



## New York’s Highest Court Granted Leave to Appeal in Habeas Corpus Case Involving “Happy” The Elephant

### Introduction

New York’s highest court, the New York Court of Appeals (Court of Appeals), is poised to revisit the question of whether a non-human animal is entitled to the rights and protections afforded by the common-law writ of habeas corpus in an action brought by the Nonhuman Rights Project (NhRP) on behalf of an autonomous and cognitively complex elephant named “Happy.” Happy has been confined at the Bronx Zoo for decades.<sup>1</sup> The lower courts determined that, while Happy is more than just a legal thing, or property, precedent compelled them to find that Happy is not a legal “person” and is, therefore, not being illegally imprisoned at the Bronx Zoo. The Court of Appeals granted the NhRP’s motion seeking permission to appeal from the most recent appellate decision.<sup>2</sup> Permission for leave to appeal to the Court of Appeals is sparingly granted but may be granted when there is a novel issue of public importance.<sup>3</sup> The Court of Appeals did not provide a reason why it granted NhRP’s motion for permission to appeal in its decision.<sup>4</sup>

Happy’s case marks a dramatic return to the Court of Appeals for NhRP and the question of whether the writ of habeas corpus is available to non-human animals. Justice Eugene M. Fahey previously made headlines<sup>5</sup> when the Court of Appeals, in *Lavery*,<sup>6</sup> considered the confinement of chimpanzees in a habeas corpus proceeding brought on behalf of Tommy and Kiko, two captive chimpanzees kept by their owners under questionable conditions. Although Justice Fahey agreed with the majority and determined that habeas relief was not available to the chimpanzees under the circumstances, he foreshadowed that, sooner or later, the “deep dilemma” of determining whether a sentient nonhuman animal is a mere “thing” in the eyes of the law must be addressed. He explained the dilemma in his concurring opinion:

The inadequacy of the law as a vehicle to address some of our most difficult ethical dilemmas is on display in this matter. . . . The 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? ...

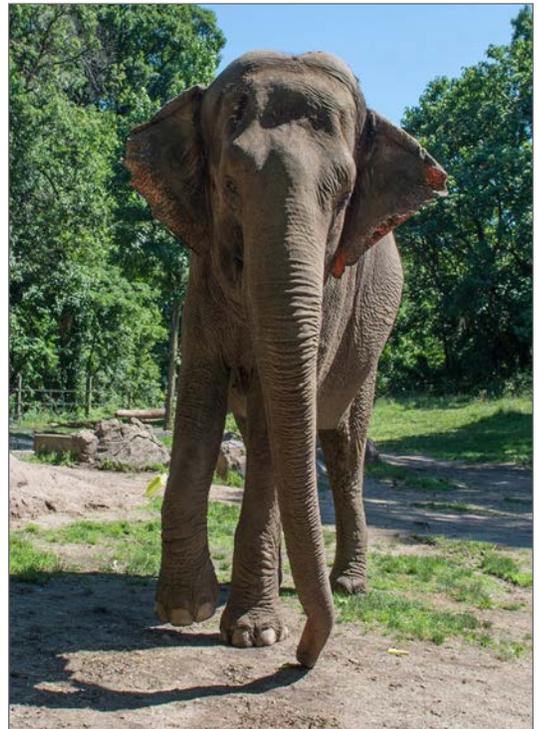
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*Happy the elephant*





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Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings have the right to protection of the law against arbitrary cruelties and enforced detention visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention. To treat a chimpanzee as if he or she has no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect (citation omitted). . . . The evolving nature of life makes clear that chimpanzees and humans exist on a continuum of living beings. Chimpanzees share at least 96% of their DNA with humans. They are autonomous, intelligent creatures. To solve this dilemma, we have to recognize this complexity and confront it.<sup>7</sup>

### **Into the Labyrinth: Habeas Corpus and The Problematic Precedent of New York's Chimpanzee Cases**

The common-law writ of habeas corpus demands that the imprisoning party deliver a prisoner from unjust restraint.<sup>8</sup> Initially, Happy found a receptive audience for her habeas corpus petition at the trial court level. Bronx County Supreme Court Judge Alison Y. Tuitt described herself as “deeply sympathetic to Happy’s plight and the NhRP’s mission on her behalf.”<sup>9</sup> Despite finding that the arguments advanced on behalf of Happy were compelling, Judge Tuitt denied habeas corpus relief because she was constrained by prior appellate decisions that required that she find that Happy, an animal, is not a “person” entitled to the writ of habeas corpus.<sup>10</sup>

In a friend of the court brief supporting Happy’s appeal to the Appellate Division, First Department, Harvard Law School Professor Laurence H. Tribe noted New York’s noble tradition of expanding the ranks of rights-holders and discussed how the writ is a time-tested means to address injustices and illegal detentions in a variety of circumstances.<sup>11</sup> Professor Tribe described how the common-law writ of habeas corpus has been available to cognitively complex “persons,” and even persons that the law treated as mere things, including infants, young children, incompetents, elderly persons, and persons deemed insane. However, like Judge Tuitt, the Appellate Division, First Department struggled with whether, a judicial determination that species other than humans are “persons” for some purposes and therefore have certain rights, would lead to “a labyrinth of questions” that common-law processes are ill-equipped to handle and that this is better suited to the legislative process.<sup>12</sup> The Appellate Division, First Department unanimously affirmed Judge



Tuitt’s decision granting the motion to dismiss Happy’s petition for a writ of habeas corpus, without costs.

The Appellate Division, First Department further noted that New York Courts had previously addressed the question of personhood with respect to chimpanzees—four identical cases were brought by the NhRP in four different counties, each within a different department of the Supreme Court, Appellate Division. In each case, the trial court declined to allow habeas corpus relief for the chimpanzees, and all four Departments of the Appellate Division affirmed the decisions.<sup>13</sup> The court expressly left such decisions to the legislature.

## Conclusion

The question of whether a nonhuman animal who has been unjustifiably confined and is entitled to the rights and protections of the common-law writ of habeas corpus is not new to the New York court. Despite several cases that have advanced through New York’s appellate courts, this legal and ethical issue has not been resolved. It is not clear from the recent decision to permit the most recent appeal brought by the NhRP if the Court of Appeals has had a change of heart or if the Court of Appeals wants to make an unequivocal statement that the common-law writ of habeas corpus simply does not lie on behalf of an elephant, a chimpanzee, or any other non-human animal, no matter how autonomous or intelligent the non-human animal may be.

New York’s legislature, despite entreaties from the courts, has not chosen to step into the labyrinth. However, the trial and intermediate appellate courts have echoed Justice Fahey’s admonition that “sooner or later” the question must be resolved. These habeas corpus cases brought by the NhRP are compelling and newsworthy and they encourage the field of animal law to develop with principles of justice that are consistent with our legal system’s commitment to equality of all beings. Whether the New York legislature takes up this issue, or whether the Court of Appeals refines the precedent, will be of keen interest to both court-watchers and animal rights advocates. The NhRP and other animal-rights advocates may shift their focus to the legislature in order to achieve their objectives. ➤

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## Endnotes

- 1 See Corinne Ramey, *Animal-Rights Group Sues to Spring Happy the Elephant from Bronx Zoo*, THE WALL ST. J. ONLINE (Oct. 2, 2018), <https://www.wsj.com>.
- 2 State of New York, Court of Appeals Decisions, at 6 (May 4, 2021), <https://www.nonhumanrights.org/content/uploads/DecisionList050421.pdf> (hereinafter Court of Appeals Decisions).
- 3 See Thomas R. Newman, Steven J. Ahmuty, Jr., *Motions for Permission to Appeal to the Court of Appeals*, N. Y. L. J. (Mar. 2, 2021) (noting that the Court of Appeals granted 2.1 percent of the civil motions for permission to appeal in 2019).
- 4 Court of Appeals Decisions, *supra* note 2, at 6.



- 5 See Karin Brulliard, *A Judge Just Raised Deep Questions About Chimpanzees' Legal Rights*, WASH. POST (May 9, 2018), <https://www.washingtonpost.com/news/animalia/wp/2018/05/09/a-judge-just-raised-some-deep-questions-about-chimpanzees-legal-rights/>.
- 6 *Nonhuman Rts. Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 100 N.E.3d 846 (2018).
- 7 *Id.* at 848 (Fahey, J. concurring).
- 8 *Writ of Habeas Corpus*, BLACK'S L. DICTIONARY (11<sup>th</sup> ed. 2019).
- 9 *Nonhuman Rights Project, Inc. ex rel. Happy v. Breheny*, No. 260441/19 (Sup. Ct., Bronx Cnty, Feb. 18, 2020), <https://www.nonhumanrights.org/content/uploads/HappyFeb182020.pdf>.
- 10 *Id.* (citing *In re People ex rel. Nonhuman Rts. Project, Inc. v. Lavery*, 124 A.D.3d 148, 998 N.Y.S.2d 248 (2014) that held that a chimpanzee is not a person entitled to the rights and protections afforded by the writ of habeas corpus).
- 11 The amicus brief noted that for centuries, the court has recognized that the common-law writ of habeas corpus "lies in all cases of imprisonment by commitment, detention, confinement or restraint, for whatever cause, or under whatever pretense." *People v. McLeod*, 33 Hill 635, 647 note j (N.Y. 1842).
- 12 *Nonhuman Rts. Project, Inc. v. Breheny*, 189 A.D.3d 583, 134 N.Y.S.3d 188 (2020), *leave to appeal granted*, 36 N.Y.3d 912 (2021) (citing *People ex rel. Nonhuman Rights Project, Inc.*, 998 N.Y.S.2d 248).
- 13 *Id.* at 189 (citations omitted).

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