

INTRODUCTION TO ANIMAL LAW BOOK

Steven M. Wise[†]

The history of the Nonhuman Rights Project (“NhRP”) began sixteen years before it was formed. In 1980 a friend handed me Peter Singer’s book, *Animal Liberation*. I closed it and changed man. I had never realized how, how long, and in what vast numbers, humans exploit nonhuman animals. I had certainly never counted myself an exploiter. But I now knew better. Worse, no lawyers appeared to represent even the most fundamental interests of any nonhuman animal. I had become a lawyer because I was interested in social justice. Now I could not think of entities more in need of legal representation than nonhuman animals. I began to take nonhuman animal-related cases and, for the next year, I thought I was the only such lawyer in the world.

I was not. At the end of the following year’s November, I attended “The First National Conference on Animal Law” in New York City where I met lawyers with similar interests; many remain my colleagues. There Joyce Tischler and Lawrence Kessenick, lawyers from San Francisco, announced the formation of a national organization, Attorneys for Animal Rights.¹ By 1985 I was president of what had been renamed the Animal Legal Defense Fund (ALDF) and would remain so for the next ten years.²

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1. Joyce Tischler, *A Brief History of Animal Law, Part I (1972–1987)*, 1 STAN. J. ANIMAL L. & POL’Y 21, 23 (2008).

2. Biography of Steven M. Wise, ANIMAL LAW CONFERENCE, animallawconference.org/steven-wise/ (last visited Nov. 14, 2016).

Between 1982 and 1987, ALDF spent a great deal of time debating the best way to begin work. There was little scholarship, law review articles, or books. Existing arguments for the rights of nonhuman animals turned on their moral rights and were being penned by moral philosophers.³ ALDF began filing lawsuits while I, and others, tried to represent the interests of nonhuman animals in our private practices. But these lawsuits were not part of a coordinated long-term strategy and the results were unsatisfactory.

In 1987, my ALDF colleague, Professor David Favre, and I began to strategize about how to solve the problem of the wholesale, nearly-unfettered exploitation of nonhuman animals. Influenced by Christopher Stone's 1972 article, *Should Trees Have Standing*,⁴ we sought to address what we believed was the major obstacle, obtaining "standing" for nonhuman animals in lawsuits. However, in time we became convinced that the major obstacle was not standing at all, but legal personhood, and the lack thereof.⁵ We slowly began to develop a long-term strategy intended to lead to at least some nonhuman animals becoming "persons" for at least some purposes. However, we understood that because the problem was ancient and widespread, success would be long in coming. It would require not only the acceptance of an animal rights jurisprudence within the legal academy, but a change in public attitude. These would necessitate the publication of law review articles and books and the teaching of animal rights classes. As there were no animal-related law school classes in 1985, I had applied to all six Boston law schools, Harvard, Boston University, Boston College, Northeastern, Suffolk, and New England, offering to teach that class. I received no responses. Five years later, in 1990, Vermont Law School asked me to teach "Animal Rights Law" in its summer program. A quarter century on, I still do.

David and I drafted an article in which we argued that chimpanzees should possess the fundamental common law rights to bodily liberty and bodily integrity. Those three decisions, (1) that chimpanzees (2) should possess the fundamental common law rights (3) to bodily liberty and bodily integrity, were sound enough that the NhRP adheres to them thirty years on. We chose *chimpanzees* because we believed that more was

3. See generally TOM REGAN, *THE CASE FOR ANIMAL RIGHTS*, at xiii (1983) ("What [Regan] . . . sought to do is articulate and defend . . . what it means to ascribe rights to animals, why we should recognize their rights, and what are some of the principal implications of doing so.").

4. See Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 456 (1972).

5. Steven M. Wise, *Introduction: Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1, 5 (2010).

known about their cognition than that of any other nonhuman animal, that scientists had clearly demonstrated that chimpanzee cognition was highly complex, and that chimpanzee cognition was of the same kind as human cognition. We chose *common law* rights because we did not want judges interpreting a word as protean as “person” as it was used in a statute, constitution, or treaty, when its legislative history would not indicate that the word had been intended to apply to nonhuman animals. Instead we argued that courts had designated nonhuman animals “things” and the common law, properly understood, required judges to keep the common law current and in line with changing scientific discovery, changes in societal mores and attitudes, and the accretion of human experience. Finally, we chose *bodily liberty* and *bodily integrity* because both interests are fundamental and similar for both humans and chimpanzees and require similar legal protections.

Our article was never published, being rejected by a law review and, more significantly, by Peter Singer and philosopher Paola Cavalieri, as a solicited chapter in their 1992 book, *The Great Ape Project*. Singer and Cavalieri rejected it⁶ at the eleventh hour primarily because they believed it focused too much on law, was too practical, and at odds with their philosophy for the volume. David and I were outraged at the rejection. As Joyce Tischler would later note, we “began to see the limitations of approaching animal rights from a purely philosophical perspective, a ‘mile high’ view of the concepts. The lawyers’ job, as they saw it, was to apply these concepts on the ground.”⁷ Out went moral philosophy; in came the beginnings of a true animal rights jurisprudence that did not ignore moral philosophy, but presented moral philosophy, when it was relevant, in a manner suitable for legal argument.

David soon accepted an interim deanship at his law school, which would occupy his time; I pushed forward, deciding that the most fruitful legal arguments in favor of nonhuman animal personhood must invoke the values and principles that judges accepted as students and lawyers, then embraced as judges, as demonstrated in their judicial writings. I needed to identify those values and principles.

For the next seven years, I haunted the Boston University libraries, immersing myself in the history of law, especially Western and ancient law, drawing from sources as far back as the time at which law had first been written down, Mesopotamian, Hebrew, Greek, Roman, Civil, and Common law, while seeking to understand where law came from, where

6. See Joyce Tischler, *A Brief History of Animal Law, Part II (1985–2011)*, 5 STAN. J. ANIMAL L. & POL’Y 27, 50 (2012).

7. See *id.*

legal rights originated, who had rights and who did not, and how rights were attained by those who lacked them.

I grounded my arguments in the values of “liberty” and “equality” as they were enshrined in Anglo-American common law, in the United States and state constitutions, and in the constitutions of numerous other countries, as well as in numerous post-World War II international human rights treaties. A “liberty” right is a non-comparative right to which one is entitled because of a status or characteristic one possesses without comparing oneself to another who has that right.⁸ An “equality” right is a comparative right to which one is entitled because one is like another who has the right in a legally relevant way.⁹

In 1996, I incorporated the litigating and educational organization, the Center for the Expansion of Fundamental Rights, Inc., which would be the primary instrument for the coming litigation and educational struggle to attain fundamental legal rights for nonhuman animals, and continued a series of law review articles intended to set out the fruits of my legal and historical thinking,¹⁰ which culminated in a lengthy 1998 article¹¹ that anticipated most of the important legal arguments the NhRP makes today.

I eventually realized that few actually read law review articles and that the ones I was writing were not efficiently advancing the long-term strategy of the Center for the Expansion of Fundamental Rights. In 1998, I decided to offer my law review ideas in the non-technical language of trade books in the hope they would garner a greater general and academic audience. Merloyd Lawrence of Perseus Publishing became my editor and two years later published *Rattling the Cage: Toward Legal Rights for Animals*.¹² At the same time I was invited to teach “Animal Rights Law” at Harvard Law School.¹³ *Drawing the Line: Science and the Case for*

8. *Steven Wise: Chimps Have Feelings and Thoughts. They Should Also Have Rights* at 8:33, TED (Mar. 2015), https://www.ted.com/talks/steven_wise_chimps_have_feelings_and_thoughts_they_should_also_have_rights?language=en [hereinafter Wise TED Talk].

9. Wise TED Talk, *supra* note 8, at 9:08.

10. Tischler, *supra* note 1, at 50.

11. See Steven M. Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793 (1998).

12. STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000). See, e.g., Martha Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506 (2001) (reviewing *RATTLING THE CAGE*, *supra*); Richard A. Posner, *Animal Rights*, 110 YALE L. J. 527 (2000) (reviewing *RATTLING THE CAGE*, *supra*); Cass R. Sunstein, *The Chimps’ Day in Court*, N.Y. TIMES (Feb. 20, 2000), <http://www.nytimes.com/books/00/02/20/reviews/000220.20sunstet.html> (reviewing *RATTLING THE CAGE*, *supra*).

13. See *Steven Wise*, NONHUMAN RTS. PROJECT, <http://www.nonhumanrightsproject.org/steve-wise/> (last visited Nov. 14, 2016).

Animal Rights, in which I burnished and extended my legal arguments for the personhood of the four species of apes, both species of elephants, cetaceans, and other species, followed three years later.¹⁴

In a single page of *Rattling the Cage*, I discussed the landmark 1772 English decision of *Somerset v. Stewart*.¹⁵ A black child, James Somerset, had been kidnapped from West Africa and sold to Charles Stewart, a Scottish merchant, in Virginia. Removed to London twenty years later, Somerset confronted Stewart, then escaped in late 1771.¹⁶ Stewart hired slave-catchers to locate then haul him to the *Ann and Mary*, anchored in London Harbour, to be chained to its deck and sailed to Jamaica.¹⁷ There he was to be sold at the slave markets and condemned to harvest sugar cane for the three to five years of life an average slave had left to him.¹⁸

Somerset's godparents raced to persuade Lord Mansfield, Chief Justice of the Court of King's Bench, to issue a common law writ of habeas corpus on behalf of the captive.¹⁹ Mansfield had been harassed for years by lawsuits on behalf of blacks sponsored by England's "First Abolitionist," Granville Sharp,²⁰ the last of which Mansfield had rid himself of that very morning. It is important to understand that Mansfield was not required to issue a writ of habeas corpus for Somerset.²¹ Habeas corpus writs were for "persons" not "things."²² There is a paradox in a "thing" even asking to be declared a "person." As many southern courts in the United States did over the next eighty-eight years, Mansfield could have refused.²³ That moment, when a thing demands to be characterized as a person, is one we have repeatedly faced. But Mansfield—perhaps the greatest judge ever to speak English—did not refuse.²⁴ He issued the common law writ of habeas corpus, had Somerset brought before him, and granted bail.²⁵ On June 22, 1772, Mansfield declared that slavery was so "odious" the common law would not support it and ordered Somerset's release, thereby implicitly abolishing human slavery in England.²⁶

14. STEVEN M. WISE, *DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS* (2002).

15. *RATTLING THE CAGE*, *supra* note 12, at 49–50, 102–05.

16. *Id.* at 50.

17. *Id.*; Wise TED Talk, *supra* note 8, at 5:59.

18. Wise TED Talk, *supra* note 8, at 5:59.

19. *Id.*

20. *RATTLING THE CAGE*, *supra* note 12, at 50.

21. *See* Wise TED Talk, *supra* note 8, at 7:20.

22. *Habeas Corpus*, *BLACK'S LAW DICTIONARY* (10th ed. 2014).

23. *RATTLING THE CAGE*, *supra* note 12, at 105–07.

24. *Somerset v. Stewart* (1772) 98 Eng. Rep. 499, 510.

25. *Id.*

26. *Id.*

While on a book tour of BBC radio stations in London the following year I chanced upon a plaque dedicated to Sharp, affixed to the wall of Westminster Abbey's Poets' Corner behind scaffolding. It noted Sharp's greatest accomplishment, his involvement with Somerset's case: "[H]e aimed to rescue his native country from the guilt and inconsistency of employing the arm of freedom to rivet the fetters of bondage and established for the Negro race, in the person of Somerset, the long disputed rights of human nature."²⁷ I instantly decided to immerse myself in the history of slave law and the abolitionist movement and write a book about *Somerset* that would demonstrate the value of using a common law writ of habeas corpus to expand the reach of the common law, and elucidate the influences upon Lord Mansfield as he was deciding the case. I intended the book to act as a blueprint for how any "thing" might litigate the legal issue of whether it ought to be a "thing" or whether it ought to be a "person" with fundamental legal rights that would protect fundamental interests, and how the NhRP might use the common law writ of habeas corpus to litigate its early cases on behalf of nonhuman animals, all the while citing *Somerset* not as English law, but as the law of any state that had incorporated the common law of England into its own common law as it stood prior to June 23, 1772.²⁸

The use of a common law writ of habeas corpus would be critical to the NhRP's initial cases. Its Legal Working Group spent years researching common law flexibility, equality, liberty, and other relevant subjects of all fifty states, the District of Columbia, Puerto Rico, and twenty common law countries, always returning to common law of habeas corpus in its search for the most favorable, or least unfavorable, jurisdictions in which to file the early lawsuits, but always returning to New York State.

Not only is the common law inherently flexible in New York, but the common law writ of habeas corpus is independently flexible and of vague scope.²⁹ It is a summary writ that eschews formality, discovery, many of the rules of evidence, and the oral presentation of evidence.³⁰ Its purpose is to allow a detained "person" to receive a rapid hearing with a minimum of formality so that a court might quickly determine whether a petitioner is being detained against her will.³¹ Because a detained person is unlikely to be in a position to seek her own common law writ of habeas

27. *Granville Sharp*, WESTMINSTER ABBEY, <http://www.westminster-abbey.org/our-history/people/granville-sharp> (last visited Nov. 14, 2016).

28. See STEVEN M. WISE, *THOUGH THE HEAVENS MAY FALL* 200 (2005).

29. *People ex rel. Keitt v. McMann*, 220 N.E.2d 653, 655 (N.Y. 1966).

30. See *id.*

31. See *id.*

corpus before a court, “standing” is dispensed with.³² Hence the names of habeas corpus cases are generally the name of the entity who seeks the writ of habeas corpus *ex rel.* the person being detained versus the detainer.³³

In 2003, I set out the general obstacles to nonhuman animal personhood; physical, economic, political, religious, historical, legal, and psychological.³⁴ The physical and economic obstacles were more appropriate when the personhood of such widely exploited nonhuman animals as cows, pigs, and chickens were involved, as opposed to apes, elephants, or cetaceans. The legal obstacle was that no nonhuman animal had ever sought to be characterized as a “person” and therefore no nonhuman animal had ever been characterized as a “person”; moreover nonhuman animals had been broadly characterized as common law “things” for centuries.³⁵

This alone would be a nearly insurmountable problem for common law “Formal Judges,” who understand justice as stability and certainty, and who are likely to feel themselves strongly bound by precedent at some level of generality.³⁶ This is as opposed to “Principle Judges,” who understand justice as doing what is right, or “Policy Judges” who understand justice as doing what is good.³⁷ The political obstacles also might be stronger in a state, such as New York, in which judges are elected, depending upon how the voters feel about the judge granting a common law writ of habeas corpus to a chimpanzee.

On the other hand, the religious, historical, and psychological obstacles are illustrations of the influence of culture. Present judges have been raised in a culture that pervasively views all nonhuman animals as “things.” As are most of their fellow citizens, most judges are daily and routinely involved in the widespread exploitation of nonhuman animals, eating them, wearing them, hunting them, and engaging in other of the numerous exploitive ways that the culture has long accepted. When thinking about humans, different clusters of neurons are subconsciously triggered depending upon the degree to which one identifies with the

32. Nonhuman Rights Project, Inc. *ex rel.* Hercules v. Stanley, 16 N.Y.S.3d 898, 905 (Sup. Ct. N.Y. Cty. 2015).

33. For unknown reasons, instead of being captioned as the names of Somerset’s godparents, or the King *ex rel.* John Knowles (the Captain of the *Ann and Mary*), the proceeding was dubbed *Somerset v. Stewart*.

34. DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS, *supra* note 14, at 9.

35. *Id.* at 21.

36. RATTLING THE CAGE, *supra* note 12, at 95.

37. *Id.* at 97.

subject.³⁸ Imagine how differently a judge is likely to view even such a close relative to humans as a chimpanzee.

Present judges are therefore likely, automatically and unconsciously, to be biased against the personhood arguments the NhRP presents—just as they are likely to be biased about race, gender, sexuality, religion, weight, age, and ethnicity³⁹—because “our minds have been shaped by the culture around us. In fact, they have been invaded by it”⁴⁰ We therefore expected to encounter puzzling and diverse judicial reactions to our early cases. We were not disappointed.⁴¹

For all these reasons, we believed that, in the NhRP’s early habeas corpus cases, the chances of it making an error, the judges making an error, or both, were likely. It therefore wanted the chance to review adverse decisions, revise its petitions and arguments, and re-file its cases, if necessary, in a different venue. In New York, *res judicata*, or claim preclusion, is not applied to common law habeas corpus cases.⁴² Nor is there a venue requirement.⁴³ New York habeas corpus law allows a petitioner to request either that a court issue an *ex parte* writ of habeas corpus, if the petitioner seeks the appearance of both the respondent and the detained person, or an *ex parte* order to show cause, which requires only the respondent to appear.⁴⁴ We believed it unlikely that, in its early cases, a supreme court justice would grant a hearing on its *ex parte* petition or on a petition with notice and, if she did, the justice was

38. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT* 138–39 (2014) (citing Jason P. Mitchell, C. Neil Macrae & Mahzarin R. Banaji, *Dissociable Medial Prefrontal Contributions to Judgments of Similar and Dissimilar Others*, 50 *NEURON* 655, 655–63 (2006)) (“Think, for example, about a judge. She must routinely make decisions about other people, some similar to herself, others quite different. How can she take into account the ways in which her judgment may be affected by the different neural processes . . . ?”).

39. These biases can be so powerful that people regularly make decisions that uphold the social hierarchy and enact a “stereotype tax” against their own self-interests. *Id.* at 117–18 (quoting Dolly Chugh, *Societal and Managerial Implications of Implicit Social Cognition: Why Milliseconds Matter*, 17 *SOC. JUST. RES.* 203, 207 (2004)).

40. *Id.* at 98.

41. See generally BANAJI & GREENWALD, *supra* note 38, at 53–70, to see where the authors of *Blindspot* and their colleagues—by the candor of the judges and lawyers, journalists and creative writers, police officers and district attorneys, social workers and health-care providers, employers and managers, students and teachers, and many others who have opted to take the Implicit Association Test and describe with honesty and even humility the disparity between their reflective and automatic minds—have spontaneously offered examples of catching themselves making assumptions about others that then turned out to be untrue, as further evidence of their blindspots. Their stories are often comical, but always instructive about how pervasive such biases are.

42. Nonhuman Rights Project, Inc. *ex rel.* Hercules v. Stanley, 16 N.Y.S.3d 898, 910 (Sup. Ct. N.Y. Cty. 2015).

43. See *id.* at 908.

44. *Id.* at 905 (citing N.Y. C.P.L.R. 7003(a) (McKinney 2013)).

unlikely to issue either. It was therefore vital that a petitioner have the right to appeal the inevitable refusal. That rule 7011 of New York Civil Practice Law and Rules (CPLR) clearly granted the right to appeal was a major reason the NhRP selected New York as the initial jurisdiction in which to litigate.⁴⁵

We choose carefully which fundamental liberty right characteristic a petitioner should possess. As always, the liberty right was chosen not to vindicate any value preference of the NhRP, but to implement the value preferences of the New York judges, as they expressed them in their written decisions.⁴⁶ In New York, we determined that liberty includes the right to be autonomous.⁴⁷

For decades, New York courts have made clear that autonomy is a supreme common law and constitutional value, though the judges never clearly defined it.⁴⁸ The NhRP helped. In an affidavit filed in support of its Verified Petition for Habeas Corpus and Order to Show Cause, Professor James King defined “autonomy” as “behavior that reflects a choice and is not based on reflexes, innate behaviors or on any conventional categories of learning such as conditioning, discrimination learning, or concept formation. Instead, autonomous behavior implies that the individual is directing the behavior based on some non-observable internal cognitive process.”⁴⁹

The word “autonomy” derives from the Greek words “autos” (“self”) and “nomos” (“law”).⁵⁰ In New York, the deprivation of common law autonomy constitutes a deprivation of common law dignity.⁵¹ That is why New York courts have “long recognized the right of competent

45. N.Y. C.P.L.R. 7011 (McKinney 2013) (“An appeal may be taken from a judgment refusing to grant a writ of habeas corpus or refusing an order to show cause issued under subdivision (a) of section 7003, or from a judgment made upon the return of such a writ or order to show cause.”).

46. See, e.g., *People ex rel. Caldwell v. Kelly*, 35 Barb. 444, 457 (N.Y. Gen. Term 1862) (Potter, J. concurring) (“Liberty and freedom are man’s natural conditions; presumptions should be in favor of this construction.”); *Oatfield v. Waring*, 14 Johns. 188, 192–93 (N.Y. Sup. Ct. 1817) (“[A]ll presumptions in favor of personal liberty and freedom ought to be made.”).

47. See Michael Mountain, *How It All Began*, NONHUMAN RTS. PROJECT (Apr. 18, 2013), <http://www.nonhumanrightsproject.org/2013/04/18/how-it-all-began-2/>.

48. See, e.g., *Rivers v. Katz*, 495 N.E.2d 337, 341 (N.Y. 1986) (“In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say . . .”).

49. Affidavit of James King at 3–4, Nonhuman Rights Project, Inc. *ex rel. Tommy v. Lavery*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 31.

50. MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 4–5 (2012).

51. *People v. Rosen*, 613 N.E.2d 946, 949 (N.Y. 1993); *Rivers*, 495 N.E.2d at 341; *Schloendorff v. Soc’y of N.Y. Hosp.*, 211 N.Y. 125, 129–30 (1914); *In re Gabr*, 961 N.Y.S.2d 736, 739 (Sup. Ct. Kings Cty. 2013).

individuals to decide what happens to their bodies.”⁵² New York common law so supremely values autonomy that it permits competent adults to decline life-saving treatment.⁵³ This “insure[s] that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires.”⁵⁴ New York common law permits a permanently incompetent, once competent, human to refuse medical treatment, if she clearly expresses a desire to refuse treatment before being silenced by incompetence in the absence of an overriding state interest.⁵⁵ Even persons who (1) have never been competent, (2) never will be competent, and (3) lack the ability to choose their medical treatment, understand their treatment, or make a reasoned decision about their treatment—such as the severely mentally retarded, the severely mentally ill, and the permanently comatose—possess a dignity equal to that possessed by those who are competent.⁵⁶

Of course we did not intend to argue that the autonomy of its chimpanzee petitioners is sufficient to allow them to evaluate something as complex as their medical treatment options. But the scientific evidence clearly demonstrates that they possess at least that autonomy sufficient to allow them to decide the issue central to a habeas corpus case: do they wish to be detained?

Autonomy is complex. However, the relevant evidence the NhRP produced in its early cases included not just Professor King’s affidavit, but the affidavits and supplemental affidavits of eight other chimpanzee cognition experts from Japan, Sweden, Germany, Scotland, England, and the United States. Together the affidavits demonstrate that chimpanzees possess, at least, an autobiographical self; episodic memory; self-consciousness; self-knowingness; self-agency; self-control; a theory of mind; referential and intentional communication; empathy; imagination; a working memory; language; metacognition; numerosity; a material, social, and symbolic culture; an ability to plan and to engage in mental time-travel; intentional action; sequential learning; mediational learning;

52. *Grace Plaza of Great Neck, Inc. v. Elbaum*, 623 N.E.2d 513, 514 (N.Y. 1993). *See, e.g., In re M.B.*, 846 N.E.2d 794, 795 (N.Y. 2006); *Rivers*, 495 N.E.2d at 341.

53. *In re Westchester Cty. Med. Ctr.*, 531 N.E.2d 607, 611 (N.Y. 1988); *Rivers*, 495 N.E.2d at 341; *People v. Eulo*, 472 N.E.2d 286, 296 (N.Y. 1984); *In re Storar*, 420 N.E.2d 64, 71 (N.Y. 1981).

54. *Rivers*, 495 N.E.2d at 341.

55. *Storar*, 420 N.E.2d at 71.

56. *See, e.g., In re M.B.*, 846 N.E.2d at 796; *Rivers*, 495 N.E.2d at 341 (citing *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 427 (Mass. 1977)); *Storar*, 420 N.E.2d at 71; *Delio v. Westchester Cty. Med. Ctr.*, 516 N.Y.S.2d 677, 686 (App. Div. 1987); *In re N.Y. Presbyterian Hosp.*, 693 N.Y.S.2d 405, 409 (Sup. Ct. Westchester Cty. 1999) (discussing that those who are competent and incompetent possess equal dignity).

mental state modeling; visual perspective-taking; cross-modal perception; an ability to understand cause-and-effect; an ability to understand the experiences of others; and the ability to imagine, imitate, engage in deferred imitation, emulate, and innovate.⁵⁷ Chimpanzees are, in short, autonomous.

There were fewer common law equality cases in New York than common law liberty cases, especially after the passage of the Fourteenth Amendment to the United States Constitution. There were, however, the usual equality values embedded within the New York common law that prohibit common carriers, victualers, and innkeepers from discriminating against anyone unreasonably or unjustly.

We argued that New York equality is greater than the sum of its state constitutions, statutes, and common law. Decades before, Judith Kaye, the former Chief Justice of the New York Court of Appeals, confirmed the two-way street that runs between common law decision-making and constitutional decision-making and that this legal traffic resulted in a “common law decision making infused with constitutional values.”⁵⁸ We argued that the common law of equality embraces, at a minimum, its sister fundamental constitutional equality value—embedded within the

57. Affidavit of James R. Anderson at 4–7, *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 27; Affidavit of Christophe Boesch at 6–9, *Tommy*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 28; Affidavit of Jennifer Fugate at 4–6, *Tommy*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 29; Affidavit of Mary L. Jensvold at 3–7, 9–10, *Tommy*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 30; Affidavit of James King, *supra* note 49, at 3–8; Affidavit of Tetsuro Matsuzawa at 3–9, *Tommy*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 32; Affidavit of William C. McGrew at 5–12, *Tommy*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 33; Affidavit of Mathias Osvath at 4–6, *Tommy*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 34; Affidavit of Sue Savage-Rumbaugh at 5–16, *Tommy*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 35; Affidavit of Jane Goodall at 6–9, *Tommy*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 38; Supplemental Affidavit of James R. Anderson at 4–9, *Tommy*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 36; Supplemental Affidavit of Christophe Boesch at 6–9, *Tommy*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 37; Supplemental Affidavit of Mary L. Jensvold at 4–5, *Tommy*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 39; Supplemental Affidavit of William C. McGrew at 5–10, *Tommy*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 40; Supplemental Affidavit of Sue Savage-Rumbaugh at 5–23, *Tommy*, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Dec. 2, 2015), NYSCEF No. 41.

58. Judith S. Kaye, *Forward: Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L. J. 727, 747 (1992) (discussing the importance of both common law and constitutional values with respect to decision making).

New York and the United States Constitutions⁵⁹—which prohibits discrimination based on irrational means or illegitimate ends.⁶⁰

Common law equality decision-making differs from constitutional equal protection decision-making in that it has nothing to do with a “respect for the separation of powers.”⁶¹ Instead, it applies constitutional equal protection values to an evolving common law.⁶² The outcomes of similar common law and constitutional cases may therefore differ. Thus the New York Court of Appeals affirmed the constitutionality of a statute prohibiting gay marriage, emphasizing that “we are deciding only this constitutional question. It is not for us to say whether same-sex marriage is right or wrong.”⁶³ But when a common law court determines the correctness of a classification, its job is precisely to say whether a classification is right or wrong, the means are irrational, and an end is legitimate⁶⁴:

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 disadvantage and benefitting just those whom it assists.⁶⁵

A state, the NhRP argues, has no legitimate interest in allowing autonomous beings, of any kind, to be detained against their will.

Allowing an autonomous chimpanzee to be caged her entire life solely because she is a chimpanzee violates a common law equality infused with constitutional values in a second way. In *Romer v. Evans*, the United States Supreme Court struck down Colorado’s “Amendment 2” not just because its purpose of repealing all existing anti-discrimination positive law based upon sexual orientation was illegitimate, but 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.”⁶⁶ To permit an autonomous chimpanzee to be detained in a

59. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 466 (1985); *Hernandez v. Robles*, 855 N.E.2d 1, 27 (N.Y. 2006).

60. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)) (“Equal protection of the law is not achieved through indiscriminate imposition of inequalities.”).

61. *Cleburne*, 473 U.S. at 441–42.

62. *Id.* at 466.

63. *Hernandez*, 855 N.E.2d at 8.

64. *Affronti v. Crosson*, 746 N.E.2d 1049, 1052 (N.Y. 2001) (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000)).

65. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1440 (2d ed. 1988).

66. 517 U.S. 620, 633 (1996).

cage for her entire life simply because she is a chimpanzee identifies “persons” by the single trait of not being human then denying them protection across the board.

In an October 2012 meeting in New York City, the NhRP’s Legal Working Group identified the top six states in which it might begin litigating. The Scientific Working Group was then asked to identify all the apes, elephants, and cetaceans being detained in those six states. On Easter Saturday, 2013, the Legal Working Project narrowed the six states to New York, and chose Merlin and Reba, two chimpanzees, as its first common law habeas corpus petitioners,⁶⁷ who were being detained at the Bailiwick Animal Park in Catskill, New York.⁶⁸ Its first case was set for filing on Monday, December 2, 2013.⁶⁹

Three weeks later, I flew to New York and paid my admission fee to enter the Bailiwick Animal Park. With me was Charles Siebert, writing a story on the NhRP for the *Sunday New York Times Magazine*, and Chris Hegedus who, with D.A. Pennebaker, was shooting the documentary about the NhRP’s work, *Unlocking the Cage*. However, only Merlin, sad and depressed, sat in the chimpanzee enclosure. Reba had died about the time we had chosen her to be our first petitioner.⁷⁰ We moved forward on Merlin’s behalf until, in late September, I sent my executive director, Natalie Prosin, back to Bailiwick to check on Merlin. He was not there and she was told Merlin died the day before after the administration of too much anesthesia for a root canal.⁷¹

The Legal Working Group decided to identify every chimpanzee residing in New York State and file common law habeas corpus suits on behalf of them all during that first week of December 2013. Over the next several weeks it located five chimpanzees. Tommy, a survivor of the movie and circus industries, was imprisoned in a cage in a shed at a used trailer lot in Gloversville, New York.⁷² Kiko and Charlie were detained in cages in a cement storefront in Niagara Falls.⁷³ Kiko was partially deaf after having been beaten with a steel rod on a movie set years before.⁷⁴

67. Michael Mountain, *Lawsuit Filed Today on Behalf of Chimpanzee Seeking Legal Personhood*, NONHUMAN RTS. PROJECT (Dec. 2, 2013), <http://www.nonhumanrightsproject.org/2013/12/02/lawsuit-filed-today-on-behalf-of-chimpanzee-seeking-legal-personhood/>.

68. *Id.*

69. *Id.*

70. *Id.*

71. *See id.*

72. Michael Mountain, *Bios on the Chimpanzees in New York Lawsuits*, NONHUMAN RTS. PROJECT (Nov. 30, 2013), <http://www.nonhumanrightsproject.org/2013/11/30/bios-on-the-chimpanzees-in-new-york-lawsuits/>.

73. *Id.*

74. *Id.*

Charlie had also been exploited by the film industry. Then his new owner taught him karate and exhibited him as “Charlie the Karate Chimp.”⁷⁵ However, before the NhRP was able to file suit on Charlie’s behalf, he died of the cardiomyopathy to which imprisoned apes often succumb.⁷⁶ Finally, Hercules and Leo were two juvenile chimpanzees who had been leased to Stony Brook University by the New Iberia Research Institute in Lafayette, Louisiana, at the age of about two.⁷⁷ For the next six years the youngsters were isolated in the basement of a college computer building⁷⁸ where they were used for research into the evolution of the straight human leg. Not only were fine wires pushed into their muscles, they were forced to undergo general anesthesia on a regular basis over six years.⁷⁹ At one point Leo’s heart had stopped while he was under anesthesia, without a veterinarian being present.⁸⁰

The Legal Working Group spent months polishing the three nearly-identical petitions for habeas corpus—one for Tommy, one for Kiko, and one for Hercules and Leo—and an Order to Show Cause. Each petition included one hundred pages of expert affidavits and an eighty-page memorandum of law.⁸¹

The NhRP had originally sought to file its Verified Petitions and Orders to Show Cause in the supreme courts where it believed it might receive the most favorable hearings. But the local New York counsel we retained advised us that venue could be obtained only in the county in which a chimpanzee was being held captive.⁸² Reluctantly, we followed this erroneous advice.

The accompanying affidavits from experts on three continents proved difficult to notarize, authenticate, and conform. New York’s requirements for admissibility of affidavits from foreign countries are

75. National Geographic, *The Karate Chimp*, YOUTUBE (Sept. 16, 2009), <https://www.youtube.com/watch?v=Ekd-2bbobkw>.

76. Mountain, *supra* note 72.

77. *Id.*

78. Steven M. Wise, *Letter from NhRP President Steven M. Wise re: Hercules and Leo*, NONHUMAN RTS. PROJECT (Aug. 16, 2016), <http://www.nonhumanrightsproject.org/2016/08/16/letter-from-nhrp-president-steven-m-wise-re-hercules-and-leo/>.

79. *Id.*

80. *Id.*

81. For Tommy, see *Legal Documents re. Tommy the Chimpanzee*, NONHUMAN RTS. PROJECT (Dec. 2, 2013), <http://www.nonhumanrightsproject.org/2013/12/02/legal-documents-re-tommy-kiko-hercules-and-leo-2/>. For Kiko, see *Legal Documents re. Kiko the Chimpanzee*, NONHUMAN RTS. PROJECT (Dec. 10, 2013), <http://www.nonhumanrightsproject.org/2013/12/10/legal-documents-re-kiko-the-chimpanzee/>. For Hercules and Leo, see *Legal Documents re. Hercules and Leo*, NONHUMAN RTS. PROJECT (Dec. 10, 2013), <http://www.nonhumanrightsproject.org/2013/12/10/legal-documents-re-hercules-and-leo/>.

82. For New York’s venue requirements, see N.Y. C.P.L.R. 503(a) (McKinney 2006).

onerous, and involve multiple steps and appearances before consular officials who can notarize, authenticate and conform the document⁸³: In the absence of a consular official, an appropriate local notary plus (1) an appropriate official who can certify that the notary was actually a notary, plus (2) a certificate of conformity from (i) a consular official of each country who resides in New York or (ii) a member of the New York Bar who resides in the country in which the affidavit was being signed.⁸⁴ We decided instead to employ the process set forth by the Hague Apostille Convention which sets out a uniform means of notarizing documents by use of an apostille, though Japan, where one affiant lived, was not a signatory (but he was going to travel to India, which was a signatory).⁸⁵

On December 2, 2013, the NhRP filed its first habeas corpus suit—on behalf of Tommy—in the Fulton County Supreme Court, appearing before the Honorable Joseph M. Sise who, to our surprise, immediately ushered counsel, myself and Elizabeth Stein, Esq., into a huge, ornate, empty courtroom and commenced oral argument.⁸⁶ At the hearing’s conclusion, he stated,

Your impassioned representations to the court are quite impressive. The Court will not entertain the application, will not recognize a chimpanzee as a human or as a person who can seek a writ of habeas corpus under Article 70. I will be available as the judge for any other lawsuit to right any wrongs that are done to this chimpanzee because I understand what you’re saying. You make a very strong argument. However, I do not agree with the argument only insofar as Article 70 applies to chimpanzees.⁸⁷

The following day counsel reprised their filings, this time on behalf of Kiko, in the Niagara County Supreme Court.⁸⁸ There Justice Joseph Boniello sent word to counsel he intended to review the documents filed and hold oral argument by telephone during the following week. At oral argument the following week, Justice Boniello concluded, “I have to say your papers were excellent However I’m not prepared to make this leap of faith and I’m going to deny the request for a petition for writ of

83. For New York’s admissibility of foreign affidavits requirements, see N.Y. C.P.L.R. 4542 (McKinney 2007).

84. N.Y. C.P.L.R. 4542.

85. See Convention Abolishing the Requirement of Legislation for Foreign Public Documents, Oct. 5, 1961, 33 U.S.T. 883–90.

86. See Transcript of Hearing, Nonhuman Rights Project Inc. *ex rel.* Tommy v. Lavery, No. 002051/2013 (N.Y. Sup. Ct. Fulton Cty. filed Dec. 3, 2013).

87. *Id.* at 26.

88. Verified Petition, Nonhuman Rights Project, Inc. *ex rel.* Kiko v. Presti, No. 151725/2013 (N.Y. Sup. Ct. Niagara Cty. filed Dec. 3, 2013).

habeas corpus. I think personally this is more of a legislative than a judicial issue.”⁸⁹

On December 2, 2013, NhRP filed suit on behalf of Hercules and Leo in the Suffolk County Supreme Court at Riverhead.⁹⁰ We never saw the supreme court justice who refused to issue the requested Order to Show Cause. The supreme court justice reviewed the NhRP’s filings in chambers and sent out his written refusal to issue the requested order to show cause without permitting oral argument.⁹¹

Obtaining two hearings in three tries meant we were doing better than expected, as it entered into its first round of appeals in New York’s four intermediate appellate courts. On January 9, 2014, we appealed the refusal of the Suffolk County justice to issue an order to show cause to the Supreme Court, Appellate Division, Second Department.⁹² But when Attorney Stein filed a motion moving my admission to the Second Department *pro hac vice*, the motion was denied and the appeal dismissed *sua sponte* “on the ground that no appeal lies as of right from an order that is not the result of a motion made on notice”⁹³ We filed a motion to reargue, pointing to the fact that CPLR 7011 gave us a clear right to appeal.⁹⁴ Nevertheless, our motion was denied.⁹⁵ We decided not to seek review by the Court of Appeals, but to refile our petition in the New York County Supreme Court.⁹⁶

Unlike the Second Department, the Supreme Court, Appellate Division, Third Department understood that CPLR 7011 gave the NhRP the right to appeal Justice Sise’s refusal to issue the requested order to

89. Transcript of Oral Argument at 15, *Kiko*, No. 151725/2013 (N.Y. Sup. Ct. Niagara Cty. filed Dec. 9, 2013).

90. Verified Petition, Nonhuman Rights Project, Inc. *ex rel.* Hercules v. Stanley, No. 32098/2013 (N.Y. Sup. Ct. Suffolk Cty. filed Dec. 5, 2013).

91. Order to Show Cause-Declined, *Hercules*, No. 32098/2013 (N.Y. Sup. Ct. Suffolk Cty. Dec. 5, 2013).

92. Notice of Appeal, *Hercules*, No. 32098/2013 (N.Y. Sup. Ct. Suffolk Cty. filed Jan. 9, 2014).

93. Decision & Order on Motion, Nonhuman Rights Project, Inc. *ex rel.* Hercules v. Stanley, Nos. 2014-01825, 32098/2013 (N.Y. App. Div. 2d Dep’t Apr. 3, 2014) (citing N.Y. C.P.L.R. 5701 (McKinney 1995 & Supp. 2014)). CPLR 5701 generally governs appeals to the appellate division from the supreme and county courts. N.Y. C.P.L.R. 5701. CPLR 7011 governs appeals specifically in habeas corpus matters. N.Y. C.P.L.R. 7011 (McKinney 2013).

94. Petitioners-Appellants’ Memorandum of Law in Support of Motion for Reargument at 9–12, *Hercules*, Nos. 2014-01825, 32098/2013 (N.Y. App. Div. 2d Dep’t filed Apr. 16, 2014).

95. Decision & Order on Motion, *Hercules*, Nos. 2014-01825, 32098/2013 (N.Y. App. Div. 2d Dep’t May 27, 2014).

96. Verified Petition, *Hercules*, No. 152736/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Mar. 19, 2015), NYSCEF No. 1 [hereinafter Verified Petition for Hercules and Leo].

show cause for Tommy. However, the Third Department held, for the first time in Anglo-American law, that only an entity able to assume duties and responsibilities could be a “person.”⁹⁷ Without giving us notice or the opportunity to place contrary facts into evidence, the court then took judicial notice of the fact that chimpanzees could not assume duties and responsibilities: “Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions.”⁹⁸

The court briefly attempted to differentiate human beings who are unable to bear duties and responsibilities from chimpanzees:

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 decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise.⁹⁹

But what could “collectively” mean? Are the personhood and rights of incompetent humans derived solely from competent humans and not in their own right? Is the act of defining “persons” solely in terms of a grouping of human beings, as opposed to a grouping of great apes, apes, primates, or some other taxonomic group, circular reasoning?

Finally, the Third Department mistook the NhRP’s demand that a chimpanzee be given the “immunity-right” of bodily liberty protected by the common law writ of habeas corpus (to which the ability to bear duties and responsibilities is by definition irrelevant) for a “claim-right,” (such as a claim for breach of contract) in which the ability to bear duties and responsibilities might be relevant.¹⁰⁰ Linking personhood to an ability to bear duties and responsibilities to enforce the fundamental common law immunity-right to bodily liberty is particularly inappropriate in the context of common law habeas corpus, the very purpose of which is to protect bodily liberty. The court’s linkage of the two therefore caused it to commit a “category of rights” error by mistaking an “immunity-right” for a “claim-right.”¹⁰¹

97. *People ex rel. Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 998 N.Y.S.2d 248, 250 (3d Dep’t 2014).

98. *Id.* at 251.

99. *Id.* at 251 n.3.

100. *Id.* at 249.

101. *See generally* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L. J.* 16 (1913) (comparing the right to be immune from certain actions with the right to bring a legal claim). *See also* RATTLING THE CAGE, *supra* note 12, at 53–61.

A month after the Third Department issued its ruling, the Fourth Department ruled on our appeal of Kiko's case.¹⁰² As did the Third Department, the Fourth Department did not follow the Second Department (or Justice Boniello) and recognized that CPLR 7011 gave the NhRP the right to appeal.¹⁰³ Nor did it follow the Third Department and hold that a chimpanzee could not be a "person."¹⁰⁴ Instead it twice assumed, without deciding, that a chimpanzee could be a "person," then held that, as we were not arguing that Kiko should be released from custody outright, but that he should be moved from a cage in a cement Niagara Falls storefront to a three to five acre island at Save the Chimps sanctuary in South Florida where he would live with twenty-five other chimpanzees, the NhRP was impermissibly using the common law writ of habeas corpus to seek to change the conditions of his confinement rather than the confinement itself.¹⁰⁵

Each of the eight cases the Third Department cited featured a human prison inmate who was seeking to utilize the writ of habeas corpus for some reason other than to procure release from prison.¹⁰⁶ Moreover, numerous cases establish that human prisoners may use habeas corpus to challenge their conditions of confinement.¹⁰⁷ Habeas corpus was used in the antebellum North to discharge slave children to the custody of

102. Nonhuman Rights Project, Inc. *ex rel.* Kiko v. Presti, 999 N.Y.S.2d 652 (4th Dep't 2015).

103. *Id.* at 653. When the NhRP filed the required motion asking Supreme Court Justice Boniello to "settle the record" in order to allow the NhRP to appeal from the Justices' refusal to issue an order to show cause in Kiko's case, Motion to Settle Record, *Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, No. 151725/2013 (N.Y. Sup. Ct. Niagara Cty. filed Feb. 7, 2014), the NhRP was informed that Justice Boniello refused to decide the motion, as he believed the NhRP lacked the right to appeal his refusal to issue the requested order to show cause. Motion to Settle Record-Denied, *Kiko*, No. 151725/2013 (N.Y. Sup. Ct. Niagara Cty. Feb. 26, 2014). On April 24, 2014, the NhRP responded by seeking an Article 78 mandamus in the Fourth Department seeking to have that court order Justice Boniello to decide the motion. Verified Petition, Nonhuman Rights Project, Inc. *ex rel.* Kiko v. Boniello, Nos. OP 14-00791, 151725/2013 (N.Y. App. Div. 4th Dep't filed Apr. 24, 2014). The Fourth Department set a hearing on the mandamus petition. Before the Petition for Mandamus could be heard, on May 6, 2014, Justice Boniello allowed the NhRP's motion to settle the record. Order, *Kiko*, No. 151725/2013 (N.Y. Sup. Ct. Niagara Cty. May 6, 2014).

104. *Kiko*, 999 N.Y.S.2d at 653–54 (4th Dep't 2015).

105. *Id.* (citing *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 690–91 (1986)).

106. *See* Nonhuman Rights Project, Inc. *ex rel. Tommy v. Lavery*, 998 N.Y.S.2d 248, 248 (3d Dep't 2014).

107. *E.g.*, *People ex rel. Brown v. Johnston*, 174 N.E.2d 725, 726 (N.Y. 1961) (holding habeas corpus was proper to test validity of prisoner's transfer from a state prison to a state hospital for the insane); *People ex rel. Saia v. Martin*, 46 N.E.2d 890, 893 (N.Y. 1943) (citing *Hoff v. State*, 18 N.E.2d 671, 672 (N.Y. 1939)).

another,¹⁰⁸ as had minors,¹⁰⁹ child apprentices,¹¹⁰ and incapacitated adults.¹¹¹

After the Court of Appeals denied further review of both Tommy's and Kiko's cases,¹¹² the NhRP decided to refile Hercules and Leo's case in New York County.¹¹³ On March 19, 2015, it filed a second Verified Petition and Order to Show Cause against Stony Brook University in New York County which was assigned to Justice Barbara Jaffe.¹¹⁴ Then, for the first time in Anglo-American law, Justice Jaffe issued a Writ for Habeas Corpus and Order to Show Cause to a respondent—here, Stony Brook University—that required that respondent to appear in court there to give a legally sufficient reason for detaining a nonhuman animal.¹¹⁵

At this moment of this victory, we made an unintentional misstep. On the first and second pages of its Verified Petition, we had stated that the supreme court could issue the Writ of Habeas Corpus and Order to Show Cause without making an initial determination that the chimpanzees were legal persons, so that the issue of their legal personhood and the legality of their confinement could be resolved.¹¹⁶ However, when Justice Jaffe issued the Writ of Habeas Corpus and Order

108. *Commonwealth v. Taylor*, 44 Mass. 72, 72 (1841) (using habeas corpus for a seven or eight-year-old slave discharged into the care of the Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Aves*, 35 Mass. 193, 225 (1836) (using habeas corpus for a seven-year-old girl discharged into custody of the law); *Commonwealth v. Holloway*, 2 Serg. & Rawle 305, 307 (Pa. 1816) (child slave discharged); *Lemmon v. People*, 20 N.Y. 562, 632 (1860) (discharging two seven-year-olds, a five-year-old, and a two-year-old).

109. *People ex rel. Intner v. Surlis*, 566 N.Y.S.2d 512, 515 (Sup. Ct. Bronx Cty. 1991).

110. *People ex rel. Bentley v. Hanna*, 3 How. Pr. 39, 45 (N.Y. Sup. Ct. N.Y. Cty. 1847); *In re McDowle*, 8 Johns. 328, 332 (N.Y. Sup. Ct. 1811).

111. *Brevorka ex rel. Wittle v. Schuse*, 643 N.Y.S.2d 861, 862 (4th Dep't 1996) (quoting N.Y. C.P.L.R. 7002 (McKinney 2013)); *State v. Connor*, 447 N.Y.S.2d 485, 487 (1st Dep't 1982); *In re Siveke*, 441 N.Y.S.2d 631, 633 (Sup. Ct. Suffolk Cty. 1981) (citing *People ex rel. Gordon v. Murphy*, 285 N.Y.S.2d 198, 200 (Sup. Ct. Sullivan Cty. 1967)).

112. Nonhuman Rights Project, Inc. *ex rel. Tommy v. Lavery*, 26 N.Y.3d 902 (2015); Nonhuman Rights Project, Inc. *ex rel. Kiko v. Presti*, 26 N.Y.3d 901 (2015).

113. Verified Petition for Hercules and Leo, *supra* note 96.

114. *Id.*; Proposed Order to Show Cause, Nonhuman Rights Project, Inc. *ex rel. Hercules v. Stanley*, No. 152736/2015 (N.Y. Sup. Ct. N.Y. Cty. filed Mar. 20, 2015), NYSCEF No. 27. Having experienced both the Second Department in Hercules's and Leo's first case and Supreme Court Justice Boniello in Kiko's case take the position that, contrary to the language of CPLR 7011, the NhRP could not appeal the refusal of a court to issue an Order to Show Cause, out of an abundance of caution the NhRP asked the supreme court to issue both a Writ of Habeas Corpus as well as an Order to Show Cause, though it understood that by doing so it was asking the court to issue an order requiring Stony Brook both to bring Hercules and Leo into court (the Writ of Habeas Corpus) and not to bring them into court (the Order to Show Cause).

115. Order to Show Cause & Writ of Habeas Corpus, *Hercules*, No. 152736/2015 (N.Y. Sup. Ct. N.Y. Cty. Apr. 20, 2015), NYSCEF No. 34.

116. Verified Petition for Hercules and Leo, *supra* note 96, at 1.

to Show Cause, the NhRP—forgetting it invited Justice Jaffe to make such a determination without necessarily deciding the personhood of Hercules and Leo—issued a press release that claimed that by issuing the Writ of Habeas Corpus and Order to Show Cause, the Justice had implicitly recognized that Hercules and Leo were “persons” for the purpose of a common law writ of habeas corpus.¹¹⁷ Justice Jaffe’s clerk promptly emailed us about our mistake, which caused us to retract the press release and for Justice Jaffe to issue the Amended Order to Show Cause we had sought.¹¹⁸

On May 27, 2015, Justice Jaffe heard the historic oral argument.¹¹⁹ On July 29, 2015, she issued an extensive and thoughtful opinion.¹²⁰ She turned back Stony Brook’s arguments that the NhRP lacked standing,¹²¹ lacked proper venue in a county in which the detainee was not being held, and was barred by *res judicata* or collateral estoppel from bringing a second action under CPLR Article 70.¹²² She agreed with the NhRP that “legal personhood” was not synonymous with being human,¹²³ rejected the slippery slope argument as not being a cogent reason for denying relief,¹²⁴ and refused to follow the Fourth Department’s ruling that the petitioner lacked recourse to habeas corpus because it did not seek release of the chimpanzees, but their transfer to a chimpanzee sanctuary.¹²⁵ However, Justice Jaffe felt bound by the Third Department’s holding in Tommy’s case, and noted that

[e]fforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed. Courts, however, are slow to embrace change, and occasionally seem reluctant to engage in broader, more

117. Press Release, Nonhuman Rights Project, Judge Recognizes Two Chimpanzees as Legal Persons, Grants them Writ of Habeas Corpus (Apr. 20, 2015), <http://www.nonhumanrightsproject.org/2015/04/20/judge-recognizes-two-chimpanzees-as-legal-persons-grants-them-writ-of-habeas-corporus/>.

118. Amended Order to Show Cause, *Hercules*, No. 152736/2015 (N.Y. Sup. Ct. N.Y. Cty. Apr. 21, 2015), NYSCEF No. 36.

119. Transcript of Proceedings, *Hercules*, No. 152736/2015 (N.Y. Sup. Ct. N.Y. Cty. filed June 10, 2015), NYSCEF No. 79.

120. Nonhuman Rights Project, Inc. *ex rel. Hercules v. Stanley*, 16 N.Y.S.3d 898, 898 (Sup. Ct. N.Y. Cty. 2015).

121. *Id.* at 905 (citing *In re Lerner*, 74 N.Y.S. 70, 72 (2d Dep’t 1902)). To the NhRP’s knowledge, this is the first Anglo-American decision to hold that a petitioner who lacks standing on its own nevertheless has standing to seek habeas corpus relief on behalf of an injured nonhuman animal.

122. *Id.* at 910.

123. *Id.* at 911 (citing *Byrn v. N.Y.C. Health & Hosps. Corp.*, 286 N.E.2d 887, 889 (N.Y. 1972)).

124. *Id.* at 917 n.2.

125. *Hercules*, 16 N.Y.S.3d at 917 n.2.

inclusive interpretations of the law, if only to the modest extent of affording them greater consideration. As Justice Kennedy aptly observed in *Lawrence v. Texas*, albeit in a different context, “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.” The pace may now be accelerating.

For now, however, given the precedent to which I am bound, [the petition is denied].¹²⁶

The NhRP now began to gather additional expert affidavits demonstrating that chimpanzees routinely bear duties and responsibilities. The six additional expert affidavits (including one from Jane Goodall) explained that chimpanzees routinely shoulder duties and responsibilities within wild chimpanzee communities, including maternal, paternal, and sibling duties, as well as duties extending beyond kinship, that they engage in lawful and rule-governed policing, that they cooperate, help and tend to injured or vulnerable community members, that they share hunting duties and food, and inform other community members about danger.¹²⁷ They also shoulder duties and responsibilities within captive chimpanzee communities and within mixed chimpanzee/human communities, including engaging in promise-making and promise-keeping, doing chores, and engaging in moral behavior.¹²⁸

With sixty pages of supplemental affidavits in hand, we refiled Tommy’s case in the New York County Supreme Court, which was also assigned to Justice Jaffe, who repeated her ruling that the Third Department was the best place to address the legality of Tommy’s detention and that there was no allegation that the new filing was sufficiently distinct from those set forth in the first petition for habeas

126. *Id.* at 917–18 (quoting *Lawrence v. Texas*, 539 U.S. 559, 579 (2003)) (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015)). The NhRP filed a timely Notice of Appeal to the First Department. However, in an action that may have destroyed the subject matter jurisdiction of the appeal, in December 2015, the New Iberia Research Center removed the pair from New York to Louisiana instead of bringing them to Save the Chimps, which had offered unconditionally to care for them and maintain them at its sanctuary for the rest of their lives, at no expense to any third party.

127. Affidavit of Jane Goodall, *supra* note 57, at 3–5; Supplemental Affidavit of James R. Anderson, *supra* note 57, at 2–3; Supplemental Affidavit of Christophe Boesch, *supra* note 57, at 3–5; Supplemental Affidavit of Mary Lee Jansvold, *supra* note 57, at 2–3; Supplemental Affidavit of William C. McGrew, *supra* note 57, at 2–4; Supplemental Affidavit of Emily Sue Savage-Rumbaugh, *supra* note 57, at 2–7, 17.

128. Supplemental Affidavit of James R. Anderson, *supra* note 57, at 6, 9; Supplemental Affidavit of Mary Lee Jansvold, *supra* note 57, at 4–5; Supplemental Affidavit of William C. McGrew, *supra* note 57, at 9–10; Supplemental Affidavit of Emily Sue Savage-Rumbaugh, *supra* note 57, at 5, 16–21.

corpus under CPLR 7003(b).¹²⁹ In early January, the NhRP filed a second habeas corpus petition on behalf of Kiko,¹³⁰ also assigned to Justice Jaffe, who then denied that second petition.¹³¹

The NhRP appealed Kiko's ruling to the First Department.¹³² At the time it filed its brief and record on appeal, the NhRP was confronted by a clerk who informed us that we had no right to appeal from a refusal to issue the order to show cause. The NhRP became concerned that the First Department might ignore CPLR 7011 and mistakenly deny the NhRP its statutory right to appeal, as the Second Department had done.¹³³ Seeking to act proactively, the NhRP filed a Motion to Appeal as of Right to the First Department under CPLR 7011.¹³⁴ On July 28, 2016, a single justice deemed the NhRP's motion to be one that was brought under CPLR 5701(c),¹³⁵ which concerns appeals by permission: "An appeal may be taken to the appellate division from any order which is not appealable as of right" with permission refused.¹³⁶ A Motion to Reargue, or in the alternative, for Leave to Appeal to the Court of Appeals was filed on August 19, 2016.¹³⁷ On October 25, 2016, a five judge panel affirmed that we lacked the right to appeal.¹³⁸ Finally, on November 1, 2016, the NhRP filed an Article 78 mandamus action in which it asked the First Department to order itself to accept the NhRP's appeal as a matter of

129. See Order to Show Cause-Declined at 2, Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery, No. 162358/2015 (N.Y. Sup. Ct. N.Y. Cty. Dec. 23, 2015), NYSCEF No. 57.

130. Verified Petition, Nonhuman Rights Project, Inc. *ex rel.* Kiko v. Presti, No. 150149/2016 (N.Y. Sup. Ct. N.Y. Cty. filed Jan. 7, 2016), NYSCEF No. 1.

131. Memorandum Declining Order to Show Cause, *Kiko*, No. 150149/2016 (N.Y. Sup. Ct. N.Y. Cty. Jan. 29, 2016), NYSCEF No. 48.

132. Notice of Appeal, *Kiko*, No. 150149/2016 (N.Y. Sup. Ct. N.Y. Cty. filed Jan. 29, 2016), NYSCEF No. 50; Brief for Petitioner-Appellant, *Kiko*, No. 150149/16 (N.Y. App. Div. 1st Dep't filed May 18, 2016). Tommy was relocated to a vicinity outside of New York. The NhRP delayed filing Tommy's appeal for ten months out of concern that he was beyond the jurisdiction of the New York courts. Brief for Petitioner-Appellant, *Tommy*, No. 162358/15 (N.Y. App. Div. 1st Dep't filed Oct. 28, 2016).

133. Decision & Order on Motion, *supra* note 95.

134. Notice of Motion to Appeal as of Right, Nonhuman Rights Project, Inc. *ex rel.* Kiko v. Presti, Nos. M-2819, 150149/16 (N.Y. App. Div. 1st Dep't filed May 26, 2016).

135. Motion Decision, *Kiko*, Nos. M-2819, 150149/16 (N.Y. App. Div. 1st Dep't July 28, 2016).

136. N.Y. C.P.L.R. 5701 (McKinney 2014).

137. Petitioner-Appellant's Memorandum of Law in Support of Its Motion to Reargue or, in the Alternative, for Leave to Appeal to the Court of Appeals, Nonhuman Rights Project, Inc. *ex rel.* Kiko v. Presti, Nos. M-4175, 150149/16 (N.Y. App. Div. 1st Dep't filed Aug. 19, 2016).

138. Motion Decision, *Kiko*, Nos. M-4175, 150149/16 (N.Y. App. Div. 1st Dep't Oct. 25, 2016).

absolute right.¹³⁹ Ultimately, the NhRP withdrew the mandamus as moot when on November 10, 2016, a five-judge panel granted NhRP its appeal as of right, holding, in part,

Reargument granted, and upon reargument, the order of this Court, entered October 25, 2016 (M-4175), recalled and vacated, and the motion brought by petitioner-appellant for leave to appeal, as of right, from the January 29, 2016 judgment of Supreme Court refusing an order to show cause (CPLR 7011), is granted.¹⁴⁰

Further cases in New York and other states involving elephants, chimpanzees, and orcas are in the works.¹⁴¹

In conclusion, the NhRP filed its first lawsuits at the earliest time it believed it had some reasonable chance of a partial or complete success. Even if it does not entirely succeed in its initial cases, the NhRP is cognizant that it is not just making history, but helping to create a new culture through its careful presentation of thorough legal arguments and powerful facts. It has done this outside the courtroom through such means as a cover story for the *Sunday New York Times Magazine*,¹⁴² an appearance on the *Colbert Report*¹⁴³ and on Fox News,¹⁴⁴ through giving a TED Talk that has attracted more than one million views,¹⁴⁵ and through the D.A. Pennebaker and Chris Hegedus film *Unlocking the Cage*,¹⁴⁶ which premiered at the 2016 Sundance Film Festival,¹⁴⁷ is being featured on HBO, and presents a film history of the NhRP's work with some of its scenes reflected in this article.¹⁴⁸

139. Verified Petition for Writ of Mandamus, Nonhuman Rights Project, Inc. *ex rel.* Kiko v. Presti, No. 150149/16 (N.Y. App. Div. 1st Dep't filed Nov. 1, 2016). This petition was withdrawn as moot following the decision of the First Department on November 10, 2016.

140. Motion Decision, *Kiko*, Nos. M-4175A, 150149/16 (N.Y. App. Div. 1st Dep't Nov. 10, 2016).

141. All developments on and filings in every case, including petitions, memoranda, briefs, motion, affidavits, decisions, and transcripts of oral arguments, are available at the NhRP's website, *Court Cases*, NONHUMAN RIGHTS PROJECT, <http://www.nonhumanrightsproject.org/category/courtfilings/> (last updated Nov. 2, 2016).

142. Charles Siebert, *Should a Chimp Be Able to Sue Its Owner?*, N.Y. TIMES MAG. (Apr. 23, 2014), <http://nyti.ms/1fhmOkb>.

143. *Colbert Report: Steven M. Wise* (Comedy Central television broadcast July 17, 2014), <http://www.cc.com/video-clips/70ezhu/the-colbert-report-steven-m-wise>.

144. *Face Off: Steven M. Wise* (Fox News television broadcast Aug. 24, 1999), <https://www.youtube.com/watch?v=sMLRNdiMqsw>.

145. Wise TED Talk, *supra* note 8.

146. UNLOCKING THE CAGE (Pennebaker Hegedus Films 2016).

147. *Screenings: Festivals*, UNLOCKING THE CAGE, <http://www.unlockingthecagethefilm.com/festivals/> (last visited Nov. 14, 2016).

148. *About: Synopsis*, UNLOCKING THE CAGE, <http://www.unlockingthecagethefilm.com/synopsis/> (last visited Nov. 14, 2016).

The NhRP occasionally says it is seeking its Lord Mansfield, judges whose rational and reflective sides might become aware and powerful enough to allow them to recognize, and struggle to equalize or overturn, their automatic unconscious biases against treating a nonhuman animal as a rights-bearer, the way Lord Mansfield brought himself to hold that blacks were rights-bearers more than two centuries ago. They exist. But many judges will be unable to shake their biases, and so the duty will fall to their children and grandchildren, who are maturing in the new culture that is no longer uncritically accepting of the legal thinghood of all nonhuman animals.¹⁴⁹

149. It remains to be seen whether there will be an effect of age, with the younger infected less strongly by an automatic implicit bias against the thinghood of all nonhuman animals than their elders, as is true with gender biases, as opposed to race bias, which is more immune to an age effect. *See, e.g.*, BANAJI & GREENWALD, *supra* note 38, at 115, 225.