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Appellate Division–First Department Case No. 2020-02581

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* LAURENCE H. TRIBE, SHERRY F. COLB, AND MICHAEL C. DORF[1] IN SUPPORT OF PETITIONER-APPELLANT

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I. Preliminary Statement

In 1971, a sentient, behaviorally complex Asian elephant was born. At just one year old, she and six other calves were captured and shipped an ocean away to be sold to various zoos and circuses for human entertainment. Their captors named the calves after Snow White's seven dwarves. They called her "Happy." In 1977, the Bronx Zoo imprisoned Happy and another calf, Grumpy. The zoo forced Happy to give rides and engage in "elephant extravaganzas." In 2002, Happy lost her sole companion of twenty-five years, and the last connection to her homeland, when the zoo euthanized Grumpy. Four years later, the zoo euthanized Happy's subsequent and only other elephant companion, Sammie. For the next fifteen years, the zoo kept Happy alone and confined to an approximately one-acre enclosure, a small portion of which contains an "elephant yard" consisting of an enclosure walled by cement. Now fifty years old, Happy remains in solitary confinement, unable to lead a physically, intellectually, emotionally, and socially complex life despite her capacity to do so.

By imprisoning Happy every day for over forty years, the Bronx Zoo has deprived her of the life to which free-living elephants are adapted.[1] Free, she would

[1] Had her captors been caretakers, Happy's life would have been vastly different. *See* Elizabeth Preston, *Reuniting an Orphan Elephant and Her Mom, Perhaps, With DNA and Luck*, THE NEW YORK TIMES (Sept. 3, 2021), available at https://www.nytimes.com/2021/09/03/science/nania-elephant.html?smid=em-share (last accessed Sept. 15, 2021).

travel ten or twenty miles a day. An extremely social animal, she would live in a herd of perhaps a dozen elephants led by a matriarch (and perhaps she would by now be a matriarch herself) and surrounded by her mother, sisters, and calves, with whom she would regularly engage in complex forms of communication and group decision-making, plan coordinated actions, and practice cooperative problem-solving. She would make choices based upon her preferences many times a day, manifest her theory of mind, and make plans. She would display empathy and grieve upon the death of a family member.

The Supreme Court, Bronx County ruled that Happy is not a "person" for purposes of habeas corpus relief, and the Appellate Division, First Department ("First Department") affirmed the judgment. This Brief argues that this Court should reject recent precedent and recognize that Happy is indeed a legal person for purposes of habeas corpus in New York and is entitled to the right to bodily liberty, which that great writ protects.

In October 2018, Happy sought an order to show cause under the New York habeas corpus statute[2] when the Nonhuman Rights Project, Inc. ("NhRP") filed a common law habeas corpus petition on her behalf in the Supreme Court, Orleans County and demanded that the court recognize her as a legal person, grant her the

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

right to bodily liberty, and order her immediate release from captivity to an appropriate sanctuary. The petition alleged that the scientific evidence contained in the affidavits attached thereto demonstrated that elephants are sentient beings who, pursuant to New York common law jurisprudence, are "persons" for purposes of common law habeas corpus and within the meaning of Article 70 of the Civil Practice Law and Rules ("CPLR"), New York's habeas corpus procedural statute.

That November, the Orleans court granted Happy a hearing. The court subsequently transferred Happy's case to the Supreme Court, Bronx County. After three days of hearings, the court "regrettably" ruled against her petition on the ground that it was bound by *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept 2014), *lv denied* 26 N.Y.3d 902 (2015) ("*Lavery*"). Petitioner-Appellant's Appendix, A-21. In *Lavery*, the Appellate Division, Third Department ("Third Department") denied habeas relief to a chimpanzee named Tommy on the novel and offensive ground that only those beings capable of bearing "social duties and responsibilities" can possess legal rights and that chimpanzees (and presumably all other nonhuman animals) lack this capacity, which that court counterfactually asserted that only humans and all humans possess. 124 A.D.3d at 150-153.

In December 2020, relying on its prior misguided conclusion that the writ of habeas corpus is limited to human beings; *Matter of Nonhuman Rights Project, Inc.*

v. Lavery, 152 A.D.3d 73, 76-78 (1st Dept 2017), *lv denied* 31 N.Y.3d 1054 (2018) ("*Lavery II*"); the First Department affirmed the judgment of the Supreme Court, Bronx County. *Matter of Nonhuman Rights Project, Inc. v. Breheny*, 189 A.D.3d 583, 583 (1st Dept 2020). This appeal followed.

In *Lavery II*, the First Department considered appeals from the denial of second habeas petitions filed on behalf of Tommy and another chimpanzee, Kiko. In its decision, the court cited *Lavery* but declined to rely on it. 152 A.D.3d at 75. The court nonetheless denied habeas relief to the chimpanzees on the grounds that the petitions were "successive" and therefore procedurally barred. *Id*. Although the court thereby disposed of the matter, it went on gratuitously to express the opinion, obviously not necessary to the result in the case, that chimpanzees and all other nonhuman animals are unfit candidates for personhood merely because they are not human. *Id.* at 76-78.[3]

The Third Department's *Lavery* ruling, which bound the Supreme Court in this case and upon which the First Department partially relied in dictum in *Lavery II*, was wrong. The Third Department's conclusion that chimpanzees could not be legal persons was based on a fundamentally flawed definition of legal personhood,

[3] Notably, in the present case, the Supreme Court based its decision on the precedent of the Third Department and not that of the First Department, despite the fact that Bronx County falls within the First Department's appellate jurisdiction, implying that the court recognized the personhood discussion in *Lavery II* to be dictum.

which turns on an entity's present capacity to bear "both rights and duties." *Lavery*, 124 A.D.3d at 151-152. This classic but deeply problematic definition, which appears on its face to exclude human children and others whose rights as persons the law indisputably protects, importantly misunderstands the relationship among rights, duties, and personhood.[4] The First Department, in turn, announced a wholly arbitrary test for personhood in *Lavery II* that bases its acquisition solely on membership in the human species, and it affirmed the lower court's judgment in the present case primarily for this reason.

Lavery and *Lavery II* both rest on the flawed assumption that human beings are the only species entitled to legal personhood and therefore the only beings on earth capable of possessing legal rights. The two decisions run counter to New York's common law of habeas corpus, which has a noble tradition of expanding the ranks of rights holders (see *infra*). Rejecting *Lavery* and *Lavery II* would keep faith with the concurring opinion of Judge Eugene M. Fahey of the New York Court of

[4] For its erroneous conception of legal personhood as contingent on the capacity to shoulder legal duties, the Third Department relied, in part, on Black's Law Dictionary, which, in turn, relied on the definition of "person" from the 10th edition of Salmond's *Jurisprudence*. In 2017, the NhRP unearthed the 10th edition of *Jurisprudence* in the Library of Congress and determined that Black's Law Dictionary had misquoted it. Salmond actually supported the NhRP's rights or duties argument. The NhRP then asked the Editor-in-Chief of Black's Law Dictionary in writing to correct the error, which he said he would do. The NhRP immediately sought to bring this development to the attention of the First Department by motion after oral argument but before the court rendered its decision. The First Department denied the motion and thereupon perpetrated the same "rights and duties" mistake in *Lavery II* as the Third Department in *Lavery*. Notably, the current Black's Law Dictionary, the 11th, which was released in 2019, corrected this crucial error.

Appeals in *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1056-1059 (2018), as well as a growing international judicial trend towards recognizing the personhood and rights of nonhuman animals, including their entitlement to habeas corpus.

Indeed, although the Third Department claimed that "Petitioner" had not "cite[d] any precedent . . . in state law, or under English common law, that an animal could be considered a 'person' for the purposes of common-law habeas corpus relief" and that such "relief has never been provided to any nonhuman entity"; *Lavery*, 124 A.D.3d at 150; in the six years since *Lavery* came down, several courts have granted nonhuman animals writs of habeas corpus (or their civil law equivalent) and declared them persons for that purpose. For example, an Argentinian court ordered a zoo in Mendoza to release a chimpanzee named Cecilia and send her to a Brazilian sanctuary.[5] An Argentinian court also declared that an orangutan named Sandra in Buenos Aires was a person for purposes of habeas corpus, and she now lives at a sanctuary in Florida.[6] In another case, the Colombian Supreme Court ordered a zoo to release an endangered Andean bear named Chucho and relocate

[5] *In re Cecilia*, File No. P-72.254/15 at 32 (Nov. 3, 2016) (referring to Cecilia as a "nonhuman legal person"), translation *available at*: https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf.

[6] *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA, Sobre Amparo* (Association of Officials and Attorneys for the Rights of Animals and Others v. GCBA, on Amparo), EXPTE. A2174-2015 (October 21, 2015). An appellate court later overturned Sandra's personhood determination.

him to a natural reserve pursuant to habeas corpus.[7] Likewise, the Islamabad High Court in Pakistan ruled that a zoo must release an Asian elephant named Kaavan and send him to a sanctuary (though this case was brought about by a writ of mandamus, not habeas corpus). *Islamabad Wildlife Mgt. Bd.*, W.P. No.1155/2019, at 62. The court noted that "an elephant has exceptional abilities and one such member of the species, 'Happy,' an inmate of the Bronx Zoo [. . .], has even passed the 'mirror test'"; *id.* at 12; and cited Judge Fahey's concurring opinion approvingly. *Id.* at 59.[8]

II. The Third Department's Reasoning in *Lavery* Together with the First Department's Adoption of that Reasoning in Dictum in *Lavery II* and Its Adherence to the Same in the Present Case Unjustifiably Curtail the Scope of Habeas Corpus

For centuries, this Court has recognized that the common law writ of habeas corpus "lies in all cases of imprisonment by commitment, detention, confinement or restraint, for whatever cause, or under whatever pretence." *People v. McLeod*, 3 Hill 635, 647 note j (N.Y. 1842).[9] In a similar spirit, the United States Supreme Court has emphasized that the writ's "scope and flexibility" and "its capacity to reach all

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[7] *Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 (July 26, 2017), translation *available at*: https://www.nonhumanrights.org/content/uploads/Translation-Chucho-Decision-Translation-Javier-Salcedo.pdf. The Colombian Constitutional Court reversed the Colombian Supreme Court's ruling by a vote of 7-2. Translation of the Court's official press release *available at*: https://www.nonhumanrights.org/content/uploads/English-Chucho-the-Bear-FINAL.pdf.

[8] *Available at*: https://www.nonhumanrights.org/content/uploads/Islamabad-High-Court-decision-in-Kaavan-case.pdf.

[9] *See also People ex rel. Pruyne v. Walts*, 122 N.Y. 238, 241-242 (1890) ("The common-law writ of habeas corpus was a writ in behalf of liberty, and its purpose was to deliver a prisoner from unjust imprisonment and illegal and improper restraint.").

manner of illegal detention," as well as "its ability to cut through barriers of form and procedural mazes . . . have always been emphasized and jealously guarded by courts and lawmakers." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

Throughout history, the writ of habeas corpus has served as a crucial guarantor of liberty by providing a judicial forum to beings, some of whom the law might not (yet) recognize as possessing legal rights or responsibilities on a footing equal to others.[10] In a time that is becoming acutely aware of the four-century history of racial enslavement and its enduring legacy, it cannot pass notice that enslaved African Americans famously used the common law writ of habeas corpus in New York to challenge their bondage and proclaim their personhood, even when the law otherwise treated them as mere things.[11] In a similar fashion, the law once considered women in England to be the property of their husbands, and they had no legal recourse against spousal abuse until the 17th century when the Court of King's Bench began to permit women and their children to utilize habeas corpus to escape abusive men.[12] Indeed, we might rightly regard the overdue transition of the most oppressed among us from thinghood to personhood through the legal vehicle of

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

[11] *See In re Tom*, 5 Johns. 365 (N.Y. 1810) (per curiam) (holding, at a time when slavery was legal in New York, that an enslaved human being could bring a habeas corpus action against a man that he alleged was illegally detaining him); *see also Lemmon v. People*, 20 N.Y. 562, 604-606, 618, 623, 630-631 (1860); *In re Belt*, 2 Edm. Sel. Cas. 93 (N.Y. Sup. 1848); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846).

[12] Paul D. Halliday, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 121-132 (2010).

habeas corpus among the proudest elements of the heritage of that great writ of liberation.

Stating—as did the First and Third Departments—that nonhuman animals are unwelcome in habeas courts solely because they are not humans is a stark and sad reminder of the shameful era in which courts refused to grant some humans personhood or legal rights because they were not of the same race or gender as those who then were rights-bearers. Contrary to these holdings, New York courts have throughout the state's history entertained petitions for writs of habeas corpus from a wide variety of beings that the law considered at the time incapable of bearing the same rights as most members of society, including infants and young children,[13] incompetent elderly persons,[14] and persons deemed insane.[15]

Cases like these recognize that the danger habeas corpus confronts—forceful but unjustified restraint and detention arguably in violation of applicable law—can exist even where the habeas petitioner still lacks other legal rights and

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

[14] *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept 1996); *State v. Connor*, 87 A.D. 2d 511, 511-512 (1st Dept 1982).

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

responsibilities or differs in important ways from other contemporary rights holders. The First Department's erroneous reliance on *Lavery* and, in this case, *Lavery II* and its misguided focus on the degree to which the habeas-seeker has already achieved full recognition of her personhood and her rights-bearing capacity would immunize many forms of allegedly illegal detention from any judicial examination whatsoever, including Happy's decades-long imprisonment at the Bronx Zoo.

New York trial courts have now twice taken the monumental first step of granting a habeas corpus hearing to a nonhuman animal.[16] Happy's liberty was the subject of three days of hearings before the Supreme Court, Bronx County. The court's decision clearly demonstrates that, but for *Lavery*, it would have ordered Happy freed to a sanctuary as a "person" under the New York habeas provision.[17]

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[16] Before the second filing on behalf of Tommy and Kiko (which culminated in *Lavery II*), the Supreme Court, New York County entertained a second petition filed by the NhRP on behalf of two chimpanzees named Hercules and Leo, issued the requested order to show cause, and held a hearing requiring the State to justify their detention. The court refused to recognize the chimpanzees as legal persons and grant their release, however, because it, like the Bronx court in the instant case, believed itself bound by *Lavery* regarding the necessary showing of duties and responsibilities. *Matter of Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc 3d 746, 772 (Sup. Ct., New York County 2015).

[17] Referencing *Lavery*, the court stated that it was "constrained to find that Happy is not a 'person' entitled to the writ of habeas corpus." Petitioner-Appellant's Appendix, A-22. The court nonetheless determined that Happy "is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty." Id.

Respondents take issue with the Petitioner's claim that Happy has a right to bodily liberty because, among other reasons, she is an autonomous being, and they reference the prior work of one of the three amici filing this brief as support for their position. Respondents' Brief, pp. 30-31. Respondents fail to recognize, however, that all three amici, and the NhRP, have always argued that autonomy is sufficient but by no means necessary for the common law right to bodily liberty protected by the great writ. Moreover, Happy's autonomous nature is just one of many unique traits that evidence that she is not simply a thing, mere property, to be used and abused as humans see fit but, rather, a sentient being with her own life experiences.

This Court has the opportunity to correct the First Department's error and provide some measure of justice to Happy by repudiating *Lavery* and the dictum of *Lavery II* and ruling that Happy is indeed a person within the meaning of the habeas corpus provision and that she is entitled to enjoy the right to bodily liberty.

III. *Lavery's* "Reciprocity" Barrier to Habeas Jurisdiction is Doubly Unsound

The Third Department's rejection of the chimpanzee's habeas petition in *Lavery* at the threshold stemmed from that court's mistaken view that Article 70's limitation of habeas protection to legal "persons" should be read to exclude all beings not "capable of rights and duties." 124 A.D.3d at 150-152 (internal citations omitted). It was that supposed incapacity that the *Lavery* court treated as disqualifying chimpanzees as a matter of law from entitlement to the protection of the habeas writ. One need not address the court's contestable assumption that these Great Apes (and presumably all other nonhuman animals) are necessarily incapable of bearing responsibility for their choices in order to challenge the court's underlying conception of the "[r]eciprocity between rights and responsibilities"; *id.* at 151; a conception that fundamentally misunderstands the relationship among rights, duties, and legal personhood.

A. Legal Personhood Cannot Require the Capacity to Bear Duties

The Third Department's conclusion that the inability of chimpanzees (and presumably every other species of nonhuman animal) to bear legal duties rendered

it "inappropriate to confer upon chimpanzees . . . legal rights"; *id.* at 152; is a non sequitur unworthy of adoption by any court. Professor Visa Kurki has applied the classical Hohfeldian analysis[18] of rights and duties to challenge the assumption that a "legal person" is simply "the subject of legal rights and duties."[19] Legal theorists have developed two competing explanations of the nature of Hohfeldian rights: the "interest theory" and the "will theory."[20]

Under the interest theory, rights properly belong to "entities that have interests and whose interests are furthered by duties in a certain manner,"[21] where "interests" refer to benefits flowing from the enforcement of the correlative duty, itself belonging to someone other than the rights holder.[22] Nonhuman animals can and in fact do hold many interest-theory rights, as the *Lavery* court's opinion conceded,[23] even though people have not conventionally classified such nonhuman animals as

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

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

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

[21] Kurki, *supra* note 19, at 7.

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

[23] *Lavery*, 124 A.D.3d at 152-153 ("Our rejection of a rights paradigm for animals does not, however, leave them defenseless. The Legislature has extended significant protections to animals . . . .").

legal persons.[24] Not to put too fine a point on it, denying that something can be in the interest or against the interest of a nonhuman being like a chimpanzee or an elephant defies common sense and ordinary linguistic usage. Everyone knows what we mean, for example, when we say that it is against an elephant's interest to burn the elephant's skin with a torch. Likewise, saying that something is against the "interest" of a bottle of shampoo or an umbrella would be nonsensical. We might say that keeping the bottle of shampoo upright will extend its useful life and allowing the umbrella to dry between uses will preserve the umbrella, but no one would describe either the shampoo or the umbrella as possessing interests.

Even from the perspective of a will-theorist, the court's view that rights-holding and duty-bearing are necessary preconditions of legal personhood in the sense relevant to habeas corpus jurisdiction is untenable. Under the will theory, an entity holds a "right" if it has "competence and authorization to waive/enforce some legal duty."[25] Therefore, the class of rights-holders under the will theory is limited to "rational beings with mental faculties that correspond to adult human beings of sound minds."[26] If one accepts the will theory's highly demanding test for

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[24] *Id.* at 250-251; Kurki, *supra* note 19, at 2-3. *But see* Jessica Berg, *Of Elephants and Embryos*, 59 HASTINGS L.J. 369, 404 (2007) ("Thus far no state has chosen to provide any legal rights directly to animals; animal welfare laws protect the interests of natural persons in preventing harm to animals."). Berg's position on the nonexistence of animal rights seems to derive from a will-theory conception of rights.

[25] Kramer, *supra* note 20, at 33.

[26] Kurki, *supra* note 19, at 11; *see also* Kramer, *supra* note 20, at 35 (identifying adult human beings with sound rational faculties as only class of rights-holders under will theory).

rightsholders, equating legal personhood with rights-holding becomes unsustainable because the class of potential rights-holders under that standard would exclude those whom our culture universally regards as legal persons.

Needless to say, infants, young children, and adults suffering from dementia are unquestionably legal persons. Yet will-theorists and respondents would deny them rights.[27] Will-theory rights are not necessary conditions for legal personhood, nor are they sufficient conditions for legal personhood. For example, during the era when our Constitution employed various euphemisms to express its toleration of the benighted institution of chattel slavery, even those who were lawfully enslaved by others possessed will-theory rights, such as the right to appeal criminal convictions, but the law considered them for most purposes to be legal things rather than persons.[28] Thus, neither an interest- nor a will-theory conception of rights supports the court's reciprocity argument. Neither does common sense.

B. One's Inclusion in or Exclusion from a Group that Includes Other Members Who Can Bear Duties is Irrelevant to One's Rights

The possession of a right does not necessarily entail the right-holder's bearing of a legal duty. Instead, as envisioned in Hohfeld's classic scheme, the possession of a right entails the "bearing of a legal duty by someone else."[29] For instance, infants

[27] *See* Kurki, *supra* note 19, at 11.
[28] *See id.* at 11.
[29] Matthew Kramer, *Getting Rights Right*, in RIGHTS, WRONGS AND RESPONSIBILITIES 28, 43 (Matthew Kramer ed., 2001).

are obviously legal persons but bear no legal duties to anyone.[30] The Third Department acknowledges in a footnote that "[t]o be sure, some humans are less able to bear legal duties or responsibilities than others," but the court justifies the legal personhood of such impaired classes of humans on the ground that "collectively, human beings possess the unique ability to bear legal responsibility." *Lavery*, 124 A.D.3d at 152 n.3. This normative justification that humans are a duty-bearing *species* and thus that any human should be deemed a legal person is highly tendentious and is logically "irrelevant for the *conceptual* point that [infants][31] do not bear duties yet they are legal persons."[32] In other words, if an individual has rights only if she can bear responsibilities, then the fact that others with similar DNA (classified as a "species" based on reproductive potential) can bear responsibilities does nothing to invest the individual who cannot bear such responsibilities with the capacity to have rights. We could, just as logically, say that because other mammals can bear responsibilities, it follows that the mammals who cannot bear them will also have rights. There is no good ground to judge an individual based on any evolutionary classification. Even if there were, there is no good ground to select "species" (as opposed to family or order or kingdom) as the relevant evolutionary

[30] Kurki, *supra* note 19, at 10.
[31] Kramer also points out that "senile people and lunatics and comatose people" have legal rights and yet cannot bear duties. Kramer, *supra* note 29, at 43.
[32] Kurki, *supra* note 19, at 12 (emphasis in original).

category. [33] In truth, bearing responsibilities is not essential to rights-holding, and that is why infants have rights notwithstanding their inability to bear responsibilities. Likewise, even if elephants and other nonhuman animals were incapable of bearing legal duties—an assumption that may not be warranted[34]—that incapacity would not justify denying them legal personhood.

When the NhRP challenged the Third Department's erroneous ruling on the requirements for personhood in a habeas corpus case, the First Department in *Lavery II* implicitly acknowledged the Third Department's error by refusing to repeat it but

[33] Certainly nature itself provides no clear reason for selecting species as the *sine qua non* of any particular trait or capacity. As Charles Darwin believed and modern biology increasingly teaches, "any concept of species" is "inadequate for capturing . . . the complexity of the natural world." Ben Crair, *Where Do Species Come From*? NEW YORKER (Sept. 21, 2021), available at https://www.newyorker.com/science/elements/where-do-species-come-from?.

[34] Professor Matthew Kramer has plausibly criticized the view that "chimpanzees and other non-human animals cannot be endowed with legal rights because they are incapable of complying with legal obligations." Matthew Kramer, *Getting Rights Right*, in RIGHTS, WRONGS AND RESPONSIBILITIES 28, 42 (Matthew Kramer ed., 2001). He argues that the ability to comprehend a duty might be necessary for regular compliance with obligations but is not conceptually necessary for bearing duties: "To bear a legal obligation is simply to be placed under it," and meaningful comprehension of the obligation is a "separate matter." *Id.* Kramer acknowledges that it might be unfair to impose legal duties upon animals incapable of fully understanding them, but it is "far from infeasible." *Id.* Given that "deterrence-oriented punishments" can be used to convey to animals that a certain type of conduct is prohibited, it is surely possible (though admittedly controversial) to conceive of animals as bearing duties. Visa Kurki, A THEORY OF LEGAL PERSONHOOD 80 (2019). Indeed, and tragically, animals in captivity have many responsibilities the neglect of which may be severely punished. And historically, in the medieval period, animals went on trial for crimes including miscegenation with humans. At any rate, to treat this issue as a pure question of law that the court could properly dispose of without hearing evidence or looking at factual information seems indefensible. Again, a reference to common sense and ordinary usage is illuminating. It might be unfair to punish a puppy for his incontinence or a cat for stealing the toy of a pet canine with which she had been raised, but it would be entirely normal for the custodian of the puppy or the cat to admonish the pet and withhold a reward to extinguish the unwanted behavior.

then based its decision on an even more fundamentally flawed definition of legal personhood, stating, at 152 A.D.3d, at 78, that:

> Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community.

At least the Third Department's decision, while erroneous, left open the possibility that an entity able to demonstrate the ability to assume duties could enjoy legal personhood. In contrast, the First Department replaced the capacity for responsibility, a flawed test, with "homo sapiens only," a wholly question-begging non-test test. The First Department's "reason" for restricting rights to humans was that only humans are human. That was the exercise of raw power, not reasoned judgment.

In the end, whether Happy and other nonhuman animals should qualify as legal "persons" requires attention not to some conventional set of formal definitions but to "the social meaning and symbolism of law."[35] The ways in which courts have approached questions of personhood in such "borderline cases" as human embryos and fetuses have obviously been marked by "doctrinal discord."[36] One might

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

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

accordingly wonder about the wisdom of replicating that discordant struggle in a context where it might prove irresolvable or even irrelevant. The issue is, at bottom, normative rather than merely descriptive: In deciding whether to extend habeas protection to a particular being, courts do not merely list the assumed capacities and characteristics of that being; they decide how the law should treat that being.

This Court might conclude that competing conceptions of personhood are nonetheless at least pertinent even if not decisive. Even if that is true, it is important to remember that legal definitions of what and who constitutes a "person" do much "more than just regulate behavior" when it comes to "America's most divisive social issues"; they express "conceptions of [the] relative worth of the objects included and excluded by personhood," and these expressions of "law's values" in turn shape social norms and values.[37] When the law says that someone is a person and not a thing, we begin to treat that someone very differently, and both we and they change as a result.

Courts cannot render defensible decisions about the meaning of legal personhood "without expressing certain values, whether they want to or not."[38] The question of Happy's legal personhood implicates "the uncomfortable but inescapable place of status distinctions" in our legal system,[39] but this Court should

[37] *See Note, supra* note 35, at 1761.
[38] *Id.* at 1764.
[39] *Id.* at 1767.

not "allow the philosophical conundrum of this eternal question to paralyze its analysis," given the "immensely important pragmatic interests" at stake in the case.[40] This is particularly so where, as in this instance, there is no powerfully competing right that clashes with the recognition that Happy seeks. Indeed, there is barely a feather to weigh against Happy's rights and interests, which are profound.[41] In the words of Judge Fahey in his concurrence, "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? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention." 31 N.Y.3d at 1058.

IV. By Rejecting, on the Basis of Species Alone, a Nonhuman Animal's Rights Claims, *Lavery* and *Lavery II* Violate Common Law Equality

The First Department opined in *Lavery II* about a species-membership conception of personhood, the "human community," which denies rights to all nonhuman animals on the mere ground they are not members of the species *Homo*

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

[41] For that reason, arguments like those raised in the *amicus* brief of the National Association for Biomedical Research ("NABR") have no bearing on this case, although, if they did, the commercial motives of its members would call into question its purported concern for the public. Despite emphasizing its academic members, by its own admission, NABR is organized under 26 U.S.C. § 501(c)(6), a provision designated for "[b]usiness leagues, chambers of commerce," and similar organizations.

Sapiens. As noted above, this kind of across-the-board disqualification for rights harkens back to dark days in our past, when race, gender, national origin, religion, and other inherited or immutable characteristics later understood to be arbitrary were used to justify the denial of rights to whole swaths of humanity.

Constitutional jurisprudence provides a useful window into how this Court should properly respond to the argument that to deny personhood on the basis of species alone violates the spirit of equality that inspired and pervades our Constitution's deepest aspirations. Such aspirations, though obviously not honored at the Founding (given our history of systematically enslaving or slaughtering African Americans and American Indians), are those that were expressed initially in the Declaration of Independence; then incorporated in the Civil War Amendments (the Thirteenth, Fourteenth, and Fifteenth); later embodied in the enfranchisement of women through the Nineteenth Amendment, of non-propertied individuals through the Twenty-Fourth, and of individuals who had reached age eighteen through the Twenty-Sixth. This spirit of "common law equality" is evident in Supreme Court cases such as *Romer v. Evans*, 517 U.S. 620 (1996), which invalidated a state constitutional amendment that singled out LGBT individuals for

denial of rights that the Court rightly described as making each LGBT individual a "stranger to its laws." *Id*. at 635.[42]

The fact that, at the time the Constitution of the United States was adopted and even at the times these amendments were added, as well as at the time the relevant provisions of New York State law were enacted, the authors and ratifiers of the relevant language would not have anticipated its extension to nonhuman creatures like Happy cannot be dispositive in a legal universe that does not make the necessarily limited understanding and expectations of past generations dispositive in the interpretation of law. The recent decision of the U.S. Supreme Court in *Bostock v. Clayton County*,[43] though of course dealing with an altogether different question, the meaning of Title VII of the Civil Rights Act of 1964, is nonetheless instructive. It reminds us that the task of a common-law court, even in performing the comparatively modest task of construing a statute, requires the attribution of meaning to positive law, not the excavation of unenacted expectations or intentions, which may well reflect the unenlightened premises of a bygone era. Though Congress in 1964 almost certainly never intended to prevent discrimination on the

[42] *See also* Laurence H. Tribe, *Equal Dignity: Speaking its Name*, A Response to Kenji Yoshino, Comment, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015), HARV. L. REV. FORUM, Vol. 129, pp. 16-32 (2015).
[43] 590 U.S. ___ (2020).

basis of sexual orientation, the Supreme Court rightly held that such discrimination violates Title VII.

Just as the U.S. Supreme Court in *Lawrence v. Texas* declined to follow what it deemed a benighted precedent upon recognizing that "*Stare decisis* is not an inexorable command,"[44] so this Court should decline to follow the *Lavery* line. It is worth recalling here the observation made by the *Lawrence* Court in reaching its judgment: Had our forebears "known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew 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. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[45] What was true in 2003 in *Lawrence* is true in 2021 in this case. And what was true of the dimensions of liberty in *Lawrence* is true of the bearers of liberty-affirming rights in the case of Happy, the Asian elephant at the heart of this habeas application.

V. Conclusion

This Court has a unique opportunity to correct the First Department's erroneous dictum in a rapidly evolving area of the law, specifically, the entitlement

[44] 539 U.S. 558, 560 (2003) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).
[45] *Id.* at 579.

of sentient nonhuman animals to the right to bodily liberty protected by habeas corpus. This Court should make clear its view that both the First and Third Departments wrongly conflated the procedural and institutional question of habeas corpus jurisdiction with the substantive question of entitlement to habeas relief; seriously misunderstood the logical relationships among rights, duties, and personhood; and myopically superimposed an overly rigid and formalistic notion of personhood onto an inquiry that should have turned on the fundamental role of habeas corpus as a bulwark against forms of physical detention that our law should be understood to condemn.

The relief that would be legally appropriate in this case would presumably involve not simple release but transfer to a facility at which Happy could fully express her extraordinary capacities, without being confined to a small space as she is now at the Bronx Zoo, and without having to stand on public display.

The courts of New York are rapidly evolving towards seeing at least some nonhuman animals as rights bearers. This kind of gradually and selectively evolving recognition of the varying forms of legal protection that beings of varying kinds deserve would recognize, to repeat what the Supreme Court said in *Lawrence v. Texas*, that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[46]

[46] 539 U.S. at 579.

The trial court recognized that Happy is an undeniably and exquisitely cognitively complex being. Respondents contend that she is nonetheless presumptively entitled to *none* of the benefits sometimes associated with legal personhood unless and until courts are ready to extend all arguably similar beings *every* benefit of that legal status. That approach would chain the common law writ of habeas corpus to the prejudices and presumptions of the past. It would undercut the great writ's historic and rightly celebrated capacity to nudge societies toward more embracing visions of justice.[47] As this State's highest court wrote in *Woods v. Lancet*, 303 N.Y. 349, 355 (1951), "'When the ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.' We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice." (quoting *United Australia, Ltd. v. Barclay's Bank, Ltd.*, (1941) A.C. 1, 29). This Court can likewise

[47] *See* Laurence H. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1338–1339 (1974) (describing how legal principles evolve and build on their past development, like "a multidimensional spiral along which the society moves by successive stages, according to laws of motion which themselves undergo gradual transformation as the society's position on the spiral, and hence its character, changes"); *see also id.* at 1340 ("Partly because it seems plausible to believe that the processes we embrace must from the beginning prefigure something of [a] final vision if the vision itself is to be approximated in history, and partly because any other starting point would drastically and arbitrarily limit the directions in which the spiral might evolve, it follows that the process with which we start should avoid a premise of human domination, or indeed a premise of the total subservience of any form of being to any other.").

act in the "finest common-law tradition" by revising current precedent and ordering that Happy is a legal person entitled to the protections of habeas corpus.

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NEW YORK STATE COURT OF APPEALS
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