

Court of Appeals
of the
State of New York

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HAPPY,

Petitioner-Appellant,

– against –

JAMES J. BREHENY, in his official capacity as Executive Vice President and
General Director of Zoos and Aquariums of the Wildlife Conservation Society
and Director of the Bronx Zoo and WILDLIFE CONSERVATION SOCIETY,

Respondents-Respondents.

**BRIEF OF *AMICI CURIAE* JOE WILLS, *ET AL.*, UK-BASED
LEGAL ACADEMICS, BARRISTERS AND SOLICITORS IN
SUPPORT OF PETITIONER-APPELLANT**

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I. INTEREST OF THE AMICI CURIAE

The undersigned *Amici curiae* submit this brief as UK-based legal academics, barristers and solicitors with expertise in animal law in support of the Nonhuman Rights Project’s efforts to secure habeas corpus relief for Happy the Elephant. *Amici* believe that the Appellate Division, First Department’s laconic ruling in *Matter of Nonhuman Rights Project, Inc. v. Breheny*, denying habeas corpus relief to Happy fails to provide a clear and principled legal basis for its decision.¹ Moreover, *Amici* are of the view that the First Department’s earlier ruling in *Matter of Nonhuman Rights Project, Inc. v. Lavery*² – which *Breheny II* relied upon as its sole legal authority³ – is also erroneous.

As specialists in animal law in a sister common law country, *Amici* submit that the Court of Appeals has a historic opportunity to address what Justice Fahey described in his concurring judgment in *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery* as the “profound and far-reaching” issue of “whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus...”⁴ *Amici* agree with Justice Tuitt in *Nonhuman Rights Project,*

¹ 189 A.D.3d 583 (1st Dep’t 2020) (hereafter “*Breheny II*”).

² 152 A.D.3d 73 (1st Dep’t 2017) (hereafter “*Lavery II*”).

³ 189 A.D.3d at 583.

⁴ 31 N.Y.3d 1054, 1059 (2018) (hereafter “*Lavery III*”).

Inc. ex rel. Happy v. Breheny that Happy is “an intelligent, autonomous being who should be treated with respect and dignity” and that the arguments advanced by the Nonhuman Rights Project (“NhRP”) for transferring her “from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary” are “extremely persuasive.”⁵ Justice Tuitt “regrettably” declined to grant Happy habeas corpus relief, believing her hands were tied by State precedent.⁶ This is not a predicament faced by the Court of Appeals. *Amici* believe that if this Court decides to rule in favor of the petitioners, it will be acting in the finest traditions of the common law writ of habeas corpus which has been utilized in a succession of celebrated rulings by courts in both the UK and US to correct manifest abuses of power where the legislature has failed to act.⁷

II. SUMMARY OF THE ARGUMENT

Courts in New York State have denied habeas corpus relief for cognitively complex nonhuman animals like elephants and chimpanzees on four identifiable bases:

⁵ No. 260441/2019, 2020 WL 1670735, at *10 (Sup. Ct. N.Y. Cty. Feb. 18, 2020) (hereafter “*Breheny I*”).

⁶ *Id.* at *9.

⁷ See Section VI, below.

(1) they cannot be legal persons or possess legal rights because they cannot “bear legal duties, or... be held legally accountable for their actions;”⁸

(2) they are not “members of the human community;”⁹

(3) according “any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process;”¹⁰ and

(4) habeas corpus is inappropriate because petitioners do not challenge the legality of detention, but merely seek to transfer such animals “to a different facility.”¹¹

As Justice Fahey has indicated that (4) is based on a “misreading” of “the case it relied on,”¹² *Amici* shall not address it in this brief. Section III will show that the ability to bear duties is unnecessary to be a legal person in theory and practice. Section IV likewise shows that the ability to bear duties is unnecessary to possess legal rights and that, in fact, animals, including elephants, already possess rights under New York State law. Section V shows that legal personhood is a flexible concept that can, and has, been extended to a variety of nonhuman entities in the common law tradition. Section VI argues that the scope of habeas corpus is not a matter for the

⁸ *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 152 (3d Dep’t 2014) (hereafter “*Lavery I*”).

⁹ *Lavery II*, 152 A.D.3d at 78.

¹⁰ *Id.* at 80; see also *Breheny II*, 189 A.D.3d 583.

¹¹ *Lavery II*, 152 A.D.3d at 79; see also *Matter of Nonhuman Rights Project, Inc. v. Presti*, 124 A.D.3d 1334, 1334 (4th Dep’t 2015).

¹² *Lavery III*, 31 N.Y.3d at 1058.

legislature and shows that the courts have a proud tradition of extending the writ to prevent abuses of power where the legislature has failed to act. Section VII will conclude with some positive arguments for recognizing Happy's habeas corpus rights, namely that doing so would: (a) be in line with New York's evolving animal protection jurisprudence; (b) promote the common law value of liberty; and (c) promote the common law value of equality.

III. INDIVIDUALS DO NOT NEED TO BE ABLE TO BEAR DUTIES TO BE LEGAL PERSONS

In *Lavery I*, the Third Department determined that “legal personhood has consistently been defined in terms of both rights and duties.”¹³ Likewise, in *Lavery II* the First Department denied habeas corpus relief on the basis that, *inter alia*, chimpanzees do not have the “capacity or ability... to bear legal duties, or to be held legally accountable for their actions.”¹⁴

Lavery II provides no legal or philosophical argumentation showing a necessary link between personhood and the capacity to bear duties. *Lavery I*, by contrast, cites *Black's Law Dictionary* (7th ed. 1999), John Chipman Gray's *The Nature and Sources of the Law* (2d ed.) and three rulings that refer to personhood as involving “rights and

¹³ *Lavery I*, 124 A.D.3d at 250.

¹⁴ *Lavery II*, 152 A.D.3d at 78.

duties”.¹⁵ *Amici* believe that these authorities do not support the proposition that the ability to bear duties is a necessary prerequisite for legal personhood.

A. The meaning of “and” in ordinary language and judicial interpretation

Before examining these sources in further detail, a preliminary point of interpretation is worth making. It would be a mistake to assume that the references to “rights *and* duties” offered in the various authorities cited by the Third Department must be strictly interpreted as a *conjunctive* requirement that the possession of *both* rights *and* duties is necessary for personhood. As Marko Milanovic notes:

[I]n everyday usage ‘and’ can be used interchangeably with ‘or’ or to indicate both a conjunction and a disjunction – if I ask you whether you would like milk and sugar with your coffee, I am not only offering you both or none, and you will know this from the *social context* in which this utterance takes place, i.e. the fact that plenty of people drink only milk or only sugar in their coffee, and not just both or neither. Such ambiguities are not resolvable on the basis of grammatical interpretation alone. Similarly, in legal usage courts (and lawyers more generally) frequently read ‘and’ and ‘or’ interchangeably, depending on the context and

¹⁵ *Lavery I*, 124 A.D.3d at 152 (citing *Calaway v. Practice Mgmt. Servs., Inc.*, 2010 Ark 432, at *4 (2010); *Wartelle v. Women’s & Children’s Hosp.*, 704 So. 2d 778, 780 (La. 1997); *Amadio v. Levin*, 501 A.2d 1085, 1098 (Pa. 1985)).

their appraisal of the intent or purpose of the legislator.¹⁶

Indeed, as a matter of statutory interpretation, it is well established in New York law that “[g]enerally, the words ‘or’ and ‘and’ in a statute may be construed as interchangeable when necessary to effectuate legislative intent.”¹⁷ It seems prudent to apply a similar interpretive principle to academic commentary and judicial precedent. Thus, if a *disjunctive* interpretation of the phrase “rights and duties” better contextually reflects an author’s or court’s view, then that is how the phrase ought to be interpreted.

B. Personhood and duty-bearing in legal theory

When one examines the sources offered in support of the proposition in *Lavery I* that duty-bearing is a necessary condition for legal personhood in more detail one finds that they actually support the disjunctive view that rights *or* duties are sufficient for legal personhood.

¹⁶ Marko Milanovic, “Foreign Surveillance and Human Rights, Part 2: Interpreting the ICCPR” (*EJIL:Talk!* Nov. 26, 2013), <https://www.ejiltalk.org/foreign-surveillance-and-human-rights-part-2-interpreting-the-iccpr/> (emphasis in original).

¹⁷ McKinney’s Cons. Laws of N.Y., Statutes § 365; *see also Dept. of Welfare v. Siebel*, 6 N.Y.2d 536 (1959) (“the word ‘or’ in the phrase quoted may be read as ‘and’ to carry out the legislative intent”); *People v. Skinner*, 704 P.2d 752, 753 (Cal. 1985) (construing “and” in Pen. Code, § 25, subd. (b) to mean “or” to conform to voters’ intent); Maurice B. Kirk, “Legal Drafting: The Ambiguity of ‘And’ and ‘Or,’” 2 Tex. Tech. L. Rev. 235, 253 (1971) (“every use of ‘and’ or ‘or’ as a conjunction involves some risk of ambiguity”).

Lavery I's citation of *Black's Law Dictionary* quotes John Salmond, *Jurisprudence* 318 (10th ed. 1947): "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties."¹⁸ As the petitioners have noted, "Black's Law Dictionary misquoted *Jurisprudence*; Professor Salmond had actually written 'rights or duties,' not 'rights and duties.'"¹⁹ *Black's Law Dictionary* has since been notified of this error and the latest edition correctly cites the disjunctive formulation.²⁰

Lavery I also quotes the following from John Chipman Gray's *The Nature and Sources of the Law*: "the legal meaning of a 'person' is a 'subject of legal rights and duties.'"²¹ However, as the petitioners again point out, this quote ignores the next qualifying sentence, in which Gray made clear that "one who has rights but not duties, or who has duties but no rights, is . . . a person."²²

When looking at the three legal authorities cited by *Lavery I*, further evidence for a disjunctive reading of rights and duties emerges.

¹⁸ *Lavery I*, 124 A.D.3d at 151 (quoting *Black's Law Dictionary* 1162 (7th ed. 1999)).

¹⁹ Brief for Petitioner-Appellant at 46, *The Nonhuman Rights Project, Inc. v. Breheny* (1st Dep't Case No. 2020-02581) (hereafter "Happy Brief").

²⁰ Happy Brief at 47; see also *Person*, *Black's Law Dictionary* (11th ed. 2019).

²¹ 124 A.D.3d at 152 (quoting John Chipman Gray, *The Nature and Sources of the Law* (2d ed. 1921) at 27).

²² Happy Brief at 46, citing Gray, *supra* note 21, at 27.

For example, *Lavery I* cites *Wartelle v. Women's & Children's Hosp.*, finding that the classification of a being or entity as a “person” is made “solely for the purpose of facilitating determinations about the attachment of legal rights and duties.”²³ However, in the next sentence,²⁴ the *Wartelle* judgment quotes A.N. Yiannopoulos, *Louisiana Civil Law Systems*: “rights and duties attach to, or are conferred by law upon, persons. Civilian terminology thus employs the word person in a technical sense to signify a subject of rights *or* duties.”²⁵ Thus, while rights and duties attach to persons, an entity does not need both in order to qualify as a legal person.

Lavery I also cites *Amadio v. Levin*, noting that “[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.”²⁶ *Amadio* is here citing a sentence from a chapter on personhood in Sir Frederick Pollock’s *A First Book in Jurisprudence*.²⁷ Later in the same chapter Pollock notes that “not every human being is necessarily a person for... there may well be human beings having no legal rights, as was the

²³ *Lavery I*, 124 A.D.3d at 152 (citing *Wartelle*, 704 So. 2d at 780 (La 1997)).

²⁴ *Wartelle*, 704 So. 2d at 780.

²⁵ A.N. Yiannopoulos, *Louisiana Civil Law Systems* § 48 (1977) (emphasis added).

²⁶ 501 A.2d at 1098 (Zappala, J., concurring) (citation & quotations omitted).

²⁷ Sir Frederick Pollock, *A First Book in Jurisprudence* 111 (Macmillan 1923).

case with slaves...”²⁸ Yet the author does not make a comparable claim about individuals who have no legal duties. Indeed, he discusses infants and people “disabled by insanity” as examples of natural persons with “reduced legal capacities.”²⁹ A closer reading of Pollock suggests he did not think that the ability to bear legal duties was a necessary condition for personhood.

Finally, the Third Department cites *Calaway v. Practice Mgmt. Servs., Inc.*, defining a “person” as “a human being or an entity...that is recognized by law as having the rights and duties of a human being.”³⁰ This citation also comes from *Black’s Law Dictionary*, which, as noted above, also contains a disjunctive account of personhood in its latest edition.

In summary, the academic commentaries and legal rulings cited in *Lavery I* do not, on closer inspection, support the claim that an individual must bear legal duties in order to be a person.

C. Personhood and duty-bearing in practice

The Court of Appeals has affirmed that legal personality requires having “the rights and privileges of a legal person,” with no reference

²⁸ *Id.* at 113-15.

²⁹ *Id.* at 122-123.

³⁰ 2010 Ark 432, at *4, (citing *Black’s Law Dictionary* (9th ed. 2009)).

to the ability to bear duties.³¹ This view comports with legal reality in New York State which – along with the rest of the common law world – recognizes human infants or individuals with profound cognitive impairments as persons, notwithstanding their inability to bear legal duties.³² As Justice Fahey notes, “[e]ven if... nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one’s infant child or a parent suffering from dementia.”³³ Any assertion that the ability to bear legal duties is a necessary condition for legal personhood should accordingly be rejected.

IV. INDIVIDUALS DO NOT NEED TO BE ABLE TO BEAR DUTIES TO BE LEGAL RIGHTS-HOLDERS

Lavery I denied extending liberty rights to a chimpanzee on the ground that “the ascription of rights has historically been connected with the imposition of societal obligations and duties.”³⁴ This section

³¹ *Byrn v. NYC Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972) (hereafter “*Byrn*”).

³² *See, e.g.*, 43 C.J.S. Infants § 220 (2011) (“[w]hile an infant under a specified age may be considered as lacking legal capacity, infants are, however, possessed of certain rights”); Surrogate’s Court Procedure Act (SCPA), Article 17-A (concerning guardianship of persons who are intellectually disabled and developmentally disabled).

³³ *Lavery III*, 31 N.Y.3d at 1057; *see also Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176 (9th Cir. 2004) (“juridically incompetent persons such as infants, juveniles, and mental incompetents” are recognized as legal persons).

³⁴ *Lavery I*, 124 A.D.3d at 151.

will show that this is false and that animals, including elephants, already possess legal rights in New York State. If the possession of rights *or* duties is sufficient to deem the possessor to be a legal person, then demonstrating that animals can and do have legal rights in New York is sufficient for demonstrating that, at least for particular purposes, they already are persons.

A. What it means to hold a legal right

To see why animals already possess rights in New York let us consider what a right is. A highly influential account of legal rights was offered by Wesley Newcomb Hohfeld in the early twentieth century. What Hohfeld called a “right in the strictest sense” involves the possession of a claim that places another under a duty, either to act or refrain from acting.³⁵ Thus, while rights are inextricably linked with duties owed *to* the rights-holder, they do not logically entail “that the right holder bear duties herself.”³⁶

There are two predominant academic accounts for understanding the relationship between a duty-bearer and a rights-

³⁵ Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions As Applied in Judicial Reasoning,” 23 Yale L.J. 16, 30 (1913).

³⁶ Saskia Stucki, “Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights,” 40(3) Oxford Journal of Legal Studies 533 (2020); *see also* Matthew H Kramer, “Do Animals and Dead People Have Legal Rights?” 14 CJLJ 29, 42 (2001).

holder; the interest theory and the will theory. Both accounts, when consistently applied and suitably formulated to plausibly track the practical realities of how rights operate in New York State, suggest that animals already possess rights under New York law.

B. The interest theory of rights

The interest theory of rights holds that legal rights are ultimately “legally protected interests.”³⁷ Thus, “the ultimate purpose of rights is the protection and advancement of some aspect(s) of an individual’s well-being and interests.”³⁸ Two conditions must be met for animals to qualify as potential right holders: “(i) animals must have interests, (ii) the protection of which is required not merely for ulterior reasons, but for the animals’ own sake, because their well-being is intrinsically valuable.”³⁹

As noted in *Lavery I*, the New York Legislature “has extended significant protections to animals.”⁴⁰ While in the past some scholars and judges have claimed that anti-cruelty legislation is “directed at protecting animals as property of their owners or as a means of promoting public morality,”⁴¹ courts across the United States are

³⁷ Joseph Raz, “Legal Rights”, 4 Oxford Journal of Legal Studies 1, 12 (1984).

³⁸ Stucki, *supra* note 36, at 542.

³⁹ *Id.*

⁴⁰ *Lavery I*, 124 A.D.3d at 152-53.

⁴¹ *State v. Nix*, 334 P.3d 437, 447 (Or. 2014).

increasingly identifying such laws as existing to protect “individual animals themselves from suffering.”⁴² Animals are accordingly being treated by courts as the “victims” of such offenses,⁴³ including in New York.⁴⁴

Elephants in particular are afforded protection for their own sake as seen in the recently passed “Elephant Protection Act,” which prohibits the use of elephants for entertainment on the grounds that “elephants used for entertainment purposes (‘entertainment elephants’) suffer physical and psychological harm due to the living conditions and treatment to which they are subjected.”⁴⁵

If animals, including elephants, are legally protected for their own sake in New York then they already have rights under the interest theory of rights. The legal rights that animals currently have may be “imperfect,” “weak” and lack the “normative force” of standard human rights, but, on an interest-based theory of rights, they are rights

⁴² *Id.*

⁴³ See, e.g., *People v. Speegle*, 62 Cal. Rptr. 2d 384 (Cal. Ct. App. 1997); *State v. Hess*, 359 P.3d 288 (Or. Ct. App. 2015); *People v. Harris*, 405 P.3d 361 (Colo. App. 2016); *State v. Newcomb*, 375 P.3d 434 (Or. 2016); *People v. Robards*, 97 N.E.3d 600 (Ill. App. Ct. 2018); *State v. Hearl*, 190 A.3d 42 (Conn. App. Ct. 2018).

⁴⁴ *People v. Curcio*, 22 Misc. 3d 907, 916 (N.Y. 2008) (comparing the inability of animals to testify against their abusers to offenses where “the victim [is] an infant, incompetent or physically disabled person”); *People v. Gordon*, 61 Misc. 3d 966, 971 (N.Y. Crim. Ct. 2018) (describing a neglected dog as “the victim in the present case”).

⁴⁵ 2017 N.Y. Senate Assembly Bill, S02098B, A00464-B (Jan. 12, 2017).

nonetheless.⁴⁶ Indeed, a number of federal courts have explicitly recognized federal and state animal protection statutes as conferring legal rights on animals.⁴⁷

C. The will theory of rights

The main academic rival to the interest theory is the will theory. According to the will theory, to be a rights-holder one must exert some sort of normative control over a correlative duty-bearer.⁴⁸ HLA Hart, a key advocate of the will theory, described a legal rights-holder as a “small-scale sovereign” who exercises “control” over another person’s duty.⁴⁹ This control can involve the ability to enforce or waive the performance of a duty, and the ability to sue and demand compensation.⁵⁰

The will theory is typically assumed to preclude animals from possessing rights given their inability to exert these forms of

⁴⁶ Stucki, *supra* note 36, at 552.

⁴⁷ See, e.g., *Cetacean Cmty.*, 386 F.3d at 1175 (“Animals have many legal rights, protected under both federal and state laws.”); *Tilikum v. Sea World Parks & Entm’t, Inc.*, 842 F. Supp. 2d 1259, 1264 (S.D. Cal. 2012) (“[a rejection of a 13th amendment challenge on behalf of an orca] is not to say that animals have no legal rights; as there are many state and federal statutes... that ‘punish those who violate statutory duties that protect animals.’”) (quoting *Cetacean Cmty.*, 386 F.3d at 1175).

⁴⁸ Leif Wenar, “Rights”, in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), <https://plato.stanford.edu/archives/spr2021/entries/rights/>.

⁴⁹ HLA Hart, “Legal Rights” in *Essays on Bentham. Jurisprudence and Political Theory* 183 (Clarendon Press 1982).

⁵⁰ *Id.* at 184.

normative control.⁵¹ However, adopting the view that a rights-holder must be able to exercise control over a duty-bearer is strikingly incongruous with legal practice virtually everywhere for it entails that infants and severely mentally disabled people also cannot possess legal rights.⁵²

To avoid this implication, will theorists such as Hart have modified the account so that an individual can also hold rights where a representative is legally empowered to enforce or waive a claim on their behalf.⁵³ It has been noted that an implication of this modification is that animals *can* possess legal rights. On this revised version of the will theory, animals would “straightforwardly” count as rights-holders under US animal trust statutes as “they hold an equitable title to property, and the relevant ‘powers and the correlative

⁵¹ See Matthew H Kramer, 14(1) “Do Animals and Dead People Have Legal Rights?” 29, 30 (2001); Hart, *supra* note 49, at 185.

⁵² Wenar, *supra* note 48 (“Within the will theory, it is impossible for incompetents like infants, animals, and comatose adults to have rights.”); see also Matthew H Kramer, “Rights without Trimmings in Matthew H Kramer, *A Debate over Rights: Philosophical Enquiries*,” 31 (OUP 2001).

⁵³ HLA Hart, *supra* note 49, at 184 (“Where infants or other persons not *sui juris* have rights, such powers and the correlative obligations are exercised on their behalf by appointed representatives and their exercise may be subject to approval by a court”).

obligations are exercised on their behalf by appointed representatives.”⁵⁴

Under New York law, designated domestic or pet animals can be named “beneficiaries” of trusts.⁵⁵ As appointed trustees can be empowered to enforce such trusts, those animal beneficiaries are rights-holders according to Hart’s version of the will theory. Happy herself is the beneficiary of such a trust created by the NhRP⁵⁶ and therefore is a rights-holder under the will theory.

In sum, if one adopts a suitably calibrated version of either the interest or the will theory of rights, it is clear that elephants are already rights-holders in New York State. The question before the Court, then, is not whether Happy should be the first nonhuman animal to be endowed with legal rights in New York State, but rather whether she should be the first elephant in New York State to be recognized as entitled to “the right to liberty protected by habeas corpus.”⁵⁷ As Justice Fahey observed, this is a question “of precise moral and legal status”⁵⁸ that depends on the “assessment of the

⁵⁴ Visa A J Kurki, “Rights, Harming and Wronging: A Restatement of the Interest Theory” 38(3) *Oxford Journal of Legal Studies* 430, 449 (2018) (quoting HLA Hart, *supra* note 49, at 184).

⁵⁵ EPTL § 7-8.1.

⁵⁶ Happy Brief at 21 n.18 (citing A-83-91).

⁵⁷ *Lavery III*, 31 N.Y.3d at 1057.

⁵⁸ *Id.*

intrinsic nature” of the animal in question.⁵⁹ It is this substantive legal and moral question that the court must grapple with in determining whether Happy is entitled to a writ of habeas corpus.

V. AN INDIVIDUAL DOES NOT NEED TO BE A HUMAN TO BE A LEGAL PERSON

Lavery II determined that the petitioner’s claim that “the word ‘person’ is simply a legal term of art” was “without merit.”⁶⁰ Instead, it denied that chimpanzees are persons because they are not members “of the human community.”⁶¹

A. The academic commentaries cited in *Lavery I* contradict the claim that only humans are legal persons

The above claim contradicts the accounts of personhood relied upon in *Lavery I*, many of which distinguish between being a legal person and a human. For example, Gray noted that while “in common speech, ‘person’ is often used as meaning a human being... the technical legal meaning of a ‘person’ is a subject of legal rights and duties.”⁶² Similarly, Salmond observed that “[s]o far as legal theory is concerned, a person is *any* being whom the law regards as capable of

⁵⁹ *Id.*

⁶⁰ *Lavery II*, 152 A.D.3d at 78.

⁶¹ *Id.*

⁶² Gray, *supra* note 21, at 27.

rights or duties... *whether human being or not.*”⁶³ Indeed, both Gray and a subsequent edition of *Salmond on Jurisprudence* recognized that legal personhood could be extended to nonhuman animals.⁶⁴ Finally, Pollock – cited indirectly via the *Amadio* citation – states that “not every human being is necessarily a person,”⁶⁵ and “there are persons in law which are not individual human beings.”⁶⁶ There are innumerable other academic authorities that back this point.⁶⁷

B. Legal personhood is a policy determination not a question of biology

New York precedent establishes that “it is a policy determination whether legal personality should attach and not a question of biological or ‘natural’ correspondence.”⁶⁸ Accordingly, “the parameters of legal personhood... will not be focused on semantics or biology, or

⁶³ John Salmond, *Jurisprudence* 318 (10th ed. 1947) (emphasis added).

⁶⁴ Gray, *supra* note 21, at 42 (“animals may conceivably be legal persons”); P J Fitzgerald, *Salmond on Jurisprudence*, 299 at n. (cc) (12th ed., Sweet & Maxwell 1966) (“[i]t would of course be possible for a legal system to regard an animal as a person”).

⁶⁵ Pollock, *supra* note 27, at 113.

⁶⁶ *Id.* at 114.

⁶⁷ For example, Hans Kelsen, *General Theory of Law and State* 94 (Transaction Publishers 2006) (“That man and person are two entirely different concepts may be regarded as a generally accepted result of analytical jurisprudence.”); George W. Paton and David P. Derham, *A Textbook of Jurisprudence by George Whitecross Paton* 282 (4th ed., Clarendon Press 1972) (“For the purposes of the law an idol, a trade union, or a ‘one man’ commercial company may be recognized as persons for the purposes of legal relationships, distinct from the humans connected with them”).

⁶⁸ *Byrn*, 31 N.Y.2d at 201.

even philosophy, but on the proper allocation of rights under the law.”⁶⁹

The purposive nature of legal personhood means that “it is possible to count as a person in some legal contexts, but to be treated as something more akin to property in others.”⁷⁰ Thus, “[a] human being or entity which has been said by... the courts to be capable of enforcing a particular right, or owing a particular duty can properly be described as a person *with that particular capacity*”⁷¹ without supposing “a larger set of right-owning, duty-owing capacities.”⁷²

The shape-shifting and chameleon-like nature of legal personhood is reflected in US law in a variety of ways. For instance, corporations are recognized as legal persons in some legal domains, including for the purposes of constitutional rights protection,⁷³ but not

⁶⁹ *Nonhuman Rights Project, Inc. ex rel. Leo v. Stanley*, 49 Misc. 3d 746, 766 (Sup. Ct. N.Y. Cty. 2015).

⁷⁰ Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* 49 (Hart 2009).

⁷¹ Peter Birks QC, *English Private Law Volume 1* 146 (OUP 2000) (emphasis in original).

⁷² *Id.*

⁷³ See, e.g., *Santa Clara Cty. v. Southern Pacific R.R. Co.*, 118 U.S. 394 (1886) (the Equal Protection Clause of the Fourteenth Amendment grants constitutional protections to corporations); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (the First Amendment applies to independent expenditures for political campaigns by corporations).

for others, such as for habeas corpus rights.⁷⁴ Similarly, although unborn children are standardly not recognized as persons in US law, they “have been recognized as acquiring rights or interests in narrow legal categories involving the inheritance or devolution of property.”⁷⁵ Some legal scholars have suggested that “certain types of property (notably animals) are in some very limited respects protected in the manner of persons.”⁷⁶

Petitioner’s arguments are restricted to claiming that Happy should be recognized as a person “for purposes of CPLR article 70.”⁷⁷ This does not entail her recognition as a person for any other legal purpose⁷⁸ or the recognition of any other nonhuman animal as a legal person. A recent monograph on legal personhood argues that extending habeas corpus rights to a nonhuman animal would not make them “a legal person *tout court*” but simply “a legal person for the purpose of *habeas corpus*.”⁷⁹

⁷⁴ *Waste Mgmt. of Wisconsin, Inc. v. Fokakis*, 614 F.2d 138 (7th Cir 1980) (refusing habeas corpus relief to a corporation “because a corporation’s entity status precludes it from being incarcerated or ever being held in custody”).

⁷⁵ *Byrn*, 31 N.Y.2d at 200.

⁷⁶ Naffine, *supra* note 70, at 48; *see also* David Bilchitz, *Moving Beyond Arbitrariness: The Legal Personhood And Dignity Of Non-Human Animals*, 25(1) *South African Journal on Human Rights* 38, 38 (2009) (“animals... have certain rights within the law, and consequently, if we take the argument to its logical conclusion that they are natural persons rather than things”).

⁷⁷ Happy Brief at 16.

⁷⁸ Happy Brief at 17-20.

⁷⁹ Visa AJ Kurki, *A Theory of Legal Personhood* 198-99 (OUP 2019).

Accordingly, the petitioner’s claim that “the word ‘person’ is simply a legal term of art” is well-founded in legal theory and practice.

C. Common law jurisdictions around the world recognize a wide variety of nonhuman legal persons

Common law courts and jurisdictions have recognized a host of nonhuman entities as persons. The most infamous of such entities is of course the corporation⁸⁰ but there are sundry other examples. In the UK for example, courts have recognized ships,⁸¹ a Hindu Idol⁸² and the ruins of an ancient temple as legal persons.⁸³ Lord Hodge, a Justice of the UK Supreme Court, has recently contemplated, extra-judicially, the merits of recognizing the separate legal personality of artificially-intelligent computers.⁸⁴ In New Zealand a national park,⁸⁵ a river⁸⁶ and a mountain⁸⁷ have been recognized as legal persons. Canada has

⁸⁰ See, e.g., *Salomon v. A Salomon and Co. Ltd.*, AC 22 (1897).

⁸¹ G. L. C, “Maritime Law: Personality of Ship: Immunity of Government Property,” 20(5) *Michigan Law Review* 533-535 (1922).

⁸² *Pramtatha Nath Mitlick v. PradVumia Ewinnr Mullick*, L.R. 52 Ind. App. 245 (1925) (“A Hindu idol... has a juridical status, with the power of suing and being sued.”).

⁸³ *Bumper Dev. Corp. v. Commissioner of Police of the Metropolis*, 1 WLR 1362 (1991) (recognising the separate legal personality of a ruined temple in Indian law).

⁸⁴ Lord Hodge, “The Potential and Perils of Financial Technology: Can the Law adapt to cope?” The First Edinburgh FinTech Law Lecture, University of Edinburgh 16-17 (14 March 2019), <https://www.supremecourt.uk/docs/speech-190314.pdf>.

⁸⁵ Te Urewera Act, No. 51 (New Zealand 2014).

⁸⁶ Te Awa Tupua Act (Whanganui River Claims Settlement), No. 7 (New Zealand 2017).

⁸⁷ A. Little, “Ngāti Maru and the Crown Sign Agreement in Principle”, beehive.govt.nz (official website of the New Zealand Government), (20 Dec. 2017),

likewise recently recognized the legal personhood of a river⁸⁸ and courts in India⁸⁹ and Pakistan⁹⁰ have recognized the personhood and fundamental rights of a number of nonhuman animals.

VI. THE SCOPE OF HABEAS CORPUS IS NOT A MATTER FOR THE LEGISLATURE

In *Breheny II* the Appellate Division denied leave to the petitioners on the grounds that “[a] judicial determination that species other than homo sapiens are ‘persons’ for some juridical purposes, and therefore have certain rights, would lead to a labyrinth of questions that common-law processes are ill-equipped to answer.”⁹¹ *Amici* concur with the petitioners that “[t]he genesis of habeas corpus is rooted in the common law,”⁹² and that “whether an individual is a ‘person’ who

<https://www.beehive.govt.nz/release/ng%C4%81ti-maru-and-crown-sign-agreement-principle#:~:text=The%20Crown%20and%20Ng%C4%81ti%20Maru%20have%20signed%20an,from%20Mount%20Taranaki%20to%20the%20upper%20Whanganui%20River.pdf>.

⁸⁸ Canadian Parks and Wilderness Society, “For the first time, a river is granted official rights and legal personhood in Canada” (Feb. 23 2021), <https://cpaws.org/for-the-first-time-a-river-is-granted-official-rights-and-legal-personhood-in-canada/>

⁸⁹ See, e.g., *Animal Welfare Board of India vs A. Nagaraja and Ors*, 7 SCC 547 (Supreme Court of India 7 May 2014); *Narayan Dutt Bhatt vs Union Of India And Others* 2018 SCC OnLine Utt 645 (Uttaranchal High Court 4 July 2018); *Karnail Singh and others v. State of Haryana* 2019 SCC OnLine P&H 704 (Punjab and Haryana High Court at Chandigarh 31 May 2019).

⁹⁰ *Islamabad Wildlife Mgmt. Bd. through its Chairman v. Metropolitan Corp. Islamabad through its Mayor & 4 others* (W.P. No.1155/2019), 25 (Islamabad High Court Judicial Dep’t, Apr. 25, 2020).

⁹¹ *Breheny II*, 189 A.D.3d at 583.

⁹² Happy Brief at 13.

may invoke the protections of habeas corpus is a substantive common law question for this Court to decide, not the legislature.”⁹³

Commenting on the pioneering role the courts have played in developing federal habeas corpus doctrine, Harvard Law Professors Richard H. Fallon, Jr. and Daniel J. Meltzer note, “a common law approach to habeas corpus issues has been not only historically dominant, but also, for the most part, historically successful... Much of the most important jurisdictional and substantive doctrine has been and remains judge-made.”⁹⁴

Indeed, habeas corpus has been used by the courts throughout history to offer protection to individuals otherwise unprotected through statutory law. This has included women and children suffering at the hands of abusive husbands and at a time when they were not considered to be full persons,⁹⁵ an enslaved African man before the English Parliament had abolished slavery,⁹⁶ an indigenous tribal leader whom the US government refused to recognize as a

⁹³ Happy Brief at 16.

⁹⁴Richard H. Fallon & Daniel J. Meltzer, “Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror,” 120 Harv. L. Rev. 2029, 2044 (2007).

⁹⁵ Paul D Halliday, *Habeas Corpus: From England to Empire* 121-32 (Harvard Univ. Press 2010) (documenting how the King’s Bench Division, under Sir Matthew Hale, tasked itself with “protecting wives and children from the over-reach of husbands and parents”); *id.* at 121-22.

⁹⁶ *Somerset v. Stewart*, 1 Lofft. 1, 98 Eng. Rep. 499 (KB 1772).

citizen or a person⁹⁷ and individuals designated by the US government as “enemy combatants” detained in Guantanamo Bay in Cuba.⁹⁸

In all of the iconic rulings just cited, the English and American judiciaries did not wait for the legislature to expressly introduce statutory reforms expanding the scope of habeas corpus or the meaning of legal personhood. Indeed, in recognizing the expansive reach of habeas corpus, the courts sometimes did so expressly against the submissions of the government.

VII. THE POSITIVE CASE FOR RECOGNIZING HAPPY’S HABEAS CORPUS RIGHTS

Having argued above that the various *Lavery* and *Breheny* rulings have not supplied compelling grounds against recognizing habeas corpus rights to Happy, *Amici* now offer some positive arguments in favor of such a determination.

A. The evolving legal status of nonhuman animals in New York State

As Justice Walters observed in *State v. Fessenden*, “we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still.”⁹⁹ As previously indicated, elephants already possess legal rights under

⁹⁷ *U.S. ex Rel. Standing Bear v. Crook*, 25 F. Cas. 695 (D. Neb. 1879).

⁹⁸ *Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁹⁹ *State v. Fessenden*, 333 P.3d 278, 284 (Or. 2014).

New York law, and therefore are already *de facto* persons for specific purposes. New York courts have noted the special status of animals and declined to treat them as mere property. One court has noted the “cherished status accorded to pets in our society,”¹⁰⁰ and another that “a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.”¹⁰¹ The Appellate Division, Second Department has observed that “[t]he reach of our laws has been extended to animals in areas which were once reserved only for people”, and “[t]hese laws indicate that companion animals are treated differently from other forms of property.”¹⁰² The New York judiciary have accordingly resolved custody disputes involving companion animals by considering what is “best for all concerned,” including the companion animal themselves.¹⁰³

New York courts have also noted “an emerging awareness of the injustice of treating animals as ‘things,’ and present efforts to change the status of nonhuman animals from ‘things’ to legally recognized ‘persons,’ for the purpose of habeas corpus protection.”¹⁰⁴ One court has

¹⁰⁰ *Raymond v. Lachmann*, 264 A.D.2d 340, 341 (1st Dep’t 1999).

¹⁰¹ *Corso v. Crawford Dog & Cat Hosp., Inc.*, 97 Misc. 2d 530, 531 (N.Y. Civ. Ct. 1979).

¹⁰² *Feger v. Warwick Animal*, 59 A.D.3d 68, 72 (2d Dep’t 2008).

¹⁰³ *Raymond*, 264 A.D.2d at 341; *Travis v. Murray*, 42 Misc. 3d 447, 460 (Sup. Ct. N.Y. Cty. 2013); *Finn v. Anderson*, 64 Misc. 3d 273, 279 (N.Y. City Ct. 2019).

¹⁰⁴ *Gordon*, 61 Misc. 3d at 971.

even opined that “it is common knowledge that personhood can and sometimes does attach to nonhuman entities like... animals.”¹⁰⁵ Justice Fahey noted that “there is no doubt that [a chimpanzee] is not merely a thing,”¹⁰⁶ and Justice Tuitt stated that “Happy is more than just a legal thing, or property. She is an intelligent, autonomous being who should be treated with respect and dignity.”¹⁰⁷ Such pronouncements reflect an emerging understanding amongst the judiciary that animals are not mere “things” and are entitled to at least some of the legal protections afforded to persons. A ruling in favor of Happy’s habeas corpus rights would build on this progressive animal protection jurisprudence, as well as rulings around the world that have recognized the liberty rights and personhood of nonhuman animals.¹⁰⁸

¹⁰⁵ *People v. Graves*, 163 A.D.3d 16, 21 (4th Dep’t 2018).

¹⁰⁶ *Lavery III*, 31 N.Y.3d at 1059.

¹⁰⁷ *Breheny I*, 2020 WL 1670735, at *10.

¹⁰⁸ See, e.g., *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA, Sobre Amparo*, EXPTE. A2174-2015 (Argentina Oct. 21, 2015) (recognising an orang-utan be a ‘nonhuman person’ with a right to appropriate living conditions); *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA, Sobre Amparo*, EXPTE. A2174-2015 (Argentina June 14, 2016) (overturning aforementioned personhood determination, but upholding the right to appropriate living conditions); *People for Animals v. MD Mohazzim & Anr* CrI.M.C. 2051/2015 & CrI.M.A. No. 7294/2015 (India) (recognizing that caged birds have “a fundamental right to fly and cannot be caged” and ordered they “be set free in the sky”); *In re Cecilia*, File No. P-72.254/15 32 (Argentina Nov. 3, 2016) (recognising a chimpanzee as a “nonhuman legal person” entitled to habeas corpus); *Islamabad Wildlife Mgmt. Bd.* (Pakistan Apr. 25, 2020) (writ of mandamus to relocate an Asian elephant named Kaavan from the Islamabad zoo to a sanctuary on the basis that it “is a right of each animal... to live in an environment that meets [their] behavioral, social and physiological needs.”); Swiss Federal Supreme Court, Judgment, 16 Sept. 2020,

B. Applying habeas corpus to Happy would promote liberty

The right to liberty has long been “highly prized and protected by the common law.”¹⁰⁹ Thus, in determining whom the writ of habeas corpus ought to be applied to, courts should take into consideration, amongst other things, the scientific literature on which beings have an interest in liberty, *i.e.* which beings are *autonomous*. Justice Tuitt described Happy as “an intelligent, autonomous being” with “complex cognitive abilities” and “advanced analytic abilities.”¹¹⁰ The uncontroverted evidence from scientific experts in elephant cognition submitted by the petitioners demonstrates that elephants are not only autonomous but possess a wide variety of complex cognitive abilities including empathy, self-determination, the ability to plan for the future and complex communication.¹¹¹

1C_105/2019 (recognizing the lawfulness of a referendum for extending rights to bodily and mental integrity to nonhuman primates in the Canton of Basel-Stadt); Selection Court of the Constitutional Court of Ecuador re: Case No.253-20-JH at para. 9 (Ecuador Dec. 22, 2020) [English translation]. COMP-158 (Ecuador) (granting leave to appeal to determine whether monkeys have habeas corpus rights).

¹⁰⁹ *R (on the application of Jalloh (formerly Jollah) v. Secretary of State for the Home Dept.* UKSC 4 (2020) (per Lady Hale PSC).

¹¹⁰ *Breheny I*, 2020 WL 1670735, at *10.

¹¹¹ Happy Brief at 3-4.

Happy has also passed what is known as the “mirror recognition test” (“MRT”), *i.e.* she can recognize herself in the mirror.¹¹² The researchers who undertook this study describe passing the MRT as an “indicator of self-awareness,” and related to “higher forms of empathy and altruistic behaviour” and “complex sociality and cooperation.”¹¹³ The available scientific evidence clearly shows that Happy is an autonomous, self-aware being with an interest in liberty. Extending the writ of habeas corpus to her would be in keeping with the Court’s historic function of respecting and promoting individual freedom.

C. Applying habeas corpus to Happy would promote equality

Equality is an integral value of the common law. The doctrine of *stare decisis* requires “treating like cases alike”¹¹⁴ and, by extension, “treating similarly situated persons similarly.”¹¹⁵ Is Happy “similarly situated” to human beings who are entitled to habeas corpus?

A similarity *Amici* can identify is her cognitive capacity. Justice Tuitt described Happy as “an intelligent, autonomous being” with

¹¹² Joshua M. Plotnik, Frans de Waal and Diana Reiss, “Self-recognition in an Asian elephant,” 103(45) PNAS 17053 (2006).

¹¹³ *Id.*

¹¹⁴ Christopher J. Peters, “Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis,” 105 Yale L.J. 2031, 2043 (1996) (citing Benjamin N. Cardozo, *The Nature of the Judicial Process* 33-34 (Yale Univ. Press 1921)).

¹¹⁵ *Id.* (citing Ronald Dworkin, *Taking Rights Seriously* 113 (Harvard Univ. Press 1977))

“advanced analytic abilities *akin to human beings*.”¹¹⁶ Likewise, Justice Fahey described a chimpanzee as “an intelligent nonhuman animal *who thinks and plans and appreciates life as human beings do*.”¹¹⁷ In this respect at least, Happy has comparable liberty interests to human beings. Should her right to liberty be denied “based on nothing more” than the fact that she “is not a member of the human species”?¹¹⁸

In the finest traditions of habeas corpus jurisprudence, courts have refused to allow characteristics such as age, sex, race or citizenship status to determine whether individuals are entitled to freedom from arbitrary detention.¹¹⁹ There is now growing consensus amongst ethicists that species membership alone cannot justify denial of rights or personhood.¹²⁰ Extending habeas corpus protections to Happy would therefore draw on the finest egalitarian traditions of the common law.

¹¹⁶ *Breheny I*, 2020 WL 1670735, at *10 (emphasis added).

¹¹⁷ *Lavery III*, 31 N.Y.3d at 1058 (emphasis added).

¹¹⁸ *Id.* at 1057.

¹¹⁹ See Section VI, above.

¹²⁰ Kristin Andrews et al., *Chimpanzee Rights: The Philosophers' Brief* 13-41 (Routledge 2018).


VIII. CONCLUSION

In 2018, Justice Fahey asked: “Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her?”¹²¹ On the basis of the foregoing reasons, *Amici* answer this question in the affirmative.

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¹²¹ *Lavery III*, 31 N.Y.3d at 1058.

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Respectfully submitted,

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