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CASE COMMENT**HABEAS CORPUS AND THE CAMPAIGN FOR ANIMAL PERSONHOOD**

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THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HERCULES and LEO, Petitioners, against SAMUEL L. STANLEY, JR., M.D., as President of State University of New York at Stony State University of New York at Stony Brook AKA Stony Brook University, Respondents. August 5, 2015 (Unreported)

‘For four thousand years, a thick and impenetrable legal wall separated all human from all nonhuman animals. On one side, even the most trivial interests of a single species – ours – are jealously guarded. We have assigned ourselves, alone among the million animal species, the status of “legal persons.” On the other side of that wall lies the legal refuse of an entire kingdom, not just chimpanzees and bonobos but also gorillas, orangutans, and monkeys, dogs, elephants, and dolphins. They are “legal things.” Their most basic and fundamental interests – their pains, their lives and their freedoms – are intentionally ignored, often maliciously trampled, and routinely abused. Ancient philosophers claimed that all nonhuman animals had been designed and placed on this earth just for human beings. Ancient jurists declared that law had been created just for human beings. Although philosophy and science have long since recanted, the law has not.’ (Wise, 2000: 4)

The case of the Nonhuman Rights Project and Stony Brook University (hereafter *Stony Brook*) is the most recent unsuccessful attempt by Steven Wise and the Non-Human Rights Project (NhRP) to breach this impenetrable legal wall by battering it with the great writ of habeas corpus. NhRP seeks to challenge the binary legal distinction between human beings enjoying the status and protection of legal personality whilst animals are, legally at least, mere property (NhRP, 2015). It seeks to extend legal protection to ‘appropriate non-human animals’ including great apes and elephants. (NhRP, 2015).

Habeas corpus ad subjiciendum is a common law writ that has the effect of bringing a detained person before a court for the purpose of reviewing the lawfulness of the detainee’s detention. The writ has an ancient pedigree and has developed into something of an emblem within common law jurisdictions as an example of the ability of the common law to protect the liberty of the subject. It is associated with Chapter 24 of Magna Carta (1215) which states:

‘No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will. We not pass upon him, nor condemn him but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.’

Lord Hoffman in *A v Secretary of State for the Home Department* [2005] UKHL 71 at para 83 argued that it ‘carries a symbolic significance as a touchstone of English liberty which influences the rest of our law.’ It has been used to challenge detention by both public and private authority, to free slaves and to protect women from domestic abuse; see *Somerset v Stewart* (1772) 98 ER 499 and *R v. Jackson* [1891] 1 QB 671. For a more detailed discussion that explores some of the myths surrounding the historical development of the habeas corpus see Brown (2000).

NhRP is part of an animal rights movement that can be traced back as least as far as Peter Singer’s 1975 work *Animal Liberation* which made the case, arguing from a utilitarian perspective, that the interests of animals should be given an equal moral consideration to those of humans. This argument was developed in the 1993 collection of essays *The Great Ape Project* edited by Singer and Paola Cavalieri. This included a *Declaration on Great Apes* which called for, ‘the extension of the community of equals to include all great apes: human beings, chimpanzees, gorillas and orang-utans. “The community of equals” is the moral community within which we accept certain basic moral principles or rights as governing our relations with each other and enforceable at law.’ (Cavalieri and Singer, 1993: 4) (see also Kolber (2002)) According to the *Declaration* these rights should include, the right to life, the protection of individual liberty and the prohibition of torture.

Facts and decision

The petition brought in *Stony Brook* aimed to take a step towards establishing the community of equals by making a habeas corpus petition on behalf of two chimpanzees, Hercules and Leo, who are the property of the State University of New York and used for the purpose of experimentation at their Stony Brook campus. The petitioner was relying on Article 70 of the New York Civil Practice Law and Rules, which governs the procedure for the common law writ of habeas corpus. The petitioner had been granted an order for Stony Brook to show cause under CPLR 70 in April 2015 and the court heard oral arguments as to the lawfulness of the chimpanzee’s detention in May 2015. The court was careful to make it clear that, in granting the order to show cause, it did not need to make an initial determination as to whether or not Hercules and Leo were persons in law. This did not prevent some rather excitable contemporary international press coverage of the case which wrongly assumed that this decision had the effect of giving the chimpanzees the status of legal persons (see Barnes (2015)).

Although Judge Barbara Jaffe, sitting in the Supreme Court of the State of New York, rejected the petition for a writ of habeas corpus she emphasised that, in reaching her decision, she felt herself bound by an existing superior court precedent of *People ex rel Nonhuman Rights Project, Inc v Lavery*, 124 AD3d 148,150 [3c Dept 2014]. This case was similar to *Stony Brook* in that it concerned the NhRP seeking a writ of habeas corpus for Tommy, a chimpanzee held

in a shed in trailer park sales yard. Here the court were persuaded by two arguments, one definitional and the other based on the social contract. An animal, by definition, is not a human being and therefore is not a natural legal person, and furthermore, legal personhood is dependent on being the bearer of rights duties and the court accepted that a chimpanzee is unable to be a bearer of duties. Thus Judge Jaffe was bound to conclude that, as a chimpanzee is not a legal person, it cannot therefore be the subject of a writ of habeas corpus.

Discussion

Despite ruling against NhRP, Judge Jaffe raises a number of issues which are pertinent to common law jurisdictions and which indicate a degree of sympathy for the petitioner's arguments; two of which will be briefly explored here. Firstly, Judge Jaffe places the claim to extend habeas corpus to the chimpanzees in the context of how the common law in general, and habeas corpus in particular, have served as an engine in extending the ambit of legal protections. Reference is made to the origins of the writ in Magna Carta (1215) and its status as the great writ, quoting from *Figuroa v Walsh* 2008 WL1945350 [ED NY 2008] that 'The great writ of habeas corpus lies at the heart of our liberty.' She emphasised the fact that although there is no precedent for issuing a writ of habeas corpus in favour of an animal this is not in itself determinative; a point acknowledged in *Lavery*. She argues that the law has developed to extend rights, and sometimes the status of legal personhood, to classes of persons previously denied such protections including slaves, women and homosexuals. She quotes from the recent landmark decision of the United States Supreme Court in *Obergefell v Hodges* (2015) US, 135 S Ct 2602, on the constitutional status of same sex marriage where it was acknowledged that 'If rights were defined by those who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.' Indeed, Jaffe concedes in her concluding remarks that the tide of the common law may be turning in favour of these animals, '[e]fforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed' (*Stony Brook* p.32).

Secondly, Judge Jaffe points out that even if she were not bound by *Lavery* the decision regarding the legal personhood of Hercules and Leo would be best made, 'if not by the Legislature, then by the Court of Appeals, given its role in setting state policy' (*Stony Brook* p.26). This shows a difference in emphasis between the decisions in *Lavery* and *Stony Brook* as Judge Jaffe is pointing to the fact that the decision of conferring the status of legal personality should be decided by issues of context and policy rather than definition. She contends that the 'determination of whether an entity or being counts as a legal person is largely context – specific, and not necessarily consistently made.' (*Stony Brook*: 26)

These two themes in Judge Jaffe's reasoning gives some comfort to those who hope that the tide of the common law is turning in favour of the proposition that the status of legal person can and should be extended beyond human beings to animals. Indeed, if the case can be

made that the autonomy and self-determination of chimpanzees is such that they should be afforded the right not to be subject to arbitrary detention, then it is reasonable that they should be considered legal persons for the particular context of habeas corpus. Nor does the argument from social contract appear to be insurmountable as the law in certain contexts already provides rights to persons who it deems to be incapable of bearing duties, including those mentally incapacitated and minors.

The NhRP have applied to the Appellate Division of the Supreme Court of the State of New York (NhRP, 2015) but, regardless of the outcome in this particular case, Judge Jaffe's judgment illustrates that the legal wall between humans and animals may not be as impenetrable as it first appears.

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