at ¶16). These capacities also involve making adjustments to existing circumstances in order to attain a goal and demonstrating that chimpanzees desire certain outcomes over others and work to achieve them (McGrew Aff. at ¶16).

Chimpanzees use "tool sets," two or more tools in an obligate sequence to achieve a single goal (McGrew Aff. at ¶17). For example, they have been known to use a set of five objects – pounder, perforator, enlarger, collector, and swab – to obtain honey (McGrew Aff. at ¶17). This kind of sophisticated tool-use involves choosing the appropriate objects in a complex hierarchical sequence to obtain a goal which is kept in

mind throughout the process (McGrew Aff. at ¶17). This kind of sequencing and mental representation is a hallmark of intentionality and self-regulation (McGrew Aff. at ¶17).

Chimpanzees have taken tool-making and use into a realm once thought to be unique to humans, that is, culture (McGrew Aff. at ¶17). Culture is behavior that is learned socially (learned by watching others), is normative (represents something most individuals do), and collective (characteristic of a group or community) (McGrew Aff. at ¶18). It is a set of behaviors transmitted by social and observational learning (learning by watching others), which becomes characteristic of a certain group or population (McGrew Aff. at ¶18). Culture is based on several high-level cognitive capacities, including imitation (the direct mimicking of bodily actions), emulation (learning about the results of someone else's actions, then achieving those results in another way) and innovation (producing novel ways to do things and combining known elements in new ways) all of which chimpanzees share (McGrew Aff. at ¶18). Under natural condition, chimpanzees construct a social structure that is rule-based, conscious and successful; culture allows them to survive as group (Savage-Rumbaugh Aff. at ¶11f).

Decades of observational field research in various locations in Africa have produced an overwhelming amount of evidence that wild chimpanzees possess different cultural traditions that they pass on from one generation to the next (McGrew Aff. at ¶19). These chimpanzee traditions meet the same criteria that define human culture (McGrew Aff. at ¶19).

Three general cultural domains are found in humans and chimpanzees: 1) material culture, defined as the use of one or more physical objects as a means to achieve an end, 2) social culture, defined as behaviors that allow individuals to develop and benefit from

social living, and 3) symbolic culture, defined as special communicative gestures and vocalizations which are only arbitrarily, that is symbolically, associated with certain intentions and behaviors (McGrew Aff. at ¶19).

With respect to the tool-making and using aspect of material culture, while all wild chimpanzees make and use tools, each chimpanzee group makes and uses a unique combination of tools known as a "tool kit" (McGrew Aff. at ¶20). Their use of a tool kit indicates that chimpanzees form a mental representation of a sequence of acts aimed at achieving a future desired outcome (Affidavit of James Anderson, at 6). A chimpanzee tool kit is a unique set of about 20 different tools, often used in a specific sequence, for various functions in daily life (McGrew Aff. at ¶20; Anderson Aff. at ¶16). These include tools used for foraging and processing food, such as specialized sticks to open up termite mounds, stems used as probes in ant nests, sticks to get marrow out of the bones of dead animals, stone "hammer and anvil" to crack nuts, among a wide variety of others (McGrew Aff. at ¶20). Tools are also made and used for personal comfort and hygiene, including using leaves to clean the body, using certain stems to comb through hair, using sticks to clear the nasal passages and using a leafy twig to fan away flies, among many others (McGrew Aff. at ¶20). Tools include those used for nest building (for sleeping), which involve specialized ways of bending branches and sticks to make a comfortable and secure sleeping nest in the trees (McGrew Aff. at ¶20). These "tool kits" vary from group to group, are passed down by observing others performing the tasks and are found in a wide range of ecological locations, from savannah to rainforest (McGrew Aff. at ¶20).

Tool-making is not genetically determined or fixed; it is not "hard-wired" behavior or simple reflex (McGrew Aff. at ¶20). Rather, tool-making depends on the same mental abilities that underlie human culture – learning from others and making specific decisions about how to do things. Each chimpanzee group develops its own culture through its own behavioural choices (McGrew Aff. at ¶20). Decades of field work show that there are at least 40 unique chimpanzee cultures spread across Africa made up of combinations of over 65 different identifiable behaviors (McGrew Aff. at ¶20). In addition to those already mentioned, these include the ingestion of various plant materials for their medicinal properties as anti-bacterial agents and dewormers (McGrew Aff. at ¶20).

Though many of the tools in chimpanzee tool kits are not preserved in the archaeological record, because they are made of organic materials that decompose over time, such as leaves, stems, bark, such chimpanzee stone tools as hammer and anvils are preserved in the same way as are human stone tools (McGrew Aff. at ¶21). Chimpanzee stone artefacts have been compared with early human stone artefacts in terms of what they reveal about their comparative mental abilities (McGrew Aff. at ¶21). The foraging tool kits of some chimpanzee populations, such as in western Tanzania, are indistinguishable in complexity from the tools kits of some of the simplest material cultures of humans, such as Tasmanian aborigines, and of the oldest known human artefacts, such as those of the Oldowan Industry discovered in East Africa (McGrew Aff. at ¶21). Dated chimpanzee stone artefacts excavated from sites in West Africa show there was once a chimpanzee "Stone Age," just as there was a "Stone Age" for humans, that dates to at least 4,300 years ago (McGrew Aff. at ¶21). The ages of the tools suggest that,

in at least one population chimpanzee tool-making culture has been passed down for 225 generations (McGrew Aff. at ¶21). These findings demonstrate that chimpanzee culture has very deep roots that predate the onset of settled farming villages and the invention of Iron Age technology in that part of Africa (McGrew Aff. at ¶21).

With respect to social culture, chimpanzees pass many social displays and social customs from one generation to the next (McGrew Aff. at ¶22). Examples include the "waterfall display" reported by Jane Goodall (McGrew Aff. at ¶22). Male chimpanzees approached a waterfall in the Gombe National Park, Tanzania, and displayed in slow, rhythmic motions along the riverbed (McGrew Aff. at ¶22). For ten minutes or more, they picked up and threw rocks and branches, leaped to seize hanging vines, and swung over the stream in the wind (McGrew Aff. at ¶22). Goodall refers to these purposeful displays as likely expressions of feelings of awe in the chimpanzees towards the waterfall (McGrew Aff. at ¶22). Another example is the social "rain dance," a slow and deliberate pattern of rhythmic, bipedal locomotion at the start of rain performed mostly at the beginning of rainy season (McGrew Aff. at ¶22). Another is the grooming hand-clasp in which two chimpanzees clasp each other's hands, raise those arms in the air, and groom each other with their free hand (McGrew Aff. at ¶22). This social custom was first observed in the Mahale Mountains of Tanzania, and occurs, with some variation, in other locations, but is absent in others (McGrew Aff. at ¶22). This demonstrates the wide variability in social cultural expression across different chimpanzee groups (McGrew Aff. at ¶22).

The symbolic element that is key to human culture is found in wild chimpanzees (McGrew Aff. at ¶23). For instance, in one chimpanzee group arbitrary symbolic gestures

are used to communicate desire to have sex whereas in another group an entirely different symbolic gesture is used to express the same sentiment (McGrew Aff. at ¶23). The presence of symbolic culture in chimpanzees demonstrates that abstract concepts can be present without human language (McGrew Aff. at ¶23).

Comparisons between human and chimpanzee cultures demonstrate that the similarities are underwritten by a common set of mental abilities (McGrew Aff. at ¶24). The most important are imitation and emulation. Learning by observation is key to being able to imitate or emulate (McGrew Aff. at ¶24). Studies show that chimpanzees copy methods used by others to manipulate objects and use both direct imitation and emulation, depending on the circumstance (McGrew Aff. at ¶24).

True imitation, which involves copying bodily actions, is an important hallmark of self-awareness because it suggests the individual has a sense of his own body and how it corresponds to someone else's body and that he can manipulate his body in accordance with the other's actions (McGrew Aff. at ¶24). There is ample evidence that, under the right circumstances, chimpanzees mimic the actions of others precisely, even mimicking the correct sequence of actions to achieve a goal (McGrew Aff. at ¶24; Anderson Aff. ¶17). For instance, chimpanzees imitate the actions of humans, or other chimpanzees, as well as the exact sequence of three actions in order to open up an "artificial fruit" to get a treat (McGrew Aff. at ¶24).

Chimpanzee infants share with human infants the ability to selectively imitate facial expressions (Anderson Aff. at ¶17). Chimpanzees may directly imitate someone else's way to achieve a goal when they have not yet figured out their own way to achieve the same goal (McGrew Aff. at ¶24; Anderson Aff. at ¶17). When chimpanzees already

have the skills to complete a task they tend to emulate, not imitate (McGrew Aff. at ¶24). These findings show that chimpanzees make choices about whether to directly copy someone else's actions based on whether they think they can figure out how to do the task themselves (McGrew Aff. at ¶24).

Not only do chimpanzees imitate, but they also know when they are being imitated, and respond as young human toddlers do when they realize they are being imitated (McGrew Aff. at ¶24). Both chimpanzees and young human children tend to "test out" the behavior of the imitator by making repetitive actions and looking to see if the imitator does the same (McGrew Aff. at ¶24). This behavior is similar to how chimpanzees and toddlers test whether an image in a mirror is herself (McGrew Aff. at ¶24). This action, called "contingency checking," is another hallmark of self-awareness (McGrew Aff. at ¶24).

In addition to being aware of being imitated and being able to imitate others, chimpanzees engage in "deferred imitation," copying actions they have seen in the extended past (McGrew Aff. at ¶24; Anderson Aff. at ¶17). Deferred imitation relies upon even more sophisticated capacities than direct imitation, as the chimpanzees must remember the past actions of another, while replicating those actions in real time (McGrew Aff. at ¶24).

All these capacities for imitation and emulation are necessary for "cumulative cultural evolution" (McGrew Aff. at ¶25; Anderson Aff. at ¶17). This specific cultural capacity, found in humans and chimpanzees, involves the ability to build upon customs that came before (McGrew Aff. at ¶25). Moreover, chimpanzees, like humans, have a tendency to be social conformists, which allows them to maintain customs within groups

(McGrew Aff. at ¶25). All of the evidence so far suggests a striking similarity between the mental capacities of humans and chimpanzees in the areas of observational learning, imitation (and thus self-awareness), decision-making, memory and innovation (McGrew Aff. at ¶25).

Chimpanzees appear to have moral inclinations and some level of moral agency; they behave in ways that, if we saw the same thing in humans, we would interpret as a reflection of moral imperatives (McGrew Aff. at ¶26). They ostracise individuals who violate social norms (McGrew Aff. at ¶26). They respond negatively to inequitable situations, e.g. when offered lower rewards than companions receiving higher ones, for the same task (McGrew Aff. at ¶26). When given a chance to play economic games, such as the Ultimatum Game, they spontaneously make fair offers, even when not obliged to do so (McGrew Aff. at ¶26).

Chimpanzee social life in nature is cooperative (McGrew Aff. at ¶27). They engage in collaborative social hunting, in which different individual hunters adopt different roles that increase the chances of success of the hunt (McGrew Aff. at ¶27). After the hunt, they share the meat from the prey gained (McGrew Aff. at ¶27). Males cooperate in territorial defense, when they engage in risky boundary patrolling (McGrew Aff. at ¶27). Encounters with neighbouring males may be fatal, so that such cooperation may have life-or-death consequences (McGrew Aff. at ¶27). These types of behaviors represent a purposeful and well-coordinated social system (McGrew Aff. at ¶27).

Numerosity, the ability to understand numbers as a sequence of quantities, requires not only sophisticated working memory (in order to keep numbers in mind), but a conceptual understanding of a sequence (Matsuzawa Aff. at ¶19). This is closely

related to "mental time travel" and planning out the right sequence of steps towards a goal, two critical components of autonomy (Matsuzawa Aff. at ¶19). Not only do chimpanzees excel at understanding sequences of numbers, they understand that Arabic symbols ("2", "5", etc.) represent discrete quantities, outperforming humans in some of these tasks (Matsuzawa Aff. at ¶19).

Sequential learning is the ability to encode and represent the order of discrete items occurring in a sequence (Matsuzawa Aff. at ¶19). Sequential learning is critical for human speech and language processing, the learning of action sequences, or any task that requires putting items into an ordered sequence (Matsuzawa Aff. at ¶19). Chimpanzees can count or sum up arrays of real objects or Arabic numerals and display the concepts of ordinality and transitivity (the logic that if A = B and B = C, then A = C) when engaged in numerical tasks, demonstrating a real understanding of the ordinal nature of numbers (Matsuzawa Aff. at ¶19). Chimpanzees understand proportions (e.g., 1/2, 3/4, etc.) (Matsuzawa Aff. at ¶19). They can learn to name (using a symbol-based computer keyboard) the number, color and type of object shown on the screen (Matsuzawa Aff. at ¶19). They can use a computer touch screen to count from 0 to 9 in sequence (Matsuzawa Aff. at ¶19). They have an understanding of the concept of zero, using it appropriately in ordinal context (Matsuzawa Aff. at ¶19). They can count as high as 21 (Savage-Rumbaugh Aff. at ¶29). Moreover, chimpanzees display "indicating acts" (pointing, touching, rearranging) similar to what human children display when counting up a sum (Matsuzawa Aff. at ¶19). Just as children touch each item when counting an array of items, chimpanzees do the same thing, suggesting further similarity in the way numbers and sequences are conceptualized in chimpanzees and humans (Matsuzawa Aff. at ¶20).

Chimpanzees have excellent working, or short-term, memory (Matsuzawa Aff. at ¶20). Working memory is the ability to temporarily store, manipulate and recall items (numbers, objects, names, etc.) (Matsuzawa Aff. at ¶20). It has to do with how good someone is at keeping several items in mind at the same time (Matsuzawa Aff. at ¶20). Working memory tasks require monitoring (i.e., manipulation of information or behaviors) as part of completing goal-directed actions in the setting of interfering processes and distractions (Matsuzawa Aff. at ¶20). The cognitive processes needed to achieve this include attention and executive control (reasoning, planning and execution) (Matsuzawa Aff. at ¶20). Chimpanzees were shown the numerals 1-9 spread randomly across a computer screen (Matsuzawa Aff. at ¶20). The numbers appeared for a very limited duration (210, 430, and 650 milliseconds) and then were replaced by white squares, which had to be touched in the correct order (1-9) (Matsuzawa Aff. at ¶20). To complicate matters, in another version of the task, as soon as the chimpanzees touched the number 1, the remaining either were immediately masked by white squares (Matsuzawa Aff. at ¶20). To successfully complete the task, they had to remember the location of each concealed number and touch them in the correct order (Matsuzawa Aff. at ¶20). The performance of a number of the chimpanzees on these seemingly impossible memory tasks was not only accurate, but much better than that of human adults, who could not even complete most of the versions of the task (Matsuzawa Aff. at ¶20). Therefore, the chimpanzees have an extraordinary working memory capability for numerical recollection better than that of adult humans, which underlies a number of mental skills related to mental representation, attention, and sequencing (Matsuzawa Aff. at ¶20).

These remarkable similarities between humans and chimpanzees are not limited to the domain of autonomy, but are true for personality and emotion (King Aff. at ¶12; Osvath Aff. at ¶11). A significant similarity exists between chimpanzees and humans in the structure of their personality and subjective well-being or happiness (King Aff. at ¶12). The basic factors or dimensions that characterize chimpanzee personality, which are heritable the same way human personality is heritable, are remarkably similar to those that characterize human personality and change with age as do human personality factors (King Aff. at ¶¶13-21). For example, chimpanzee happiness or subjective well-being mimics human happiness or subjective well-being, and is similarly stable, related to other aspects of personality, undergoes a midlife crisis, and predicts longevity (King Aff. at ¶¶22-28).

Chimpanzees are very competent at "cross-modal perceptions." They can take in information in one modality such as vision or hearing, and internally translate it to information in another modality (Savage-Rumbaugh Aff. at ¶26). They can match a vocalization (audio) recording of a familiar chimpanzee individual or a video of a familiar individual chimpanzee producing a vocalization to the picture of the individual, or a voice recording of a familiar human to the picture of the human (Fugate Aff. at ¶16). They can take in symbolically encoded information and translate it into any non-symbolic mode (Savage-Rumbaugh Aff. at ¶26). When shown a picture of an object, they can retrieve that object by touch alone. They can retrieve the correct object by touch when shown only the symbol representing that object (Savage-Rumbaugh Aff. at ¶26).

On June 26, 2013, the National Institutes of Health (NIH) announced the agency's decisions with respect to recommendations concerning the use of chimpanzees in NIH-

supported research by The Working Group on the Use of Chimpanzees in NIH-Supported Research within the Council of Councils' Recommendation. *Announcement of Agency Decision: Recommendations on the Use of Chimpanzees in NIH-Supported Research* (June 26, 2013), *available at* http://dpcpsi.nih.gov/council/pdf/NIH_response_to_Council_of_Councils_recommendations_62513.pdf (last visited November 20, 2013) ("*NIH Decision*") (Affidavit of Steven M. Wise ("Wise Aff.") annexed as Exhibit 3). These included acceptance of the following recommendations of The Working Group:

1. Working Group Recommendation EA1: "Chimpanzees must have the opportunity to live in sufficiently large, complex, multi-male, multi-female social groupings, ideally consisting of at least 7 individuals. Unless dictated by clearly documented medical or social circumstances, no chimpanzee should be required to live alone for extended periods of time. Pairs, trios, and even small groups of 4 to 6 individuals do not provide the social complexity required to meet the social needs of this cognitively advanced species. When chimpanzees need to be housed in groupings that are smaller than ideal for longer than necessary, for example, during routine veterinary examinations or when they are introduced to a new social group, this need should be regularly reviewed and documented by a veterinarian and a primate behaviorist." (*NIH Decision* at 5).
2. Working Group Recommendation EA2: "The density of the primary living space of chimpanzees should be at least 1,000 square feet (93 square meters). Therefore, the minimum outdoor enclosure size for a group of 7 animals should be 7,000 square feet (651 square meters)". While the NIH *rejected* this recommendation,

stating that "[a]lthough the NIH agrees that sufficient square footage is needed for chimpanzees to travel, patrol, co-exist in social groups of 7 or more members, and separate from others, the agency is concerned about the lack of scientific consensus on the recommended square footage and is especially concerned about whether the published literature supports 1,000 square feet per chimpanzee . . . the agency will review the space density requirements with respect to the promotion of species-appropriate behavior." (*NIH Decision* at 6-8).

3. Working Group Recommendation EA4: "Chimpanzees should have the opportunity to climb at least 20 ft (6.1m) vertically. Moreover, their environment must provide enough climbing opportunities and space to allow all members of larger groups to travel, feed, and rest in elevated spaces." (*NIH Decision* at 8-9).
4. Working Group Recommendation EA5: "Progressive and ethologically appropriate management of chimpanzees must include provision of foraging opportunities and diets that are varied, nutritious, and challenging to obtain and process." (*NIH Decision* at 9-10).
5. Working Group Recommendation EA6: "Chimpanzees must be provided with materials to construct new nests on a daily basis." The NIH *accepted* this recommendation. (*NIH Decision* at 10-11).
6. Working Group Recommendation EA8: "Chimpanzee management staff must include experienced and trained behaviorists, animal trainers, and enrichment specialists to foster positive human-animal relationships and provide cognitive stimulation[.]" (*NIH Decision* at 11-12).

NAPSA was founded in 2010 by the directors of the seven leading chimpanzee sanctuaries in North America (Affidavit of Sarah Baeckler Davis ("Davis Aff."), at ¶4). With a mission to provide exceptional lifetime sanctuary care for chimpanzees, NAPSA represents the gold standard in primate care and provides permanent sanctuary to almost 500 chimpanzees (Davis Aff. at ¶¶5-6). Each sanctuary cares for chimpanzees in ethnologically appropriate social groups of no fewer than seven chimpanzees, provides naturalistic outdoor environments for the chimpanzees, has extensive environmental enrichment, and enough space and opportunity to exhibit species-typical behaviors like running, grooming, nesting, and climbing, has large numbers of staff, and adheres to strict and comprehensive standards (Davis Aff. at ¶¶7-8, ¶¶10-26). For example, Save the Chimps in Ft. Pierce, Florida, provides permanent homes for 261 chimpanzees on twelve artificial islands, upon which live groups of up to 25 chimpanzees, and has 59 employees (Davis Aff. at ¶20).

III. ARGUMENT

A. THE NhRP HAS STANDING TO FILE THIS PETITION.

The NhRP has standing to bring this action on behalf of Hercules and Leo. N.Y. C.P.L.R. § 7002(a) provides that "[a] person illegally imprisoned or otherwise restrained in his liberty within the state, *or one acting on his behalf* . . . may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance." (emphasis added). As was the law in England where concerned third parties brought famous habeas corpus actions on behalf of detained black slaves, *Somerset v. Stewart,* 20 Howell's State Trials 1, 98 Eng. Rep. 499, Lofft 1 (K.B. 1772) (third parties sought common law writ of habeas corpus on behalf of black slave imprisoned on a ship);

Case of the Hottentot Venus, 13 East 185, 104 Eng. Rep. 344 (K.B. 1810) (Abolitionist Society sought common law writ of habeas corpus to determine whether an African women who was being exhibited in London was there on her own free will), New York has long recognized broad common law next friend representation in habeas corpus cases. *See Lemmon v. People*, 20 N.Y. 562 (N.Y. 1860) (as he had in other cases, the dock worker, Louis Napoleon, sought a writ of habeas corpus on behalf of eight detained slaves with whom he had no relationship); *Holzer v. Deutsche Reichsbahn Gesellschaft*, 290 N.Y.S. 181, 192 (N.Y. Sup. Ct. 1936) *aff'd,* 299 N.Y.S. 748 (1937) *aff'd in part, modified in part,* 277 N.Y. 474 (1938) ("[i]n 1852 Mrs. Lemmon, of Virginia, proceeded to Texas via New York, with eight negro slaves. . . . Upon her arrival in New York a free negro, as next friend, obtained a writ of habeas corpus which was sustained"); *People v. McLeod*, 1842 WL 5106, 3 Hill 635, 647 note j (N.Y. 1842) ("every Englishman who is imprisoned by any authority whatsoever, has an undoubted right, by his agents or *friends*, to apply for and obtain a writ of habeas corpus") (citations omitted, emphasis added); *People ex rel. Turano v. Cunningham*, 395 N.Y.S.2d 4 (N.Y. App. Div. 1st Dept. 1977); *State v. Lascaris,* 322 N.Y.S.2d 426 (N.Y. App. Div. 4th Dept. 1971); *People ex rel. Hubert v. Kaiser,* 150 A.D. 541, 544 (N.Y. App. Div. 1912); *People ex rel. Sheldon v. Curtin,* 152 A.D. 364 (N.Y. App. Div. 1912); *People ex rel. Rao v. Warden of City Prison*, 11 N.Y.S.2d 63 (N.Y. Sup. Ct. 1939).

B. ONE CLAIMING TO BE A PERSON ILLEGALLY IMPRISONED IN NEW YORK IS ENTITLED TO A COMMON LAW WRIT OF HABEAS CORPUS.

1. "Legal person" is not a synonym for "human being," but designates an entity with the capacity to possess legal rights.

"[U]pon according legal personality to a thing the law affords it the rights and privileges of a legal person." *Byrn v. New York City Health & Hospitals Corporation*, 31 N.Y.2d 194, 201 (N.Y. 1972) (*citing* John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909); Hans Kelsen, *General Theory of Law and State* 93-109 (1945); George Whitecross Paton, *A Textbook of Jurisprudence* 349-356 (4th ed., G.W. Paton & David P. Derham eds. 1972); Wolfgang Friedman, *Legal Theory* 521-523 (5th ed. 1967)). Legal persons possess inherent value; "legal things," possessing merely instrumental value, exist solely for the sake of legal persons. 2 William Blackstone, *Commentaries on the Laws of England* *16 (1765-1769).

"Legal person" is not a synonym for "human being." Legal person is not even a biological concept. It does not "necessarily correspond" to the "natural order." *Byrn,* 31 N.Y.2d at 201. Legal personhood is a legal concept. "Legal person" may be narrower than "human being." For the purpose of the Fourteenth Amendment to the United States Constitution, a human fetus is not a legal person. *Roe v. Wade*, 410 U.S. 113 (1973). Before the Civil War, human slaves were not legal persons. *See, e.g., Jarman v. Patterson*, 23 Ky. 644, 645-46 (Ky. 1828) ("Slaves, although they are human beings, are by our laws placed on the same footing with living property of the brute creation. However deeply it may be regretted, and whether it be politic or impolitic, a slave by our code, is not treated as a person, but (*negotium*), a thing, as he stood in the civil code of the Roman Empire. In other respects, slaves are regarded by our laws, as in Rome, not as persons, but as things"); *Ex parte Boylston*, 33 S.C.L. (1 Strob) 41, 43 (S.C. Ct. App. of Law 1847) ("'every endeavor to extend to (a slave) positive rights, is an attempt to reconcile inherent contradictions.' In the very nature of things, he is subject to

despotism") (*quoting Kinloch v. Harvey*, Harp. 50816 S.C.L. 508 (S.C. App. L. & Eq. 1830)).

"Legal person" may designate an entity broader or qualitatively different than a human being. "Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol." George Whitecross Paton, *A Textbook of Jurisprudence* 393 (3rd ed. 1964). Corporations have long been "persons" within the meaning of the Fourteenth Amendment to the United States Constitution. *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1996). An August 30, 2012 agreement between the indigenous peoples of New Zealand and the Crown, p.10, secs. 2.6, 2.7, and 2.8, designated New Zealand's Whanganui River Iwi as a legal person. *See* http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CWhanganuiRiverAgreement.pdf (last visited November 20, 2013).

"There is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." John Chipman Gray, *The Nature and Sources of the Law*, Chapter II, 39 (1909) ("Gray"). Citing, among other authorities, George Whitecross Paton, *supra*, at 349-350, *Salmond on Jurisprudence* 305 (12th ed. 1928) ("A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination,"), and IV Roscoe Pound, *Jurisprudence* 192-193 (1959), a common law Indian court designated the Sri Guru Granth Sahib - the sacred text of Sikhism - as a "legal person" with the capacity to sue and be sued. *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, A.I.R. 2000 S.C. 421 (Indian Supreme Court). This

permitted the Sri Guru Granth Sahib to own and possess property. Another Indian court designated a mosque as a legal person, to the same end. *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369 (Lahore High Court, Full Bench). A pre-Independence court designated a Hindu idol as a "person" with the capacity to sue. *Pramath Nath Mullick v. Pradyunna Nath Mullick,* 52 Indian Appeals 245, 264 (1925).

The struggles over the legal personhood of human fetuses,[1] human slaves,[2] Native Americans,[3] women,[4] corporations,[5] and other entities have never been over whether they are human but whether, under the circumstances, justice demands that they count in law. In short, "'[p]erson' is a term of art." *Wartelle v. Womens' & Children's Hospital,* 704 So. 2d 778, 781 (La. 1997). Legal persons count, whether they are rivers, religious idols, holy books, former slaves, corporations, fetuses, or human beings; "legal things" don't. *See*

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[1] *Roe,* 410 U.S. 113; *Byrn,* 31 N.Y.2d 194.

[2] *Compare Trongett v. Byers*, 5 Cow. 480 (N.Y. Sup. Ct. 1826) (recognizing slaves as property), *Smith v. Hoff*, 1 Cow. 127, 130 (N.Y. 1823) (same), *In re Mickel*, 1817 WL 1515, 14 Johns. 324 (N.Y. Sup. Ct. 1817) (same) and *Sable v. Hitchcock*, 2 Johns. Cas. 79 (N.Y. Sup. Ct. 1800) (same) *with Lemmon*, 20 N.Y. 562 (slaves are free) and *Somerset*, 98 Eng. Rep. 499 (slavery is "so *odious* that nothing can be suffered to support it but positive law") (emphasis added).

[3] *United States ex rel. Standing Bear v. Crook,* 25 F. Cas. 695, 697 (D. Neb. 1879) (Native Americans are "persons" within the meaning of the Federal Habeas Corpus Act).

[4] *See, e.g., Nairn v. University of St. Andrews*, A.C. 147 (1909) ("It is incomprehensible to me that anyone acquainted with our laws or the methods by which they are ascertained can think, if anyone does think, there is room for argument of such a point" [that "all persons" who graduated from certain universities included women]); *In re Goodell*, 39 Wis. 232, 240 (Wis. 1875) (women could not be lawyers); Blackstone, *Commentaries on the Law of England* *442 (1765-1769) ("By marriage, the husband and wife are one person in law: that is the very being or legal existence of the woman is suspended during the marriage . . . ")

[5] *Citizens United v. Federal Communications Commission*, 558 U.S. 310 (2009) (corporations are "persons" within the meaning of the Fourteenth and First Amendments to the United States Constitution). But corporations are not protected by the Fifth Amendment's Self-Incrimination Clause. *Bellis v. United States*, 417 U.S. 85 (1974).

Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction,* 114 HARV. L. REV. 1745, 1746 (2001).

"[T]he significant fortune of legal personality is the capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). "The technical legal meaning of a 'person,'" said John Chipman Gray, is "a subject of legal rights and duties." Gray, *supra*, at 27.[6] "'To be a person' or 'to have a legal personality," is identical to having legal obligations and subjective rights." Hans Kelsen, *Pure Theory of Law* 172 (rev. and enlarged 1967). *See* Paton, *supra*, at 391 ("legal persons are all entities capable of being right-and-duty bearing units – all entities recognized by the law as capable of being parties to a legal relationship"); *Amadio v. Levin,* 509 Pa. 199, 225 (1985) (Zappala, J., concurring) ("[p]ersonhood' as a legal concept arises not from the humanity of the subject but from the ascription of rights and duties to the subject" and "'not every human being is necessarily a person, for a person is capable of rights and duties, and there may well be human beings having no legal rights, as was the case with slaves in English law.'") (*citing Black's Law Dictionary* 1299, 1300 (4th ed. 1968); Pollock, First Book of Jurisprudence 110; Gray, *supra*, for both statements); *Wartelle,* 704 So. 2d at 780-81 (the "classification of 'person' [a fetus] is made solely for the purpose of facilitating determinations about the attachment of legal rights and duties.")

That Hercules and Leo are chimpanzees does not mean they may never count as legal persons. As Gray explained, there may also be

> systems of law in which animals have legal rights . . . animals may conceivably be legal persons . . . when, if ever, this is the case, the wills of human beings must be attributed to the animals. There seems no essential

[6] This statement lies in Chapter II, cited with approval in *Byrn*, 31 N.Y.2d at 201.

> difference between the fiction in such cases and those where, to a human being wanting in legal will, the will of another is attributed.

Gray, *supra,* at 43. Who is deemed a legal person is a "matter which each legal system must settle for itself." *Byrn,* 31 N.Y.2d at 202 (quoting Gray, *supra*, at 3).

The historic question before this Court is whether Hercules and Leo, two illegally imprisoned chimpanzees, are legal persons who "count" for the purpose of a common law writ of habeas corpus in the state of New York. In the following sections, the NhRP will demonstrate that, both as a matter of New York common law liberty and common law equality, Hercules and Leo should each be recognized as a legal person possessed of the common law right to bodily liberty that the common law writ of habeas protects.

2. New York recognizes the common law writ of habeas corpus.

The "common-law writ of habeas corpus [is] a writ in behalf of liberty, and its purpose [is] to deliver a prisoner from unjust imprisonment and illegal and improper restraint." *People ex rel. Pruyne v. Walts*, 122 N.Y. 238, 241-42 (N.Y. 1890). It is, and always has existed in New York, independent of statute. *People ex rel. Jenkins v. Kuhne,* 57 Misc. 30, 40 (N.Y. Sup. Ct. 1907), *aff'd.*, 195 N.Y. 610 (N.Y. 1909) ("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 would still exist and could be enforced."); *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (N.Y. 1875) ("is not the creature of any statute . . . and exists as a part of the common law of the State"); *People ex rel. Patrick v. Frost*, 133 A.D. 179, 187-88 (N.Y. App. Div. 2nd Dep't 1909).[7]

[7] It may never be suspended except in exigent circumstances. N.Y. Const. Art. 1, § 4; *Morhous v. Supreme Court*, 293 N.Y. 131, 135 (N.Y. 1944).

In New York, 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." *McLeod*, 3 Hill 635 "note j." Its "scope and flexibility . . . its capacity to reach all manner of illegal detention - its ability to cut through barriers of form and procedural mazes-have always been emphasized and jealously guarded by courts and lawmakers." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). *See, e.g., People ex rel. Keitt v. McCann*, 18 N.Y.2d 257, 263 (N.Y. 1966); *People ex rel. Schreiner v. Tekben*, 607 N.Y.S.2d 850, 851 (N.Y. Sup. Ct. 1993).

The procedure for using the common law writ of habeas corpus is set forth in N.Y. C.P.L.R. §§ 7001-7012.[8] However, "[t]he 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." Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013). *See People ex rel Lobenthal v. Koehler*, 516 N.Y.S 2d 928-29 (N.Y. App. Div. 1st Dept. 1987).

C. THE RESPONDENTS MUST PROVE THEY ARE NOT IMPRISONING HERCULES AND LEO ILLEGALLY.

Because all persons are presumed to be entitled to personal liberty (*in favorem libertatis*),[9] the Respondents bear the burden of proving their imprisonment of Hercules and Leo is legally sufficient. *See People ex rel. Lebelsky v. Warden of New York City,*

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[8] The first section provides in part: "the provisions of this article are applicable to common law or statutory writs of habeas corpus." N.Y. C.P.L.R. § 7001.

[9] *See Oatfield v. Waring,* 14 Johns. 188, 192-93 (N.Y. Super. Ct. 1817) ("all presumptions in favor of personal liberty and freedom ought to be made"); *People ex rel. Caldwell v. Kelly*, 1862 WL 4670 (N.Y. Gen. Term 1862) (Potter, J. concurring) ("Liberty and freedom are man's natural conditions: presumptions should be in favor of this construction"). *See also infra*, discussing this presumption in the context of petitioners' common law right to bodily liberty.

Penitentiary, 168 N.Y.S. 704, 706 (N.Y. Sup. Ct. 1917) ("The burden in the first instance is upon the officer or party who detains the person to show that such detention is authorized by some local authority"). After the Petitioner makes a prima facie showing of entitlement to the issuance of the writ by meeting the requirements of N.Y. C.P.L.R. § 7002(c) (requiring the petitioner to state that the person is "detained" and the "nature of the illegality"), the Court must issue the writ without delay. N.Y. C.P.L.R. § 7003(a). The burden then shifts to the Respondents to present facts that show the detention is lawful. N.Y. C.P.L.R. § 7006(a). The Respondents' return must:

> Fully and explicitly state whether the person detained is or has been in the custody of the person to who the writ is directed, the authority and cause of the detention, whether custody has been transferred to another, and the facts of and authority for any such transfer.

N.Y. C.P.L.R. § 7008(b). If the Respondents fail to set forth the cause and custody of the detention, the Petitioner must be discharged. N.Y. C.P.L.R. § 7010(a). *See People ex re. Wilson v. Flynn*, 106 N.Y.S. 1141 (N.Y. Sup. Ct. 1907).

Slaves employed the common law writ of habeas corpus in New York to challenge their imprisonment as things.[10] *Lemmon*, 20 N.Y. at 604-06, 618, 623, 630-31 (*citing Somerset*); *In re Belt*, 2 Edm. Sel. Cas. 93 (N.Y. Sup. 1848); *In re Kirk*, 1 Edm. Sel. Cas.

[10] New York's adoption of English common law as it existed prior to April 19, 1775, *Montgomery v. Daniels*, 338 N.Y.2d 41, 57 (N.Y. 1975); *Jones v. People,* 79 N.Y. 45, 48 (N.Y. 1879): N.Y. Const. Art. I, § 14; N.Y. Const. § 35 (1777), incorporated Lord Mansfield's celebrated common law habeas corpus ruling in *Somerset v. Stewart*. In *Somerset*, Lord Mansfield began by assuming, without deciding, that the slave, James Somerset, could possibly possess the right to bodily liberty protected by the common law writ of habeas corpus, then issued the writ that required the Respondents to demonstrate that his imprisonment of James Somerset was legal. Steven M. Wise, *Though the Heavens May Fall – The Landmark Trial That Led to the End of Human Slavery* 114-20 (2005). After an oral argument spread over six months, Lord Mansfield ruled that human slavery was so "odious" it could not exist, except by positive law, and set James Somerset at liberty. 98 Eng. Rep., at 510; Lofft, at 19.

315 (N.Y. Sup. Ct. 1846) (*citing Somerset* and its progeny, *Forbes v. Cochran,* 107 Eng. Rep. 450, 467 (K.B. 1824); *In re Tom*, 5 Johns. 365 (N.Y. 1810) (per curiam) (at a time when slavery was legal in New York, a black slave successfully brought a habeas corpus action against a man Tom alleged was illegally detaining him).

Many others employed the common law writ of habeas corpus in a similar manner, including (1) apprentices and indentured servants, *People v. Weissenbach,* 60 N.Y. 385, 393 (N.Y. 1875); *People v. Hanna,* 3 How. Pr. 39 (N.Y. Sup. 1847); *In re M'Dowle*, 8 Johns. 328 (N.Y. Sup. Ct. 1811); *Rex v. DeLavel*, 97 Eng. Rep. 913 (K.B. 1763), (2) infants, *Weissenbach*, 60 N.Y. 385; *M'Dowle*, 8 Johns. 328; *In re Conroy*, 54 How. Pr. 432 (N.Y. Sup. Ct. 1878), (3) the incompetent elderly, *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (N.Y. App. Div. 4th Dep't 1996); *State v. Connor*, 87 A.D. 2d 511, 511-12 (N.Y. App. Div. 1st Dep't 1982), and (4) other mental incompetents, *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (N.Y. 1961) (criminally insane); *People ex rel. Ledwith v. Board of Trustees*, 238 N.Y. 403, 408 (N.Y. 1924); *Sporza v. German Sav. Bank*, 192 N.Y. 8, 15 (N.Y. 1908) (insane); *People ex rel. Morrell v. Dold*, 189 N.Y. 546 (N.Y. 1907); *Williams v. Director of Long Island Home, Ltd.*, 37 A.D. 2d 568, 570 (N.Y. App. Div. 2d Dep't 1971) (insane); *Matter of Gurland*, 286 A.D. 704, 706 (N.Y. App. Div. 2d Dep't 1955); *People ex rel. Ordway v. St. Saviour's Sanitarium*, 34 A.D. 363 (N.Y. App. Div. 1898).

The NhRP may similarly employ the common law writ of habeas corpus to challenge the legality of Hercules and Leo's imprisonment. Accordingly, this Court should issue a common law writ of habeas corpus on behalf of Hercules and Leo that

requires the Respondents to provide a legally sufficient reason for imprisoning them and then determine its legal sufficiency after full oral argument.

D. BECAUSE HERCULES AND LEO ARE IMPRISONED ILLEGALLY THEY ARE ENTITLED TO IMMEDIATE DISCHARGE.

An illegally imprisoned person in New York must be discharged forthwith once he brings a common law writ of habeas corpus. *People ex re. Stabile v. Warden of City Prison*, 202 N.Y. 138, 152 (N.Y. 1911). Imprisoned children and incapacitated adults have been similarly discharged from slavery, industrial training schools or other detention facilities, mental institutions, and other unlawful imprisonments. Before the Civil War, children detained as slaves were discharged through common law writs of habeas corpus into another's care. *Lemmon*, 20 N.Y. at 632 (discharged slaves included two seven-year-olds, a five-year-old, and a two-year-old); *Commonwealth v. Taylor*, 44 Mass. 72, 72-74 (Mass. 1841) (seven or eight year old slave discharged into care of the Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Aves*, 35 Mass. 193 (Mass. 1836) (seven year old girl discharged into custody of Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Holloway*, 2 Serg. & Rawle 305 (Pa. 1816) (child discharged); *State v. Pitney*, 1 N.J.L. 165 (N.J. 1793) (child discharged).

Free minors, who had long been discharged from industrial training schools or other detention facilities through a common law writ of habeas corpus, remained subject to the care of their parents or guardians. *People ex rel. F. v. Hill*, 319 N.Y.S.2d 961, 965 (N.Y. App. Div. 2d Dept. 1971), *aff'd*, 29 N.Y. 2d 17 (1971); *People ex rel. Silbert v. Cohen*, 320 N.Y.S.2d 608, 609 (N.Y. App. Div. 2d Dept. 1971) *aff'd*, 29 N.Y. 2d 12 (1971) (juveniles discharged); *People ex rel. Margolis on Behalf of Carlos R. v. Dunston*, 571 N.Y.S. 2d 295, 296 (N.Y. App. Div. 1st Dept. 1991); *People ex rel. Kaufmann v.*

Davis, 393 N.Y.S. 2d 746, 747 (N.Y. App. Div. 2d Dept. 1977); *People ex rel. Cronin v. Carpenter*, 25 Misc. 341, 342 (N.Y. Sup. Ct. 1898); *People ex rel. Slatzkata v. Baker*, 3 N.Y.S. 536, 539 (N.Y. Super. 1888); *In re Conroy*, 54 How. Pr. at 433-34; *People ex rel. Soffer v. Luger*, 347 N.Y.S. 2d 345, 347 (N.Y. Sup. Ct. 1973).

Minors similarly have been discharged from mental institutions pursuant to the habeas corpus writ, *People ex rel. Intner on Behalf of Harris v. Surles*, 566 N.Y.S.2d 512, 515 (N.Y. Sup. Ct. 1991), as have child apprentices, *Hanna*, 3 How. Pr. at 45; *In re M'Dowle*, 8 Johns, even though they were required to return to their parent's care.

Courts apply these principles to the discharge of incapacitated adults, *Brevorka*, 227 A.D. 2d 969 (elderly and ill woman showing signs of dementia); *Connor*, 87 A.D.2d at 511-12; *Siveke v. Keena*, 441 N.Y.S. 2d 631 (N.Y. Sup. Ct. 1981) (elderly and ill man).

As the Respondents cannot provide a legally sufficient reason for imprisoning Hercules and Leo, who the NhRP will demonstrate are each a legal person within the meaning of the common law writ of habeas corpus, this Court must discharge Hercules and Leo forthwith, and order them to be evaluated by NAPSA for placement in a member sanctuary that will care for their unique needs for the rest of their life.

1. <u>Hercules and Leo are legal persons.</u>

a. Hercules and Leo are legal persons within the meaning of EPTL § 7-8.1.

Hercules and Leo are the beneficiaries of an *inter vivos* trust created by the NhRP pursuant to EPTL §7-8.1 for the purpose of their care.[11] This statute recognizes Hercules

[11]This is true for four reasons. First, New York courts agree that EPTL § 7-8.1 permits the creation of *inter vivos* trusts. *Feger v. Warwick Animal Shelter,* 870 N.Y.S.2d 124, 126-27 (N.Y. App. Div. 2d Dep't 2008) (New York "law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the . . . *incapacitation* of their owner") (emphasis added); *In re Fouts*, 677 N.Y.S.2d 699 (N.Y. Sur. Ct. 1998)

and Leo's capacity for legal personhood, as only "persons" may be trust beneficiaries. *Lenzner v. Falk,* 68 N.Y.S.2d 699, 703 (N.Y. Sup. Ct. 1947); *Gilman v. McArdle,* 65 How. Pr. 330, 338 (N.Y. Super. 1883), *rev'd on other grounds,* 99 N.Y. 451 (1885).

"Before this statute [EPTL § 7-8.1] trusts for animals were void, because a private express trust cannot exist without a beneficiary capable of enforcing it, and because non-human lives cannot be used to measure the perpetuities period." Margaret Turano, *Practice Commentaries,* N.Y. Est. Powers & Trusts Law § 7-8.1 (2013). *See In re Mills' Estate*, 111 N.Y.S.2d 622, 625 (N.Y. Sur. Ct. 1952); *In re Estate of Howells*, 260 N.Y.S. 598, 607 (N.Y. Sur. Ct. 1932). New York did not even recognize honorary trusts for nonhuman animals which, by definition, lack beneficiaries. *In re Voorhis' Est.,* 27 N.Y.S.2d 818, 821 (N.Y. Sur. Ct. 1941).

In 1996, the Legislature altered this by enacting EPTL § 7-6 (now EPTL §7-8), sec. (a), which permitted "domestic or pet animals" to be designated as trust beneficiaries.[12] This section thereby acknowledged these nonhuman animals as "persons" capable of possessing legal rights. Accordingly, in *Fouts*, the Surrogate's Court recognized that five chimpanzees were "income and principal beneficiaries of the trust"

(court recognized an *inter vivos* trust for five chimpanzees). Second, EPTL § 7-8(c) refers to a "grantor" rather than a "testator." Third, the statute's Practice Commentaries explain "the testator or *grantor* may designate a person to be enforcer of the trust terms" pursuant to subparagraph (a), Margaret Turano, *Practice Commentaries,* N.Y. Est. Powers & Trusts Law § 7-8.1 (2013) (emphasis added). Fourth, if the legislature had intended to confine the statute's reach to testamentary trusts, it would have said so.

[12] Section (a) stated in relevant part: "A trust for the care of a designated domestic or pet animal is valid. The intended use of the principal or income may be enforced by an individual designated for that purpose in the trust instrument or, if none . . . by a trustee. The Sponsor's Memorandum attached to the bill that became EPTL § 7-6.1 (and now § 7-8.1) stated the statute's purpose was "to allow animals to be made the beneficiary of a trust." Sponsor's Mem. NY Bill Jacket, 1996 S.B. 5207, Ch. 159. The Senate Memorandum made clear the statute allowed "such animal to be made the beneficiary of a trust." Mem. of Senate, NY Bill Jacket, 1996 S.B. 5207, Ch. 159.

and referred to its chimpanzees as "beneficiaries" throughout the opinion. 677 N.Y.S. 2d. at 699. In *Feger*, the appellate court observed "[t]he reach of our laws has been extended to animals in areas which were once reserved only for people. For example, the law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner." 870 N.Y.S.2d at 126.

In 2010, the legislature renumbered EPTL § 7-6.1 as EPTL § 7-8.1, removed "Honorary" from the statute's title, "Honorary Trusts for Pets," leaving it to read, "Trusts for Pets,"[13] and amended section (a) to read:

> A trust for the care of a designated domestic or pet animal is valid. The intended use of the principal or income may be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual, or by a trustee. *Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive.*

(emphasis added). In removing "Honorary" and the twenty-one year limitation on trust duration, the legislature dispelled any doubt that a nonhuman animal was capable of being a trust beneficiary in New York.[14] By allowing "designated domestic or pet

[13] The Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York's report to the legislature stated, "we recommend that the statute be titled 'Trusts for Pets' instead of 'Honorary Trusts for Pets,' as honorary means unenforceable, and pet trusts are presently enforceable under subparagraph (a) of the statute." N.Y. Bill Jacket, 2010 A.B. 5985, Ch. 70 (2010).

[14] Other states recognize nonhuman animals as trust beneficiaries. *See* Colo. Rev. Stat. Ann. § 15-11-901(2) (2013) ("the designated domestic or pet animals become present beneficiaries of the trust"); Mass. Gen. Laws Ann. ch. 203E, § 408 (h) (2013) ("[t]he measuring lives shall be those of the beneficiary animals, not human lives."); Nev. Rev. Stat. Ann. § 163.0075 (2013) ("animal beneficiary"); Va. Code Ann. § 64.2-726 (A) (2013) ("animal beneficiaries"); Wash. Rev. Code Ann. § 11.118.020 (2013) ("the trust will terminate when no animal that is designated as a beneficiary of the trust remains living."); Wash. Rev. Code Ann. § 11.118.050 (2013) ("an animal that is a beneficiary of the trust"). Some states define a beneficiary as a "person." *See* Colo. Rev. Stat. Ann. § 15-10-201(5) (2013) ("a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer.");

animals" to be trust beneficiaries able to own the trust corpus, New York recognized these nonhuman animals as "persons" with the capacity for legal rights. Because Hercules and Leo are New York trust beneficiaries, they are legal "persons."

EPTL § 7-8.1 has created legal personhood in those nonhuman animals within its reach. This demonstrates that New York public policy already treats at least some nonhuman animals as persons capable of possessing one or more legal rights. For the reasons argued, *infra,* this Court should hold that Hercules and Leo are legal persons entitled to the common law right to the bodily liberty that the common law writ of habeas corpus protects.

b. New York common law requires this Court to declare Hercules and Leo are common law "persons."

Hercules and Leo's legal thinghood derives from the common law. When justice requires, New York courts refashion the common law with the directness Lord Mansfield displayed in *Somerset v. Stewart*, when he held slavery "so *odious* that nothing can be suffered to support it but positive law." 98 Eng. Rep., at 510; Lofft, at 19 (emphasis added). *See W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007, 1009 (N.Y. Sup. Ct. 1998), *aff'd*, 267 A.D.2d 233 (1999) ("For those who feel that the incremental change allowed by the Common Law is too slow compared to statute, we refer those disbelievers to the holding in *Stewart v. Somerset*, . . . which stands as an eloquent monument to the fallacy of this view").

The Court of Appeals rejects any claim that "change . . . should come from the Legislature, not the courts." *Woods v. Lancet*, 303 N.Y. 349, 355 (N.Y. 1951). "We

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Mass. Gen. Laws Ann. ch. 203E, § 103 (2013) (defining "[b]eneficiary" as "a person."); Va. Code Ann. § 64.2-701 (2013) (defining "beneficiary" as "a person.").

abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." *Id. See, e.g.*, *Flanagan v. Mount Eden General Hospital,* 24 N.Y. 2d 427, 434 (N.Y. 1969) ("we would surrender our own function if we were to refuse to deliberate upon unsatisfactory court-made rules simply because a period of time has elapsed and the legislature has not seen fit to act"); *Greenburg v. Lorenz*, 9 N.Y. 2d 195, 199-200 (N.Y. 1961) ("Alteration of the law [when the legislature is silent] has been the business of the New York courts for many years").

The 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,* which was 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[,]" the Court answered: "we should make the law conform to right." 303 N.Y. at 351. It explained that "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 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 (N.Y. 1988) (citing Cardozo, *Nature of Judicial Process*, at 152).

Therefore, in New York, "'[w]hen 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.' [The Court] act[s] in the finest common-law tradition when [it] adapt[s] and alter[s] decisional law to produce common-sense justice." *Woods,* 303 N.Y.

at 355 (*quoting United Australia, Ltd., v. Barclay's Bank, Ltd.*, (1941) A.C. 1, 29). 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." *Id.* (*quoting Funk v. United States*, 290 U.S. 371, 382 (1933)). *See, e.g., Gallagher v. St. Raymond's R.C. Church*, 21 N.Y.2d 554, 558 (N.Y. 1968) ("the common law of the State is not an anachronism, but is a living law which responds to the surging reality of changed conditions"); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 508 (N.Y. 1968) ("No recitation of authority is needed to indicate that this court has not been backward in overturning unsound precedent"); *Bing v. Thunig,* 2 N.Y.2d 656, 668 (N.Y. 1957) (a rule of law "out of tune with the life about us, at variance with modern day needs and with concepts of justice and fail dealing . . . [i]t should be discarded"); *Silver v. Great American Ins. Co.*, 29 N.Y. 2d 356, 363 (N.Y. 1972) ("Stare decisis does not compel us to follow blindly a court-created rule . . . once we are persuaded that reason and a right sense of justice recommend its change"); *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 391 (N.Y. 1916) (legal principles "are whatever the needs of life in a developing civilization require them to be"); *Rumsey v. New York and New England Railway Co.*, 133 N.Y. 79, 85 (N.Y. 1892) ("cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error") (*quoting* 1 *Kent's Commentaries* 477 (13th edition 1884)).

c. As Hercules and Leo are autonomous, they are common law persons entitled to the common law right to the bodily liberty that the common law writ of habeas corpus protects.

Its roots anchored into the depths of English history, the common law has been "viewed as a principle safeguard against infringement of individual rights." Judith S. Kaye, *supra*, at 730. Nonhuman animals were once believed to lack the abilities to think, believe, remember, reason, and experience emotion. Richard Sorabji, *Animal Minds & Human Morals – The Origins of the Western Debate* 1-96 (1993). From a plethora of scientific disciplines have emerged a mountain of facts that expose these ancient pre-Darwinian beliefs as anachronistic and untrue with respect to chimpanzees. See Statement of Facts, *supra*. Discussing the use of chimpanzees in biomedical research, the Institute of Medicine and National Research Council of the National Academies in 2011 noted that:

> Chimpanzees live in complex social groups characterized by considerable interindividual cooperation, altruism, deception, and cultural transmission of learned behavior (including tool use). Furthermore, laboratory research has demonstrated that chimpanzees can master the rudiments of symbolic language and numericity, that they have the capacity for empathy and self-recognition, and that they have the human-like ability to attribute mental states to themselves and others (known as the "theory of mind"). Finally, in appropriate circumstances, chimpanzees display grief and signs of depression that are reminiscent of human responses to similar situations.[15]

The affidavits attached to the Habeas Petition were submitted by some of the world's greatest working natural scientists. They confirm the extraordinarily complex, often human-like, cognitive abilities of chimpanzees. At every level, chimpanzees are today understood as beings entitled to extraordinary consideration; they have been steadily edging toward personhood.

Since Roman times, bodily liberty has been recognized as the natural condition of

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[15] *Chimpanzees in Biomedical and Behavioral Research - Assessing the Necessity* 27 (Bruce M. Altevogt, *et. al*, eds., The National Academies Press 2011).

many nonhuman animals. *J. Inst.* 2.1.12 ("natural liberty); *Dig.* 41.1.3 (Gaius, Common matters or golden things, Book 2) ("natural state of freedom"); *Dig.* 41.1.55 (Proculus, Letters, Book 2) ("natural state of freedom"); *Dig.* 41.1.44 (Ulpian, Edict, Book 19) ("natural freedom"); *Dig.* 41.2.3.14 (Paul, Edict, Book 54) ("natural state of liberty"). Two millennia before Darwin, Roman jurists "conceived that most things were destined by nature to be controlled by man. Such control expressed their natural purpose." Roscoe Pound, *An Introduction to the Philosophy of Law* 110 (1954). This legal expression of a natural linear hierarchy was part of what became known as the "Great Chain of Being," one "of the half-dozen most potent and persistent presuppositions in Western thought." *See generally*, Arthur O. Lovejoy, *The Great Chain of Being* viii (1933). "[A] perfect example of an absolutely rigid and static scheme of things," *id.* at 242, it was "explicitly and vehemently antievolutionary." Stephen Jay Gould, "Bound by the Great Chain," in *The Flamingo's Smile* 281, 282 (1985).

Consequently, Roman law allowed humans to obtain title to any nonhuman animal through "occupancy": seizure of a "thing," whether a human slave or a nonhuman animal that belonged to no one. 2 Patrick Mac Chombaich de Colquhon, *A Summary of the Roman Civil Law Illustrated by Commentaries and Parallels from the Mosaic, Canon, Mohammedan, English, and Foreign Law* 35-38 (1851).[16] *Hominum cause omne jus constituititum,* they wrote ("all law was established for men's sake"), *Dig.* 1.5.2

[16] *See, e.g.,* T. Lambert Mears, *Analysis of M. Ortolan's Institutes of Justinian, Including the History and Generalization of Roman Law* 146-147 (1876); Thomas C. Sandars, *The Institutes of Justinian* 40 (1984); Rudolph Sohm, *The Institutes – A Textbook of the History and System of Roman Private Law* 208 (James C. Ledlie, trans. 1907); Charles Donahue, Jr., *Animalia Ferae Naturae*: Rome, Bologna, Leyden, Oxford, and Queens County, N.Y. in *Studies of Roman Law in Memory of A. Arthur Schiller* 46 (Roger S. Bagnall & William V. Jarris eds. 1986); Dig. 41.1.14 (Neratius, Parchments); Dig. 41.2.3.14 (Paul, Edict book 54).

(Hermogenianus, Epitome of Law, book 1). Writing a millennium and a half before the invention of the scientific method, marinated in the erroneous Great Chain of Being, ignorant of the true capabilities of nonhuman animals, such as chimpanzees, they were wrong.[17]

The great common law expounders, Bracton, Fleta, Britton, and Blackstone merely restated the Roman law on the thinghood of nonhuman animals and their occupation. Henri de Bracton, *On the Laws and Customs of* 39-49 (Samuel E. Thorne, trans. 1968) (echoing Ulpian and Justinian, Bracton classified both nonhuman animals and human slaves as *res* subject to private ownership); 3 Fleta, Books III and IV 1-2 (H.G. Richardson & G.O. Sayles, trans. & eds. 1972); 1 Francis M. Nichols, *Britton* 214-216 (1983); 2 William Blackstone, *Commentaries on the Law of England* *390-*403 (1765-1769). *See Blades v. Higgs*, 11 Eng. Rep. 1474, 1481 (1865) ("there seems to be no difference between the Roman and common law" in obtaining a property interest in wild nonhuman animals). The famous case of *Pierson v. Post*, 3 Cai. R. 174 (N.Y. Sup. Ct. 1805), which noted that the fox had a "natural liberty," implicitly embraced the erroneous Great Chain of Being, and was little more than a disagreement on whether the majority should adopt Republican or Imperial Roman occupancy law. Half a century on, Chief Justice Taney would allude to the Great Chain of Being in the infamous Dred Scott case, when he claimed that blacks had long been "looked upon as so far below [whites] in the scale of created beings."[18]

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[17] The world laughs today at the New York jury that ignored expert scientific testimony to insist that a whale was a fish. D. Graham Burnett, *Trying Leviathan – The Nineteenth-Century Court Case That Put the Whale on Trial and Challenged the Order of Nature* (2007) (referring to the 1818 case of *Maurice v. Judd*).

[18] *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393, 409 (1856).

The law of England, incorporated into New York law, was long *in favorem libertatis* ("in favor of liberty").[19] Francis Bacon, "The argument of Sir Francis Bacon, His Majesty's Solicitor General, in the Case of the Post-Nati of Scotland," in IV *The Works Of Francis Bacon, Baron of Verulam, Viscount St. Alban And Lord Chancellor* 345 (1845) (1608); 1 Sir Edward Coke, *The First Part of the Institutes of the Laws of England* sec. 193, at *124b (1628); Sir John Fortescue, *De Laudibus Legum Angliae* 105 (S.B. Chrimes, trans. 1942 [1545]); *Moore v. MacDuff*, 309 N.Y. 35, 43 (N.Y. 1955); *Whitford v. Panama R. Co.*, 23 N.Y. 465, 467-68 (N.Y. 1861) ("prima facie, a man is entitled to personal freedom, and the absence of bodily restraint . . ."); *In re Kirk*, 1 Edm. Sel. Cas. 315, 327 (N.Y. Sup. Ct. 1846) ("In a case involving personal liberty [of a fugitive slave] where the fact is left in such obscurity that it can be helped out only by intendments, the well established rule of law requires that intendment shall be in favor of the prisoner"); *Oatfield v. Waring*, 14 Johns. 188, 193 (N.Y. Sup. Ct. 1817) (on the question of a slave's manumission, "all presumptions in favor of personal liberty and freedom ought to be made"); *Fish v. Fisher*, 2 Johnson Cas. 89, 90 (N.Y. Sup. Ct. 1800) (Radcliffe, J.); *People ex. rel Caldwell v Kelly*, 33 Barb. 444, 457-58 (N.Y. Sup Ct. 1862) ("Liberty and freedom are man's natural conditions; presumptions should be in favor of this construction") (Potter, J.). New York statutes agree. N.Y. Stat. Law § 314 (McKinney) ("A statute restraining personal liberty is strictly construed"); *Carollo, People ex rel. v. Brophy*, 294 N.Y. 540, 545 (N.Y. 1945); *People v. Forbes*, 4 Parker

[19] References to the overarching value of bodily liberty may be found as early as Pericles' Funeral Oration, Thucydides, *The Complete Writings of Thucydides - The Peloponnesian War*, sec. II. 37, at 104 (1951).

Crim. Rep. 611, 612 (N.Y. Sup. Ct. 1860) (statutes must be "executed carefully in favor of the liberty of the citizen").

Accordingly, "Anglo-American law starts with the premise of thorough-going self determination." *Natanson v. Kline*, 350 P.2d 1093, 1104 (Kan. 1960) *decision clarified on denial of reh'g*, 354 P.2d 670 (Kan. 1960). *See, e.g.*, *Thor v. Superior Court*, 5 Cal. 4th 725, 736 (Cal. 1993) (en banc); *Largey v. Rothman,* 110 N.J. 204, 209 (N.J. 1988); *Fain v. Smith,* 479 So. 2d 1150 n.3 (Ala. 1985) (Jones, J., dissenting) (the case echoes Justice Cardozo's sentiment in *Schloendorff v. Soc'y of N.Y. Hospital*, 211 N.Y. 125, 129-30 (N.Y. 1914) discussed *infra*); *Scott v. Bradford,* 606 P. 2d 554, 556 (Ok. 1979). The United States Supreme Court famously held that

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . "The right to one's person may be said to be a right of complete immunity: to be let alone."

Union P. R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (*quoting Cooley on Torts* 29).

The word "autonomy" derives from the Greek "autos" ("self") and "nomos" (law"). Michael Rosen, *Dignity – Its History and Meaning* 4-5 (2012). *See State v. Perry*, 610 So. 2d 746, 767 (La. 1992) ("The retributory theory of punishment presupposes that each human being possesses autonomy, a kind of rational freedom which entitles him or her to dignity and respect as a person which is morally sacred and inviolate"). Its deprivation constitutes a deprivation of dignity, both under the Fourteenth Amendment, *Lawrence v. Texas*, 539 U.S. 558, 574 (2003), and under New York common law, *People v. Rosen*, 81 N.Y. 2d 237, 245 (N.Y. 1993); *Rivers v. Katz,* 67 N.Y.2d 485, 493 (N.Y. 1986); *In re Gabr*, 39 Misc. 3d 746, 748 (N.Y. Sup. Ct. 2013), which "long recognized

the right of competent individuals to decide what happens to their bodies." *Grace Plaza of Great Neck, Inc. v. Elbaum,* 82 N.Y.2d 10, 15 (N.Y. 1993). *See, e.g., In re M.B.*, 6 N.Y.3d 437, 439 (N.Y. 2006); *Rivers,* 67 N.Y.2d at 492; *Schloendorff,* 211 N.Y. at 129-30.[20]

New York common law so powerfully values autonomy that it permits competent adults to decline life-saving treatment, though it may lead to death, *In re Westchester County Med. Ctr. ex rel. O'Connor*, 72 N.Y.2d 517, 526-28 (N.Y. 1988) ("*O'Connor*"); *Rivers,* 67 N.Y.2d. at 493; *People v. Eulo*, 63 N.Y. 2d 341, 357 (N.Y. 1984); *Matter of Storar*, 52 N.Y.2d 363, 378 (N.Y. 1981), *cert. den.*, 454 U.S. 858 (1981). This "insure[s] that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires." *Rivers,* 67 N.Y.2d at 493. It guarantees one the right to defend oneself against criminal charges without counsel. *In re Kathleen K.*, 17 N.Y.3d 380, 385 (N.Y. 2011) ("respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice with eyes open"). It permits a permanently incompetent, once-competent human to refuse medical treatment, if he clearly expressed his desire to refuse treatment before incompetence silenced him, and no over-riding state interest exists. *Matter of Storar,* 52 N.Y.2d at 378. Even the never-competent who will never be competent, such as the severely mentally retarded, the severely mentally ill, and the permanently comatose, possess common law autonomy that equals that of the competent. *See Rivers,* 67 N.Y.2d at 493 ("This right [to have the final say in medical treatment

[20] This common law right under New York law is co-extensive with the liberty interest protected by the Due Process Clause of the New York Constitution. *Matter of Fosmire v. Nicoleau,* 75 N.Y.2d 218, 226 (N.Y. 1990); *Rivers,* 67 N.Y.2d at 493.

decisions] extends equally to mentally ill persons who are not treated as persons of lesser status or dignity because of their illness") (*citing Superintendent of Belchertown State School v. Saikewicz,* 373 Mass. 728 (Mass. 1977)); *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 15 (N.Y. App. Div. 2d Dep't 1987) ("As noted in . . . [*Saikewicz*] the 'value of human dignity' extends to both competent and incompetent patients"); *Matter of Mark C.H.,* 28 Misc. 3d 765, 775 n.25 (N.Y. Sur. Ct. 2010) ("Like persons suffering from mental illness, courts 'must recognize the dignity and worth of such a person' with mental retardation or developmental disabilities") (*quoting Saikewicz,* 373 Mass. at 746); *In re New York Presbyterian Hosp.,* 181 Misc. 2d 142, 151 n.6 (N.Y. Sup. Ct. 1999) (*Saikewicz* "recognized that the right to refuse medical treatment 'must extend to the case of an incompetent as well as a competent patients because the value of human dignity extends to both'").[21]

Hercules and Leo's undoubted capacity for autonomy is expressly set forth in great detail in the expert Affidavits attached to the Habeas Petition and summarized in the Statement of Facts. Chimpanzees' most legally significant cognitive ability is "autonomy," which subsumes many of their other numerous complex cognitive abilities.

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[21] The New York common law rule that third parties may end life-saving medical treatments of the never-competent is grounded in the biological fact that the never-competent lack the ability, have always lacked the ability, and always will lack the ability, to choose, understand, or make a reasoned decision about medical treatment. *In re M.B.,* 6 N.Y.3d at 440; *Matter of Storar*, 52 N.Y.2d at 380. The common law right to decline life-saving medical treatment is personal, not exercisable by a third person. *O'Connor*, 72 N.Y.2d at 526-28; *Eulo,* 63 N.Y.2d at 357. "[I]t is inconsistent with our fundamental commitment to the notion that no person or court should substitute its judgment as to what would be an acceptable quality of life for another." *O'Connor,* 72 N.Y. 2d. at 530. *But see id.* at 537 (Hancock, J. concurring) (criticizes *Storar* as it "ties the patient's right of self-determination and privacy solely to past expressions of subjective intent"); *id.* at 540-541 (Simons, J., dissenting) (criticizes *Storar's* refusal to adopt a substituted judgment rule). In 2002, the legislature adopted a substituted judgment rule, SCPA 1750(2).

These include, but are not limited to, their possession of an autobiographical self, episodic memory, self-determination, self-consciousness, self-knowingness, self-agency, referential and intentional communication, empathy, a working memory, language, metacognition, numerosity, and material, social, and symbolic culture, their ability to plan, engage in mental time-travel, intentional action, sequential learning, mediational learning, mental state modeling, visual perspective-taking, cross-modal perception; their ability to understand cause-and-effect and the experiences of others, to imagine, imitate, engage in deferred imitation, emulate, to innovate and to use and make tools.

In June 2013, the NIH recognized that chimpanzees possess the capacity for choice and self-determination. *See* Accepted Recommendation EA7 of The Working Group on the Use of Chimpanzees in NIH-Supported Research within the Council of Councils' Recommendation, which states: "The environmental enrichment program developed for chimpanzees must provide for relevant opportunities for *choice and self determination.*" (*NIH Decision* at 10-11) (emphasis added). There the NIH noted, "A large number of commenters who responded to this topic strongly supported this recommendation as a way to ensure both the complexity of the captive environment and chimpanzees' ability to *exercise volition with respect to activity, social grouping, and other opportunities.*" *Id.* (emphasis added).

Autonomous, possessed of self-determination and the ability to choose, and dozens of allied complex cognitive capacities, Hercules and Leo are entitled to common law personhood and the common law right to bodily liberty protected by the New York common law writ of habeas corpus.

2. Hercules and Leo are common law persons entitled to the common law equality right to bodily liberty that the common law writ of habeas corpus protects.

In addition to being entitled to common law personhood and the right to bodily liberty as a matter of common law liberty, Hercules and Leo are entitled to them as a matter of common law equality. Equality has always been a vital New York value, as a matter of constitutional law, statutes, and the common law.[22] Article 1, § 11 of the New York Constitution contains both an Equal Protection Clause, modeled on the Fourteenth Amendment to the United States Constitution, and an anti-discrimination clause not found in the United States Constitution. "[T]he principles expressed in those sections [of the Constitution] were hardly new." *Brown v. State*, 89 N.Y.2d 172, 188 (N.Y. 1996). As the Court of Appeals explained:

> The Equal Protection Clause of the Fourteenth Amendment had been thoroughly debated and adopted by Congress and ratified by our Legislature after the Civil War, and the concepts underlying it are older still. Indeed, cases may be found in which this Court identified a prohibition against discrimination in the Due Process Clauses of earlier State Constitutions, clauses with antecedents traced to colonial times (*see*

[22] Equality is an important value in Western jurisprudence. *See Vriend v. Alberta*, 1 R.C.S. 493, 536 (Canadian Supreme Court 1998) (Cory and Iacobucci, JJ) ("The concept and principle of equality is almost intuitively understood and cherished by all"); *Miller v. Minister of Defence*, HCJ 4541/94, 49(4) P.D. 94, ¶6 (Israel High Court of Justice 1995) (Strasberg-Cohen, T., J.) ("It is difficult to exaggerate the importance and stature of the principle of equality in any free democratic society"); *Israel Women's Network v. Government*, HCJ 453/94. 454/94, ¶22 (Israel High Court of Justice 1994) ("The principle of equality, which . . . 'is merely the opposite of discrimination' . . . has long been recognized in our law as one of the principles of fairness and justice which every public authority is commanded to withhold") (citation omitted); *Mabo v. Queensland* (no. 2), 175 CLR 1 F.C. 92-014, ¶29 (Australian Supreme Court 1992) ("equality before the law . . . is [an] aspiration[] of the contemporary Australian legal system"). *See also* Alexis de Toqueville, *Democracy in America*, Book II, Chapter 1, at 65 (Digireads.com Publishing 2007) ("Democratic nations are at all times fond of equality . . . for equality their passion is ardent, insatiable, incessant, invincible; they call for equality in freedom; and if they cannot obtain that, they still call for equality in slavery"); United States Declaration of Independence (July 4, 1776) ("all men are created equal")

> [citation omitted] Charter of Liberties and Privileges, 1683, § 15, reprinted in 1 Lincoln, Constitutional History of New York, at 101).

Id. New York equality values are embedded into its common law. For example, under the common law, such private entities as common carriers, victualers, and innkeepers may not discriminate unreasonably or unjustly. *See, e.g., Hewitt v. New York, N.H. & H.R. Co.,* 284 N.Y. 117, 122 (N.Y. 1940) ("a carrier should not 'be permitted to unreasonably or unjustly discriminate against other individuals . . . where the conditions are equal. So far as reasonable, all should be treated alike'") (*quoting Root v. Long Island R. Co.*, 114 N.Y. 300, 305 (N.Y. 1889)); *New York Tel. Co. v. Siegel-Cooper Co.*, 202 N.Y. 502, 508 (N.Y. 1911) ("A common carrier . . . may not, where the circumstances and conditions are the same, unreasonably or unjustly discriminate in favor of one against the other") (*quoting Lough v. Outerbridge,* 143 N.Y. 271, 278 (N.Y. 1894)); *People v. King,* 110 N.Y. 418, 427 (1888) ("By the common law, innkeepers and common carriers are bound to furnish equal facilities to all, without discrimination, because public policy requires them so to do").

> The origins of the duty to serve and the recent direction of the case law suggest that a basic concern for individual autonomy animates the duty to serve. This concern recognizes the vulnerability of individuals to the arbitrary and unreasonable power of private entities. Realizing the importance to the individual of some goods, services, and associations, the duty to serve seeks to limit the power of the controlling entities by allowing exclusion only when based on fair and reasonable grounds.

Note, *The Antidiscrimination principle in the Common Law,* 102 HARVARD L. REV. 1993, 2001 (1989).

This principle of common law equality, which forbids discrimination founded on unreasonable means or unjust ends, has been extended to prohibit racial discrimination. *Odom v. E. Ave. Corp.*, 34 N.Y.S.2d 312 (N.Y. Sup. Ct. 1942) *aff'd*, 37 N.Y.S.2d 491

(N.Y. App. Div. 4th Dept. 1942) (blacks may sue restaurants that refused them service). "New York has led in the proclamation and extension of its liberal policy favoring equality and condemning [racial] discrimination." *In re Young,* 211 N.Y.S 2d 621, 626 (N.Y. Sup. Ct. 1961). The common law reaches the conduct of private organizations that arbitrarily refuse admission to an applicant. *Ascherman v. St. Francis Memorial Hospital,* 45 Cal. App. 3d 507, 511 (Cal. App. 1st Dist. 1975); *Pinsker v. Pac. Coast Soc. of Orthodontists,* 12 Cal. 3d 541, 548 (Cal. 1974) (en banc). This principle was embraced as public policy by New York statute. *Fritz v. Huntington Hospital,* 39 N.Y.2d 339, 344 (N.Y. 1976) (arbitrary rejection of a membership application prohibits rejection pursuant to an unfair procedure as well as an improper reason).

The Petitioners' Affidavits attached to the Habeas Petition and summarized in the Statement of Facts demonstrate that genetically, physiologically, and psychologically, Hercules and Leo's interest in exercising their autonomy, choice, and self-determination is as fundamental to them as it is to a human being. Recall the United States Supreme Court's admonition that "[n]o right is held more sacred, or is more carefully guarded, by *the common law*, than the right of every individual to the possession and control of his own person[.]" *Botsford,* 141 U.S. at 251 (emphasis added). On this ground alone, this Court must hold that, as a matter of New York common law equality, Hercules and Leo are entitled to bodily liberty, and their right is protected by the common law writ of habeas corpus.

However, New York equality is not merely a product of its constitutions, statutes, and common law operating independently. Two decades ago, Chief Justice Kaye confirmed that the two-way street between common law decision-making and

constitutional decision-making had resulted in a "common law decision making infused with constitutional values." Judith S. Kaye, *supra*, at 747.[23] In harmony with the common law equality principles that forbid private discrimination founded on either unreasonable means or unjust ends, the New York common law of equality embraces, at minimum, its sister fundamental constitutional equality value - embedded within the New York and the United States Constitutions - that prohibits discrimination based on irrational means or illegitimate ends.[24] *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities") (*quoting Sweatt v. Painter,* 339 U.S. 629, 635 (1950); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

Common law equality decision-making differs from constitutional equal protection decision-making in that it does not involve judicial review of a governmental classification. It has nothing to do with a constitutional "respect for the separation of powers." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441-42 (1985). Instead it applies constitutional equal protection values to an evolving common law. The outcomes of similar common law and constitutional cases may therefore be dramatically different.

For example, in *Hernandez v. Robles*, 7 N.Y.3d 338 (N.Y. 2006), the Court of Appeals affirmed the constitutionality of New York's Domestic Relations Law that limited marriage to opposite-sex couples. "*The critical question [was] whether a rational legislature could decide that these benefits should be given to opposite-sex couples, but*

[23] Among Chief Justices Kaye's examples was the doctrine of fairness and equality as applied to the duty of private persons, such as innkeepers, victuallers, and common carriers, to serve the public on a nondiscriminatory basis. *Id.* at 748.

[24] The New York Equal Protection Clause "is no broader in coverage than the federal provision." *Under 21, Catholic Home Bur. for Dependent Children v. City of New York*, 65 N.Y.2d 344, 360 n.6 (1985).

not same-sex couples." *Id.* at 358 (emphasis added). The Court held that the legislature could rationally conclude that same-sex relationships are more causal or temporary, to the detriment of children, and rationally assume children do best with a mother and father at home. *Id.* at 359, 360. In the face of a dissent that concluded, "I am confident that future generations will look back on today's decision as an unfortunate misstep," *id.* at 396 (Kaye, C.J., dissenting), the majority "emphasize[d] . . . we are deciding only this constitutional question. *It is not for us to decide whether same-sex marriage is right or wrong*." *Id.* at 366 (emphasis added). *See People v. Reilly,* 381 N.Y.S.2d 732, 739-40 (N.Y. County Ct. 1976) (in engaging in constitutional review, "[t]he question of the wisdom or the appropriateness in adopting a classification is a matter of no concern to the courts.").

In contrast, the wisdom and appropriateness of adopting a classification is a matter of great concern to a common law court. A common law court *should* decide what is right and wrong. Its job is precisely to do the "right thing." This Court *should* recognize Hercules and Leo's common law personhood. This Court *should* determine that any classification of a chimpanzee as a "legal thing" invokes an illegitimate end. This Court *should* decide Hercules and Leo have a common law right to bodily liberty sufficient to entitle them to a writ of habeas corpus and a chance to live the rest of their life in a legitimate sanctuary designated by NAPSA, where they will be surrounded by other chimpanzees with whom they will live in society, have regular and routine access to the outdoors, receive appropriate veterinary treatment, be able to climb high and at will, and be able to live the autonomous, self-determining life of which they are capable and for which they long.

Hercules and Leo's common law classification as a "legal thing," unable to possess any legal right, including the right to bodily liberty that the writ of habeas corpus is intended to protect, rests upon an illegitimate end. *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (N.Y. 2001), *cert. denied,* 534 U.S. 826 (2001). *See, e.g., Goodridge v. Department of Public Health*, 440 Mass. 309, 330 (Mass. 2003) (*quoting English v. New England Medical Center*, 405 Mass. 423, 429 (Mass. 1989); *Cleburne,* 473 U.S. at 452 (Stevens, J., concurring)).

> This theory of [Fourteenth Amendment Equal Protection] rationality as governing the relation between means and end assumes that all legislation must have a legitimate public purpose or set of purposes based on some conception of the general good. Without such a requirement of legitimate public purpose it would seem useless to demand even the most perfect congruence between means and ends, for each law would supply its own indisputable - and indeed tautological fit: if the means chosen burdens one group and benefits others, then the means perfectly fits the end of burdening just those whom the law disadvantage and benefitting just those it assists.

Laurence H. Tribe, *American Constitutional Law* 1440 (second ed. 1988).

In *Romer,* the United States Supreme Court struck down the so-called "Amendment 2," because its purpose of repealing all existing statutes, regulations, ordinances, and policies of state and local entities that prohibited discrimination based upon sexual orientation, was illegitimate. 517 U.S. at 626 (*quoting Evans v. Romer*, 854 P. 2d 1270 (Colo. 1993)). It violated federal equal protection because *"[i]t is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board."* *Id.* at 633 (emphasis added). This statute was "simply so obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violated *basic equal protection values.*" *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997), *cert. denied,* 525 U.S. 943 (1998)

(emphasis added). *See Mason v. Granholm,* 2007 WL 201008 (E.D. Mich. 2007) (noting that *Romer* found that Colorado's Amendment 2 was "at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board," the Court struck down an amendment to the Michigan Civil Rights Act that prevented prisoners from suing for a violation of their civil rights while imprisoned as violating federal equal protection); *Goodridge,* 440 Mass. at 330 (same-sex marriage ban impermissibly "identifies persons by a single trait and then denies them protection across the board").

As it would be a tautology for the Federal Equal Protection Clause to fail to demand that a legitimate public purpose or set of purposes based on some conception of the general good be the legislative end, it would be a tautology to determine whether class members are similarly situated for all purposes. The true test is "whether they are similarly situated *for the purposes of the law challenged.*" *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 158 (Conn. 2008) (*quoting Stuart v. Commissioner of Correction,* 266 Conn. 596, 601-602 (Conn. 2003)) (emphasis added).

Denying Hercules and Leo their common law right to bodily liberty solely because they are chimpanzees is also a tautology. "'[S]imilarly situated' [cannot] mean simply 'similar in the possession of the classifying trait.' All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test." *Varnum v. O'Brien*, 763 N.W. 2d 862, 882-83 (Iowa 2009) (citations omitted). The "equal protection guarantee requires that laws treat all those who are similarly situated with respect to the purposes of law alike." *Id.* In *Goodridge,* the Supreme Judicial Court of Massachusetts swept aside the argument that the legislature

could refuse gays the right to marry because the purpose of marriage is procreation, which they could not accomplish. 440 Mass. at 330. This argument "singles out the one unbridgeable difference between same-sex and opposite sex couples, and transforms that difference into the essence of legal marriage." *Id.* at 333. *See Miller*, HCJ 4541/94, ¶6 (Dorner, J.) ("in the absence of [criteria determining whether a difference is a relevant difference], there is a danger – which has frequently been realized – that the criteria applied in each case will reflect the degrading stereotypes which the prohibition of discrimination was originally intended to prevent").

No one doubts that, if Hercules and Leo were human, this Court would instantly issue a writ of habeas corpus. There can equally be no doubt that Hercules and Leo are imprisoned for a single reason: despite their capacities for autonomy, self-determination, self-awareness, and dozens of allied and connected extraordinarily complex cognitive abilities, they are chimpanzees. Possessing that "single trait," he is "denie[d] . . . protection across the board." *Romer*, 517 U.S. at 633.

Homo sapiens membership has been laudably designated a <u>sufficient</u> condition for legal personhood. Even the permanently comatose and anencephalic of our species humans are entitled to fundamental legal rights under international and American law. *See* Steven M. Wise, *Hardly a revolution – The eligibility of nonhuman animals to dignity rights in a liberal democracy*, 22 VERMONT L. REV. 793, 846-68 (1998). However, "the thesis that humans should be ascribed rights simply for being human has received practically no support from philosophers." Daniel Wikler, "Concepts of

Personhood: A Philosophical Perspective," in *Defining Human Life: Medical, Legal, and Ethical Implications* 13, 19 (Margery W. Shaw and A. Edward Doudera, eds. 1983).[25]

The sole argument for discriminating against chimpanzees *because they are chimpanzees* to the extent of permanently disqualifying them from legal personhood has been put forward by Judge Richard A. Posner. Writing with his usual candor and flair, he has argued that the invidious discrimination against, and enslavement of, any nonhuman descends from

> a moral intuition deeper than any reason that could be given for it and impervious to any reason that you or anyone could give against it. Membership in the human species is not a "morally irrelevant fact," as the race and sex of human beings has come to seem. If the moral irrelevance of humanity is what philosophy teaches, and so we have to choose between philosophy and the intuition that says that membership in the human species is morally relevant, then it is philosophy that will have to go.[26]

But, as Judge Posner's nod toward outmoded racial and gender discrimination implicitly acknowledges, when "philosophy goes," invidious discrimination and slavery enter. Who can read the famous case of *State v. Mann*, 13 N.C. 263, 265-66 (N.C. 1829) without

[25] *See* L.W. Sumner, *The Moral Foundation of Rights* 206 (1987) ("it is quite inconceivable that the extension of any right should coincide exactly with the boundary of our species. It is thus quite inconceivable that we have any rights simply because we are human"); Christina Hoff, "Immoral and moral uses of animals," 302(2) *New England Journal of Medicine* 115, 115 (Jan. 19, 1980) ("It is sometimes asserted that 'just being human' is a sufficient basis for a protected moral status, that sheer membership in the species confers exclusive moral rights . . . The principle appears evident to us because it is embodied in the attitudes and institutions of most civilized communities. Although this accounts for its intuitive appeal, it is hardly an adequate reason to accept it. Without further argument the humanistic principle is arbitrary. What must be adduced is an acceptable criterion for awarding special rights. But when we proffer a criterion based, on say the capacity to reason or to suffer, it is clearly inadequate either because it is satisfied by some but not all members of the species *Homo sapiens*, or because it is satisfied by them all – and many animals as well").

[26] Richard A. Posner, "Animal Rights," *Slate*, http://www.slate.com/articles/news_and_politics/dialogues/features/2001/animal_rights/_3.html (June 12, 2011) (last visited on August 24, 2013).

experiencing moral revulsion, anger, and disgust at the words of the majority who overturned the conviction of a white man for beating his slave nearly to death:

> The end [of slavery] is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make any thing his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being, to convince him what, it is impossible but that the most stupid must feel and know can never be true--that he is thus to labour upon a principle of natural duty, or for the sake of his own personal happiness, such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect.

"[M]oral intuition deeper than any reason that could be given for it and impervious to any reason that you or anyone could give against it" has been odiously used as a sword to cut down the legitimate claims of blacks, Chinese, women, and others. *Dred Scott,* 60 U.S. at 407-09 (blacks were of "an inferior order" and "far below whites in the scale of created beings"); *Mayor and Council of Columbus v. Howard*, 6 Ga. 213, 220 (Ga. 1849) (black slaves "need a higher degree of intelligence than their own, not only to direct their labor, but likewise to protect them from the consequences of their own improvidence"); *People v. Hall,* 4 Cal. 399, 405 (Cal. 1854) (Chinese, "whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point," could not testify against whites); *In re Goodell*, 39 Wis. 232, 240 (Wis. 1875) (woman was unfit "by nature" to practice law).

The sole purpose in classifying Hercules and Leo as a "legal thing" is the illegitimate, odious one of enslaving them. Speaking of Jerom, a young chimpanzee infected with an HIV virus that killed him, Professor Laurence H. Tribe observed,

"Clearly, Jerom was enslaved." Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1, 7 (2001). *See also Nairn,* A.C. 147 at 166. Clearly, Hercules and Leo are enslaved.

But New York courts have loathed slavery for over one hundred and seventy-five years. In what has been called "one of the most extreme examples of hostility to slavery in Northern courts," Paul Finkleman, *Slavery in the Courtroom* 57 (1985), the Court of Appeals recalled the *Somerset* holding "that a state of slavery could not exist except by force of positive law . . . and [so] it became impossible to continue the imprisonment of [Somerset]." *Lemmon,* 20 N.Y. at 605. In language as blunt as Lord Mansfield's, Justice Wright explained why: human slavery

> is repugnant to natural justice and right, has no support in any principle of international law and is antagonistic to the genius and spirit of republican government. Besides liberty is the natural condition of men, and is world-wide: whilst slavery is local and beginning in physical force, can only be supported by positive law. "Slavery," says Montesquieu "not only violates the laws of nature and of civil society; it also wounds the best forms of government; . . . [Negro slavery] never had any foundation in the law of nature, and was not recognized by the common law . . . slavery originates in the predominance of physical force, and is continued by the mere predominance of social force, the subject knowing or obedient to no law but the will of the master . . . . a status which the law of nations treats as resting on force against right . . .

Id. at 617-18, 631. *See also Jack v. Martin*, 14 Wend. 507, 533 (N.Y. 1835) (Sen. Bishop) ("Slavery is abhorred in all nations where the light of civilization and refinement has penetrated, as repugnant to every principle of justice and humanity, and deserving the condemnation of God and man").

The NhRP agrees that humans who have never been sentient nor conscious nor

possessed of a brain *should* have basic legal rights. But *if* humans bereft of autonomy, self-determination, sentience, consciousness, even a brain, are entitled to personhood and legal rights, *then* this Court must either recognize Hercules and Leo's just equality claim to bodily liberty or reject equality entirely. Abraham Lincoln understood that the act of extending equality protects it: "[i]n *giving* freedom to the slave, we *assure* freedom to the free, honorable alike in what we give, and what we preserve." 5 *Collected Works of Abraham Lincoln* 537 (Roy P. Basler, ed. 1953) (annual message to Congress of December 1, 1862) (emphasis in the original). The act of denying equality in order to enslave, based on a single trait, jeopardizes the equality of everyone.

Judge Posner's rejection of even the *possibility* of a chimpanzee's legal right is not merely invidious, it is dangerous because, if he is wrong – and history says he is – he commits a severe error of *exclusion*, that derives entirely from an irrational bias that strips its victims of every possible legal right, including their liberty and lives. In contrast, if Lord Mansfield's and Justice Wright's condemnations of human slavery were wrong, at worst they committed minor errors of *inclusion* that erroneously granted a right to those who did not deserve it.

Hercules and Leo face an ancient discrimination created and sustained by nothing more than Judge Posner's eloquently-conceived, but morally and legally flawed, "moral intuition." Courts "kn[o]w 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." *Lawrence*, 539 U.S. at 579. The purpose of equal protection review is "to protect constitutional rights of individuals from legislative enactments that have denied those rights, even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge

a deeply ingrained practice or law viewed as impervious to the passage of time." *Varnum,* 763 N.W. 2d at 876. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." *People v. Liberta,* 64 N.Y.2d 152, 167 (N.Y. 1984) (*quoting* Oliver Wendell Holmes, Jr., *The path of the law*, 10 HARV. L. REV. 457, 469 (1897)). Equal protection

> can only be defined by the standards of each generation. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L.Rev. 1161, 1163 (1988) ("[T]he Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure."). The process of defining equal protection . . . begins by classifying people into groups. A classification persists until a new understanding of equal protection is achieved. The point in time when the standard of equal protection finally takes a new form is a product of the conviction of one, or many, individuals that a particular grouping results in inequality and the ability of the judicial system to perform its constitutional role free from the influences that tend to make society's understanding of equal protection resistant to change.

Varnum, 763 N.W. 2d at 877-78.

Finally, it is important to emphasize what the NhRP is *not* seeking. The NhRP claims only Hercules and Leo's common law right to bodily liberty that the common law writ of habeas corpus protects. Once deemed a common law "person" who each possess the fundamental right to bodily liberty sufficient to trigger the protection of the common law writ of habeas corpus, what, if any, other common law rights Hercules and Leo possess will differ along the same three axes as do the legal rights of humans.

First, Hercules and Leo might possess *fewer* legal rights than others. A severely mentally limited human may not be able to participate in the political process, but would still have the right freely to move about. Similarly, Hercules and Leo cannot participate in the political process, but may have the right to move about.

Second, Hercules and Leo might possess *narrower* legal rights. A severely mentally limited human might not have the right to move about freely in the world at large, but would have the right to move within the confines of her home. Similarly, Hercules and Leo may not move freely throughout the country. But they can move within the confines of the sanctuary in which they will be placed by NAPSA, as they would have had the right to move freely about in their natural habitat.

Third, Hercules and Leo might possess only partial elements of a complex Hohfeldian right.[27] A profoundly mentally limited human may possess a claim-right to bodily integrity, but lack the power-right to waive it, as in an inability to consent to a risky medical procedure or the withdrawal of life-saving medical treatment. Similarly, Hercules and Leo may possess an immunity-right of bodily liberty, but lack the power-right to enforce it. *See* Steven M. Wise, *Hardly a revolution – The eligibility of nonhuman animals to dignity rights in a liberal democracy*, 22 VERMONT L. REV. 793, 868-73, 908-09 (1998).

In *Byrn*, the Court of Appeals noted that human fetuses are considered "persons" for some purposes in New York, including inheritance, devolution of property, and wrongful death, while not being "persons in the law in the whole sense," such as being subject to abortion. 31 N.Y.2d at 200. Courts across the United States commonly hold

[27] Wesley Hohfeld, whose analysis of legal rights remains "the standard model," emphasized that a legal right must involve two legal persons, and identified four types of legal rights, liberties (Isaiah Berlin would famously identify two prominent liberty-rights, negative, or "freedom from" and positive or "freedom to"), Isaiah Berlin, "Two concepts of liberty," in *Four Essays on Liberty* 121-122 (1969), claims (exemplified by contracts), immunities (such as the Thirteenth Amendment to the United States Constitution's prohibition of slavery), and powers (the power to sue being the most important), along with their correlate no-rights, duties, disabilities, and liabilities. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Walter Wheeler Cook ed., 1919).

that an entity may be a legal person not "in the whole sense," but for some purposes. *See, e.g.*, *Summerfield v. Superior Court,* 698 P.2d 712, 723 (Ariz. 1985) (en banc); *O'Grady v. Brown*, 654 S.W.2d 904, 909 (Mo. 1983) (en banc). Fetuses have been classified as "persons" within the meaning of the Due Process Clause of a state constitution, *Mallison v. Pomeroy*, 291 P.2d 225, 228 (Ore. 1955), but not of the United States Constitution. *Roe*, 410 U.S. at 158. They may be "persons" within the meaning of a state's wrongful death statute, *Stidam v. Ashmore*, 167 N.E.2d 106 (Ohio Ct. App. 1959), but not within the meaning of that state's vehicular homicide statute, *State v. Dickinson*, 275 N.E.2d 599, 602 (Ohio 1971). They may be persons in equity, *Wallis v. Hodson*, 26 Eng. Rep. 472, 473 (Ch. 1740), but not under the common law. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (Mass. 1884).

V. CONCLUSION

When a 2005 case demanding a writ of habeas corpus pursuant to the Brazilian Civil Procedure Code was filed on behalf of a confined chimpanzee named Suica in Salvador, Brazil, the trial judge noted the matter "is worthy of discussion, as this is a highly complex issue requiring an in-depth examination of 'pros and cons.'" *See In Favor of Suica*, annexed to the Habeas Petition as an attachment to the affidavit of Steven M. Wise. Because Suica died on the eve of the judge's decision, he was required by statute to dismiss the case.

Hercules and Leo are alive and this Court has the opportunity to examine the matter that is so worthy of discussion. Hercules and Leo are possessed of autonomy, self-determination, self-awareness, and the ability to choose how to live their lives, as well as dozens of complex cognitive abilities that comprise and support their autonomy. They are

entitled to legal personhood under EPTL § 7-8.1 and, as a matter of common law liberty and equality, which entitle them to a writ of habeas corpus. They are further entitled to their bodily liberty, and immediate discharge from their decades-long imprisonment.

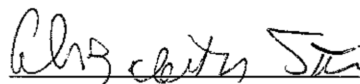
This is a matter of life or death for Hercules and Leo. Nearly half the chimpanzees in New York State have died over the last eight months. It is fundamentally a matter of fairness, justice, liberty, equality, and humanity. Professor Osvath made it clear that every day of Hercules and Leo's perpetual imprisonment is hellish, that as chimpanzees "have a concept of their personal past and future and therefore suffer the pain of not being able to fulfill one's goals or move around as one wants; like humans they experience the pain of anticipating a never-ending situation." (Osvath Aff. at ¶16).

Hercules and Leo cannot be released to Africa. But they can be released from their imprisonment in New York. This Court should order them discharged from the Respondents' control and evaluated by NAPSA forthwith, then delivered into the permanent care of one of their extraordinary sanctuaries forthwith, there to spend the rest of their lives living like chimpanzees, amongst chimpanzee friends, climbing, playing, socializing, feeling the sun, and seeing the sky.

Dated: December 2, 2013

New Hyde Park, New York

Respectfully Submitted,



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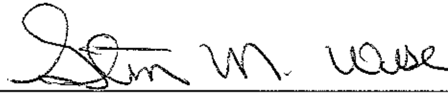

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