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,

Index No. 518336

THE PEOPLE OF THE STATE OF NEW YORK ex. rel. THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Petitioners-Appellants,

v.

PATRICK C. LAVERY, individually and As an officer of Circle L. Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents.

AMICUS CURIAE BRIEF
BY THE CENTER FOR THE STUDY OF THE GREAT IDEAS
IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO APPEAL

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INTRODUCTION

The Nonhuman Rights Project, Inc. (NRP) has petitioned the Supreme Court of the State of New York for the release of a chimpanzee named Tommy, who is allegedly being "unlawfully detained"—not pursuant to existing laws governing the mistreatment of animals (*see, e.g.*, Agricultural & Markets Law § 373, regarding confinement in "crowded or unhealthy conditions"), but on the novel basis that the chimps are "persons" under the law entitling them to deliverance via *habeas corpus*. The Supreme Court Appellate Division, Third Judicial Department, affirmed the Supreme Court, Fulton County's refusal to issue a writ of habeas corpus on behalf of Tommy, holding that "a chimpanzee is not a 'person' entitled to the rights and protections afforded by the writ of habeas corpus." Opinion and Order in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 2014 Slip Op. 08531, 2014 N.Y. App. Div. LEXIS 8451 (3rd Dept. Dec. 4, 2014). This result is correct and should not be disturbed.

INTEREST OF AMICUS CURIAE

The Center for the Study of the Great Ideas, Inc., a not-for-profit 501(c)(3) educational corporation, was co-founded in 1990 by Mortimer J. Adler and Max Weismann (the "Center"). Mortimer Jerome Adler (1902-2001) was an American philosopher, educator and author of over fifty books. He served as Chairman of the Board of Editors of the Encyclopedia Britannica, Editor in Chief of the *Great*

Books of the Western World and *The Syntopicon: An Index to the Great Ideas*, Founder and Director of the Institute for Philosophical Research, and Instructor the Aspen Institute for Humanistic Studies, University of Chicago, and Columbia University. The Center derives its funding from membership donations, seminar and lecture tuitions and private gifts. With hundreds of adult and student members from diverse intellectual, cultural and educational backgrounds, the Center is dedicated to Dr. Adler's belief that Philosophy is Everybody's Business, that a cogent understanding of practical philosophy, through the study of the Great Ideas inherent in the great literature of our Western Tradition, is essential for responsible citizenship and the individual pursuit of happiness. The Center's mission is to promulgate the insights and ideals embedded in Dr. Adler's lifelong intellectual work in the fields of Philosophy, Liberal Education, Ethics and Politics while functioning as a central resource for, access to, and the on-going interpretation of his work. To advance this mission, Dr. Adler donated a vast collection of his works and manuscripts to the Center and the Center makes available these materials through live and on-line seminars, the Internet, public discourse, and access to the Center's library collection of books, essays, articles, journals and audio/video programs.

ARGUMENT

I

THE APPELLATE DIVISION APPLIED THE CORRECT STANDARD OF LAW

Petitioner contends that the Appellate Division applied an incorrect standard of law by not addressing the habeas corpus relief it sought under the *common law*. But, in fact, the Appellate Division ruled squarely on Petitioner's application for a common law writ of habeas corpus.

Petitioner may be correct that none of the cases cited by the Appellate Division involved the writ of habeas corpus at common law. Each of such citations, as Petitioner correctly points out, appears to have concerned a statutory or constitutional construction. But the Appellate Division's argument, which specifically referred to the "common law writ of habeas corpus," did not stand solely on those citations.

The Appellate Division's decision also rested on at least these two propositions: (a) no nonhuman animal has never been considered a "person" for purposes of common law writ of habeas corpus; and (b) chimpanzees are not "persons" because "unlike human beings, chimpanzees cannot bear any legal duties."

A. No Nonhuman Animal Has Ever Been Considered A "Person" For Purpose Of Habeas Corpus

The Appellate Division correctly observed that "Petitioner does not cite any precedent—and there appears to be none—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." Opinion & Order at 3. The Appellate Division then conceded that this lack of precedent did not end the inquiry and proceeded to address why it would not extend the writ's ancient common law relief to chimpanzees. Thus, rather than ignoring Petitioner's common law claims, the court addressed them head on.

B. Chimpanzees Are Not "Persons" Because Unlike Human Beings, They Cannot Bear Any Legal Duties

The Appellate Division held that chimpanzees are not "persons" because "unlike human beings, chimpanzees cannot bear any legal duties, submit to social responsibilities or be held legally accountable for their actions." *Id*. at 6. That incapability "renders it inappropriate to confer upon chimpanzees legal rights – such as the fundamental right to liberty protected by the writ of habeas corpus – that have been afforded to human beings." *Id*.

Petitioner may disagree with the court's conclusion, discussed *infra*, but it cannot legitimately claim the court applied the wrong standard.

II

THE NEW YORK LEGISLATURE HAS NEVER GRANTED PERSONHOOD TO NONHUMAN ANIMALS

Petitioner has suggested that, because Section 7-8.1 of the Estates, Powers & Trusts law of New York, the State of New York has allowed "domestic or pet animals" to be beneficiaries of a trust, that such beneficiaries are "persons" under the law of New York. The two cases Petitioner cited—*Lenzner* and *Gilman*—for the proposition that a beneficiaries of a trust "must be persons" predate the statute by 50 and 100 years. *Lenzner v. Falk*, 68 N.Y.S. 2d 699 (Sup. Ct. 1947); *Gilman v. McCardle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883). Whatever may have been the law in 1883 and 1947, the State of New York, in 1996, specifically permitted animals that are not persons to become beneficiaries.

Moreover, nowhere in the statute does it say that the animal beneficiary is a "person." In fact, §7-8.1(a) & (b) repeatedly uses the term "animal" in reference to the beneficiary, not person. Elsewhere, the New York Code defines the term "animal" as "every living creature except a human being." See, Agriculture & Markets Law §350. The term animal, obviously, includes chimpanzees.

By Petitioner's own admission, a chimpanzee is not a human being:

> THE COURT: … Do you have any case that equates a chimpanzee with a human being? And when I say equate, I don't mean—any case that defines a human being to include a chimpanzee.
>
> MR. WISE: We are not claiming, your Honor, that Kiko is a human being. It's clear that he is a chimpanzee. And we're not seeking human

> rights for Kiko. We understand he is not entitled to human rights. We're saying he is entitled to chimpanzee rights. So there are no cases that specifically do what you say. Because this—these are the first cases of their kind as far as we understand.

Nonhuman Rights Project, Inc. v. Presti, Index No. 151725, Supreme Court (County of Niagra), Transcript of Hearing re: Kiko, 12/9/13 at 11-12, which is available at http://www.nonhumanrightsproject.org/wp-content/uploads/2013/12/Transcript_of_Oral_Argument-_Niagara_County_12-9-13.pdf

Petitioner cites *Matter of Fouts*, 176 Misc. 2d 521, 677 NYS 2d 699 (1998) to suggest that the enforcer of the animal's interest "presumably performs the same function as a guardian ad litem for an incapacitated person." *Id*. at 522. But the court's observation cannot be taken to mean when one enforces statutory rights in favor of animals one is enforcing the rights of a *person*. Indeed, just two paragraphs earlier in its opinion, the *Fouts* court stated specifically, "the court need not reach the issue of personhood for chimpanzees because the statute provides an adequate alternative remedy that will satisfy the concerns of the petitioner." *Id.*

Even if the animal could possibly be considered a *person* for purposes of the trust, that does not make it a person for the purpose of having his "bodily liberty" violated. (A useful analogy may be a corporation—which is considered a "person" for numerous legal purposes, including the violation of criminal law—but a corporation cannot be imprisoned or have its physical liberty restricted. See,

People v. Ebasco Services, Inc., 77 Misc.2d 784, 787 (1974) ("It would be manifestly inappropriate to apply the definition of 'person' to corporation in regard to persons who might be seized and arrested")). When a person's "bodily liberty" is being violated, the law looks not to the state's Estate, Power and Trust Law, but, rather, to the state's Penal Law:

> A person is guilty of unlawful imprisonment in the second degree when he *restrains* another *person*. New York Penal Law §135.05 [Emphasis added].

The term "restrains," defined in New York Penal Law §130.00(1), means:

> to restrict a *person's* movements intentionally and unlawfully in such manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent and with knowledge that the restriction is unlawful. [Emphasis added]

New York Penal Law §10.00(7), which governs the legal interpretation of *unlawful imprisonment* under §135.05, provides the following definition:

> "Person" means a *human being*, and *where appropriate*, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality. [Emphasis added]

Because the chimp is not one of the kinds of corporations, partnerships, or governmental organizations listed in §10.00(7), it can only be given the status of "person" for purposes of bodily liberty under New York Law if it were deemed a *human being.* As noted, Petitioner has already admitted that a chimpanzee is not a human being. *Nonhuman Rights Project, Inc. v. Presti*, supra, at 11-12.

The NRP has made much of the fact that to be a *person* does not necessarily mean *human being*. That is true, but if you are not a human being, or one of the specific kinds of entities listed in the statute, you cannot be a *person* whose liberty is restricted under New York State law. In an affirmation filed in another case brought earlier this year by the NRP, an Assistant Solicitor General of the State of New York opined that "nonhuman animals" are "outside the purview of New York's habeas corpus statute." *Nonhuman Rights Project, Inc. v. Stanley*, Docket No. 2014-01825, Supreme Court Appellate Division, Second Department, Affirmation of Jason Harrow in opposition to appellant's motion for reargument (April 30, 2014), a copy of which is available at: http://www.nonhumanrightsproject.org/wp-content/uploads/2014/06/8.-Affirmation-in-opposition-to-appellant%E2%80%99s-motion-for-reargument-Hercules-Leo.pdf.

In sum, contrary to Petitioner's contention, the laws of the State of New York do not suggest that animals may be considered "persons" by virtue of the fact that they may now become the beneficiaries of a trust. On the contrary, for a person to assert a right of bodily liberty, it must be a human being. A chimpanzee is not a human being.

III

THE APPELLATE DIVISION'S OPINION IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT

Petitioner contends that the Opinion and Order of the Appellate Division is in conflict with the decision of this Court in *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d. 194 (1972). The issue in *Byrn* was whether an unborn fetus must be recognized as a person under the law. Indeed, *Byrn* held that "[w]hether the law should accord legal personality is a policy question which in most instances devolves on the Legislature." But that proposition did not hold for very long.

Several months after *Byrn*, the issue was addressed by U.S. Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). Although high court agreed with the result in *Byrn*—that a "person" does not include the unborn—it specifically rejected the notion that the question devolves upon the legislature. On the contrary, the Supreme Court decided instead that the question was one for the courts to decide under the Fourteenth Amendment's "concept of personal liberty and restrictions upon state action." *Id.* at 153 and 158.

Indeed, if the Supreme Court had followed the policy advocated by Petitioners, today the states, or Congress, would be the ones deciding whether an unborn fetus must be recognized as a person in the law. As the dissent in *Byrn* pointed out, this very policy argument was "made by Nazi lawyers and Judges at

Nuremberg." In other words, the power to decide who *is* a person is inseparable from the power to decide who *is not*. The Supreme Court has been wise to reject a position that would leave a question so basic to an individual's life and liberty to the whim or prejudices of the majority.

Petitioner has cited decisions of the courts of India for designating a Hindu idol and a Sikh sacred text each as a *legal person*; a Pakistani court for so designating a mosque; and a treaty between the Crown and the indigenous peoples of New Zealand recognizing personhood in a river. Now, Petitioner has gone so far as suggesting that it sees "no difficulty giving legal rights to a *supernatural* being and thus making him or her a legal person." Quoting John Chipman Gray, *The Nature and Sources of Law*, Chapter II at 39 (1909). Oddly, Petitioner characterizes the opposite view, the view embraced by the Appellate Division, as "a minority view shared by only a few philosophers."

IV

THE APPELLATE DIVISION AVOIDED THE "CATEGORY OF RIGHTS" MISTAKE MADE BY PETITIONER

Petitioner's reading of the work of Wesley N. Hoefeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913) ("Hoefeld"), requires correction.

One does not have an "*immunity*-right to bodily liberty." The right to bodily liberty, in Hoefeld's terms, is a *privilege*—a freedom to go where one pleases, so

long has one does not infringe anyone's rights in doing so. Hoefeld made this quite clear:

> A "liberty" considered as a legal relation (or "right" in the loose and generic sense of that term) must mean, if it have any definite content at all, precisely the same thing as privilege. *Id*. at 36.

The dominant technical meaning of the term *liberty* is "negation of legal duty"—i.e., you are under no duty to do otherwise. By contrast, the *immunity-right* to which Petitioner refers has nothing to do with what one may or may not physically do, such as move one's body from one place to another. Rather, in Hoefeld's words,

> [A]n immunity is one's freedom from the *legal power* or "control" of another *as regards some legal relation*. *Id*. at 55. [Emphasis added].

A *power*, as Hoefeld explains, refers to an ability to affect legal relationships—such as the power to transfer one's interest in an object or tract of land to another, to create a contractual obligation by accepting an offer, or to grant legal powers to an agent. In other words, a *power* involves "one's affirmative control over a given *legal relation* as against another." *Id*. An *immunity* is one's freedom from the power of another to affect your *legal relations*. *Id*. The "best synonym" for the term *immunity,* says Hoefeld, "is, of course, the term *exemption." Id*. at 57. The examples of immunities Hoefeld provides are "exemption from taxation" and exemption "from jury and military duty." *Id*.

If one does not have "an *immunity*-right to bodily liberty," but only a *privilege-right* to move about from one place to another, what is the correlative of that privilege? Hoefeld, finding no single term available to express the conception, coined the term "no-right." *Id.* at 32. A *no-right* is the correlative of a *privilege* and the opposite of a *right (or claim)*. A *right* is a correlative of *duty* and the opposite of *no-right*. *Id.*

	right	privilege	power	immunity
Jural Opposites	no-right	duty	disability	liability
	right	privilege	power	immunity
Jural Correlatives	duty	no-right	liability	disability

To put the matter properly in Hoefeld's terms: a human being has *rights* and a chimpanzee has *no-rights*. If there were any doubts about Hoefeld's position on this, one need only consider his reference to the "instructive passage" by Mr. Justice Cave in *Allen v. Flood* [1898] A.C. 1, 29:

> "The personal rights with which we are most familiar are: 1. Rights of reputation; 2. *Rights of bodily safety and freedom*; 3. Rights of property; or, in other words, rights relating to the mind, body and estate. In my subsequent remarks the word 'right' will, as far as possible, always be used in the above sense….Thus it was said that a man has a perfect right to fire off a gun, when all that was meant, apparently, was that a man has a *freedom* or *liberty* to fire off a gun, so long has he does not violate or infringe any one's rights in doing so, which is very different thing from a right, the violation or disturbance of which can be remedied or prevented by legal process." *Id*. at 41. [Emphasis added].

A chimpanzee has *no personal right* to freedom or liberty. Why? Because it has no correlative duty "not to violate or infringe any one's rights in doing so." As

the Appellate Division properly pointed out, "unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions."

The correctness of the Appellate Division's conclusion should be academic. To reach it, one need not accept the "social contract" theory referenced by the court. *See*, Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from 'Marginal Cases,'* 45 Ariz. St. L. J. 1 (2013); Richard L. Cupp, Jr., *Moving Beyond Animal rights: A Legal Contractualist Critque*, 46 San Diego L. Rev. 27 (2009). A far more comprehensive analysis, in amicus curiae's view, was posited by the American philosopher Mortimer J. Adler. *See*, Mortimer J. Adler, *The Difference of Man and The Difference It Makes* (Holt 1969) and *Intellect* (Macmillan 1990). In a nutshell, non-human animals, having only an instinct to survive rather than a free will to choose otherwise, can neither understand nor carry out moral or legal obligations, such as respecting the life, liberty, and property of others. As the Appellate Division concluded, this incapacity to bear legal responsibilities "renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings."

V

THE APPELLATE DIVISION PROPERLY TOOK JUDICIAL NOTICE OF THE FACT THAT A CHIMPANZEE IS UNABLE TO BEAR DUTIES OR RESPONSIBILITIES

Petitioners contend that that the Appellate Division's statement that a chimpanzee's incapacity to bear duties or responsibilities is unsupported and contradicted by the record, but the Appellate Division had no need to rely merely on a record based solely on materials provided by Petitioner, especially where the Respondent has not responded to this action. The over 100 pages of affidavits submitted into the record by Petitioner point out the *similarities* between chimpanzees and human beings—including the fact that all primates, including humans, exhibit varying degrees of "autonomy." But the record does nothing to refute the significant *differences* between human from nonhuman animals, including the solid scientific evidence that human beings have something that other animals do not.

Professor V.S. Ramachandran, Director for Brain and Cognition at the University of California, San Diego, has called the human brain "unique and distinct from that of the ape by a huge gap." *See*, V.S. Ramachandran, *The Tell-Tale Brain: A Neuroscientist's Quest for What Makes Us Human* (W.W. Norton & Company 2011). The difference, he says, boils down to language: Our "unique competence" in producing language, "seems to be absent in all other animals."

This competence, he adds, "comes from our language acquisition device or LAD. Humans have LAD; apes and all other animals lack it."

Likewise, the linguist, Professor Noam Chomsky, has conceded that human beings must be born with what he termed a "universal grammar." See, Noam Chomsky, *The Science of Grammar* (Cambridge Univ. Press 2012). Animals do have "communications systems," says Chomsky, "but they don't have anything like a language… [T]he human conceptual system looks as though it has nothing analogous in the animal world." *Id.*

The basis of this unique *language acquisition device* or *universal grammar* is what Dr. Adler called the human *intellect*, our power of conceptual thought, something which science has not found present in other animals. It is our human intellect, our ability to apprehend intelligible objects rather than merely perceptual ones, which affords us our ability to act in ways that are not governed by a species-wide instinct. In place of that instinct, according to Dr. Adler, we have an obligation, a moral obligation, to do what is really good for ourselves, including establishing just governments for the purpose of securing such rights. It is by virtue of this moral *duty* that each of us has the *right* to life, liberty and the pursuit of happiness. As the Appellate Division concluded, "rights are connected to moral agency and the ability to accept societal responsibility in exchange for those

rights." Opinion and Order at 4 (citing Cupp, *supra*). In sum, jurisprudentially, rights follow from duties, not the other way around.

On whatever basis the Court chooses to condition the *rights* of personhood upon the *duties* that attached to it, it should be self-evident that nonhuman animals, governed by instinct alone, can have no intelligible understanding of moral or legal obligations.

VI

NRP OFFERS NO GOOD REASON FOR THIS COURT TO CHANGE THE COMMON LAW

The common law has only ever applied the writ of *habeas corpus* to *human beings*, and the Petitioner provides no good reason for this Court to change the common law to include chimpanzees or any other nonhuman animal under the rubric of the writ. On the contrary, expanding the common law to offer chimps some of the same rights as humans gives rise to enormous practical consequences.

A. No Practical Need to Equate Chimpanzees With Humans

In opposing the writ, *amicus curiae* is by no means being unsympathetic to the plight of the chimps in question. Every animal in this State—including Tommy, Kiko, and the others—is already the beneficiary of New York's statutory protection against the unhealthy confinement of animals. Specifically, Section 373(2) of the Agriculture & Markets Law allows the police and qualified animal

rights organizations to rescue animals who are being confined in a "crowded or unhealthful condition."

The NRP has admitted that it is not seeking the complete release of Tommy from confinement, only the chimp's transfer to a more hospitable confinement. Since the law already provides for a means to that end, changing the common law writ of habeas corpus to include chimps would provide the animals with no marginal benefit whatsoever.

B. Providing Nonhuman Animals with Human Rights Would Have Enormous Practical Consequences

Whatever the reason NRP has decided not to pursue existing remedies that might improve Tommy's living conditions, extending basic human rights to chimpanzees is not only unnecessary to achieve that end, doing so would have widespread practical consequences.

1. What Would Be The Scope of a Nonhuman Animal Rights Under Habeas Corpus?

The right which the NPR seeks here is an animal's "bodily liberty." But, again, petitioner is not seeking the complete release of the chimp from confinement, only a transfer of confinement to better conditions. How will the courts determine whether one particular form of confinement over another—for a particular kind of animal and for a particular individual animal—will abridge the animal's "bodily liberty"? Would "bodily liberty" be extended to encompass

protection against bodily assault or abuse? At what point would training a domestic animal interfere with its liberty? And its sale?

The State of New York has not only enacted legislation regarding the conditions of an animal's confinement, it has addressed issues concerning an animal's abandonment, malnourishment, poisoning, exposure, sale, carrying animals in a cruel manner, clipping a dog's ears, operating upon a horse's tail, and the like. See, Article 26, Agriculture & Markets Law §§ 350 et. seq. If additions or modifications need be made to the law, the legislature may so act. Currently, they may act without being burdened with considerations of personhood, which would evoke fundamental issues of liberty and equal protection.

2. What Rights Would Petitioner Have The Courts Recognize Beyond The Animal's "Bodily Liberty?"

NRP has already told the courts that it intends to seek not only a right of "bodily liberty," but *other rights*, as well. *Nonhuman Rights Project, Inc. v. Presti*, Index No. 151725, Supreme Court (County of Niagra), Transcript of Hearing re: Kiko, 12/9/13 at 14, lines 2-8. The extent of such rights, NRP says, would be determined "on a case by case basis." *Id.*

Petitioner thus has it backwards: It would have the legislature decide what nonhuman animals are *persons* and have the court's decide "on a case-by-case basis" the scope of the rights that each species is entitled.

3. <u>What Other Nonhuman Creatures Should Be Accorded Such Rights?</u>

Would such rights only apply to chimps? In an interview with Stephen Wise, the NRP president and lawyer is asked, *Where are you going next?* His answer:

> [W]e're looking at those top states and seeing whether there are apes, cetaceans (whales and dolphins) or elephants there who need our help. . .

See, Q & A with Steven M. Wise, 4/24/14, http://www.nonhumanrightsproject.org/2014/04/24/q-a-with-steven-m-wise/ (accessed on March 10, 2014).

Petitioner has contended that personhood is a public policy decision for the legislature, yet it intends to seek personhood for other animals by appealing to the courts:

> We've tentatively chosen our next state, in fact, and we've tentatively chosen certain elephants in that state as the petitioners for our next habeas corpus petitions."

Petitioner has not suggested what guidance the courts would be expected to provide owners of pets, farmers, zookeepers and others (*e.g.*, owners of autonomous, self-driving cars and robots) should the courts start declaring personhood nonhuman autonomous animals and artifacts.

CONCLUSION

The writ of *habeas corpus,* under the common law, has never been applied to *persons,* only to *human beings*. The State of New York has never expanded nor contracted the scope of beings subject to *habeas corpus* actions under the common law, and the NRP has provided no good reason to expand the application of such actions under the common law to any being other than a *human being*. Since Tommy is not a human being—nor has a chimp ever been equated to human being, a fact which even the NRP has admitted—the writ was properly denied.

For the reason set forth above, Petitioner's motion should be denied.

Dated: New York, New York
March 10, 2015

Respectfully submitted,

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