To be Argued by:
STEVEN M. WISE
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By Permission of the Court
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

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.

Appellate Case No.: 2020-02581

BRIEF FOR PETITIONER-APPELLANT

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I. QUESTIONS PRESENTED[1]

1. Does Happy, an Asian elephant imprisoned at the Bronx Zoo, have the common law right to bodily liberty protected by habeas corpus?

The lower court ruled that it was bound by *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) ("*Lavery I*") to find that Happy is not a "person" for purposes of habeas corpus. (A-22).

2. Does habeas corpus relief permit Happy to be released to an appropriate elephant sanctuary?

The lower court did not address this question, but as *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) ("*Lavery II*") and *Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 124 A.D.3d 1334 (4th Dept. 2015) ("*Presti*") did, the matter is addressed herein.

II. STATEMENT OF THE CASE

A. Introduction

This Court must address the "profound" issue of "whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus." *Nonhuman Rights Project, Inc. on Behalf of Tommy v. Lavery*, 31 N.Y. 3d 1054, 1059 (2018) (Fahey, J., concurring) ("*Fahey Concurrence*"). For centuries, it was wrongly

[1] The appendix pages are cited herein as "A" followed by the page number ("A-").

believed that all nonhuman animals were unable to think, believe, remember, reason, or even experience emotion.[2] They have long been characterized as common law "things." But to treat, for example,

> a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect.

Fahey Concurrence, 31 N.Y.3d at 1058.[3] Elephants are no different.

Happy is an autonomous Asian elephant "inmate"[4] at the Bronx Zoo who Respondents-Respondents, the Wildlife Conservation Society and James J. Breheny (collectively "Bronx Zoo" or "Respondents"), have imprisoned for more than four decades inside a barn during the winter and on approximately one acre of land during the remainder of the year. For many of those years Happy has been alone.

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[2] *See* Richard Sorabji, *Animal Minds & Human Morals – The Origins of the Western Debate* 1–96 (1993).

[3] Judge Fahey's concurrence carries considerable weight. *See Welch v. Mr. Christmas, Inc*., 85 A.D.2d 74, 77 (1st Dept. 1982) ("[T]he view expressed in the concurring opinion [of a Court of Appeals case] has frequently been relied upon"), *aff'd*, 57 N.Y.2d 143; *Darling v. Darling*, 869 N.Y.S.2d 307, 316 (Sup. Ct. 2008) ("The concurring opinion . . . has been cited with approval, and principles it articulates have been recognized.").

[4] *Islamabad Wildlife Mmgt. Bd. v. Metropolitan Corp. Islamabad*, W.P. No.1155/2019 at 12 (H.C., Islamabad, Pakistan 2020) (referencing Happy in the context of, *inter alia*, ordering an Asian elephant named Kaavan freed from the Islamabad Zoo and sent to sanctuary). *Available at*: https://www.nonhumanrights.org/content/uploads/Islamabad-High-Court-decision-in-Kaavan-case.pdf.

In its Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition"), Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), demanded that the court recognize Happy's "common law right to bodily liberty protected by common law habeas corpus" (A-37, para. 18), conclude she is being unlawfully imprisoned, and order her immediate release to an appropriate elephant sanctuary **(**A-78, para. 118) where she would be able to realize her autonomy to the fullest extent possible.[5] Judicial recognition of Happy's common law right to bodily liberty is the sole legal right sought in the Petition. (A-37, para. 18).[6]

Based upon the six uncontroverted expert affidavits from five of the world's most respected elephant cognition and behavior experts submitted on behalf of Happy ("Expert Affidavits"),[7] the lower court found that "Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings. . . . [S]he is an intelligent autonomous being who

[5] As the NhRP represented to the court below, The Elephant Sanctuary in Tennessee has agreed to provide Happy with lifetime care at no cost to Respondents.

[6] *Lavery II*'s dicta, 152 A.D.3d at 77, that "petitioner does not cite any sources indicating that United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty" ignored the fact that the NhRP brought its habeas corpus petitions solely under New York's common law.

[7] They are: Joint Aff. of Lucy Bates, Ph.D and Richard M. Byrne, Ph.D (A-92 – A-122); Aff. of Joyce Poole, Ph.D. (A-139 – A-164); Aff. of Karen McComb, Ph.D (A-179 – A-200); Aff. of Cynthia Moss (A-218 – A-235); Supplemental Aff. of Joyce Poole, Ph.D (A-243 – A-245); and Second Supplemental Aff. of Joyce Poole, Ph.D (A-437 – A-482).

should be treated with respect and dignity, and who may be entitled to liberty."[8] (A-22). The court also found that "[t]he arguments advanced by the NhRP are extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot" and that "Happy is more than just a legal thing or property." (A-22).

The NhRP will argue in § III–A (*infra* 11–29) that as a matter of the public policy and moral principles embedded within common law liberty and equality, as well as New York's pet trust statute (EPTL § 7-8.1), this Court has a duty to recognize Happy's common law right to bodily liberty protected by habeas corpus and free her from her unlawful imprisonment. The refusals to do so with respect to chimpanzees in *Lavery I* and *Lavery II*'s dicta were arbitrary, irrational, inequitable, and a violation of common law.[9]

[8] None of the Expert Affidavits were controverted by any elephant cognition or behavior expert from the staff of the billion-dollar Wildlife Conservation Society or by any other elephant expert, not even by an elephant keeper at the Bronx Zoo. (A-474, para. 4). Their silence is as significant as the silence of the "dog that didn't bark in the night." *State v. Rosado*, 134 Conn. App. 505, 517 n.4 (2012) (referencing Sherlock Holmes in *Silver Blaze*). Respondents' trio of affiants are administrators who failed to state that they possessed any elephant cognition or behavior expertise by education or experience and failed to state the details of any personal observations (if any) of Happy. (A-319 – A-322; A-329 – A-332; A-333 – A-338; A-458 – A-464).

[9] Once this Court recognizes Happy's right to bodily liberty, she is necessarily a "person" under Article 70 because an entity explicitly granted a legal right is implicitly a legal person for purposes of bearing that right. Similarly, EPTL § 7-8.1, which explicitly grants certain nonhuman animals the right to the corpus of a trust, has long implicitly recognized their personhood for purposes of that statute. (*See infra* 26–29).

The NhRP will argue in § III–B (*infra* 29–52) that *Lavery I*, *Lavery II*, and *Presti*, all of which denied habeas corpus relief to chimpanzees, are neither binding nor persuasive because they are based on demonstrable misunderstandings of the law and are evidently contrary to reason.

B. Procedural History

On October 2, 2018, the NhRP filed its Petition in the Supreme Court, Orleans County ("Orleans Court"). (A-31 – A-79). On November 16, 2018, the Orleans Court issued an Order to Show Cause and made it returnable on December 14, 2018, when a hearing on the Petition was held in Albion, New York. (A-323 – A-325).

In a notice of motion dated December 3, 2018, Respondents moved to transfer the proceeding to the Supreme Court, Bronx County ("Bronx Court") or, in the alternative, to dismiss the Petition pursuant to CPLR 3211(a) or, if the Petition was not dismissed, for permission to file an answer pursuant to CPLR 404(a).[10] (A-326 – A-328). On January 18, 2019, the Orleans Court granted Respondent's motion to transfer venue and ordered that "all motions and issues submitted to" the Orleans Court be stayed pending transfer to the Bronx Court. (A-30).

Following transfer, Justice Alison Y. Tuitt heard extensive oral argument over three days on the merits of the Petition, Respondents' motion to dismiss, and other

[10] Respondents' grounds for dismissing the Petition were: (1) failure to state a cause of action, (2) lack of standing, and (3) collateral estoppel. (A-327).

motions not relevant to this appeal. (A-8). On February 18, 2020, Justice Tuitt issued her Decision and Order granting Respondents' motion to dismiss the Petition (A-5 – A-22), and did so solely on the basis of *Lavery I*'s holding that nonhuman animals are not "persons." (A-22).[11]

C. Statement of Facts

The Bronx Court recognized that "Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings." (A-22). This is because elephants are autonomous beings, as "they exhibit [self-determined] behavior that is based on freedom of choice." (A-11; A-57, para. 72; A-105, para. 30; A-119, para. 60; A-148, para. 22; A-164, para. 55; A-187, para. 24; A-198 – A-199, para. 54; A-223, para. 18; A-235, para. 48). As a psychological concept, autonomy "implies that the individual is directing their behavior based on some non-observable, internal cognitive process, rather than simply responding reflexively." (A-11; A-57 – A-58, para. 72; A-105, para. 30; A-148, para. 22; A-187, para. 24; A-223, para. 18).

"African and Asian elephants share numerous complex cognitive abilities with humans, such as self-awareness, empathy, awareness of death, intentional

[11] The Bronx Court did not grant Respondents' motion to dismiss on the grounds of standing or collateral estoppel but found that pursuant to CPLR 7002(a) the NhRP had "standing to bring the habeas corpus proceeding on behalf of Happy." (A-18). The remaining motions were denied as academic or moot. (A-22).

communication, learning, memory, and categorization abilities. Each is a component of autonomy." (A-11; A-57, paras. 71 – 72; A-108, para. 37; A-150, para. 29; A-189, para. 31; A-225, para. 25). "Physical similarities between human and elephant brains occur in areas that link to the capacities necessary for self-awareness and autonomy." (A-11; A-59, para. 76; A-107, para. 34; A-149 – A-150, para. 26; A-188, para. 28; A-224, para. 22).

Elephants, as autonomous beings, possess complex cognitive abilities including: empathy, self-awareness, self-determination, theory of mind (awareness that others have minds), insight, working memory and an extensive long-term memory that allows them to accumulate social knowledge, the ability to act intentionally and in a goal-oriented manner and to detect animacy and goal-directedness in others, imitation including vocal imitation, pointing and understanding pointing, true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do), cooperation and coalition building, cooperative and innovative problem-solving, behavioral flexibility, understanding causation, intentional communication including vocalizations to share knowledge and information with others in a manner similar to humans, ostensive behavior that emphasizes the importance of a particular communication, using a wide variety of gestures, signals, and postures, using specific calls and gestures to plan and discuss a course of action, the ability to adjust plans according to assessment of risk and

execute those plans in a coordinated manner, complex learning and categorization abilities, and an awareness of and response to death, including grieving behaviors. (A-11; A-56 – A-57, para. 70; A-105, para. 30; A-107, para. 34; A-108 – A-119, paras. 37 – 60; A-148, para. 22; A-149 – A-150, para. 26; A-150 – A-164, paras. 29 – 55; A-189 – A-199, paras. 31 – 54; A-224, para. 22; A-225 – A-235, paras. 25 – 48).

Happy has been imprisoned at the Bronx Zoo since 1977 where, in addition to being kept on display, she once gave rides and participated in "elephant extravaganzas." For 25 years, Happy lived with another elephant named Grumpy. In 2002, Grumpy was euthanized after being attacked by Patty and Maxine, two other elephants imprisoned at the Bronx Zoo. Happy then lived with a younger elephant named Sammie, who, in 2006, was euthanized after suffering from kidney failure. Since Sammie's death, Happy has lived alone in a one-acre enclosure.[12] (A-9 – A-10; A-43 – A-44, para. 38; A-479 – A-480, para. 28).

In 2005, Happy was found to possess mirror self-recognition (MSR) using the "mark test." MSR is the ability to recognize one's reflection in the mirror as oneself, while the mark test involves surreptitiously placing a colored mark on an individual's forehead that she cannot see or be aware of without the aid of a mirror.

[12] Maxine was euthanized after the NhRP filed its Petition. Respondent Breheny has confirmed that Happy and Patty are kept separated from each other. *See* https://www.nonhumanrights.org/content/uploads/Breheny-email-statement.pdf.

The individual is thought to recognize her reflection as herself if she uses the mirror to investigate the mark. (A-11 – A-12; A-43 – A-44, para. 38; A-69, para. 96; A-108, para. 38; A-151, para. 30; A-189, para. 32; A-225 – A-226, para. 26).

MSR is an accepted identifier of self-awareness, which is intimately linked to autobiographical memory in humans and is central to autonomy and being able to direct one's own behavior to achieve personal goals and desires. To recognize themselves in a mirror, elephants must hold a mental representation of themselves from another perspective and thus be aware that they are a separate entity from others. (A-12; A-69 – A-70, para. 97; A-108 – A-109, para. 38; A-151, para. 30; A-189 – A-190, para. 32; A-225 – A-226, para. 26).

Elephants have evolved to move and, in free-living elephant societies, are active more than 20 hours each day, moving "many miles across landscapes to locate resources to maintain their large bodies, to connect with friends and to search for mates." (A-243, para. 4). Captivity and confinement "prevents them from engaging in normal, autonomous behavior and can result in the development of arthritis, osteoarthritis, osteomyelitis, boredom and stereotypical behavior." *Id*. When held in isolation, "elephants become bored, depressed, aggressive, catatonic and fail to thrive. Human caregivers are no substitute for the numerous, complex social relationships and the rich gestural and vocal communication exchanges that occur between free-living elephants." *Id*.

Happy cannot meaningfully exercise her autonomy while imprisoned alone in "a space that, for an elephant, is equivalent to the size of a house." (A-475, para. 9). At the Bronx Zoo, Happy has no choice of social partners and almost no ability to engage in species typical behavior. (A-480, paras. 30 – 31). "When elephants are forced to live in insufficient space for their biological, social and psychological needs to be met, over time, they develop physical and emotional problems." (A-478, para. 19).

Happy cannot simply be sent back to the wild, as life there requires survival skills and social relationships she was never allowed to develop. The best option for meeting her needs and remedying the violation of her autonomy and right to bodily liberty is release to an appropriate sanctuary, such as The Elephant Sanctuary in Tennessee. (A-243 – A-244, para. 5). "[E]xtremely positive transformations . . . have taken place when captive elephants are given the freedom that larger space in sanctuaries . . . offer." (A-476, para. 11). The differences between traditional zoos and sanctuaries "relate to the orders of magnitude of greater space that is offered in sanctuaries. Such space permits autonomy and allows elephants to develop more healthy social relationships and to engage in near natural movement, foraging, and repertoire of behavior." (A-478, para. 19). In short, a sanctuary offers elephants "more autonomy and the possibility to choose where to go, what to eat and with whom and when to socialize." (A-476, para. 11).

III. ARGUMENT

A. As Happy is autonomous this Court must recognize her common law right to bodily liberty protected by habeas corpus.

1. This Court has the duty to examine whether Happy has the common law right to bodily liberty protected by habeas corpus.

This Court has "the duty to re-examine a question where justice demands it" in order "to bring the law into accordance with present day standards of wisdom and justice" and "make the law conform to right." *Woods v. Lancet*, 303 N.Y. 349, 354, 355, 351 (1951). The common law's "genius . . . lies in its flexibility and in its adaptability to the changing nature of human affairs and in its ability to enunciate rights and to provide remedies for wrongs where previously none had been declared." *Rozell v. Rozell*, 281 N.Y. 106, 112 (1939) (citation omitted).

The Court of Appeals has long rejected the claim that "change . . . should come from the Legislature, not the courts," especially "in a field peculiarly nonstatutory," *Woods*, 303 N.Y. at 355, such as habeas corpus, which "is not the creature of any statute," but "exists as a part of the common law of the State" and is "the great bulwark of liberty."[13] *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565, 566 (1875).

[13] Historically courts used habeas corpus to recognize the right to bodily liberty of slaves and secure their freedom. *See Lemmon v. People*, 20 N.Y. 562 (1860) (seven slaves); *In re Belt*, 2 Edm. Sel. Cas. 93 (N.Y. Sup. Ct. 1848) (slave); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846) (slave imprisoned on brig); *Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (slave) (adopted as New York's common law, N.Y. Const., art. I, § 14; N.Y. Const., art. 35 (1777), and

Habeas corpus is uniquely characterized by "'its great flexibility and vague scope.'" *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 263 (1966) (citation omitted). This common law writ "cannot be abrogated, or its efficiency curtailed, by legislative action . . . . The remedy against illegal imprisonment afforded by this writ, as it was known and used at common law, is placed beyond the pale of legislative discretion[.]" *Tweed*, 60 N.Y. at 566–67. *E.g.*, *People ex rel. Lobenthal v. Koehler*, 129 A.D.2d 28, 30 (1st Dept. 1987) ("The 'great writ', although regulated procedurally by article 70 of the CPLR, is not a creature of statute, but a part of the common law of this State").[14]

The examination required for determining whether Happy has the common law right to bodily liberty must not be limited to consulting dictionary definitions of "person," as the Third Department did in *Lavery I* to support its conclusion that chimpanzees cannot possess any legal rights. *See Lavery I*, 124 A.D.3d 151–52 (citing, *inter alia*, the definition of "person" in Black's Law Dictionary).

When grappling with the question of whether a chimpanzee has the right to liberty protected by habeas corpus, Judge Fahey explained:

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approved in *Lemmon*, 20 N.Y. at 604–5)). As these human slave cases were not human welfare cases, Happy's case is not an animal welfare case. The sole issue is whether Happy "may be legally detained at all." *The Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898, 901 (Sup. Ct. 2015).

[14] *See also* Vincent Alexander, *Practice Commentaries*, McKinney's CPLR 7001 ("The drafters of the CPLR made no attempt to specify the circumstances in which habeas corpus is a proper remedy. This was viewed as a matter of substantive law.").

> The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. That question, one of precise moral and legal status, is the one that matters here. [. . .]
>
> 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. [. . .]
>
> Whether a being has the right to seek freedom from confinement through the writ of habeas corpus should not be treated as a simple either/or proposition . . . .While it may be arguable that a chimpanzee is not a "person," there is no doubt that it is not merely a thing.[15]

Fahey Concurrence, 31 N.Y.3d at 1057–59.

Justice therefore demands that this Court examine the question of whether Happy has the common law right to bodily liberty protected by habeas corpus and is therefore an Article 70 "person."[16] Failing to do so would amount "to a refusal to confront a manifest injustice." *Fahey Concurrence*, 31 N.Y.3d at 1059.

Examining Happy's entitlement to habeas corpus is a constituent part of the process of "mak[ing] the law conform to right." *Woods*, 303 N.Y. at 351. Moreover, the Court of Appeals has made clear that the question of "whether legal personality should attach" – in other words, whether an entity should have the capacity for rights

[15] Notably, Judge Fahey does not state that it may be arguable that a chimpanzee is not a person.

[16] The Third Department failed to fulfill its duty by urging the NhRP to seek relief for its imprisoned chimpanzee client in the legislature. *See Lavery I*, 124 A.D. 3d at 153.

– is also a "policy question" requiring a "policy determination." *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972) (citations omitted). *See id*. at 201 ("according legal personality to a thing the law affords it the rights and privileges of a legal person.") (citations omitted).

"Person" is not defined in Article 70, so the policy determination of whether Happy constitutes a "person" for purposes of habeas corpus is for this Court to decide under the common law. *See Siveke v. Keena*, 441 N.Y.S 2d 631, 633 (Sup. Ct. 1981) ("person" in Article 70 is not restricted by qualifying language: "[h]ad the legislature so intended to restrict the application of Article 70 of the CPLR to [infants or persons held in state institutions], it would have done so by use of the appropriate qualifying language."); *see also P.F. Scheidelman & Sons, Inc. v. Webster Basket Co*., 257 N.Y.S. 552, 555 (Sup. Ct. 1932), *aff'd*, 236 A.D. 2d 774 (4th Dept. 1932) ("distress" and "distrain" must be given their common law meaning since they lack statutory definitions).

This Court must therefore reject the erroneous assertions in *Lavery I* and *Lavery II* that "[t]he common law writ of habeas corpus" is "codified by CPLR article 70." 124 A.D.3d at 150; 152 A.D.3d at 77. Article 70 cannot curtail the substantive entitlement to the writ as it merely "governs the procedure of the

common-law writ of habeas corpus."[17] *People ex rel. DeLia v. Munsey*, 26 N.Y.3d 124, 130 (2015); *Tweed*, 60 N.Y. at 566–67. *See also* CPLR 101 and 102.

2. As Happy is autonomous this Court must recognize her common law right to bodily liberty as a matter of liberty.

Judge Fahey recognized that autonomy lies at the heart of the question of whether a chimpanzee "has the right to liberty protected by habeas corpus," writing:

> the answer to that question will depend on our assessment of the intrinsic nature of chimpanzees as a species. The record before us in the motion for leave to appeal contains unrebutted evidence, in the form of affidavits from eminent primatologists, that chimpanzees have advanced cognitive abilities. . . . Moreover, the amici philosophers with expertise in animal ethics and related areas draw our attention to recent evidence that chimpanzees demonstrate autonomy by self-initiating intentional, adequately informed actions, free of controlling influences[.]

Fahey Concurrence, 31 N.Y.3d at 1058 (citations omitted). *See The Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898, 901 (Sup. Ct. 2015) ("*Stanley*") (habeas corpus "is deeply rooted in our cherished ideas of individual autonomy and free choice").

This has long been the common law. *See Union Pac R Co v. Botsford*, 141 U.S. 250, 251 (1891) ("[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control

[17] New York's Suspension Clause precludes the legislature and judiciary from abrogating the substantive right to the common law writ. *See* N.Y. Const., art. I, § 4; *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939); *Tweed*, 60 N.Y. at 591–92.

of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law . . . .'The right to one's person may be said to be a right of complete immunity; to be let alone.'") (citation omitted). That autonomy is valued more than human life is exemplified by the fact that an autonomous human may choose to reject lifesaving medical treatment and die. *See Matter of Storar*, 52 N.Y.2d 363, 372, 376–77 (1981), *superseded by statute on other grounds*, as noted in *In re MB*, 6 N.Y.3d 437 (2006).

The deprivation of an autonomous being's bodily liberty therefore constitutes a serious violation of the fundamental principle of liberty that New York judges stoutly defend:

> In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires [Citing, *inter alia*, *Matter of Erickson v. Dilgard*, 44 Misc. 2d 27 (Supreme Ct. 1962) (Meyer, J.) and *Botsford*, 141 U.S. at 251.]

Rivers v. Katz, 67 N.Y.2d 485, 493 (1986). *See Fahey Concurrence*, 31 N.Y.3d at 1057 (habeas corpus may be sought on behalf of infants and adults suffering from dementia).

The Bronx Court found that the Expert Affidavits demonstrate that Happy is "an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty." (A-22). The Expert Affidavits establish that she

is seriously wronged by the deprivation of her bodily liberty. (*See supra* 9–10; A-243, para. 4; A-474 – A-476, paras. 6 – 11; A-478 – A-479, paras. 22 – 24; A-479 – A-480, paras. 28 – 31).

This Court has the duty to safeguard and uphold the fundamental common law liberty interest of autonomous beings. As Happy is an autonomous being, this Court must recognize her right to bodily liberty protected by habeas corpus and order her freed.

3. As Happy is autonomous this Court must recognize her common law right to bodily liberty as a matter of equality.

Equality has both a comparative component, in which one's entitlement to a right is determined by comparing one's position to the position of another who has that right, and a noncomparative component, in which one's entitlement to a right is determined not by any comparison, but by making a normative judgment.[18] The comparative equality component is violated when similarly situated individuals are intentionally treated in dissimilar ways, while the noncomparative equality component is violated when the dissimilar treatment lacks a legitimate end or is grounded upon an illegitimate end.

[18] In addition to its noncomparative component, the Fifth Amendment's Due Process Clause also has a comparative component, *see, e.g.*, *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533 n. 5 (1973), while in addition to its comparative component, the Fourteenth Amendment's Equal Protection Clause also has a noncomparative component, *see, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996).

a. Happy's imprisonment violates the comparative component of common law equality because elephants and humans are similarly situated when imprisoned.

Comparative equality has deep roots in Western ethics, natural justice, and the common law. "Since the earliest conscious evolution of justice in western society, the dominating principle has been that of equality of treatment of like persons similarly situated, a principle at the root of any rational system of justice." *People v. Jones*, 39 N.Y. 2d 694, 698 (1976) (Breitel, C.J.) (dissenting) (citing Aristotle, *Ethica Nicomachea*, [Ross ed], book V, pars 1129a, 1131a; Friedmann, *Legal Theory* [5th ed], at p 416; Bodenheimer, *Treatise on Justice*, § 10, at p 84; Hart, *Concept of Law*, pp 153-163, especially pp 155, 158-159; Cahn, *Sense of Injustice*, pp 14-15; and Paton, *Jurisprudence* [3d ed], at p 95)). In short, "[o]ur whole system of law is predicated on the general fundamental principle of equality of application of the law." *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). *See Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943) (Our "institutions are founded upon the doctrine of equality.").

The equal protection clauses of the Fourteenth Amendment and the New York Constitution (N.Y. Const., art. I, § 11) require that similarly situated individuals be treated alike. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (Equal Protection Clause mandates that "all persons similarly situated should be treated alike."); *Walton v. New York State Dept of Correctional Services*,

13 N.Y.3d 475, 492 (2009) (New York's Equal Protection Clause, modeled after the Fourteenth Amendment's Equal Protection Clause, requires that similarly situated individuals should be treated alike); *Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 630 (2004) ("[t]he essence of a violation of the constitutional guarantee of equal protection is, of course, that all persons similarly situated must be treated alike."). Moreover, "[t]he breadth of coverage under the equal protection clauses of the federal and [New York] state constitutions is equal." *Pinnacle Nursing Home v. Axelrod*, 928 F. 2d 1306, 1317 (2d Cir. 1991).

This classic comparative component of equality is part of the common law of New York, as it is in other jurisdictions. Thus in *Millington v. Southeastern Elevator Co*, 22 N.Y.2d 498, 508, 509 (1968), the Court updated the common law "on the basis of policy and fairness" to terminate "an unjust discrimination under New York law." *Millington* recognized that women have an "equal right" to damages resulting from the loss of consortium, rejecting the prior rule which limited the cause of action to men, since the "'wife's interest in the undisturbed relation with her consort is no less worthy of protection than that of the husband.'" *Id*. at 504–5 (citation omitted).

Millington's common law equality decision drew guidance, in part, from a Fourteenth Amendment decision in *Levy v. Louisiana*, 391 U.S. 68, 72 (1968), which held that a wrongful death statute prohibiting "illegitimate children" from recovering damages constituted invidious discrimination, as their status had no possible

relevance "to the harm that was done the mother." *See* 22 N.Y.2d at 508 (finding *Levy*'s reasoning applicable "since it is concluded that there is no basis for the existing discrimination."). *E.g*. *Root v. Long Island Railroad Co*. 114 N.Y. 300, 305 (1889) (under common law, a public carrier cannot "unreasonably or unjustly discriminate against other individuals . . . where the conditions are equal. So far as is reasonable all should be treated alike").[19] *De Ayala v. Florida Farm Bureau Cas. Ins. Co*., 543 So. 2d 204, 206 (Fla.1989) ("Under . . . our common law heritage, all similarly situated persons are equal before the law."); *Farley v. Engelken*, 241 Kan. 663, 667 (Kan. 1987) ("Equality was recognized by the founding fathers as one of man's natural rights"); *Simrall v. City of Covington,* 14 SW 369, 370 (Ky. App.1890) ("Perhaps the most distinguishing feature of the common law is its regard for the protection and equality of individual right").

This relationship between the common law and constitutional equal protection clauses exemplifies the two-way street that exists between common law and constitutional adjudication. "[A]s the common law once nourished the constitutions, constitutional values – especially the values so meticulously set out in our lengthy state charters – also can enrich the common law."[20] Judith S. Kaye, *Forward: The*

[19] Courts, which make common law the way legislatures make statutory law, may not create a rule that would be struck down on equality grounds had it been fashioned by the legislature.

[20] *Cf*., Note, *The Antidiscrimination Principle in the Common Law,* 102 Harv. L. Rev. 1993, 2011 (1989) ("judges often consult common law norms and baselines in analyzing private law and constitutional issues").

Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights, 23 Rutgers L. J. 727, 743 (1992). The result has been a "common law decision making infused with constitutional values." *Id*. at 747.

Comparative equality, as well as noncomparative equality, is breached when a classification is "so obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violate[s] basic equal protection values," and renders "the ordinary three-part equal protection query . . . irrelevant." *Equality Foundation v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997) (discussing *Romer v. Evans*, 517 U.S. 620, 632 (1996)). *See Foss v. City of Rochester*, 65 N.Y.2d 247, 257 (1985) (a "classification violates constitutional equal protection guarantees [of the federal and New York state constitutions] . . . if the distinction between the classes is 'palpably arbitrary' or amounts to 'invidious discrimination.'") (citations omitted); *Millington*, 22 N.Y.2d at 509.

Determining whether two classes are similarly situated for purposes of comparative equality may be difficult for there are an infinite number of ways in which any two classes can be similar or dissimilar. A court must decide whether the two classes are similarly situated in some relevant way related to the purpose of the desired end. *See American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 199 (1990); *330 West 42nd St. Corp. v. Klein*, 46 N.Y. 2d 686, 695 (1979).

The NhRP argues that elephants and human beings are similarly situated when

imprisoned for purposes of habeas corpus relief because they each possess the autonomy upon which the right to bodily liberty is grounded and which habeas corpus is intended to protect. (*See* discussion, *supra* 15–17). On the other hand, the Bronx Zoo has argued, and is likely to argue before this Court, that imprisoned elephants and human beings are not similarly situated solely because elephants are not human beings.

The only nonarbitrary, nonoppressive, and equitable way for this Court to choose between these two competing arguments is to embrace the one which harmonizes most closely with the policies and principles normally embraced by New York courts. The Court of Appeals has made clear that autonomy is a common law value more important than human life itself. *See Katz*, 67 N.Y. 2d. at 492–93; *Storar*, 52 N.Y. 2d at 372–74.

Katz and *Storar* concerned the autonomy necessary for a human being to make complex medical decisions. The Expert Affidavits demonstrate that elephants possess the autonomy necessary for a wide variety of sophisticated cognitive abilities, including complex decision-making. While elephants, like many human beings, may not be capable of complex medical decisions, they are capable of making decisions relevant to habeas corpus. (*See supra* 6–9). To deny Happy the right to bodily liberty protected by habeas corpus merely because she is not human violates the values of basic equality that form the bedrock of any rational system of

justice.

The Bronx Zoo's argument that Happy should be denied the common law right to bodily liberty protected by habeas corpus solely because she is not human parrots the misguided dictum in *Lavery II*, 152 A.D. 3d. at 78, that chimpanzees cannot have the common law right to bodily liberty protected by habeas corpus because that right is restricted to "human beings, members of the human community."

Judge Fahey recognized the arbitrariness of depriving autonomous chimpanzees of their right to bodily liberty protected by habeas corpus merely because they are not human. "[T]hat a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species." *Fahey Concurrence*, 31 N.Y.3d at 1057. *Cf.*, *Buck v. Davis*, 137 S. Ct. 739, 778 (2017) ("Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.").

Lavery I's and *Lavery II*'s disregard of the New York courts' long-held position that autonomy is even more important than human life echoes a long and deeply regrettable history of naked judicial biases so severe they would today violate the equal protection clauses of the Fourteenth Amendment and New York constitution. (*See* argument, *infra* 25–26). The United States Supreme Court once

stated that all black people, slave and free – merely because they were black – "had no rights which the white man was bound to respect." *Dred Scott v. Sandford*, 60 U.S. 393, 408 (1857). The California Supreme Court once held that Chinese people – merely because they were Chinese – could not testify against a white man in court, for the Chinese are a people that "indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference." *People v. Hall*, 4 Cal. 399, 404–5 (1854). A United States Attorney once argued that Ponca Chief Standing Bear – merely because he was Native American – was not a "person" for the purposes of habeas corpus. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 796–7 (C.C. Neb. 1879). *See* Stephen Dando Collins, *Standing Bear is a Person* 117 (2004) (district attorney's argument was essentially that "Indians had no more rights in a court of law than beasts of the field.").[21] The Wisconsin Supreme Court once refused to allow Ms. Lavinia Goodell to practice law for no reason other than that she was a woman. *In re Goodell*, 39 Wis. 232 (1875). This is not a history to emulate in New York.

[21] Chief Standing Bear now stands in the U.S. Capitol's National Statuary Hall. *See* https://www.aoc.gov/art/national-statuary-hall-collection/chief-standing-bear.

Denying Happy the common law right to bodily liberty protected by habeas corpus merely because she is an elephant violates the comparative component of common law equality. She is equally entitled to this right and it is irrational and arbitrary to deprive her of it.

b. As New York has no legitimate interest in allowing the arbitrary imprisonment of an elephant, Happy's imprisonment violates the noncomparative component of common law equality.

Under the common law, this Court must find that New York has no legitimate end, i.e., no normatively acceptable interest, in allowing Happy's arbitrary imprisonment. *Romer v. Evans*, 517 U.S. 620 (1996) identified two relevant and illuminating ways in which a classification can lack a legitimate end.

First, Colorado's Amendment 2 adopted an inequitable, arbitrary, and/or oppressive classification grounded upon a single, irrelevant trait – being gay or lesbian – and "then denie[d] [gay and lesbian persons] protection across the board." *Romer*, 517 U.S. at 633. Denying Happy, who is autonomous, the common law right to bodily liberty protected by habeas corpus merely because she an elephant is equally inequitable, arbitrary, and oppressive and therefore violates the noncomparative component of common law equality.

Second, Amendment 2's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Id*. at

632. *See also City of Cleburne*, 473 U.S., at 450 (an "irrational prejudice against the mentally retarded" is not a legitimate governmental interest); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (if "'equal protection of the laws' means anything, it must . . . mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

As discrimination based upon a single, irrelevant trait or rooted in animus, irrational prejudice, or bias violates equality, so does Happy's arbitrary imprisonment at the Bronx Zoo. Her arbitrary imprisonment lacks a legitimate end; it is normatively unacceptable because it is grounded upon a single, irrelevant trait – being an elephant – and rooted in an irrational prejudice or bias towards nonhuman animals that ignores the relevant trait of her autonomy. Denying Happy the common law right to bodily liberty protected by habeas corpus merely because she is an elephant therefore violates the noncomparative component of common law equality.

4. The Fourth Department and the public policy embedded within EPTL § 7-8.1 recognize that certain nonhuman animals can be "persons" with legal rights.

"[I]t is common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals." *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018) (citing, *inter alia*, *Presti*). In considering Happy's personhood, this Court should look to the public policy embedded within EPTL § 7-8.1, which grants

"domestic or pet animals" the legal right to trust corpuses as beneficiaries.[22] "Before this statute, trusts for animals were void, because a private express trust cannot exist without a beneficiary capable of enforcing it, and because nonhuman lives cannot be used to measure the perpetuities period." Margaret Turano, *Practice Commentaries*, N.Y. Est. Powers & Trusts Law 7-8.1 (2013).[23]

In 1996, EPTL § 7-6 (now EPTL § 7-8.1) was enacted permitting "domestic or pet animals" to be designated as trust beneficiaries.[24] By explicitly granting such nonhuman animals legal rights, the legislature implicitly recognized them as "persons," for only "persons" can be trust beneficiaries.[25] *See Stanley*, 16 N.Y.S.3d at 901 (referring to "this state's recognition of legal personhood for some nonhuman animals under [EPTL § 7-8.1]"); *Matter of Fouts*, 176 Misc.2d 521, 522 (Sur. Ct.

[22] "[S]tatutes can serve as an appropriate and seminal source of public policy to which common law courts can refer." *Reno v. D'Javid*, 379 N.Y.S.2d 290, 294 (Sup. Ct. 1976) (citing, *inter alia*, *Muller v. Oregon*, 208 U.S. 412 (1908)).

[23] *See In re Mills' Estate*, 111 N.Y.S.2d 622, 625 (Sur. Ct. 1952) (since nonhuman animals are not "persons," "income or rents and profits trusts may only be measured by the life or lives of human beings.").

[24] The Sponsor's Memorandum stated that its purpose was "to allow animals to be made the beneficiary of a trust." Sponsor's Mem. NY Bill Jacket, 1996 S.B. 5207, Ch. 159. *See also* Mem. of Senate, NY Bill Jacket, 1996 S.B. 5207, Ch. 159 (same).

[25] *See Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947) ("'Beneficiary' is defined as 'a person having enjoyment of property of which a trustee and executor, etc. has legal possession.'") (quoting Black's Law Dictionary); *Gilman v. McArdle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) ("Beneficiaries . . . must be persons[.]"), *rev'd on other grounds*, 99 N.Y. 451 (1885).

1998) (recognizing five chimpanzees as "income and principal beneficiaries of [a] trust" and referring to them as "beneficiaries" throughout the opinion).

In 2010, the legislature removed "Honorary" from the statute's title and amended section 7-8.1 (a) to read, in part, "[s]uch trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive," thereby dispelling any doubt that certain nonhuman animals have trust beneficiary rights.[26] *See Feger v. Warwick Animal Shelter*, 59 A.D.3d 68, 72 (2d Dept. 2008) ("[t]he reach of our laws has been extended to animals in areas which were once reserved only for [humans]. For example, the law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner.").

In short, the Fourth Department has recognized the obvious – nonhuman animals can be "persons" – while EPTL § 7-8.1 embodies a legislative public policy that, in harmony with *Byrn*, 31 N.Y.2d at 201 ("according legal personality to a thing the law affords it the rights and privileges of a legal person"), makes clear in New York that certain nonhuman animals are already "persons" with the capacity for legal

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

rights.[27] Moreover, this public policy refutes any argument that Happy cannot possibly be a "person."

B. This Court is not bound by, nor should it follow, the statements of *Lavery I*, *Lavery II*, and *Presti* regarding legal personhood for nonhuman animals or habeas corpus relief.

Lavery I held, for the first time in history, that legal personhood requires the capacity to bear legal duties. 124 A.D.3d at 152. Recognizing the obvious fact that "some humans are less able to bear legal duties or responsibilities than others," the court stated that "[t]hese differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility." *Id*. at 152. n.3.

In dicta, *Lavery II* noted *Lavery I*'s conclusion that nonhuman animals lack legal rights because they lack the capacity for legal duties. 152 A.D.3d. at 76–78. It also recognized the obvious fact that many humans lack the capacity for legal duties but nonetheless possess legal rights, yet similarly stated: "[the NhRP's] argument ignores the fact that these are still human beings, members of the human community." *Id*. at 78. *Lavery II* also followed *Presti*, asserting in dicta that habeas corpus relief was not available to two imprisoned chimpanzees where the relief sought was "their transfer to a different facility." *Id*. at 79.

[27] Happy is the beneficiary of a trust created by the NhRP pursuant to EPTL § 7-8.1. (A-83 – A-91).

None these statements are binding or persuasive because (1) *Lavery II*'s statements are dicta (*infra* 30–31) and (2) they are all based on demonstrable misunderstandings of the law and are evidently contrary to reason (*infra* 31–52).

1. *Lavery II*'s statements regarding legal personhood for nonhuman animals and habeas corpus relief are dicta.

"Without even addressing the merits of petitioner's arguments," *Lavery II* concluded "that the motion court properly declined to sign the orders to show cause since these were successive habeas proceedings which were not warranted or supported by any changed circumstances [under CPLR 7003(b)]." 152 A.D.3d at 75–76 (citations omitted). Its subsequent discussion regarding legal personhood for chimpanzees and habeas corpus relief is therefore dicta and not binding.[28] Dicta, even from the Court of Appeals, is not binding.[29] *See In re Mackay's Will*, 65 Sickels 611, 615 (1888) (in reaching the opposite conclusion from its statement in a prior decision, the Court of Appeals noted that its prior statement was "mere dictum,

[28] When a court decides a case on procedural grounds, any discussion of the merits is dicta. *See Whale Telecom Ltd. v. Qualcomm Inc.*, 41 A.D.3d 348, 349 (1st Dept. 2007) ("the motion court properly recognized that its dismissal on timeliness grounds rendered those alternative grounds academic. It is unnecessary to address the court's dicta."); *Sherb v. Monticello Cent. Sch. Dist.*, 163 A.D.3d 1130, 1132 (3d Dept. 2018) (where improper service of process resulted in denial of motion to file a late notice of claim, "[t]he court's ensuing comments on the merits . . . were dicta"); *Matter of Isaiah M. (Nicole M.)*, 144 A.D.3d 1450, 1453 n.3 (3d Dept. 2016) ("The appeal . . . was dismissed upon procedural grounds and, therefore, the resulting discussion of the merits is dictum.").

[29] *See Robinson Motor Xpress, Inc.*, 37 A.D.3d 117, 124 (2d Dept. 2006) (dicta in Court of Appeals decision that a certain notice must be "written" was not controlling on lower courts); *Walling v. Przybylo*, 24 A.D.3d 1, 5 (3d Dept. 2005) (suggestion in Court of Appeals' opinion, which was seemingly inconsistent with other appellate decisions, was "dictum . . . and not controlling").

unnecessary to the decision in that case, and therefore cannot have weight as authority.").

2. Stare decisis does not apply to decisions based on demonstrable misunderstandings of the law or that are evidently contrary to reason.

Stare decisis "does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason." *Rumsey v. N.Y. & N.E. R.R. Co.*, 88 Sickels 79, 85 (1892); *Matter of Eckart*, 39 N.Y.2d 493, 499 (1976). The statements of *Lavery I*, *Lavery II*, and *Presti* regarding legal personhood for nonhuman animals or habeas corpus relief are based on demonstrable misunderstandings of the law and are evidently contrary to reason.

Specifically, *Lavery I*'s and *Lavery II*'s rejections of legal personhood for chimpanzees are each based on the demonstrable misunderstanding that the right to bodily liberty requires the capacity for duties, which no other English-speaking court has held and which the New York legislature has rejected (*infra* 32–50). *See, e.g.*, *Graves*, 163 A.D. 3d at 21; EPTL § 7-8.1.[30] In addition, *Lavery II*'s and *Presti*'s

[30] In *Lavery II*, this Court stated that "habeas relief has never been found applicable to any animal (*see e.g. United States v Mett*, 65 F3d 1531 [9th Cir 1995], *cert denied* 519 US 870 [1996); *Waste Mgt. of Wisconsin, Inc. v Fokakis*, 614 F2d 138 [7th Cir 1980], *cert denied* 449 US 1060 [1980; *Sisquoc Ranch Co. v Roth*, 153 F2d 437, 441 [9th Cir 1946].)." 152 A.D. 3d. at 78. These cases however have nothing to do with nonhuman animals. *Mett* merely permitted a corporation to invoke the writ of coram nobis. *Waste Management* refused to grant habeas corpus to a corporation "because a corporation's entity status precludes it from being incarcerated or ever being held in

statements regarding habeas corpus relief are based on the demonstrable misunderstanding that such relief does not permit the release of an imprisoned individual from one facility to a different facility, when it does (*infra* 50–52).

3. Stare decisis does not apply to *Lavery I*'s and *Lavery II*'s statements regarding legal personhood for nonhuman animals.

a. "Person" designates an entity with the capacity for legal rights and has never been synonymous with "human being."

"The significant fortune of legal personality is the capacity for rights." Roscoe Pound, *Jurisprudence* vol. IV 197 (1959). "Legal persons" possess inherent value; "legal things," which exist for the sake of legal persons, possess mere instrumental value. 2 William Blackstone, *Commentaries on the Laws of England* *16 (1765–69). "[A] person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not[.]" Black's Law Dictionary (11th ed. 2019) (quoting John Salmond, *Jurisprudence* 318 (Glanville L. Williams ed., 10th ed. 1947)). *Byrn* makes clear that "according legal personality to a thing the law affords it the rights and privileges of a legal person." 31 N.Y.2d at 201 (citing Kelsen, *General Theory of Law and State*, 93–109; Paton, *Jurisprudence* 349–56 (3d ed.); Friedmann, *Legal Theory* 521–23 (5th ed.); and John Chipman Gray, *The Nature and Sources of the Law*, ch. II (2d ed.). *Byrn* is silent on duties.

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custody." 65 F.2d at 140. *Sisquoc Ranch* merely held that a corporation's contractual relationship with a human being did not give it standing to seek habeas corpus on that human's behalf.

Human slaves were "persons" for some purposes in New York: beginning in 1809, they had the right to a jury trial, to own and transfer property by will, and to marry and bear legitimate children, though they remained property themselves until 1827.[31] Certain nonhuman animals have long been "persons" in New York with the right to the corpus of a trust established under EPTL § 7-8.1, but have had no other rights. Thus a cat may be a "person" with the right to a trust corpus and yet still be property. *See Matter of Ruth H.*, 159 A.D. 3d 1487, 1490 (4th Dept. 2018) (finding a cat to be personal property and therefore not subject to Family Court jurisdiction). Similarly, Happy may possess the right to bodily liberty protected by habeas corpus but still be property.[32]

Who is deemed a "person" is a matter "'which each legal system must settle for itself'" in light of evolving public policy and moral principle. *Byrn*, 31 N.Y.2d at 201–02 (quoting Gray, *supra*, at 39); *Woods*, 303 N.Y. at 351 ("The precise question for us . . . is: shall we follow [common law precedent], or shall we bring the common law of this State, on this question, into accord with justice? I think, as New York State's court of last resort, we should make the law conform to right.").

[31] Edgar J. McManus, *A History of Negro Slavery in New York* 63, 65, 177–78 (1966). *E.g.*, *Trongett v. Byers*, 5 Cow. 480 (N.Y. Sup. Ct. 1826) (recognizing slaves as property).

[32] *See Animal Welfare Board v. Nagaraja*, 6 SCALE 468 at paras. 54, 55, 56, and 62 (Supreme Court of India 2014) (In India, although nonhuman animals remain property, they possess certain statutory and constitutional rights.). *Available at*: https://www.nonhumanrights.org/content/uploads/Animal-Welfare-Board-v-A.-Nagaraja-7.5.2014.pdf.

See Fahey Concurrence, 31 N.Y.3d at 1058 ("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); *see also Somerset v. Stewart*, 1 Lofft 1, 19 (K.B. 1772) ("The state of slavery is . . . so odious, that nothing can be suffered to support it, but positive law.").

"Person" has never been synonymous with "human being," since determining personhood is "not a question of biological or 'natural' correspondence." *Byrn*, 31 N.Y.2d at 201; *see Graves*, 163 A.D. 3d at 21 (citing, *inter alia*, *Byrn*); EPTL § 7-8.1. "Person" has been defined more narrowly than "human being." Thus *Byrn* acknowledged that while a fetus "is human," 31 N.Y.2d at 199, it is not a Fourteenth Amendment "person." *Id*. at 203; *see also Roe v. Wade*, 410 U.S. 113, 158 (1973). Slaves were sometimes "persons" for extremely limited purposes (*supra* 33), while

women were not "persons" for many purposes until well into the twentieth century,[33] and Jews were once not "persons" for any purpose.[34]

On the other hand, "[l]egal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol." George Whitecross Paton, *A Textbook of Jurisprudence*, 351 (3d ed. 1964). *See* John Chipman Gray, *The Nature and Sources of the Law*, 43 (2d ed. 1963) ("Gray") (nonhuman animals with legal rights are "persons"). Corporations have long been Fourteenth Amendment persons. *See Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886). And "[t]here is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." Gray, at 39.

Other countries are regularly designating an expanding number of nonhuman individuals and entities as "persons." On May 21, 2020, Pakistan's Islamabad High Court stated "without any hesitation" that an Asian elephant named Kaavan had legal

[33] *See Stanley*, 16 N.Y.S.3d at 912 ("Married women were once considered the property of their husbands, and before marriage were often considered family property, denied the full array of rights accorded to their fathers, brothers, uncles, and male cousins.") (citation omitted); Robert J. Sharpe and Patricia I. McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (2007).

[34] RA Routledge, *The Legal Status of the Jews in England 1190-1790*, 3 J. Legal Hist. 91, 93, 94, 98, 103 (1982) (during the 13th century, Jews were chattels of the King).

rights and ordered him released to a sanctuary,[35] and cited with approval both the *Fahey Concurrence* and Justice Tuitt's decision.[36] In May 2019, the High Court of Punjab & Haryana (India) declared that all nonhuman animals within those states are "legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person."[37] In 2018, the Colombian Supreme Court recognized the Colombian portion of the Amazon rainforest as a "subject of rights," in other words, a "person."[38] In 2017, the same court ordered that, pursuant to habeas corpus, an endangered Andean bear be released from a zoo and relocated to a natural reserve.[39] In 2017, the New Zealand Parliament designated the New Zealand's

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[35] *Islamabad Wildlife Mmgt. Bd*, W.P. No.1155/2019 at 59, 62. *Available at*: https://www.nonhumanrights.org/content/uploads/Islamabad-High-Court-decision-in-Kaavan-case.pdf.

[36] *Id*. at 40, 41–42. The Court recognized 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.

[37] *Singh v. State of Haryana*, CRR-533-2013, para. 95(29) (May 31, 2019), *available at*: https://www.livelaw.in/pdf_upload/pdf_upload-361239.pdf.

[38] STC4360-2018 (April 5, 2018), *available at*: http://www.cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf. (Translation excerpts *available at*: https://www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf?x54537.).

[39] *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. However, on January 23, 2020, 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.

Whanganui River Iwi a "legal person" with "all the rights, powers, duties, and liabilities of a legal person.[40] In 2016, a court in Mendoza, Argentina declared a chimpanzee named Cecilia a "nonhuman legal person" and ordered her transferred to a sanctuary.[41] In 2014, the Supreme Court of India held that nonhuman animals in general possess constitutional and statutory rights.[42]

b. *Lavery I*'s and *Lavery II*'s determination that nonhuman animals cannot possess the right to bodily liberty because they lack the capacity for duties confused claim rights, which correlate with duties, with immunity rights, which correlate with disabilities.

The common law right to bodily liberty, like the Thirteenth Amendment's abolition of slavery and the First Amendment's guarantee of free speech, is an immunity right and, like all immunity rights, correlates not with a duty, but with a disability. *See* Wesley J. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 30, 40 (1913); *Botsford*, 141 U.S. at 251 ("'The right to one's person may be said to be a right of complete immunity: to be let alone'") (citation omitted).

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[40] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, *available at*: http://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html#DLM6831460.

[41] *In re Cecilia*, File No. P-72.254/15 at 32 (Nov. 3, 2016), translation *available at*: https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf.

[42] *Animal Welfare Board v. Nagaraja*, 6 SCALE 468, *available at*: https://www.nonhumanrights.org/content/uploads/Animal-Welfare-Board-v-A.-Nagaraja-7.5.2014.pdf.

For example, *Roe v. Wade* held that a woman has an immunity right to an abortion free from governmental intrusion in her first and second trimesters, the latter being subject only to regulations reasonably related to maternal health. 410 U.S. at 164. Correlatively, the government is disabled from otherwise regulating her decision. Subsequently, *Harris v. McRea*, 448 U.S. 297, 316–20 (1980) distinguished between an immunity right and a claim right by holding that although, pursuant to *Roe*, a woman has an immunity right to an abortion that disables the government from otherwise regulating her decision, *Roe* had not bestowed either a duty upon the government or a correlative claim against the government to pay for the abortion.

Similarly, humans have the immunity right not to be enslaved as well as the immunity right to free speech, regardless of their capacity to bear duties. The same holds true of the immunity right to bodily liberty protected by habeas corpus, with Judge Fahey noting:

> Even if it is correct, however, that 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 (*see People ex rel. Wehle v. Weissenbach*, 60 N.Y. 385 [1875]) or a parent suffering from dementia (*see e.g. Matter of Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969, 643 N.Y.S.2d 861 [4th Dept. 1996]).

Fahey Concurrence, 31 N.Y. 3d. at 1057.

On the other hand, the capacity to bear duties is highly relevant in the context of claim rights, such as, for example, a claim right for breach of contract. But the NhRP does not assert that Happy has a claim for breach of contract or any other claim. Instead, the NhRP asks this Court to recognize Happy's single immunity right to bodily liberty protected by habeas corpus, which does not and has never required a corresponding capacity to bear duties. Happy's capacity to bear duties is irrelevant to whether she is entitled to the immunity right to bodily liberty.

What is relevant is *Woods*'s statement that the common law is grounded upon what is just and morally right, 303 N.Y. at 351, and *Byrn*'s statement that personhood involves a "policy determination" and not a biological one. 31 N.Y.2d at 201. In direct conflict with *Byrn* and *Wood*, *Lavery I*'s and *Lavery II*'s personhood determinations were based neither upon policy nor moral principle,[43] but rather were erroneously based upon the obvious biological fact that the imprisoned chimpanzees are not human. It was therefore not only erroneous, but irrational and arbitrary, for *Lavery I* and *Lavery II* to find that nonhuman animals are not entitled to the immunity

[43] Judge Fahey criticized *Lavery II*'s conclusion that "a chimpanzee cannot be considered a 'person' and is not entitled to habeas corpus relief" as being "based on nothing more than the premise that a chimpanzee is not a member of the human species." *Fahey Concurrence*, 32 N.Y. 3d at 1057.

right to bodily liberty merely because they lack the capacity to bear the duties that correlate with claim rights.[44]

c. The capacity for rights alone is sufficient for legal personhood.

Aside from *Lavery I* and those few cases that have relied upon it, including *Lavery II*, no English-speaking court has ever limited immunity rights, especially the right to bodily liberty protected by habeas corpus, to individuals with the capacity to bear duties. The obvious fact that hundreds of thousands of New Yorkers who lack the capacity for duties indisputably possess numerous rights, including the fundamental right to bodily liberty, proves that legal personhood cannot possibly turn upon the capacity for duties.

In premising legal personhood on the capacity for duties, *Lavery I* misread its sources, including Professor Gray's *The Nature and Sources of the Law* (2d ed.), which was cited with approval in *Byrn*, 31 N.Y.2d at 201–02, and Judge John Salmond's *Jurisprudence*. Both make clear not only that the capacity for legal duties is not required for legal personhood, but that the capacity for legal rights alone is sufficient for legal personhood.

[44] Not even all claim rights require the rightsholder to possess the capacity to bear duties. As discussed, *supra* 26–29, certain nonhuman animals are already legal persons because they have trust beneficiary rights under EPTL § 7-8.1. Yet there is no requirement that, in order to have trust beneficiary rights, nonhuman animals must possess the capacity to bear duties.

Byrn stated that a "legal person . . . simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person." 31 N.Y.2d at 201 (citations omitted). Notably, *Byrn* said nothing about duties, as rights and duties are legally and logically independent from one another. This is because the capacity to bear duties was irrelevant to the issue there: whether human fetuses were "persons" with the right to life.[45] Similarly, the capacity for duties should have been irrelevant to the issue in *Lavery I* and *Lavery II*: whether chimpanzees were "persons" with the right to bodily liberty protected by habeas corpus.[46]

A century ago, Professor Gray demonstrated how *Lavery I*, and therefore *Lavery II*, went wrong. Quoting Gray's treatise, *Lavery I* noted that "the legal meaning of a 'person' is a 'subject of legal rights and duties.'" 124 A.D.3d at 152 (quoting Gray, at 27). However, Professor Gray's very next sentence, which *Lavery I* ignores, makes clear that this means "one who has rights but not duties, or who has

[45] *See Byrn*, 31 N.Y.2d at 199 ("The issue . . . is whether children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life.").

[46] In *Singh v. State of Haryana*, CRR-533-2-13 at para. 95(29), the High Court of Punjab & Haryana quoted, at para. 67, at length the Supreme Court of India in *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & others*, AIR 2000 SC 1421, which discussed the jurisprudential literature on legal personhood, including George Paton's *Jurisprudence* (cited in *Byrn*), and defined a legal person "as any entity (not necessarily a human being) to which rights or duties may be attributed." *Available at*: https://www.livelaw.in/pdf_upload/pdf_upload-361239.pdf.

duties but no rights, is . . . a person," and that "if there is any one who has rights though no duties, or duties though no rights, he is . . . a person in the eye of the Law." Gray, at 27. One important consequence of this, as further noted by Professor Gray, is that "animals may conceivably be legal persons," and there may be "systems of Law in which animals have legal rights." *Id*. at 42–43.

Lavery I also erroneously relied upon the 7th edition of Black's Law Dictionary for a purported quotation from Judge Salmond's *Jurisprudence*, which allegedly stated: "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties." 124 A.D.3d at 151 (quoting Black's Law Dictionary [7th ed. 1999]). The NhRP later discovered that the court failed to confirm the accuracy of the sentence attributed to Salmond's treatise. What *Jurisprudence* actually said was: "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties." John Salmond, *Jurisprudence* 318 (10th ed. 1947).[47]

Moreover, similar to Gray, the next sentence of *Jurisprudence* makes clear that "[a]ny being that is so capable [of rights or duties] is a person, whether a human being or not[.]" *Id*. *See also Wartelle v. Women's & Children's Hospital Inc.*, 704 So. 2d 778, 780 (La. 1997) (cited with approval in *Lavery I*, 124 A.D.3d at 152), where the Louisiana Supreme Court quoted with approval a secondary source that

[47] This misquotation error was continued through the tenth edition of Black's Law Dictionary.

expressly stated, as had Professor Gray and Judge Salmond, that a "'person in a technical sense . . . signif[ies] a subject of rights or duties." (Citation omitted.).

Lavery I also relied upon Black's Law definition of "person" as "[a]n entity (such as a corporation) that is recognized by law as having the *rights and duties* [of] a human being." 124 A.D.3d at 151 (quoting Black's Law Dictionary [7th ed. 1999]; emphasis added by *Lavery I*).[48] This definition cannot and, contrary to *Lavery I's* interpretation, does not mean that an entity must have the capacity for both rights and duties to be a "person." It means that an entity with the capacity for either rights or duties is a "person" but that a "person," once acknowledged, has the capacity for both rights and duties, even if it does not actually have both. Such an interpretation is entirely consistent with and supported by jurisprudential sources.

While *Lavery II* was pending, the NhRP pointed out the *Jurisprudence* misquotation error to Bryan A. Garner, Esq., the editor-in-chief of Black's Law Dictionary, who promptly agreed to correct it in the eleventh edition (A-465 – A-

[48] *Lavery I*, 152 A.D.3d at 152, also relied on foreign case law containing a similar dictionary definition. *See Smith v. ConAgra Foods, Inc.*, 431 S.W.3d 200, 203–04 (Ark. 2013) (citing *Calaway v. Practice Mgmt. Servs., Inc.*, 2010 Ark. 432, at *4 (2010) (quoting definition from Black's Law Dictionary 9th edition, which is identical to 7th edition)); *Western Sur. Co. v. ADCO Credit, Inc.*, 251 P.3d 714, 716 (Nev. 2011) (quoting *Webster's New Universal Unabridged Dictionary* 1445 (1996); *State v. A.M.R.*, 51 P.3d 790, 791 (Wa. 2002) (quoting definition from Black's Law 7th edition; also citing *Webster's Third New International Dictionary of the English Language* 1686 (1986)); *State v. Zain*, 528 S.E.2d 748, 755 (W. Va. 1999) (quoting *Webster's Third New International Dictionary of the English Language Unabridged* 1686 (1970), and *Random House Dictionary of the English Language* 1445 (2d ed., unabridged, 1987)).

472), and did.[49] The NhRP also notified this Court of the error, first by letter,[50] and then in a supplemental motion seeking leave to file its correspondence with Mr. Garner.[51] This Court, however, denied the NhRP's motion without explanation and blindly perpetuated *Lavery I*'s error in stating that the recognition of legal personhood requires the capacity for duties. *See* 152 A.D.3d at 76–78.

d. Social contract theory does not condition the right to bodily liberty—and therefore legal personhood—on the capacity to bear duties.

Lavery I stated that:

> the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government (*see* Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 Ariz St LJ 1, 12-14 [2013]; Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L Rev 27, 69-70 [2009]; *see also In re Gault*, 387 US 1, 20-21 [1967]; *United States v Barona*, 56 F3d 1087, 1093-1094 [9th Cir 1995], *cert denied* 516 US 1092 [1996]). Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, "rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those]

[49] The corrected sentence from *Jurisprudence* now reads: "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties." Black's Law Dictionary (11th ed. 2019), person.

[50] Specifically, after oral argument in *Lavery II*, the NhRP delivered a letter to this Court alerting it to the error. *See* https://www.nonhumanrights.org/content/uploads/Letter-to-First-Dept-re-Tommy-and-Kiko-3.27.17-FINAL-1.pdf.

[51] *See* https://www.nonhumanrights.org/content/uploads/162358_15_The-Nonhuman-Rights-Project-Inc.-v.-Patrick-C.-Lavery_Motion-4.11.17.pdf.

> rights" (Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 Ariz St LJ 1, 13 [2013]; *see* Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L Rev 27, 69 [2009]).

124 A.D.3d at 151.[52]

The Third Department's statements in *Lavery I* regarding social contract theory are wrong for two reasons: (1) the federal cases it cited do not support them; and (2) Cupp's idiosyncratic idea of social contract theory has no support and is wrong.

First, *Lavery I* cited *Application of Gault*, 387 U.S. 1, 20–21 (1967) and *United States v. Barona*, 56 F.3d 1087, 1093–94 (9th Cir. 1995), s*ee* 124 A.D.3d at 151, neither of which provides any support for the Third Department's assertions. The only possibly relevant passage from *Gault* merely states that "[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." 387 U.S. at 20. "*Gault* does not even provide facial support for the [*Lavery I*] court's claim: it addresses neither the relationship between rights and duties nor the limitations of the meaning of legal

[52] *Lavery II*, in reliance upon Richard L. Cupp Jr.'s amicus brief (*see* https://www.nonhumanrights.org/content/uploads/CuppAmicus.pdf), similarly asserted without any support that "nonhumans lack sufficient responsibility to have any legal standing." 152 A.D.3d at 78. Cupp's brief cited no authority for the claim that responsibility is required for legal standing, and instead made a vague reference to "John Locke's contractualist assertions" in connection with the notion of "requiring legal accountability to each other." Cupp Brief at 8. As explained *infra*, Locke's social contract theory does not support this claim.

personhood for the purposes of habeas corpus." Craig Ewasiuk, *Escape Routes: The Possibility Of Habeas Corpus Protection For Animals Under Modern Social Contract Theory*, 48 Colum. Human Rights L. Rev. 69, 78 (2017).

In *Barona*, the 9th Circuit quoted from the dissenting opinion in a prior decision, *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), opining that:

> Because our constitutional theory is premised in large measure on the conception that our Constitution is a "social contract," [. . .] "the scope of an alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear." [. . .] "Not until an alien has assumed the complete range of obligations that we impose on the citizenry may he be considered one of 'the people of the United States' entitled to the full panoply of rights guaranteed by our Constitution."

56 F.3d at 1093–94.

Barona provides no support for *Lavery I*'s assertions on social contract theory. First, *Barona* concerns an interpretation of the Fourth Amendment to the United States Constitution, not the New York common law of habeas corpus. Second, the dictum in the quoted passage concerns the interpretation of the constitutional phrase "the People of the United States," not the New York common law meaning of "person." Third, the Supreme Court reversed the *Verdugo-Urquidez* decision quoted in *Barona*,[53] such that

[53] *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

> it is clear that [*Lavery I*] made an argument that was the *converse* of the argument made by the Supreme Court. [*Lavery I*] argued that if one has rights, then one must have duties, and if you do not have duties, then you do not have rights. The Supreme Court suggested that if you have duties, then you must have rights, and if you do not have rights, then you must not have duties. These are different arguments.

Escape Routes, 48 Colum. Human Rights L. Rev. at 82 (emphasis in original).

Second, *Lavery I* relied upon an obscure writer, Richard J. Cupp, Jr., to support its unprecedented claim that the capacity for duties is required for the ascription of any rights at all. *Lavery II*, in turn, uncritically embraced Cupp's unique views without ascertaining whether they had any support in the literature, despite the fact they are junk political science, junk philosophy, and junk history that Cupp devised for the purpose of preventing any nonhuman animal from obtaining a legal right.[54]

Thus, in *Children, Chimps, and Rights*, Cupp's sole source for the social contract theory assertions later stated in *Lavery I* is Peter de Marneffe's *Contractualism, Liberty, and Democracy*, 104 Ethics 764 (1994).[55] But throughout

[54] *See State v. Donald DD*. 24 N.Y. 3d 174, 186 (2014) ("In the dissent in *Shannon S.*, three members of this Court who are now in the majority stated our view that the paraphilia NOS diagnosis presented by Dr. Kirschner and another expert witness in that case 'amount[ed] to junk science devised for the purpose of locking up dangerous criminals'"). In deciding whether to accept an expert scientific opinion or reject it as junk science, this Court would have utilized the Frye test to determine "whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally." *People v. Wesley*, 83 N.Y. 2d 417 (1994).

[55] *See Children, Chimps, and Rights*: *Arguments from "Marginal" Cases*, 45 Ariz. St. L.J. 1, 12–13 & nn.48-51 (2013) (cited in *Lavery I*, 124 A.D.3d at 151).

that entire article, de Marneffe never once claims "that individual rights are exchanged for responsibilities," or "uses the words 'duty,' 'responsibility,' 'reciprocity,' 'exchange' or synonymous terms." *Escape Routes*, 48 Colum. Human Rights L. Rev. at 83. To the contrary, "de Marneffe's work contradicts Cupp's claim," as it "states that the establishment of animal rights is . . . compatible with modern social contract theory." *Id*. at 84; *id*. at 84–85 (critiquing Cupp's citation to Mark Bernstein's article *Contractualism and Animals*, 86 Phil. Stud. 49, 49 (1997), which argues, at 66, that "contractualism is compatible with according full moral standing to non-human animals."); *id*. at 84 & n.80 (describing other instances in which de Marneffe's article does not support the propositions for which it is cited by Cupp).

Lavery I also cites Cupp's *Moving Beyond Animal Rights*,[56] in particular pages that include a general reference to John Locke's "conception of the social contract . . . that citizens are entitled to 'life, liberty and property,'" 46 San Diego L. Rev. at 69, but which contain no authority for the assertion that the social contract requires reciprocity between rights and duties.[57] Cupp also falsely claims that

[56] *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L. Rev. 27, 69–70 (2009) (cited in *Lavery I*, 124 A.D.3d at 151).

[57] Cupp's article also includes a claim attributed to philosopher L.W. Sumner's book *The Moral Foundations of Rights* 203 (1987) that, under Wesley Newcomb Hohfeld's framework of rights, "animals cannot have rights because they do not have duties or responsibilities." 46 San Diego L. Rev. at 69. However, Sumner was specifically discussing one of two competing theoretical

"general reciprocity between rights and responsibilities is a basic tenet" of social contract theory. *Id*. at 66. As detailed in *Escape Routes*, the origin of Cupp's assertion is merely a secondary reading of Thomas Hobbes in a book that "cites no particular passage in Hobbes's writings, but rather eight chapters of *Leviathan*." 48 Colum. Human Rights L. Rev. at 86.

Moreover, according to the seventeen "amici philosophers with expertise in animal ethics and related areas" who influenced Judge Fahey, *Fahey Concurrence*, 31 N.Y.3d at 1058, Cupp's reciprocity claim "is not how political philosophers have understood the meaning of the social contract historically or in contemporary times." Philosophers' Brief at 15–16.[58] Rather,

> social contracts create citizens, not persons. Citizens are individuals who are subject to the laws authorized by the contract. Notably, the U.S. Constitution mentions the term 'persons' fifty-seven times, but does not define it. The 14th Amendment, however, distinguishes between persons and citizens. This is consistent with social contract theory, which holds that only persons can bind themselves through a contract and, in so doing, become citizens. While persons do not depend on a social contract, the social contract depends on persons who will be its 'signatories.'

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conceptions of moral rights. Under what Sumner terms the "protected choices" model, rightsholders must have a certain level of cognitive agency, and it will "deny rights, on logical grounds, to . . . fetuses, infants, young children, and the severely mentally handicapped," not just to nonhuman animals. *The Moral Foundations of Rights* at 203. In contrast, under what Sumner terms the "interest model," rightsholders will include "many non-human beings (at least some animals)" because they have interests. *Id*. at 206.

[58] *Available at*: https://www.nonhumanrights.org/content/uploads/In-re-Nonhuman-Rights-v.-Lavery-Amicus-Brief-by-PHILOSOPHERS.pdf.

> It follows from social contract theory that all contractors must be persons, but not that all persons must necessarily be contractors. There can be persons who are not contractors—either because they choose not to contract (e.g., adults who opt for life in the state of nature) or because they cannot contract (e.g., infants and some individuals with cognitive disabilities).
>
> Social contract philosophers have never claimed—not now, not in the 17th century—that the social contract can endow personhood on any being. The contract can only endow citizenship on persons who exist prior to the contract and agree to it. If persons did not exist before the contract, there would be no contract at all since only persons contract. Personhood, therefore, must be presupposed as a characteristic of contractors in social contract theories.

Philosophers' Brief at 17–19.[59]

The utter lack of support for Cupp's views fatally undermines *Lavery I*'s and *Lavery II*'s statements that the ascription of rights generally requires the capacity for duties.

4. Stare decisis does not apply to *Lavery II*'s and *Presti*'s erroneous statements regarding habeas corpus relief.

Upon this Court's determination that Respondents' imprisonment of Happy is unlawful, it must order her immediate release. CPLR 7010(a). That Happy cannot be released into the wild or onto the streets of New York in no way precludes an order directing her immediate release to an appropriate sanctuary, where she can

[59] *See also Escape Routes*, 48 Colum. Human Rights L. Rev. at 87–105 (explaining that the social contract theories of Thomas Hobbes, John Locke, and John Rawls do not preclude granting rights to nonhuman animals).

freely exercise her autonomy. *See Fahey Concurrence*, 31 N.Y.3d at 1058–59; *Stanley*, 16 N.Y.S.3d at 917 n.2.

In *Stanley*, where the NhRP demanded the immediate release of two imprisoned chimpanzees to a chimpanzee sanctuary, the court cited Court of Appeals and First Department precedent allowing such a transfer:

> Respondents also maintain that as [NhRP] does not seek the release of the chimpanzees from the University, but their transfer to a chimpanzee sanctuary, it has no legal recourse to habeas corpus. (Resps. Memo. of Law). There is, however, authority to the contrary in the First Department. (*See McGraw v. Wack*, 220 A.D.2d 291, 292, 632 N.Y.S.2d 135 [1st Dept.1995] [observing that Court of Appeals approved, sub silentio, use of writ of habeas corpus to secure transfer of mentally ill individual to another institution], *citing Matter of MHLS v. Wack*, 75 N.Y.2d 751, 551 N.Y.S.2d 894, 551 N.E.2d 95 [1989]). Consequently, I am not bound by the decision of the Fourth Department in [*Presti*].

Id. at 917 n.2.

Not only did *Lavery II* erroneously ignore *McGraw* and *Wack*, as Judge Fahey explained, this Court misapplied *People ex rel. Dawson v Smith*, 69 N.Y.2d 689 (1986):

> Notably, the Appellate Division erred in this matter, by misreading the case it relied on, which instead stands for the proposition that habeas corpus *can* be used to seek a transfer to "an institution separate and different in nature from the. . . facility to which petitioner had been committed," as opposed to a transfer "within the facility" (*People ex rel. Dawson v Smith*, 69 NY2d 689, 691 [1986]). The chimpanzees' predicament is analogous to the former situation, not the latter.

Fahey Concurrence, 31 N.Y. 3d at 1058–59 (emphasis in original).

In *Dawson*, the Court of Appeals distinguished two very different scenarios:

> [W]e held [in *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482 (1961)] that the writ of habeas corpus was properly employed by petitioner, an Attica inmate, in seeking his release from an allegedly illegal confinement in Dannemora State Hospital, an institution for custody of prisoners who are declared insane. The confinement in [*Brown*] was in an institution separate and different in nature from the correctional facility to which petitioner had been committed pursuant to the sentence of the court. . . . Here, by contrast, petitioner does not seek his release from custody in the facility, but only from confinement in the special housing unit, a particular type of confinement within the facility[.]

Id. at 691.

Thus, just as in *Lavery II*, the NhRP's demand in the case at bar is not "analogous to the situation [in *Dawson*]," 152 A.D.3d at 80, since it does not seek Happy's transfer from one section of the Bronx Zoo to a different section of the zoo. Rather, in accordance with *Brown*, *Dawson*, *Wack*, *McGraw*, and the *Fahey Concurrence*, the NhRP appropriately demands Happy's immediate release from the Bronx Zoo to an elephant sanctuary located a thousand miles away that is wholly separate and completely different in nature.[60]

IV. CONCLUSION

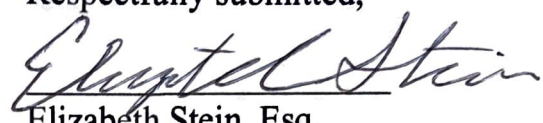
This Court should recognize Happy's common law right to bodily liberty protected by habeas corpus, reverse the Bronx Court's dismissal of the Petition, and remand the case with instructions to order Happy's immediate release to The

[60] The NhRP has repeatedly alleged that Happy is being unlawfully detained or imprisoned. (A-8; A-32, paras. 1 – 3; A-33 – A-34, para. 8; A-43, para. 38; A-48, para. 54; A-48 – A-49, para. 56).

Elephant Sanctuary in Tennessee, together with any such other and further relief that this Court may deem just, proper, and equitable.

Dated: July 10, 2020

Respectfully submitted,



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Dated: July 10, 2020

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

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.

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1. The index number of the case in the court below is 260441/19. The index number issued in Orleans County is 45164/18.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, Orleans County and transferred to Supreme Court, Bronx County.

4. The action was commenced on or about October 2, 2018 by filing of a Verified Petition. Issue was joined on or about December 3, 2018 by service of a Motion to Dismiss the Verified Petition in lieu of an Answer.

5. The nature and object of the action involves Common Law Writ of Habeas Corpus relief.

6. This appeal is from the Decision and Order of the Honorable Alison Y. Tuitt, dated February 18, 2020, which granted Respondents' Motion to Dismiss the Verified Petition.

7. This appeal is on the Appendix method.