



## “A Deep Dilemma”: New York Is Poised to Take Another Look at Personhood Status for Nonhuman Animals

*“Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to protection of the law against arbitrary cruelties and enforced detention? This is not merely a definitional question, but a deep dilemma of ethics and policy that deserves our attention.”*

- New York Court of Appeals Justice Eugene M. Fahey<sup>1</sup>

The question of “personhood” and whether a nonhuman animal has the rights and protections afforded by a writ of habeas corpus is poised to return to New York’s appellate courts and, potentially, to New York’s highest court. The timing may be propitious: two recent cases have highlighted “regrettable” precedent regarding this question and compelling evidence that nonhuman animals and humans are a continuum of living beings and share essential characteristics.<sup>2</sup>

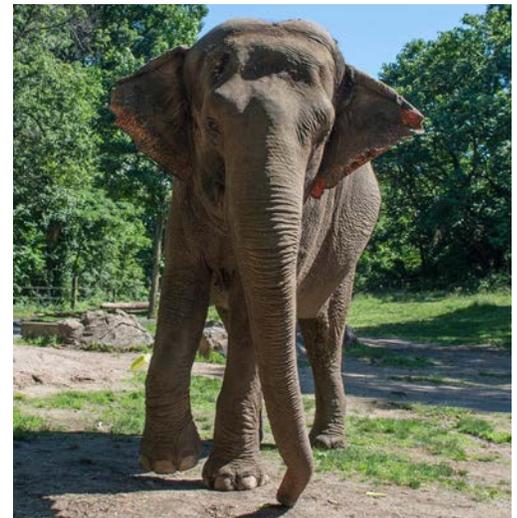
The Nonhuman Rights Project, Inc. (NhRP) is a non-profit corporation and a civil rights organization and has advocated for the common law status of some nonhuman animals. The NhRP has argued that their status should evolve from mere “things”, which lack the capacity to possess any legal rights, to “persons,” who possess such fundamental rights as bodily integrity and bodily liberty and other rights to which evolving standards may apply.<sup>3</sup> Under New York law, a habeas corpus<sup>4</sup> petition may be brought by a person who is illegally imprisoned or otherwise restrained within the state, or by someone acting on his or her behalf.<sup>5</sup> A writ of habeas corpus challenges the illegal detention or imprisonment of a person—and necessarily requires a determination that the one who is imprisoned is a “person.” The NhRP has challenged that determination, with some success, in New York.

Recently, in *Nonhuman Rights Project, Inc., ex rel. Happy v. Breheny*, Hon. Alison Y. Tuitt determined that the NhRP had standing to file a habeas corpus petition on behalf of “Happy,” a 48-year-old elephant located at the Bronx Zoo (the “Zoo”).<sup>6</sup> The NhRP argued that Happy is unlawfully imprisoned at the Zoo and sought her immediate release to an elephant sanctuary (a sanctuary previously agreed to provide lifetime care for Happy at no cost to the Zoo; however, the Zoo declined the offer).<sup>7</sup> The NhRP did not contend that the *conditions* of Happy’s imprisonment are unlawful. Rather, the NhRP argued that Happy should not be kept at the Zoo at all.<sup>8</sup> The Zoo Respondents claimed that Happy is not unlawfully imprisoned and that Happy could not be considered a

### Carla Varriale-Barker

Segal McCambridge Singer and Mahoney, Ltd.

*Carla Varriale-Barker is a Shareholder in the New York office of Segal McCambridge Singer and Mahoney, Ltd. She is the Chair of the firm’s Sports, Recreation and Entertainment practice group and focuses her practice on the representation of clients in the sports, recreation and entertainment industries. She also teaches Sports Law and Ethics at Columbia University’s Sports Management Program. She can be reached at [cvarriale@smsm.com](mailto:cvarriale@smsm.com).*



*Happy, the Elephant*

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“person” under New York law. Therefore, she is not entitled to rights and protections afforded by the writ of habeas corpus.<sup>9</sup>

The question before Justice Tuitt was simple: should habeas corpus protection be extended to a nonhuman animal like Happy? The answer proved not to be so simple. Justice Tuitt analyzed evidence, including uncontroverted expert evidence. The evidence established that Happy’s existence at the Zoo could not be characterized as “happy”: she has no direct social contact with any other elephants and spends most of her time indoors. Justice Tuitt further noted that African and Asian elephants share numerous complex cognitive abilities, such as self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities. Each of these abilities is a component of autonomy. Moreover, elephants frequently display empathy in the form of protection, comfort, and consolation, and actively help those in difficulty. The NhRP also presented evidence that Happy passed the mirror self-recognition test (the “MSR”), described as an indicator of an animal’s self-awareness and is thought to correlate with higher forms of empathy and altruistic behavior.<sup>10</sup>

Justice Tuitt considered New York precedent that addressed the question of “personhood” with respect to chimpanzees and found it lacking. For example, the NhRP previously brought a habeas corpus petition on behalf of two adult captive chimpanzees, known as Tommy and Kiko. According to the petition, the chimpanzees were confined by their owners to small cages located in a warehouse and a cement storefront in a crowded residential area, respectively.<sup>11</sup> The petition sought the transfer of the chimpanzees to sanctuaries. As in Happy’s case, the NhRP did not allege that the respondents were in violation of any state or federal statutes respecting the keeping of wild animals, instead the petition focused on arguing that Tommy and Kiko should be considered “persons” entitled to certain fundamental rights under New York law. The NhRP’s habeas corpus petition was denied, however, because habeas corpus could not apply where the NhRP sought only to change the conditions of confinement, rather than the confinement itself.<sup>12</sup>

Justice Tuitt regretted she was constrained by existing appellate court precedent in New York. She noted, however, that she was “extremely sympathetic” to Happy’s plight and the NhRP’s mission on her behalf. She recognized Happy as an extraordinary animal with complex cognitive abilities, and an “intelligent being with advanced analytic abilities akin to human beings.”<sup>13</sup> Nonetheless, she concluded that Happy is not a “person” who is entitled to the protections afforded by a writ of habeas corpus.<sup>14</sup>

She cited *Lavery I*, in which New York’s Appellate Division, First Department held that habeas corpus relief should not be extended to chimpanzees, notwithstanding their human-like characteristics, because they could not be considered “persons”



under the law.<sup>15</sup> However, the Court anchored this conclusion upon the chimpanzees' purported lack of legal duties or lack of legal accountability for their actions.<sup>16</sup> The Court further held that even if habeas corpus was potentially available to chimpanzees, the NhRP failed to challenge the legality of the chimpanzees' detention (it merely sought their transfer to a different and more appropriate setting).<sup>17</sup>

On a motion for leave to appeal this decision to New York's Court of Appeals (New York's ultimate court), the reasoning that the chimpanzees could not be considered "persons" because they lack the capacity to bear duties or to be held legally accountable for their actions captured the attention of Justice Eugene M. Fahey. In a remarkable concurring opinion, Justice Fahey noted that although he would have voted to affirm the Appellate Division, First Department's decision, it was not a decision on the merits of the NhRP's case. Justice Fahey emphasized: "[t]he question will have to be addressed eventually. Can a non-human animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence, a thing?"<sup>18</sup>

Justice Fahey exposed the fallacy of the Appellate Division, First Department's determination that chimpanzees are not "persons." He noted that human infants or comatose adults also lack the capacity or the ability to bear legal duties or to be held legally accountable for their actions, yet no one doubts their rights, including the right to seek relief through a habeas corpus proceeding.<sup>19</sup>

Justice Fahey observed: "[t]he inadequacy of the law as a vehicle to address some of our most difficult ethical dilemmas is on full display in this matter"<sup>20</sup> and he suggested a "better approach."<sup>21</sup> According to Justice Fahey, this approach should focus, not on whether a nonhuman animal fits the definition of a "person," or whether he or she has the same rights and duties as a person, but on whether he or she has a right to liberty that is protected by habeas corpus.<sup>22</sup> This "better approach" depends on our assessment of the intrinsic nature of chimpanzees (or elephants) as a species. Like Justice Tuitt, he credited the unrebutted evidence about the chimpanzees' cognitive abilities, capacity for self-awareness and self-control, and the ability to communicate, among other things. In other words, he noted that a chimpanzee is a sentient being with inherent value who has the right to be treated with respect. He implored that a refusal to confront this fact is "a manifest injustice"<sup>23</sup>

### Addressing "The Dilemma"

Dilemmas invite solutions.

Justice Tuitt, like Justice Fahey, would not conclude that these nonhuman animals are merely "things." She determined that Happy is more than just a legal thing or property.



“She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty. Nonetheless, we are constrained by the caselaw to find that Happy is not a ‘person’ and is not being illegally imprisoned.”<sup>24</sup> Justice Tuitt cited to Justice Fahey’s concurring opinion in *Lavery II* and his observation that “[the issue of whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a ‘person,’ there is no doubt it is not merely a thing.”<sup>25</sup>

Confronting a manifest injustice is the role of the law. The courts in New York and elsewhere will continue to grapple with the question of whether habeas corpus protection should be extended to nonhuman animals and whether they, too, have intrinsic rights. Even in the human realm, the law (and essential rights) have often lagged behind societal norms (marriage equality, civil rights, and women’s suffrage are a few examples), until there is a catalyst for change. In *Lavery II*, Justice Fahey declared that the issue of whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is “profound and far-reaching and speaks of our relationship with all of life around us.” His holding is sobering and a moment for reflection as we consider the rights and intrinsic worth of all beings.

Happy’s case may prove to be a catalyst for change. An appeal provides an opportunity to consider Justice Fahey’s “better approach” to solve the difficult dilemma framed by Justice Fahey and echoed by Justice Tuitt. While a concurring opinion is not binding precedent, it can provide persuasive authority and Justice Fahey’s concurring opinion in *Lavery II* is nothing if not compelling. Justice Tuitt also highlighted her frustration with the inadequate and outmoded precedent in New York. Justice Fahey took an important step, as did Justice Tuitt, in recognizing the inherent rights of sentient beings such as a chimpanzee or an elephant and established that they are not “things” by anyone’s definition. An appeal could upend the “manifest injustice” caused by treating nonhuman animals like inanimate objects that lack fundamental rights. ➤

## Endnotes

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| <p>1 <i>Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery</i>, 31 N.Y.3d 1054, 100 N.E.3d 846, 848 (2018) (Fahey, J. concurring) [hereinafter <i>Lavery II</i>].</p> <p>2 <i>Id.</i>; Nonhuman Rights Project, Inc., ex rel. Happy v. Breheny, Sup Ct, Bronx County, Feb. 18, 2020, Tuitt, J., index No. 260441/19, <a href="https://www.nonhumanrights.org/content/uploads/HappyFeb182020.pdf">https://www.nonhumanrights.org/content/uploads/HappyFeb182020.pdf</a> [hereinafter <i>Breheny</i>].</p> <p>3 NONHUMAN RIGHTS PROJECT, <i>Who We Are</i>, <a href="https://www.nonhumanrights.org/who-we-are/">https://www.nonhumanrights.org/who-we-are/</a> (last visited June 9, 2020).</p> <p>4 Latin for “that you have the body,” <i>Habeas Corpus</i>, BLACK’S LAW DICTIONARY (11th ed. 2019).</p> <p>5 N.Y. C.P.L.R. 7003 (McKinney).</p> | <p>6 <i>Breheny</i>, <i>supra</i> note 2, at 13.</p> <p>7 <i>Id.</i> at 2.</p> <p>8 <i>Id.</i> at 4.</p> <p>9 <i>Id.</i> at 2.</p> <p>10 <i>Id.</i> at 4-5.</p> <p>11 <i>Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery</i>, 152 A.D.3d 73, 54 N.Y.S.3d 392, 394 (2017) [hereinafter <i>Lavery I</i>].</p> <p>12 <i>Id.</i> at 397.</p> <p>13 <i>Breheny</i>, <i>supra</i> note 2, at 14.</p> <p>14 <i>Id.</i></p> <p>15 <i>Lavery I</i>, 54 N.Y.S.3d at 395.</p> | <p>16 <i>Id.</i> at 396.</p> <p>17 <i>Id.</i> at 397.</p> <p>18 <i>Lavery II</i>, 100 N.E.3d at 846.</p> <p>19 <i>Id.</i> at 847.</p> <p>20 <i>Id.</i> at 846.</p> <p>21 <i>Id.</i> at 847.</p> <p>22 <i>Id.</i></p> <p>23 <i>Id.</i> at 848.</p> <p>24 <i>Breheny</i>, <i>supra</i> note 2, at 16.</p> <p>25 <i>Lavery II</i>, <i>supra</i> note 1, at 849.</p> |
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