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A New York Appellate Court Takes a First Swing at Chimpanzee Personhood: And Misses

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A NEW YORK APPELLATE COURT TAKES A FIRST SWING AT CHIMPANZEE PERSONHOOD. AND MISSES.

STEVEN M. WISE†

ABSTRACT

Beginning in late 2013, the Nonhuman Rights Project began filing common law habeas corpus petitions with attached expert affidavits on behalf of chimpanzees in New York State, alleging that, as autonomous beings, chimpanzees must be recognized as legal "persons" with the fundamental common law right to bodily liberty. One such petition, on behalf of a chimpanzee named Tommy in upstate New York, led to an intermediate appellate decision in 2014—the *Lavery* case—in which the court denied relief to Tommy on the unprecedented grounds that "personhood" (the capacity to have any legal right) requires a correlative ability to bear duties and responsibilities, and stated that chimpanzees lacked that capacity. Recognizing that its decision would strip rights from millions of humans who lacked the capacity for duties and responsibilities (e.g., infants, the comatose, and the mentally ill), the *Lavery* court opined that all humans would continue to be eligible for personhood because, as a species, they are "collectively" capable of bearing legal responsibility and submitting to social duties. The mainstream view, and the view of the New York Court of Appeals, has long held that the question of who is a person must be answered by reference to public policy, not biology. *Lavery* ignored this fundamental teaching and misapprehended the nature of the rights sought, as well as the philosophical and political foundations of those rights. *Lavery* merits scrutiny because it represents a misunderstanding of the relationship between rights and duties, constitutes a drastic and arbitrary departure from centuries of habeas corpus precedent, and contradicts a correct decision of the New York Court of Appeals.

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INTRODUCTION

In December 2013, the Nonhuman Rights Project, Inc. (NhRP) commenced three lawsuits on behalf of four chimpanzees that challenged the chimpanzees' status as legal "things" that lack the capacity to possess any legal rights.[1] The lawsuits petitioned for common law writs of habeas corpus and orders to show cause that demanded that each chimpanzee be recognized as a "person" under the common law of habeas corpus and within the meaning of New York Civil Practice Law and Rules (CPLR) Article 70.[2] The NhRP filed one such petition in the New York State

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1. *Clients, Hercules and Leo (Chimpanzees): Two Former Lab Chimpanzees Exploited for Scientific Research, Waiting to Be Released to Sanctuary*, NONHUMAN RIGHTS PROJECT [hereinafter *Hercules and Leo*], https://www.nonhumanrightsproject.org/hercules-leo (last visited Mar. 21, 2017); *Client, Kiko (Chimpanzee): A Former TV Animal Actor, Partially Deaf from Physical Abuse*, NONHUMAN RIGHTS PROJECT [hereinafter *Kiko*], https://www.nonhumanrightsproject.org/client-kiko (last visited Mar. 21, 2017); *Client, Tommy (Chimpanzee): Our First Nonhuman Animal Client*, NONHUMAN RIGHTS PROJECT [hereinafter *Tommy*], https://www.nonhumanrightsproject.org/client-tommy (last visited Mar. 21, 2017).

2. *Hercules and Leo*, *supra* note 1; Nonhuman Rights Project, Inc. *ex rel.* Hercules v. Stanley, No. 32098/2013 (N.Y. Sup. Ct. Suffolk Cty. filed Dec. 5, 2013); *Kiko*, *supra* note 1; Nonhuman Rights Project, Inc. *ex rel.* Kiko v. Presti, No. 151725/2013 (N.Y. Sup. Ct. Niagara Cty. filed Dec. 3, 2013); *Tommy*, *supra* note 1; Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery, No. 002051/2013 (N.Y. Sup. Ct. Fulton Cty. filed Dec. 2, 2013). Article 70 governs the procedure applicable to all habeas corpus actions and requires the court to issue an order to show cause rather than a writ of habeas corpus when the petitioner does not demand production of the detainee in court. N.Y. C.P.L.R. 7001, 7003(a) (McKinney 2017). As the NhRP was not demanding production of the chimpanzees, it sought an order to show cause in all cases. *See* Verified Petition at 16, Nonhuman Rights Project *ex rel.* Kiko v. Presti, N.Y. Sup. Ct. (Dec. 2, 2013), https://www.nonhumanrightsproject.org/content/uploads/Niagara-Verified-Petition-E.Stein-and-S.Wise_.pdf; Verified Petition at 16, Nonhuman Rights Project *ex rel.* Hercules & Leo v. Stanley, N.Y. Sup. Ct. (Dec. 2, 2013), https://www.nonhumanrightsproject.org/content/uploads/Suffolk-Verified-Petition-of-E.Stein-and-S.Wise_.pdf; Verified Petition at 16, Nonhuman Rights Project *ex rel.* Tommy v. Lavery, N.Y. Sup. Ct. (Dec. 2, 2013),

Supreme Court, Fulton County on behalf of Tommy, a chimpanzee living alone in a cage in a warehouse on a used trailer lot (Tommy Petition).[3]

Attached to the Tommy Petition were approximately 100 pages of expert affidavits from many of the most respected chimpanzee cognition researchers in the world, which demonstrated that chimpanzees possess numerous complex cognitive abilities that individually and together are sufficient for legal personhood for the purpose of common law habeas corpus.[4] Their most significant cognitive ability was autonomy, which subsumes many of their other cognitive abilities, including their possession of (1) an autobiographical self; (2) episodic memory; (3) self-determination; (4) self-consciousness; (5) self-knowingness; (6) self-agency; (7) referential and intentional communication; (8) empathy; (9) a working memory; (10) language; (11) metacognition; (12) numerosity; and (13) material, social, and symbolic culture; as well as their ability: (14) to plan; engage in (15) mental time-travel; (16) intentional action; (17) sequential learning; (18) mediational learning; (19) mental state modeling; (20) visual perspective-taking; (21) cross-modal perception; (22) to understand cause-and-effect and experiences of others; (23) to imagine, (24) imitate, (25) engage in deferred imitation, (26) emulate, and (27) innovate; and (28) to use and make tools.[5]

As habeas corpus "is deeply rooted in our cherished ideas of individual autonomy and free choice,"[6] the NhRP argued that, as a matter of common law liberty and equality, a chimpanzee's capacity for autonomy was sufficient to mandate his or her personhood for the purpose of a common law writ of habeas corpus.[7] After holding an ex parte hearing on the Tommy Petition, the trial court found that the word "person" as used in CPLR Article 70 did not include chimpanzees and refused to sign the requested order to show cause.[8] The NhRP appealed to the New York State Supreme Court, Appellate Division, Third Judicial Department (Third Department) which, in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*,[9] held that Tommy was not a person entitled to a common

https://www.nonhumanrightsproject.org/content/uploads/Petition-re-Tommy-Case-Fulton-Cty-NY.pdf.

3. Verified Petition, Nonhuman Rights Project *ex rel.* Tommy v. Lavery, *supra* note 2, at 3.

4. *Id.* at 5–6.

5. *Id.* at 6.

6. Nonhuman Rights Project *ex rel.* Hercules & Leo v. Stanley, 16 N.Y.S.3d 898, 903 (N.Y. Sup. Ct. 2015).

7. Petitioner's Memorandum of Law in Support of Order to Show Cause & Writ of Habeas Corpus and Order Granting the Immediate Release of Tommy at 62–63, Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery, No. 002051/2013 (N.Y. Sup. Ct. Fulton Cty. filed Dec. 2, 2013), https://www.nonhumanrightsproject.org/content/uploads/Memorandum-of-Law-Tommy-Case.pdf.

8. People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248, 249 (N.Y. App. Div. 2014), *leave to appeal den.*, 38 N.E.3d 828 (N.Y. 2015).

9. *Id.*

law writ of habeas corpus or any other legal right because chimpanzees are unable to bear duties and responsibilities.[10]

At first blush, the *Lavery* decision—a brief five-page opinion about the novel issue of legal personhood for a chimpanzee—may appear a minor coda to the rich and lengthy history of habeas corpus. The court, however, for the first time in Anglo-American history, held that only an entity capable of bearing duties and responsibilities may be a person for any purpose, including habeas corpus. The decision further contradicted the New York Court of Appeals decision in *Byrn v. New York City Health & Hospitals Corp.*,[11] which stated that personhood is not determined by reference to biology or taxonomy, but is a matter of public policy.[12] *Lavery* merits scrutiny as it represents a drastic departure from centuries of habeas corpus precedent and contradicts the decision of New York's highest court.[13]

Part I of this Article will set out the salient parts of the *Lavery* decision. Part II will explain how *Lavery* rested in substantial part on the court's failure to consider that the fundamental right to bodily liberty is an immunity-right for which a capacity for bearing duties and responsibilities is irrelevant. Part III will describe how the *Lavery* court's decision also rested in substantial part upon its misinterpretation of social contract theory. Part IV will note that jurisprudential writers, legislatures, and courts have long recognized entities that lack the capacity to bear duties and responsibilities as "persons." Part V will explain how *Lavery* improperly took judicial notice of the alleged scientific fact that chimpanzees cannot bear duties and responsibilities. Part VI will discuss why the *Lavery* court erred in finding that humans who are unable to bear duties and responsibilities nevertheless are persons with the same habeas corpus rights as humans who are able to bear duties and responsibilities because humans "collectively" have that capacity.

I. THE *LAVERY* DECISION

After the *Lavery* court located no precedent in either state law or English common law that a nonhuman animal could be a person "capable of asserting rights for the purpose of state or federal law,"[14] it acknowl-

10. *Id.* at 251.

11. 286 N.E.2d 887 (N.Y. 1972).

12. *Id.* at 889. The Third Department did not analyze the NhRP's public policy arguments that, both as a matter of liberty and equality, Tommy was entitled to be released pursuant to the common law of habeas corpus. *Lavery*, 998 N.Y.S.2d at 249.

13. *See Lavery*, 998 N.Y.S.2d at 251; *Bryn*, 286 N.E.2d at 889.

14. *Lavery*, 998 N.Y.S.2d at 249–50. None of the cases cited concerned either general common law or common law habeas corpus specifically. *See id.* at 250; *see also* United States v. Mett, 65 F.3d 1531, 1533–34 (9th Cir. 1995) (discussing whether a corporation has standing to raise a Sixth Amendment claim); Waste Mgmt. of Wis., Inc. v. Fokakis, 614 F.2d 138, 139 (7th Cir. 1980) (analyzing whether federal courts can hear a corporation's collateral attack under the Civil Rights Act); Sisquoc Ranch Co. v. Roth, 153 F.2d 437, 440–41 (9th Cir. 1946) (holding that a corporate employer could not rely on the fact that its employee was inducted into the military as support for a

edged that this "does not, however end the inquiry as the writ has over time gained increasing use given its 'great flexibility and scope.'"[15]

The court then opined that "the liberty rights protected by such writ, 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 . . . ."[16] Relying almost exclusively upon a pair of law review articles by the same author, the court stated that "[u]nder 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] rights.'"[17] The court further stated that "legal personhood has consistently been defined in terms of both rights and duties."[18] Citing *Black's Law Dictionary*'s 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,"[19] the court stated that "[c]ase law has always recognized the correlative rights and duties that attach to legal personhood."[20] It noted that "[a]ssociations of human beings, such as corporations and municipal entities, may be considered legal persons, because they too bear legal duties in exchange for their legal rights."[21]

Finally, the court took judicial notice, sua sponte, that

> [n]eedless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights—such as the fun-

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habeas petition on its own behalf); Graham v. State, 267 N.Y.S.2d 1009, 1009 (N.Y. App. Div. 1966) (holding that the writ of habeas corpus is not available as a method to secure the return of property).

15. *Lavery*, 998 N.Y.S.2d at 250 (quoting People *ex rel.* Keitt v. Mcann, 220 N.E.2d 653, 655 (N.Y. 1966)).

16. *Id.*

17. *Id.* (quoting Richard L. Cupp, Jr., *Children, Chimps, and Rights, Arguments from "Marginal" Cases*, 45 ARIZ. ST. L.J. 1, 14 (2013)); Richard L. Cupp Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 69 (2009) [hereinafter Cupp, *Moving Beyond Animal Rights*).

18. *Id.* at 250–51 (citing *Person*, BLACK'S LAW DICTIONARY (7th ed. 1999)).

19. *Id.* (quoting *Person*, BLACK'S LAW DICTIONARY (7th ed. 1999)).

20. *Id.* at 251 (citing Smith v. ConAgra Foods, Inc., 431 S.W.3d 200, 203–04 (Ark. 2013) (citing Calaway v. Practice Mgmt. Servs., Inc., 2010 Ark 432, *4 (2010) (defining a "person" as "a human being or an entity that is recognized by a law as having the rights and duties of a human being")); Wartelle v. Women's & Children's Hosp., Inc., 704 So. 2d 778, 780 (La. 1997) (finding that the classification of an entity as a "person" is made "solely for the purpose of facilitating determinations about the attachment of legal rights and duties"); Amadio v. Levin, 501 A.2d 1085, 1098 (1985) (Zappala, J., concurring) (noting that "'(p)ersonhood' as a legal concept arises not from the humanity of the subject but from the ascription of rights and duties to the subject")).

21. *Id.* at 251 (citing Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888); Western Sur. Co. v. ADCO Credit, Inc., 251 P.3d 714, 716 (Nev. 2011); State v. A.M.R., 51 P.3d 790, 791 (Wash. 2002); State v. Zain, 528 S.E.2d 748, 755–59 (W. Va. 1999)).

damental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings.[22]

II. *LAVERY* RESTED IN SUBSTANTIAL PART ON A FAILURE TO CONSIDER THAT THE RIGHT TO BODILY LIBERTY DEMANDED WAS AN IMMUNITY-RIGHT AND NOT A CLAIM-RIGHT

The great Yale jurisprudence professor, Wesley N. Hohfeld's, conception of the comparative structure of rights has for a century been employed as the overwhelming choice of courts, jurisprudential writers, and moral philosophers when they discuss what rights are.[23] Hohfeld began his famous article by noting that "[o]ne of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties'"[24] and that "the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense."[25]

Lavery apparently made this erroneous "express or tacit assumption" and, as explained below, accordingly mistook the NhRP's demand for Tommy's fundamental "immunity-right" to bodily liberty that is protected by a common law writ of habeas corpus for a "claim-right." This mistake, combined with the improper linkage of personhood for the purpose of a common law writ of habeas corpus to an ability to bear duties and responsibilities, caused the *Lavery* court to commit a serious "category of rights" error. Accordingly, the court's statement that "the ascription of rights has historically been connected with the imposition of societal obligations and duties" was incorrect.[26] The statement was particularly inappropriate in the context of a common law writ of habeas corpus to enforce the fundamental common law immunity-right to bodily liberty, with the court implying that any entity unable to fulfill duties and responsibilities could therefore be indefinitely deprived of her autonomy and essentially enslaved for life.[27] No case cited by the court supported this proposition or concerned bodily liberty or habeas corpus.[28]

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22. *Id.*

23. *See generally* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913).

24. *Id.* at 28.

25. *Id.* at 30.

26. *Lavery*, 998 N.Y.S.2d at 249 (N.Y. App. Div. 2014), *leave to appeal den.*, 38 N.E.3d 828 (N.Y. 2015).

27. The argument does not change because Hohfeld may have originally described his system of rights with respect to "persons" and/or believed that "persons" meant human beings. Hohfeld, for example, knew that human fetuses were both human and not "persons." *See* Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 15–16 (1884). Moreover, who or what Hohfeld understood to be a "person" a century ago is irrelevant to how his system of legal rights generally operates. It does not require New York courts to apply Hohfeldian rights only to those "persons" Hohfeld may have imagined. This is especially true in New York, where "person" is not synonymous with "human,"

Hohfeld pointed out that John Chipman Gray, the distinguished jurisprudential writer, made the same mistake in his *Nature and Sources of the Law*.[29]

> In [Gray's] chapter on "Legal Rights and Duties," the distinguished author takes the position that a right always has a duty as its correlative; and he seems to define the former relation substantially according to the more limited meaning of "claim." Legal privileges, powers, and immunities are *prima facie* ignored, and the impression conveyed that all legal relations can be comprehended under the conceptions, "right" and "duty."[30]

A claim-right such as breach of contract, which the NhRP did not demand, does correlate with a duty.[31] Even then, only a so-called "Will" theorist, as opposed to an "Interest" theorist, would agree that the requirement of being able to bear duties and responsibilities would apply to Tommy's lawsuit to enforce a contractual right, while only the most restrictive Will theorist would limit a claim-right to entities that possess the capacity to assert claims within a moral community.[32] Yet this restrictive Will Theory marks *Lavery*'s personhood test for the immunity right to bodily liberty, an immunity-right that the U.S. Supreme Court referred to when it stated that "'[t]he right to one's person may be said to be a right of complete *immunity*: to be let alone.'"[33]

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and where the determination of who and who is not a "person" turns not on biology, but on public policy and moral principle. Byrn v. New York City Health & Hosp. Corp., 31 N.Y.2d 194, 201 (N.Y. 1972). It is no better public policy or good moral principle to act irrationally and with bias in determining who *is* a "person" than it is in determining what rights one should have *as* a "person."

28. *See* Lewis v. Burger King, 344 Fed. App'x 470, 472 (10th Cir. 2009) (rejecting plaintiff's claim that her service dog had standing to sue under the Americans with Disabilities Act of 1990); Cetacean Cmty. v. Bush, 386 F.3d 1169, 1179 (9th Cir. 2004) (holding that cetaceans lacked standing under the Endangered Species Act and were not within that statute's definition of "person"); Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, 842 F. Supp. 2d 1259, 1263 (S.D. Cal. 2012) (explaining that the legislative history makes clear Thirteenth Amendment was only intended to apply to human beings); Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45, 49 (D. Mass. 1993) (finding that a dolphin is not a "person" within meaning of Administrative Procedure Act, section 702).

29. Hohfeld, *supra* note 23, at 34; *see* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27–62 (Colum. Univ. Press 1909).

30. Hohfeld, *supra* note 23 at 34. Gray's error becomes obvious when one reads that, in the same book, he agreed that both nonhuman animals and supernatural beings could be "persons." *See* GRAY, *supra* note 29, at 27–28; *see also* Visa Kurki, *Why Things Can Hold Rights: Reconceptualizing the Legal Person* 3 (Univ. of Cambridge Faculty of Law Research Paper, No. 7/2015 (citing JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 19 (David Campbell & Philip Thomas eds., 1997)), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563683.

31. STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 56–57 (2000) [hereinafter WISE, RATTLING THE CAGE]; Steven M. Wise, *Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793, 807–11 (1998) [hereinafter Wise, *Hardly a Revolution*].

32. WISE, RATTLING THE CAGE, *supra* note 31, at 57; Wise, *Hardly a Revolution*, *supra* note 31, at 808–10.

33. Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (emphasis added) (quoting THOMAS M. COOLEY, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 29 (Chicago, Callaghan & Co. 1879).

An immunity-right correlates not with a duty, but with a disability.[34] Other examples of immunity-rights are the right not to be enslaved guaranteed by the Thirteenth Amendment to the U.S. Constitution, in which all others are disabled from enslaving those covered by that Amendment,[35] and the First Amendment right to free speech, which the government is disabled from abridging.[36] One need *not* be able to bear duties and responsibilities to possess the fundamental right to bodily liberty any more than the right to be free from enslavement or the right to free speech.

The U.S. Supreme Court has illustrated the difference between a claim-right and an immunity-right.[37] Eight years before *Harris*, the Supreme Court in *Roe v. Wade*[38] recognized a woman's immunity-right to privacy and against interference by the state with her decision to have an abortion in the earlier stages of her pregnancy.[39] After the *Harris* plaintiff claimed she therefore had the right to a state-financed abortion she was herself unable to afford, the Supreme Court recognized that the woman's immunity-right to an abortion correlated with the state's disability to interfere in her decision to have the abortion but did not correlate with the state's duty to fund the abortion.[40] Therefore, she had no claim against the state for payment for her abortion.[41]

The NhRP argued that Tommy's common law immunity-right to bodily liberty protected by common law habeas corpus correlates solely with the respondents' disability to imprison him. The existence or nonexistence of Tommy's ability to bear duties and responsibilities was irrelevant, as it is irrelevant to every immunity-right.[42]

III. *LAVERY* MISUNDERSTOOD THE MEANING OF SOCIAL CONTRACT

Lavery stated that

> the liberty rights protected by such writ, 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 . . . . Under this view, society extends rights in exchange for an express or

34. WISE, RATTLING THE CAGE, *supra* note 31,. at 57–59; Wise, *Hardly a Revolution*, *supra* note 31, at 810–15.
35. U.S. CONST. amend. XIII, § 1.
36. U.S. CONST. amend. I.
37. Harris v. McRea, 448 U.S. 297, 316–18 (1980).
38. 410 U.S. 113 (1973).
39. *Id.* at 154.
40. *Harris*, 448 U.S. at 301–02.
41. *Id.* at 314–15.
42. Petitioner's Oral Argument, Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery, 998 N.Y.S.2d 248 (N.Y. App. Div. 2014), https://www.nonhumanrights.org/content/uploads/Tommy-Appellate-Court-Transcript-100814.pdf.

implied agreement of its members to submit to social responsibilities. In other words, "Rights [are] connected to moral agency and the ability to accept societal responsibility for [those] rights."[43]

Here, *Lavery* misunderstood social contract, which addresses the authority of the state over the individual.[44] At its most elementary, social contract "is an agreement 'between the people and the government they create [that] binds the agencies of government to respect the blueprint of government and the rights retained by the people.'"[45] Courts generally invoke social contract in terms of the state's positive duty toward persons in the "aid, care and support of the needy" and in consideration of fundamental procedural rights.[46] Individuals surrender some freedoms to the state in exchange for the state's protection of other freedoms.[47] The *Lavery* court's position that social contract means "[s]ociety extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities" is therefore incorrect.[48] It is the government that grants express or implied agreement to be responsible.[49]

Lavery correctly notes that social contract emphasizes the accountability of the state to civil society.[50] John Locke argued that individuals would be bound morally by the law of nature not to harm each other, but without government to defend them people would have no security in their rights.[51] Under the social contract, "the State has an interest in protecting its citizens . . . . [T]his surely is at the core of the Lockean 'social contract' idea."[52] To this end, fundamental rights impede and temper the exercise of state power. Thus, rights cases invoke a breach of state responsibilities, not social responsibilities of the individual.[53]

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43. People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248, 251 (N.Y. App. Div. 2014), *leave to appeal den.*, 38 N.E.3d 828 (N.Y. 2015).

44. J.W. GOUGH, THE SOCIAL CONTRACT 2–3 (Oxford Univ. Press 1936).

45. State v. Santiago, 122 A.3d 1, 210 (Conn. 2015).

46. Tucker v. Toia, 371 N.E.2d 449, 451 (N.Y. 1977); Khrapunskiy v. Doar, 909 N.E.2d 70, 75 (N.Y. 2009) (citing *Tucker*, 371 N.E.2d at 451).

47. State v. Webb, 680 A.2d 147, 161 (Conn. 1996); William Uzgalis, *John Locke*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2017), https://plato.stanford.edu/entries/locke.

48. *Lavery*, 998 N.Y.S.2d 248, 249 (N.Y. App. Div. 2014).

49. *See generally* Lemmon v. People, 20 N.Y. 562, 602–04 (1860).

50. *Lavery*, 998 N.Y.S.2d at 251.

51. *See e.g.*, JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 12, 17 (Putnam ed., 1906) ("It is a vain and contradictory agreement to stipulate absolute authority on one side and obedience without limit on the other. Is it not clear that there is no obligation towards one from whom you have the right to demand everything? And does not this one condition, without equivalent or exchange, involve the nullity of the act?").

52. Roberts v. Louisiana, 431 U.S. 633, 646–47 (1977) (discussing criminal law).

53. *In re* Foster Care Status of Shakiba P., 587 N.Y.S.2d 300, 301 (N.Y. App. Div. 1992) ("Recognizing that 'it is the unique mandate of our courts to enforce the obligations we owe to children under our social contract[.]'"); People v. Wynn, 424 N.Y.S.2d 664, 667 (N.Y. Sup. Ct. 1980) (holding criminal rights to be from "a system of justice evolved over centuries from origins rooted in a fundamental philosophy processed from experience in our political and social ascent from historical tyrannies. It is a corporal part of our social contract covenanted by the [C]onstitution"); 500 W. 174 St. v. Vasquez, 325 N.Y.S.2d 256, 257 (N.Y. Civ. Ct. 1971) ("Perhaps chief among the assurances which together make up the social contract is the judiciary's promise

What social contract does not require is that the rights-holder be subject to correlative responsibilities. The individual holds the rights; but the government bears the responsibilities.[54] *Lavery*'s requirement that a legal person must be capable of reciprocal duties and responsibilities in order to have the right to habeas relief conflicts with social contract's actual focus on the responsibilities of the government.[55]

Lavery's confusion can be traced in part to its reliance upon the idiosyncratic theories of Professor Richard Cupp, who conflates social contract with the philosophical theory of contractualism that denies all rights to nonhuman animals and human beings alike because of their failure to qualify as rational agents. In Cupp's view, and therefore *Lavery*'s, contractualism necessarily connects rights to moral agency and the ability to accept societal responsibilities.[56] But Cupp fails to substantiate his singular notion that social contract requires that rights correlate with responsibilities, in support of which he cites no relevant case law, and fails to address the problem that the immunity-right to bodily liberty does not correlate with any duties.[57] Cupp's errors became *Lavery*'s.

Had the *Lavery* court not misunderstood social contract, it still would have erred in applying it for, as the U.S. Supreme Court has recognized, social contract lies "among the great juristic myths of history . . . . As a practical concept, from which practical conclusions can be drawn, it is valueless."[58] In contrast to *Lavery*, social contract theorists generally recognize that the foundation upon which contractualist arguments rests does not support the "express or implied agreement [of

never to close the courthouse doors. Through them should walk unhindered every citizen with a dispute to settle or a grievance to air.").

54. *In re* Gault, 387 U.S. 1, 20 (1967) (holding that the social compact "defines the rights of the individual and delimits the powers which the state may exercise"); *id.* at 18–22 (discussing due process).

55. Thus, in *State v. Lyon*, a New Jersey habeas corpus action brought by a slave, the court stated that "[i]n cases of this kind the state is bound to protect the rights of all who are within its dominion, and fulfill the duties which are imposed by the social contract." 1 N.J.L. 462, 464 (N.J. 1789).

56. People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248, 250–51 (N.Y. App. Div. 2014), *leave to appeal den.*, 38 N.E.3d 828 (N.Y. 2015); Cupp, *Moving Beyond Animal Rights*, *supra* note 17, at 68–71.

57. Even contractualist philosophers may argue it embraces nonhuman animals. *E.g.*, THOMAS M. SCANLON, WHAT WE OWE EACH OTHER 179, 183–84 (1998).

58. FPC v. Nat. Gas Pipeline Co., 315 U.S. 575, 605 n.6 (1942) (citing Gerard C. Henderson, *Railway Valuation and the Courts*, 33 HARV. L. REV. 1031, 1051 (1920)); *see also* Kentucky v. Dennison, 65 U.S. 66, 92 (1861) (discussing the imperfect obligation within the social compact "which binds every organized political community to avenge all injuries aimed at the being or welfare of its society. Certainly, this is the first and highest of all governmental duties; but nevertheless it is, in juridical language, a 'duty of imperfect obligation,' incapable in its essence of precise exposition or admeasurement, and its fulfillment depends on moral and social considerations, accosting the community at large, which a judicial tribunal can neither weigh, define, nor enforce"); Watson v. Employ. Liab. Assurance Corp., 348 U.S. 66, 79 n.2 (1954) ("Phrases like . . . 'the principles of the social compact' were in fashion . . . for stating intrinsic limitations on the exercise of all political power. More recently, the power of this Court to strike down legislation has been more acutely analyzed and less loosely expressed. Rhetorical generalizations have not been deemed sufficient justification for invalidating legislation").

rights-bearers] to submit to social responsibilities" because there is no such agreement.[59] Contractualism consists of hypotheticals, not legal fact.

Moreover, habeas corpus has always been available to those who are not part of the fictitious American "social contract." In *Rasul v. Bush*,[60] the Supreme Court stated, "Application of the habeas statute to persons detained at the base [in Guantanamo] is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm . . . ."[61]

These Guantanamo petitioners were not part of any social contract. In fact, the U.S. government alleged they desired to destroy any social contract that existed. Still they were eligible for habeas corpus. American courts followed a similar practice in the early years of the Republic.[62] In *Jackson v. Bulloch*,[63] for example, a black slave was freed pursuant to habeas corpus despite being doubly excluded from the social compact both because he was black and because he was a slave.[64]

IV. JURISPRUDENTIAL WRITERS, LEGISLATURES, AND COURTS RECOGNIZE ENTITIES WHO LACK THE CAPACITY FOR DUTIES AND RESPONSIBILITIES AS PERSONS

Lavery not only contradicts *Byrn*, but also sister common law and civil law countries that have declared that an entity may be a person without having the capacity to bear any duties and responsibilities. For instance, in 2012, an agreement between the indigenous peoples of New Zealand and the Crown granted New Zealand's Whanganui River "legal personality" so that the river owns its riverbed and is itself incapable of being owned.[65] In July of 2014, the Te Urewara park in New Zealand was designated a "legal entity, and has all the rights, powers, duties, and liabilities of a person."[66] In 2000, the Indian Supreme Court designated

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59. *Lavery*, 998 N.Y.S.2d at 250; *see e.g.*, Jean Hampton, *Contract and Consent*, *in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 179, 379–83 (Robert E. Goodin & Philip Pettit eds., 1993); Charles W. Mills, *Race and the Social Contract Tradition*, *in* READINGS IN POLITICAL PHILOSOPHY: THEORY AND APPLICATIONS 144, 144–47 (Diane Jeske & Richard Fumerton eds., 2012).

60. 542 U.S. 466 (2004).

61. *Id.* at 481–82, 481 n.11 (citing *inter alia* Somerset v. Stewart, Lofft 1, 98 Eng. Rep. 499 (K.B.1772); Case of the Hottentot Venus, 13 East 195, 104 Eng. Rep. 344 (K.B.1810)).

62. *See, e.g.*, United States v. Villato, 2 U.S. 370, 372 (1797) (granting habeas relief to a Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States).

63. 12 Conn. 38 (1837).

64. *Id.* at 38–39.

65. Tutohu Whakatupua Agreement Between the Whanganui and the Crown of New Zealand [2012] NZTS 10 (signed 30 August 2012), http://www.harmonywithnatureun.org/content/documents/193Wanganui%20River-Agreement--.pdf.

66. Te Urewera Act 2014, s 3 (N.Z.), http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183705.html.

the Sikh's sacred text as a legal person.[67] Pre-Independence Indian courts designated mosques as legal persons to the same end.[68] A pre-Independence Indian court designated a Hindu idol as a person with the capacity to sue.[69]

More to the exact point, on November 3, 2016, a Mendoza, Argentina court granted a writ of habeas corpus on behalf of a chimpanzee named Cecelia. The court declared Cecelia a "non-human legal person," and ordered her transferred to a Brazilian sanctuary.[70] Rejecting the claim that Cecelia could not avail herself of habeas corpus because she was not human,[71] the court stated that

> societies evolve in their moral conducts, thoughts, and values, and also in their legislations. More than a century ago most of the individual rights that are expressly recognized today in the constitutions of the different countries and by the Human Rights International Treaties were ignored and in some cases they were even overlooked, or worse, insulted like the rights related to gender perspective . . . .
>
> . . . At present, we can see an awareness of situations and realities that, although they have persisted since time immemorial, have not been recognized before by social actors. That is the case of gender violence, marriage equality, equal voting rights, etc. There is an identical situation with the awareness of animal rights.[72]

The Mendoza court stated that classifying

> animals as things is not a correct standard [that] . . . chimpanzees have the capacity to reason, they are intelligent, are conscientious of themselves, they have culture diversity, expressions of mental games, they manifest grief, use and construction of tools to access food or to solve simple problems of daily life, abstraction capacity, skills to handle symbols in communication, conscience to express emotions such as happiness, frustration, desires or deceit, planned organization for intraspecific battles and ambush for hunting, they have metacognitive capabilities, they have a moral, psychic, and physical status, they have their own culture, they have affectionate feelings (they ca-

67. Shiromani Gurdwara Parbandhak Comm., Amritsar v. Som Nath Dass, AIR 2000 SC 421 (India), https://indiankanoon.org/doc/1478973.

68. Masjid Shahid Ganj Mosque v. Shiromani Gurdwara Parbandhak Comm., AIR 1938 (Lahore) 369, ¶15 (full bench) (India), https://indiankanoon.org/doc/103551 5.

69. Pramath Nath Mullick v. Pradyunna Nath Mullick, 52 IA 245, 264 (India 1925), https://indiankanoon.org/doc/290902.

70. Terecer Juzgado de Garantías [Third Court of Guarantees], 3/11/2016, "Presented by A.F.A.D.A About the Chimpanzee "Cecilia" – Non Human Individual," (Arg.), 22–24, 32, https://www.nonhumanrightsproject.org/content/uploads/Chimpanzee-Cecilia_translation-FINAL-for-website-2.pdf.

71. *Id.* at 19.

72. *Id.* at 19–20.

ress and groom each other), they are capable of lying, they have symbols for human language and use tools.[73]

The court concluded it was "undeniable that great apes, like the chimpanzee . . . have non-human rights."[74]

Moreover, several states, including Connecticut, New York, and Massachusetts, expressly allow nonhuman animals to be trust "beneficiaries."[75] In so legislating, these states recognize nonhuman animals as "persons" with the capacity for legal rights, as only persons may be trust beneficiaries.[76] Before these statutes, "trusts for animals were void, because a private express trust cannot exist without a beneficiary capable of enforcing it, and because non-human lives cannot be used to measure the perpetuities period."[77]

For example, in 1996, the New York Legislature enacted Estates Powers and Trusts Law (EPTL) 7-6 (now EPTL 7-8) (a), which permitted "domestic or pet animals" to be designated as trust beneficiaries. The Sponsor's Memorandum stated the statute's purpose was "to allow animals to be made the beneficiary of a trust."[78] This section thereby acknowledged these nonhuman animals as persons capable of possessing legal rights. In *In re Fouts*,[79] the court recognized that five chimpanzees were "income and principal beneficiaries of the trust" and referred to its chimpanzees as beneficiaries throughout.[80] In 2010, the legislature removed "Honorary" from the title and the twenty-one year limitation on

73. *Id.* at 23–24.

74. *Id.* at 24.

75. *See* CONN. GEN. STAT. ANN. § 45a-489a (West 2009); N.Y. EST. POWERS & TRUSTS § 7-8.1 (McKinney 2010); MASS. GEN. LAWS ANN. ch. 203E, § 408(h) (West 2012) ("The measuring lives shall be those of the beneficiary animals, not human lives.").

76. *See* RESTATEMENT (THIRD) OF TRUSTS § 43 (2003) ("A person who would have capacity to take and hold legal title to the intended trust property has capacity to be a beneficiary of a trust of that property; ordinarily, a person who lacks capacity to hold legal title to property may not be a trust beneficiary."); RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS § 124 (1959); KATE MCEVOY, 20 CONN. PRAC., CONN. ELDER LAW § 2:16 (2016 ed.); Gilman v. McArdle, 65 How. Pr. 330, 338 (N.Y. Sup. Ct. 1883) ("Beneficiaries may be natural or artificial persons, but they must be persons . . . In general, any person who is capable in law of taking an interest in property, may, to the extent of his legal capacity, and no further, become entitled to the benefits of the trust."), *rev'd on other grounds*, 99 N.Y. 451 (1885); *see also Beneficiary*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("A *person* for whose benefit property is held in trust; esp., one designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy, etc.), or to receive something as a result of a legal arrangement or instrument. 2. A *person* to whom another is in a fiduciary relation, whether the relation is one of agency, guardianship, or trust. 3. A *person* who is initially entitled to enforce a promise, whether that person is the promisee or a third party.") (emphases added).

77. Margaret Turano, Commentary, *Practice Commentaries*, MCKINNEY'S N.Y. EST. POWERS & TR. L. § 7-8.1 (2010).

78. Bill Jacket, S.B. 5207, Ch. 159, Leg. 219th, 1996 Sess. (N.Y. 1996) (including Memorandum of Support from bill sponsors Norman Levy and Richard Gottfried).

79. 677 N.Y.S.2d 699 (N.Y. Sur. Ct. 1998).

80. *Id.* at 699; Feger v. Warwick Animal Shelter, 870 N.Y.S.2d 124, 126 (N.Y. App. Div. 2008) ("[T]he law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner.").

trust duration, and amended section (a) to read: "Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive" thereby dispelling any doubt that animals are capable of being beneficiaries in New York.[81]

The NhRP argued that a person is any entity with the capacity to bear rights *or* duties. But *Lavery* rejected this argument and relied upon two sources to support its claim that a person is any entity with the capacity to bear rights *or* duties.[82] However, both sources actually support the NhRP's position. The first source was the tenth edition of *Black's Law Dictionary*, which stated that "a person is any being whom the law regards as capable of rights *and* duties," quoting the seventh edition.[83] In turn the sole support for this statement in the seventh edition of *Black's Law Dictionary* was the tenth edition of John Salmond's *Jurisprudence*.[84] But every edition of Salmond, including the tenth edition, actually provides that "a person is any being whom the law regards as capable of rights *or* duties," just as the NhRP argued.[85] When the NhRP pointed out its error, *Black's Law Dictionary* promptly promised to correct it in its next edition.[86]

The second source that the tenth edition of *Black's Law Dictionary* relied upon was John Chipman Gray's *The Nature and Sources of the Law*,[87] which the Third Department quoted as stating that "the legal meaning of a 'person' is 'a subject of rights and duties.'"[88] But Gray makes clear that "[o]ne who has rights but not duties, or has duties but no rights is . . . a person."[89] In his discussion of legal personhood, Gray notes that "supernatural beings have been recognized as legal persons" in

81. N.Y. ESTATES, POWERS & TRUSTS LAW § 7-8.1(a) (McKinney 2010).

82. People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248, 250–51 (N.Y. 2014) (emphasis added).

83. *Person*, BLACK'S LAW DICTIONARY (10th ed. 2014) (quoting *Person*, BLACK'S LAW DICTIONARY (7th ed. 1999)).

84. *Person*, BLACK'S LAW DICTIONARY (7th ed. 1999) (quoting JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947)).

85. JOHN SALMOND, JURISPRUDENCE OR THE THEORY OF THE LAW 334 (1st ed. 1902) (emphasis added); JOHN SALMOND, JURISPRUDENCE OR THE THEORY OF THE LAW 277 (2d ed. 1907) (emphasis added); JOHN SALMOND, JURISPRUDENCE 272 (4th ed. 1913) (emphasis added); JOHN SALMOND, JURISPRUDENCE 272 (5th ed. 1916) (emphasis added); JOHN SALMOND, JURISPRUDENCE 272 (Sweet & Maxwell, Ltd., 6th ed. 1920) (emphasis added); JOHN SALMOND, JURISPRUDENCE 329 (Sweet & Maxwell, Ltd., 7th ed. 1924) (emphasis added); JOHN SALMOND, JURISPRUDENCE 329 (C.A.W. Manning ed., Sweet & Maxwell, Ltd., 8th ed. 1930) (emphasis added); JOHN SALMOND, JURISPRUDENCE 318 (Glanville L. Williams ed., Sweet & Maxwell, Ltd., 10th ed. 1947) (emphasis added); JOHN SALMOND, SALMOND ON JURISPRUDENCE 350 (Glanville Williams ed., Sweet & Maxwell, Ltd., 11th ed. 1957) (emphasis added); JOHN SALMOND, SALMOND ON JURISPRUDENCE 299 (P.J. Fitzgerald ed., Sweet & Maxwell, Ltd., 12th ed. 1966) (emphasis added).

86. James Trimarco, *Chimps Could Soon Win Legal Personhood*, YES! MAG. (Apr. 27, 2017), http://www.yesmagazine.org/peace-justice/chimps-could-soon-win-legal-personhood-20170428.

87. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (2d ed. 1921).

88. *Lavery*, 998 N.Y.S 2d, at 251.

89. GRAY, *supra* note 87, at 27.

several legal systems, such as in ancient Rome[90] and the Middle Ages of Germany,[91] and that

> animals may conceivably be legal persons . . . . [There may be] systems of Law in which animals have legal rights . . . . When, if ever, this is the case, the wills of human beings must be attributed to the animals. There seems no essential difference between the fiction in such cases and in those where, to a human being wanting in legal will, the will of another is attributed.[92]

The *Lavery* court also failed to recognize that whether a chimpanzee is a person for the purpose of demanding a common law writ of habeas corpus is a matter of policy, not biology. The court avoided the issue by sua sponte creating the novel and unsupported personhood requirement for any purpose of reciprocal rights and duties.[93]

V. *LAVERY* IMPROPERLY TOOK JUDICIAL NOTICE OF THE ALLEGED SCIENTIFIC FACT THAT CHIMPANZEES CANNOT BEAR DUTIES AND RESPONSIBILITIES

The capacity of chimpanzees to bear duties and responsibilities is not an adjudicative fact, but a scientific fact that requires proof through expert testimony and therefore is not appropriate for judicial notice. In the absence of expert testimony, a court may only take judicial notice of facts "which everyone knows,"[94] that is facts that are indisputable.[95] To be appropriate for judicial notice, the source of the underlying information must be of "indisputable accuracy,"[96] and so "patently trustworthy as to be self-authenticating."[97] "The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof."[98] Judicial notice is particularly inappropriate in "scientifically

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90. *Id.* at 40.
91. *Id.* at 41–42.
92. *Id.* at 42–43.
93. *See Lavery*, 998 N.Y.S.2d at 250–51.
94. States v. Lourdes Hosp., 100 N.Y.2d 208, 212–13 (N.Y. 2003) (quoting RESTATEMENT (SECOND) OF TORTS § 328D cmt. d (1965)).
95. *See* TOA Constr. Co. v. Tsitsires, 861 N.Y.S.2d 335, 339 (N.Y. App. Div. 2008); *see also* People v. Darby, 701 N.Y.S.2d 395, 397 (N.Y. App. Div. 2000); People v. Jovanovic, 700 N.Y.S.2d 156, 172 (N.Y. App. Div. 1999).
96. Crater Club, Inc. v. Adirondack Park Agency, 446 N.Y.S.2d 565, 567 (N.Y. App. Div. 1982).
97. People v. Kennedy, 503 N.E.2d 501, 507 n.4 (N.Y. 1986).
98. Dollas v. W.R. Grace & Co., 639 N.Y.S.2d 323, 324 (N.Y. App. Div. 1996) (quoting Ecco High Frequency Corp. v. Amtorg Trading Corp., 81 N.Y.S.2d 610, 617 (N.Y. Sup. Ct. 1948)). Judicial notice of a fact is only proper when adjudicative facts are commonly known to exist. *Id.* "Adjudicative facts" are "propositions of general knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." JACK B. WEINSTEIN, HAROLD KORN & ARTHUR R. MILLER, NEW YORK CIVIL PRACTICE, § 4511.02 (2d ed. 2005). *See* People v. Jones, 539 N.E.2d 96, 98 (N.Y. 1989) (explaining that "a court may take judicial notice of facts 'which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy'").

complex cases."[99] The only scientific facts appropriate for judicial notice are "notorious facts" that cannot be disputed and are supported by reference to "sources of indisputable reliability."[100] Judicial notice was further inappropriate "because of the novelty of the issue"[101] that the Tommy Petition raised.

The *Lavery* court improperly took judicial notice of the complex scientific fact that chimpanzees cannot bear duties and responsibilities despite the fact that the issue had not been noted, briefed, or argued by either party before either the lower or appellate court.[102] The *Lavery* court further failed to refer to any scientific authority supporting this fact and gave no notice to the NhRP that it intended to take judicial notice thereof. Had the NhRP been so apprised by the court, it could have presented expert evidence on the issue.[103]

In December 2015, the NhRP filed its second petition for a common law writ of habeas corpus and order to show cause in the New York State Supreme Court, New York County on behalf of Tommy and attached about sixty pages of expert affidavits directed solely to demonstrating that chimpanzees have the capacity to bear duties and responsibilities both in chimpanzee societies and in human/chimpanzee societies.[104] These make clear that the Third Department's decision to take judicial notice was both inappropriate and incorrect.

VI. THE *LAVERY* COURT ERRED IN DECLARING THAT HUMANS WHO ARE UNABLE TO BEAR DUTIES AND RESPONSIBILITIES ARE "PERSONS" BECAUSE HUMANS "COLLECTIVELY" HAVE THAT CAPACITY

An obvious problem with the *Lavery* court's holding that a person must have the capacity to bear duties and responsibilities is that millions of New Yorkers lack that capacity. In an attempt to avoid condemning them to thinghood, the court stated the following in footnote three:

> To be sure, some humans are less able to bear legal duties or responsibilities than others. These differences do not alter our analysis, as it is undeniable that, *collectively*, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this deci-

99. Hamilton v. Miller, 15 N.E.3d 1199, 1204 (N.Y. 2014).

100. *In re* Perra, 827 N.Y.S.2d 587, 592 (N.Y. Sup. Ct. 2006) (citing PRINCE, RICHARDSON ON EVIDENCE, § 2-204 et seq. (Farrell 11th ed.)) (court took judicial notice that smoking was harmful to the fetus based upon the much-discussed and much-respected "*2006 Surgeon General's Report On The Health Consequences of Involuntary Exposure to Tobacco Smoke* . . . , [a] document created by the Office of the Surgeon General and the U.S. Department of Health and Human Services.").

101. Brown v. Muniz, 878 N.Y.S.2d 683, 685 (N.Y. App. Div. 2009).

102. *See* People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248, 251 (N.Y. App. Div. 2014), *leave to appeal den.*, 38 N.E.3d 828 (N.Y. 2015); *see generally Tommy*, *supra* note 1.

103. *See Lavery*, 998 N.Y.S.2d at 249–51.

104. All affidavits are available on Tommy's Litigation page: https://www.nonhumanrights.org/client-tommy.

> sion should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise.[105]

The *Lavery* court cited nothing in support of this remarkable statement nor did it hint at what it intended "collectively" to mean. To be sure, millions of human beings can bear duties and responsibilities at a high level. Millions of human beings can bear duties and responsibilities at some level. And millions of human beings cannot bear duties and responsibilities at any level. Yet the court concluded that *all* human beings are legal persons not because they are human beings, which is indefensible, but because *some* human beings can bear duties and responsibilities.

The court's choice of species as the relevant touchstone was arbitrary and likely meant merely to reinforce the status quo. Other touchstones it could have chosen also contain all the human beings the court claimed are able to bear duties and responsibilities, but these are broader than the category of human being, such as vertebrates, primates, and mammals. Still other categories contain all human beings able to bear duties and responsibilities that are narrower than human being, such as sane humans and humans with an IQ above 60.

The philosopher, James Rachels, pointed out that any choice of category—as opposed to individual characteristics—as a condition for rights "assumes that we should determine how an individual should be treated, not on the basis of its own qualities but on the basis of other individual's qualities."[106] Something like *Lavery*'s unusual notion of group benefits has been occasionally employed to correct the effects of prior discrimination, such as affirmative action, not to invent new ways to discriminate.[107] But this does not mean that racial or gender affirmative action is, or should be, illegal. Harvard Law School Professor Laurence H. Tribe, who supports racial and sexual affirmative action, acknowledged the "tenaciously-held principle . . . with undeniable constitutional roots . . . that each person should be treated as an individual rather than as a statistic or as a member of a group—particularly of a group the individual did not knowingly choose to join."[108] Yet even those judges may exhibit what Professor Tribe called "considerable unease" in their discussions and rulings.[109]

That unease has not quieted. The Supreme Court has long required race-based admissions to meet strict scrutiny.[110] In 2003, the U.S. Supreme Court in *Gratz v. Bollinger*,[111] struck down a system of under-

105. *Lavery*, 998 N.Y.S.2d at 251 n.3 (emphasis added).

106. JAMES RACHELS, CREATED FROM ANIMALS 157 (1990).

107. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326, 328 (2003).

108. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1589 (2d ed. 1988); *see id.* at 1526–29.

109. *See id.* at 1523.

110. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504–06 (1989).

111. 539 U.S. 244, 244 (2003).

graduate admissions that allocated predetermined points to racial minority candidates.[112] That day, the Supreme Court also upheld a system of preferences that treated race as a relevant feature in a law school admission process with a holistic review.[113] Thirteen years later, the Supreme Court in *Fisher v. University of Texas*,[114] would note "the enduring challenge . . . to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity."[115]

There exists a common law promise of equality, as well, that belies the argument that persons must be able to bear duties and responsibilities. Equality has always been a vital New York value, embraced by constitutional law, statutes, and common law.[116] Article 1, § 11 of the New York Constitution contains both an Equal Protection Clause, modeled on the Fourteenth Amendment, and an anti-discrimination clause.[117] New York equality values are embedded into New York common law. There has long been a "two-way street between common law decision-making and constitutional decision-making" that had resulted in a "common law decisionmaking infused with constitutional values."[118] At common law, such private entities as common carriers, victuallers, and innkeepers may not discriminate unreasonably or unjustly.[119]

In harmony with common law equality principles that forbid private discrimination, the common law of equality embraces, at a minimum, its sister fundamental constitutional equality value—embedded within the

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112. *Id.* at 244, 246–47.

113. Grutter v. Bollinger, 539 U.S. 306, 306–10 (2003).

114. 136 S. Ct. 2198 (2016).

115. *Id.* at 2214.

116. Equality is an important value throughout Western jurisprudence. *See Vriend v. Alberta*, [1998] 1 S.C.R. 493, 536 (S.C.C.) ("The concept and principle of equality is almost intuitively understood and cherished by all."); HCJ 4541/94 Miller v. Minister of Defence 49(4) PD 94, ¶6 (1995) (Isr.) ("It is difficult to exaggerate the importance and stature of the principle of equality in any free, democratic and enlightened society."); HCJ 453/94 Israel Women's Network v. Government 48(5) PD 501, ¶ 22 (1994) (Isr.) ("The principle of equality, which . . . 'is merely the opposite of discrimination' . . . has long been recognized in our law as one of the principles of justice and fairness which every public authority is commanded to uphold."); *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, ¶ 29 (Austl.) ("equality before the law . . . [is an] aspiration[] of the contemporary Australian legal system"); *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Book II, 65 (Henry Reeve trans., 2007) ("Democratic nations are at all times fond of equality . . . for equality their passion is ardent, insatiable, incessant, invincible; they call for equality in freedom; and if they cannot obtain that, they still call for equality in slavery."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[A]ll men are created equal").

117. N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.").

118. Brief for Petitioner-Appellant at 38, Nonhuman Rights Project, Inc. v. Presti, 124 A.D.3d 1334 (N.Y. App. Div. 2014) (No. 14-00357); Judith S. Kaye, *Forward: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 746–47 (1992).

119. *See, e.g.*, Hewitt v. New York, 29 N.E.2d 641, 643–44 (N.Y. 1940); New York Tel. Co. v. Siegel-Cooper Co., 96 N.E. 109, 111 (N.Y. 1911); Lough v. Outerbridge, 38 N.E. 292, 294–95 (N.Y. 1894); People v. King, 18 N.E. 245, 248–49 (N.Y. 1888).

constitutions of New York, most other states, and the Constitution of the United States—that prohibits discrimination based on irrational means or illegitimate ends.[120]

A chimpanzee's common law classification as a "thing," unable to possess any legal rights, rests upon the illegitimate end of enslaving an autonomous being.[121]

Without such a requirement of legitimate public purpose it would seem useless to demand even the most perfect congruence between means and ends, for each law would supply its own indisputable—and indeed tautological—fit: if the means chosen burdens one group and benefits another, then the means perfectly fits the end of burdening just those whom the law disadvantages and benefitting just those whom it assists.[122]

In *Romer*, the Supreme Court struck down "Amendment 2" because its purpose of repealing all existing anti-discrimination positive law based upon sexual orientation was illegitimate.[123] It violated equal protection because "[i]t is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board."[124]

The test is whether persons are similarly situated for purposes of the law challenged.[125] "'[S]imilarly situated' cannot mean simply 'similar in the possession of the classifying trait.' All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test."[126] "The equal protection guarantee requires that laws treat all those who are similarly situated *with respect to the purposes of law* alike."[127] In *Goodridge*, the court swept aside the argument that the legislature could refuse same-sex couples the right to marry because the purpose of marriage is procreation, which they could not accomplish.[128] This argument "singles out the one unbridgeable

120. *See* Romer v. Evans, 517 U.S. 620, 633–34 (1996) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.").

121. *See* Affronti v. Crosson, 746 N.E.2d 1049, 1052 (N.Y. 2001) (discussing the permissibility of suspect purposes for creating classifications); *see, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959–60 (Mass. 2003); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 451–52 (1985) (Stevens, J., concurring).

122. TRIBE, *supra* note 108, at 1440.

123. 517 U.S. at 623–26.

124. *Id.* at 633; *see also Goodridge*, 798 N.E.2d at 962 (noting that same-sex marriage ban impermissibly "identifies persons by a single trait and then denies them protection across the board").

125. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 421–22 (Conn. 2008).

126. Varnum v. Brien, 763 N.W.2d 862, 882 (Iowa 2009).

127. *Id.* at 883.

128. 798 N.E.2d at 961–62.

difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage."[129]

Tommy is imprisoned for one reason: he is a chimpanzee. Possessing that "single trait," he was "denie[d] . . . protection across the board,"[130] to which his autonomy and ability to self-determine entitle him. Denying him his common law right to bodily liberty solely because he is a chimpanzee is therefore a tautology.

Even those who will never be competent, who have always lacked the ability and always will lack the ability, to choose, understand, or make a reasoned decision about medical treatment possess common law autonomy and dignity equal to the competent.[131] But if humans bereft even of sentience are entitled to personhood, courts must either recognize a chimpanzee's just equality claim to bodily liberty or reject the principle of equality. The court in *Lavery* opted, mistakenly, for the latter.[132]

Nor is there any rational connection between the right to bodily liberty sought and the *Lavery* court's novel "duties and responsibilities" requirement. The NhRP claimed that chimpanzees have a common law right to bodily liberty protected by the common law of habeas corpus.[133] To satisfy equality, the classification (*viz.*, the ability to bear duties and responsibilities) must be rationally related to the goal or purpose of the classification.[134] If, for instance, the right sought was a right to vote, right to drive, or a right to bear arms, then perhaps a logical connection would exist for *Lavery*'s classification. By way of example, the Supreme Court held that imposing a mandatory retirement age for judges was rationally connected to the state's interest in "maintaining a judiciary fully capable of performing the demanding tasks that judges must perform," because it is "an unfortunate fact of life that physical and mental capacity sometimes diminish with age."[135]

But no such connection exists between the ability to bear duties and responsibilities and the denial of an autonomous being's right to bodily liberty. The "object of the writ of *habeas corpus* is to set at large those

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129. *Id.* at 962.

130. *See* Romer v. Evans, 517 U.S. 620, 633 (1996).

131. *See, e.g.*, *In re* M.B., 6 N.Y.2d 394, 440, 443–44 (N.Y. 2006); Rivers v. Katz, 495 N.E.2d 337, 341 (N.Y. 1986) (citing Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 425 (Mass. 1977)); *In re* Storar, 420 N.E.2d 64, 72–73 (N.Y. 1981). *See* discussion *supra* Parts II, IV.

132. People *ex rel.* Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248, 249–50 (N.Y. App. Div. 2014), *leave to appeal den.*, 38 N.E.3d 828 (N.Y. 2015). Abraham Lincoln understood that the act of extending equality protects everyone: "[i]n *giving* freedom to the *slave*, we *assure* freedom to the *free*—honorable alike in what we give, and what we preserve." ABRAHAM LINCOLN, *Annual Message to Congress, December 1, 1862*, *in* 5 COLLECTED WORKS OF ABRAHAM LINCOLN 537 (Roy P. Basler ed., 1953).

133. *Lavery*, 998 N.Y.S.2d at 249–50; Brief for Petitioner at 46, Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery, 998 N.Y.S.2d 248 (N.Y. App. Div. 2014) (No. 2013-02051).

134. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 462–63 (1981).

135. Gregory v. Ashcroft, 501 U.S. 452, 471–72 (1991).

who are illegally restrained of their liberty, and this applies equally whether the person restrained be an infant or of full age."[136] Even the never-competent—the severely mentally retarded, the severely mentally ill, and the permanently comatose—who will never be competent, lack the ability, have always lacked the ability, and always will lack the ability, to choose, understand, or make a reasoned decision about medical treatment possess the right to bodily liberty equal to that of the competent.[137] Such mentally incapable adults are entitled to habeas corpus despite lacking the ability to bear duties and responsibilities, not because they are human but because equality so demands.[138]

CONCLUSION

The determination of who is a person, for any reason, has never been predicated upon an entity's ability to bear duties and responsibilities. The New York Court of Appeals correctly held forty years ago that the question of who may be a person must be answered by reference to public policy, not biology.[139]

Recognizing that its decision would strip millions of humans who lack this capacity from having legal rights, the *Lavery* court erroneously opined at footnote three that all humans would continue to be eligible for personhood because they are "collectively" human, without relying upon anything.[140] The court further erred by taking judicial notice of the alleged scientific fact that chimpanzees do not have the capacity to bear duties and responsibilities.[141] In subsequent habeas corpus cases involving the *Lavery* chimpanzee, Tommy, the NhRP attached numerous affidavits that demonstrated that chimpanzees actually possess this capacity.[142]

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136. *In re* Kottman, 2 Hill Eq. 363, 364 (S.C. Eq. 1834).

137. *E.g.*, *In re* M.B., 846 N.E.2d 794, 795 (N.Y. 2006); Rivers v. Katz, 495 N.E.2d 337, 341 (N.Y. 1986) (citing Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 423 (Mass. 1977)); *In re* Storar, 420 N.E.2d 64, 73 (N.Y. 1981), *superseded by statute*, SURR. CT. PROC. ACT § 1750 (2016), *as recognized in In re M.B.*, 846 N.E.2d at 796–97; Delio v. Westchester Cty. Med. Ctr., 516 N.Y.S.2d 677, 685–86 (N.Y. App. Div. 1987); *In re* Mark C.H., 906 N.Y.S.2d 419, 426 n.25 (N.Y. Sur. Ct. 2010) (quoting *Saikewicz*, 370 N.E.2d at 428); *In re* New York Presbyterian Hosp., 693 N.Y.S.2d 405, 411 n.5 (N.Y. Sup. Ct. 1999) (quoting *In re* Beth Israel Med. Ctr., 519 N.Y.S.2d 511, 513–14 (N.Y. Sup. Ct. 1987)); *In re* Guardianship of L.W., 482 N.W.2d 60, 65, 67 (Wis. 1992) (An "individual's right to refuse unwanted medical treatment emanates from the common law right of self-determination and informed consent," as well as "the personal liberties protected by the Fourteenth Amendment.").

138. *See, e.g.*, People *ex rel.* Brown v. Johnston, 174 N.E.2d 725, 725–26 (N.Y. 1961); People *ex rel.* Jesse F. v. Bennett, 661 N.Y.S.2d 657, 658 (N.Y. App. Div. 1997); Brevorka *ex rel.* Wittle v. Schuse, 643 N.Y.S.2d 861, 862 (N.Y. App. Div. 1996); *In re* Cindy R., 970 N.Y.S.2d 853, 855 (N.Y. Sup. Ct. 2012).

139. Byrn v. New York City Health & Hosps. Corp., 286 N.E.2d 887, 889 (N.Y. 1972).

140. People *ex rel.* Nonhuman Rights Project, Inc. v Lavery, 998 N.Y.S.2d 248, 251 n.3 (N.Y. App. Div. 2014), *leave to appeal den.*, 38 N.E.3d 828 (N.Y. 2015).

141. *See id.* at 251.

142. Brief for Petitioner at 5, 60, Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery, No. 162358/2015 (N.Y. Sup. Ct. filed Dec. 2, 2015).

The NhRP recently challenged the *Lavery* decision in the New York Supreme Court's First Judicial Department. But when the NhRP asked the First Department, by motion, to consider *Black's Law Dictionary*'s concession that it had erred in stating that a "person" was required to have the capacity for rights *and* duties, rather than rights *or* duties, an error the *Lavery* court had adopted, the First Department denied the NhRP's motion, then perpetuated *Lavery*'s and *Black's Law Dictionary*'s error, as if *Black's Law Dictionary* had never recanted.[143]

Appearing to recognize the frailty of *Lavery*'s personhood reasoning in footnote three, the First Department noted that "Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights."[144] The First Department's entire response was that the NhRP "ignores the fact that these are still human beings, members of the human community."[145]

That very young humans and comatose humans are "persons" with the capacity to possess legal rights, despite their inability to bear duties and responsibilities, explodes the claim that the capacity to bear duties and responsibilities has any relevance to personhood and the capacity for legal rights.

Instead of entering into the required mature weighing of public policy and moral principle that determines, and ought to determine, personhood in New York and elsewhere,[146] the First Department merely announced that only humans can have legal rights, without providing any justification. We have seen such naked biases in other contexts.

Before the Supreme Court in 1857, Dred Scott's lawyers "ignored the fact" that he was not white.[147] The lawyers for the Native American, Chief Standing Bear, "ignored the fact" that Standing Bear was not white when, in 1879, the U.S. Attorney, in the Circuit Court for the District of Nebraska, argued that a Native American could not be a "person" for the purpose of habeas corpus after Standing Bear was jailed for returning to his ancestral lands.[148] The California Attorney General "ignored the fact" that a Chinese person was not white when he insisted in 1854, without success before the California Supreme Court, that a Chinese witness could testify against a white man charged with murder in a California

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143. Matter of Nonhuman Rights Project, Inc. v. Lavery, 152 A.3d 73, 76 (N.Y. App. Div. 2017).

144. *Id.* at 78.

145. *Id.*

146. Byrn v. N.Y.C. Health & Hosps. Corp., 286 N.E.2d 887, 889 (N.Y. 1972).

147. *See generally* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

148. *See generally* United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14891).

court.[149] The lawyer for Ms. Lavinia Goodell "ignored the fact" that she was not a man before the Wisconsin Supreme Court that, in 1876, denied her the right to practice law solely because she was a woman.[150]

Chimpanzees are autonomous beings who can choose how to live their rich lives. Habeas corpus protects autonomy. Rational arguments are required to support the proposition that an autonomous being's species should be relevant in determining whether she possesses the fundamental right to the bodily liberty—the autonomy—that habeas corpus protects. None have been provided.

149. *See generally* People v. Hall, 4 Cal. 399 (1854).
150. *See generally In re* Goodell, 39 Wis. 232 (Wis. 1875).