Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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S281614

October 6, 2023

The Honorable Jorge E. Navarrete
Clerk and Executive Officer
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: Letter of *Amicus Curiae*, Professor Justin Marceau, Supporting Verified Petition for a Common Law Writ of Habeas Corpus, and Issuance of an Order to Show Cause in *In re NhRP on behalf of Amahle, Nolwazi, and Mabu On Habeas Corpus* (No. S281614)

Dear Mr. Navarette,

Under California Rules of Court, rule 8.500(g), *Amicus Curiae*, I, Professor Justin Marceau, submit this letter supporting the Verified Petition for Writ of Habeas Corpus and issuance of an order to show cause in the above-captioned case. Please transmit this letter to the justices for their consideration.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

I am a habeas corpus scholar and the Brooks Institute Research Scholar at the University of Denver, Sturm College of Law. I have been a full-time law professor at the University of Denver, Sturm College of Law for eight years, and was awarded tenure in 2012. During the Spring of 2020, I was a visiting professor at Harvard Law School where I taught both criminal procedure and animal law. I specialize in constitutional and criminal law with an emphasis on habeas corpus procedures and teach habeas corpus courses in addition to criminal law and advanced criminal procedure. I regularly research and write in the field of habeas corpus. I co-authored the book Federal Habeas Corpus, Andrea D. Lyon, Emily Hughes, Mary Prosser, & Justin Marceau, Federal Habeas Corpus Carolina Academic Press, (3d ed. 2024), and have written approximately 15 scholarly papers dealing with issues related to habeas corpus. My publications have been cited by numerous courts, including the United States Supreme Court and state supreme courts. My work has also been cited by more than 400 scholarly works, including leading treatises such as Federal Habeas Corpus Practice and Procedure and Criminal Procedure. Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure (6th ed. 2011); Wayne R. LaFave et al., Criminal Procedure (3d ed. 2014). My habeas corpus publications have appeared in the Yale Law Journal, the William & Mary Law Review, the Hastings Law Journal, and many others.

II. APPLYING HABEAS CORPUS TO NONHUMAN ANIMALS IS CONSISTENT WITH THE WRIT'S HISTORICAL USE

Habeas corpus has been used throughout history in situations where no precise legal solution existed under codified law, but where leaving the status quo unchallenged would be unjust.[1]

A. Family Law

Historians have documented that physical violence directed by husbands toward their wives moved from acceptable towards unacceptable during the eighteenth century. However, "some men found new ways to exert power over their wives," including "[c]onfinement, either within the home or in private madhouses."[2] Disputes over such confinement were often adjudicated through habeas proceedings, because the writ of habeas corpus was said to be rightly employed as a check on "every unjust restraint of personal freedom in private life."[3] Historians have noted that the use of the writ to challenge private confinement was not uncommon.[4]

Historian Elizabeth Foyster examined every existing affidavit from a habeas case involving child or spouse custody before the King's Bench between 1738 and 1800.[5] Foyster observes that the writ of habeas corpus provided a vehicle, much like the case before this Court, to test the very boundaries of one's legal power to confine. Habeas actions provided a "forum where the boundaries of men's rights and women's freedoms were tested," as private parties, including the "supporters of wives who were being confined" sought writs of habeas corpus against husbands or their agents.[6]

More generally, the King's Bench in England utilized habeas corpus to adjudicate problems within families.[7] Scholars have noted that this small number of cases are highly significant to the writ's history because they "reveal more about process and the writ's possibility than any other category of cases."[8] Consistent with the arguments of the NhRP, historians have noted that the "equity of a common law writ [was] constrained by little more than the justices' creativity."[9]

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[1] PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 133 (2010).

[2] Elizabeth Foyster, *At the Limits of Liberty: Married Women and Confinement in Eighteenth-Century England*, 17 CONTINUITY AND CHANGE 39, 40 (2002) ("The subject of confinement raised issues about women's rights over their bodies, personal liberties and identity within the law.").

[3] *Id.* at 41 (emphasis added).

[4] *Id.* ("This writ was directed to a private individual and not a court of law. It directed the person detaining the other to bring the detainee to the King's Bench").

[5] *Id.*

[6] *Id.* at 42. As with legal history more generally, the history of the writ of habeas corpus is not one of linear progress. Foyster herself observes that in addition to habeas actions filed on behalf of wives, "husbands requested writs to be directed to those who were offering refuge to their runaway wives." *Id.* at 42. There is, then, something of a mixed story when it comes to progress against injustice through the use of the writ. But it cannot be gainsaid that the writ provided women, children, and others a forum to "contest those rights." *Id.*

[7] HALLIDAY, *supra* note 1, at 121–132.

[8] *Id.* at 121.

[9] *Id.* (noting that the "creativity" extended to the remedies "beyond simply declaring someone remanded or released").

Without the creative deployment of the writ of habeas corpus, women subjected to abusive situations may have lacked any legal vehicle to seek relief.[10] Since women and children were deemed by the law to be less than full legal persons, many courts would have certainly scoffed at the idea that habeas corpus would be available to such parties.[11] Yet historians have observed that the flexibility of the writ allowed it to work in "an experimental mode," and it was the writ of habeas corpus that, despite the formalistic barrier presented by the lack of legal personhood, allowed wives and children to challenge their confinement or mistreatment. The writ was deployed to "release wives from abusive husbands," and in so doing, the writ became enshrined as a legal vehicle capable of "pierc[ing] the cultural wall" around established or longstanding practices and norms.[12] Habeas corpus provided the procedures to litigate reforms that were well in front of statutorily mandated protections.

Importantly, habeas corpus was not used simply as a tool to secure freedom from abusive "captors," but rather was also used to "assign custody"—women and children could be transferred to a different, non-abusive household.[13] This use of the writ demonstrates that it can be used for more than simply seeking release from custody, but rather includes transfer to a safer environment, even if the end result was not utter liberation.[14] From the perspective of family law disputes, perhaps what is most notable is that there are notable historical examples of the writ being used to "negotiate solutions to problems on a case-by-case basis."[15]

B. Slavery

Analogies to slavery in service of animal rights can be treacherous.[16] And no one should equate human slavery with the mistreatment of animals; they are fundamentally incomparable. Moreover, any historical claim that enslaved persons moved completely from the category of "property" and into the realm of "person" following litigation, falsely suggests that struggles

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[10] *Id.* at 24.

[11] Peter Singer has eloquently retold the history of mocking the ascension of beings deemed less than human. "The idea of 'The Rights of Animals' actually was once used to parody the case for women's rights. When Mary Wollstonecraft published her Vindication of the Rights of Women in 1792, her views were widely regarded as absurd, and before long, an anonymous publication appeared entitled A Vindication of the Rights of Brutes. The author of this satirical work (now known to have been Thomas Taylor, a distinguished Cambridge philosopher) tried to refute Mary Wollstonecraft's arguments by showing that they could be carried one stage further. If the argument for equality was sound when applied to women, why should it not be applied to dogs, cats, and horses?" PETER SINGER, ANIMAL LIBERATION, first published 1975, 2nd ed., 1990 (Ecco, New York), pp.1.

[12] *Id.* at 125 (describing the writ's use as a "striking innovation"). To be fair, the writ was not always about securing release. HALLIDAY, *supra* note 1, at 124 (noting that wives obtain "articles of peace" against their husbands). The writ was used against those who housed wives who had fled their husbands as well.

[13] *Id.* at 129.

[14] *Id.* It may be of some historical relevance to mention that when spouses alleged that their partner was insane and in need of confinement, the courts would look to outside experts to help evaluate the situation. *Id.* at 127 (noting that Mansfield's "court then tried a new approach: relying on [outside] expertise" from doctors).

[15] *Id.* at 133.

[16] MAJORIE SPIEGEL, THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY (1996).

against racial inequality are complete, or nearly complete. But neither the writ of habeas corpus, nor a civil war could achieve this goal.

Still, the law is a system of analogous reasoning, and the common law evolves through the process of applying imperfect (sometimes wildly unrelated) comparisons from prior litigation. The historical reality is that habeas corpus has previously allowed for remedies when the legal system itself denied a being their basic humanity and personhood. Thus, without claiming an analogy between human slavery and animal captivity, the history of the common law writ in correcting legal wrongs and allowing for legal proceedings that were otherwise foreclosed is relevant.

Of note, then, in the historic Somerset decision, the King's Bench declared that slavery was contrary to the British common law, and thus refused to force James Somerset back into involuntary servitude.[17] It is a striking case because although no clear procedural or substantive basis existed for doing so, the court granted James Somerset's requested habeas corpus relief. Without resorting to sweeping claims about the writ's emancipatory power, in this particular case, habeas corpus offered a flexible and powerful tool for ending an instance of unjust captivity.

The writ of habeas corpus provided a procedural vehicle to challenge a wrongful private confinement.[18] Despite, or perhaps because of, the lack of alternative legal avenues or frameworks, habeas provided a procedural vehicle to challenge confinement when no other legal recourse was available.[19] One need not regard the Somerset case as paradigmatic, or treat it as causing the end of human slavery in order to appreciate that, just as in the family law context, the writ of habeas corpus has proved itself to be a useful procedural stop-gap for individual litigants. There is not a promise of sweeping change, but the reality of case-by-case determinations that can bring redress to individuals who are unjustly confined.

C. Wartime Habeas

Although it is true that "[t]oday, habeas corpus is understood primarily as a legal remedy for prisoners, [in the] nineteenth century Americans frequently used the process in other ways, from disputing child custody to questioning the validity of military enlistments."[20] The writ of habeas corpus was used, for example, to challenge the improper enlistment of children in the Army.[21]

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[17] *See generally* STEVEN M. WISE, THOUGH THE HEAVENS MAY FALL: THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY IX (Da Capo Press 2005).

[18] Eric M. Freedman, *Habeas by Any Other Name*, 38 HOFSTRA L. REV. 275, 277 (2009).

[19] Jonathan Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 YALE J.L & HUMAN 413 (1993).

[20] Frances M. Clarke & Rebecca Jo Plant, *No Minor Matter: Underage Soldiers, Parents, and the Nationalization of Habeas Corpus in Civil War America*, 35 LAW & HIST. REV. 881 (2017).

[21] *Id.* at 885 (noting cases involving parents who "insisted on their right to recover children from the military's clutches"); *id.* at 887, 889 ("a writer for the New York Times claimed with some hyperbole that the judge [McCunn] had released "more than two full regiments of soldiers, on one pretext or another," earning himself the nickname "Habeas Corpus MCCUNN."); *but see id.* at 889 ("the very first instance of a military officer refusing a writ of habeas corpus during the Civil War involved a case of an enlisted minor.").

Less numerous but more celebrated are the habeas cases challenging the confinement of political detainees held without trial.[22] The wartime history of habeas starts with the glorification of the writ by Blackstone as the bulwark of liberty and the "second magna carta." Indeed, the writ's legacy was so legendary that refusal of the British to extend the protections of habeas corpus to the colonists is regarded as one of the rationales contributing to the push for independence.[23]

Although it has proven far from perfect in protecting liberty in times of emergency, both in England and in the United States, the common law writ has provided novel procedural opportunities to contest confinement. For example, habeas corpus has been used to provide non-citizen detainees an opportunity to challenge their confinement, despite their incarceration outside of the United States.

The United States' efforts to combat terrorism after September 11, 2001 led to legislative action regarding the habeas corpus rights of aliens designated by military authorities as enemy combatants. Specifically, the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 statutorily eliminated habeas rights for enemy combatants detained at Guantanamo Bay, Cuba. The location of the Guantanamo Detainee Center was chosen not only for its large land availability and distance from known terrorist cells, but because it was thought that the statutory and constitutional rights of non-citizen detainees could be limited if they were not physically present in the United States itself. However, the United States Supreme Court in *Rasul v. Bush* held that a district court does have jurisdiction to hear habeas corpus petitions by alien detainees at Guantanamo concerning the legality of their detentions.[24]

Additionally, in 2008, the Court ruled that Guantanamo detainees possessed habeas rights because the United States exercised some sovereignty over that territory. In *Boumediene v. Bush*, the Supreme Court held that the Suspension Clause had full effect at Guantanamo Bay, even though Congress had attempted through legislation to strip federal courts of jurisdiction to hear habeas claims.[25] Therefore, detainees are entitled to the privilege of habeas corpus to challenge the legality of their detention.[26] In holding that the Suspension Clause applied at Guantanamo Bay, the Court noted that "at the absolute minimum" the Clause protects the writ as it existed when the Constitution was ratified.[27] Moreover, the Court held that Guantanamo detainees were entitled to habeas corpus despite the fact that the Court had previously "never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution."[28]

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[22] *Id.* at 885; *see generally*, AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY (2017) (recounting the history of wartime habeas corpus).

[23] *Id.* at 5.

[24] 542 U.S. 466, 483–84 (2004).

[25] 553 U.S. 723, 771 (2008).

[26] *Id.*

[27] *Id.* at 746–47.

[28] *Id.* at 771.

The writ of habeas corpus certainly did not swing the gates of Guantanamo Bay's detention facility open. Nor is the writ's overarching wartime history particularly rosy. But habeas corpus has provided a unique check on the confinement of individuals, even when those individuals are assumed by those confining them to be beyond the protections of law. At the very least, the common law writ's history includes a strain of precedent reflecting flexibility and an evolving doctrine that can be shaped by judges. This case provides an opportunity to do justice for confined beings by relying on this justice-oriented aspect of the prerogative writ's history.

III. CONCLUSION

Allowing abused spouses or children, or a person like James Somerset to seek common law habeas relief did not end the abhorrent violence inherent in racism or sexism. The writ did not end slavery or domestic violence or wartime detentions without trials, but it provided a procedurally significant vehicle for litigating the interest of the being. In short, habeas can serve as a mechanism for generating momentum in the direction of social change that cuts against prevailing unjust cultural norms. The writ can, in the words of a historian, act "as a lifeline" for those parties deprived of other available procedural vehicles.[29]

Certainly, animal cruelty statutes, which provide remedies including criminal punishment for humans who harm nonhuman animals, exist. However, this type of statute provides no substantive basis for nonhuman animals to challenge their confinement per se. Indeed, courts have rejected efforts relying on anti-cruelty statutes as a basis for securing many forms of civil relief for the animal. Put differently, these statutes simply provide a mechanism for punishing humans for their cruel treatment of nonhuman animals, rather than substantively ensuring the wellbeing of the harmed animals.[30]

The NhRP's Petition states a prima facie case for relief and this Court should grant an order to show cause so that it can consider the merits of whether to grant habeas corpus relief to Amahle, Nolwazi, and Mabu.

Respectfully submitted,

Justin Marceau

Justin Marceau

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[29] Foyster, *supra* note 2, at 49.

[30] It is worth noting that a non-trivial amount of animal protection litigation is focused on a carceral solution to the problem of animal suffering. It is often argued that advancing the status of animals as victims in the service of human incarceration is the best way to protect the rights of animals. The NhRP, by contrast, pursues litigation that opposes carceral logics and has more in common with traditional civil rights and movement lawyering. In this historical moment when the country is searching for alternatives to tough-on-crime solutions to social problems, litigation seeking access to habeas corpus relief should be recognized as a unique approach to protecting the dignity of animals. *See* JUSTIN MARCEAU, BEYOND CAGES (Cambridge 2019).

PROOF OF ELECTRONIC SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 811 Wilshire Blvd, Ste. 900, Los Angeles, CA 90017. On **October 6, 2023,** I served **Letter of Amicus Curiae, Professor Justin Marceau Supporting Verified Petition for a Common Law Writ of Habeas Corpus and issuance of an Order to Show Cause in In Re NhRP on behalf of Amahle, Nolwazi, and Mabu On Habeas Corpus (No. S281614)** on the interested parties in this action by electronic service pursuant to CRC Rule 2.251. Based on the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic addresses listed below for each party.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 6, 2023, at Los Angeles, California.

Fernando Mercado
[Printed Name]

/s/ Fernando Mercado
Signature