ANIMAL RIGHTS — UTILIZATION OF RACIAL PRECEDENT — NEW YORK COURT OF APPEALS REJECTS EXTENDING WRIT OF HABEAS CORPUS TO ELEPHANT. — *Nonhuman Rights Project, Inc., ex rel. Happy v. Breheny*, No. 52, 2022 WL 2122141 (N.Y. June 14, 2022), *reargument denied*, No. 2022-552, 2022 WL 17588057 (N.Y. Dec. 13, 2022) (mem.) (unpublished table decision).

Elephant is not the new Black.[1] Happy, a fifty-one-year-old Asian elephant, is a longtime resident of the Bronx Zoo whose solitary confinement spurred legal advocates to petition for a writ of habeas corpus on her behalf.[2] According to the Nonhuman Rights Project (the animal rights organization representing the pachyderm), refusing to recognize Happy's right to habeas corpus "echoes a long and deeply regrettable history of naked biases"[3] — notably, the enslavement of African Americans.[4] Recently, in *Nonhuman Rights Project, Inc., ex rel. Happy v. Breheny*,[5] the New York Court of Appeals held that nonhuman animals cannot avail themselves of the writ of habeas corpus because such animals are not persons.[6] In rejecting Happy's petition, the majority rightfully distinguished habeas corpus precedent regarding enslaved persons[7] from Happy's case. Reliance on abolition-related precedent to advocate for nonhuman animals is folly under both theories advanced by the appellant;[8] such analogies are not only fraught with racist implications, but are inapposite to novel extensions of rights to new species as they do not demonstrate the flexibility of legal personhood.

Born in the Asian wilderness, Happy arrived at the Bronx Zoo in 1977.[9] In 2006, Happy passed the mirror test, which demonstrated to "researchers that pachyderms can recognize themselves in a mirror —

---

[1] *See generally* BÉNÉDICTE BOISSERON, AFRO-DOG: BLACKNESS AND THE ANIMAL QUESTION (2018) ("Is the Animal the New Black?" *Id.* at 1.).

[2] *See Client: Happy (Elephant)*, NONHUM. RTS. PROJECT, https://www.nonhumanrights.org/client-happy [https://perma.cc/Q5KX-XYHN].

[3] Brief for Petitioner-Appellant at 42, Nonhum. Rts. Project, Inc. v. Breheny, No. 52 (N.Y. June 14, 2022).

[4] *See id.*

[5] No. 52, 2022 WL 2122141 (N.Y. June 14, 2022).

[6] *Id.* at *1.

[7] This comment utilizes the terminology "enslaved person" when referring to those people who historically have been called "slaves." For more information on this diction, see Shannon Browning-Mullis, *Why We Use "Enslaved,"* TELFAIR MUSEUMS (May 4, 2020), https://www.telfair.org/article/why-we-use-enslaved [https://perma.cc/SGQ9-HRRC] ("The noun slave implies that she was, at her core, a slave. The adjective enslaved reveals that though in bondage, bondage was not her core existence. Furthermore, she was enslaved by the actions of another.").

[8] *See* Brief for Petitioner-Appellant, *supra* note 3, at 13, 20 (arguing either that Happy is person or that writ of habeas corpus has historical flexibility proven by extension to enslaved persons).

[9] *Happy the Elephant Is Not a Person, A Court Rules*, NPR (June 14, 2022, 4:26 PM), https://www.npr.org/2022/06/14/1105031075/bronx-zoo-elephant-not-person-court-rules [https://perma.cc/N9Q3-XT84].

complex behavior observed in only a few other species."[10] Originally, Happy lived gleefully with other elephantine friends, but each of her companions has since passed.[11] Woefully, Happy does "not get along" with Patty, the other remaining elephant at the Bronx Zoo, and therefore lives in a solitary enclosure.[12]

In 2018, the Nonhuman Rights Project (NhRP) commenced a habeas corpus proceeding against James Breheny, the director of the Bronx Zoo, on behalf of Happy.[13] NhRP alleged that Happy "is being unlawfully imprisoned," is "denied direct social contact with any other elephants, and spends most of her time indoors."[14] The Supreme Court of New York dismissed the petition, stating that "animals are not 'persons' entitled to rights and protections afforded by the writ of habeas corpus."[15]

In a brief opinion, the New York Appellate Division affirmed the Supreme Court's conclusion, stating that "the writ of habeas corpus is limited to human beings."[16] Undeterred, NhRP appealed the lower courts' determination to the highest court of New York.[17]

The New York Court of Appeals affirmed the decisions of the lower courts.[18] Writing for the majority, Chief Judge DiFiore[19] concluded that the Supreme Court's dismissal of Happy's habeas corpus claim was proper as the common law writ has only been used to release "*human beings*" from "unlawful confinement."[20] To generate this conclusion, the majority first considered the lack of judicial precedent supporting "the notion that the writ . . . should be applicable to nonhuman animals."[21] New York statutes do not confer personhood on any nonhuman animals

---

[10] Andrew Bridges, *Mirror Test Suggests Elephants Are Self-Aware*, NBC NEWS (Oct. 30, 2006, 5:00 PM), https://www.nbcnews.com/id/wbna15487308 [https://perma.cc/NZ8P-DCLM].

[11] Bill Mahoney, *Happy the Elephant at Bronx Zoo Is Not a Person, New York's Top Court Rules*, POLITICO (June 14, 2022, 10:48 AM), https://www.politico.com/news/2022/06/14/happy-elephant-bronx-zoo-00039409 [https://perma.cc/5VKJ-SUMP].

[12] *Id.* Like humans, elephants are communal creatures and "social interactions remain central to their well-being throughout their lives." Rachel Fobar, *"Nothing to Do, Nowhere to Go": What Happens When Elephants Live Alone*, NAT'L GEOGRAPHIC (Jan. 31, 2022), https://www.nationalgeographic.com/animals/article/what-happens-when-captive-us-elephants-live-alone [https://perma.cc/A3DW-3DE3].

[13] Nonhum. Rts. Project, Inc. v. Breheny, No. 260441/19, 2020 WL 1670735, at *2 (N.Y. Sup. Ct. Feb. 18, 2020).

[14] *Id.*

[15] *Id.* at *9 (citing Nonhum. Rts. Project, Inc., *ex rel.* Tommy v. Lavery, 100 N.E.3d 846 (N.Y. 2018) (Fahey, J., concurring)).

[16] Nonhum. Rts. Project, Inc., *ex rel.* Happy v. Breheny, 134 N.Y.S.3d 188, 189 (App. Div. 2020) (mem.) (citing Nonhum. Rts. Project, Inc., *ex rel.* Tommy v. Lavery, 54 N.Y.S.3d 392, 393–95 (App. Div. 2017)).

[17] *See Nonhum. Rts. Project, Inc.*, 2022 WL 2122141, at *1.

[18] *Id.*

[19] Chief Judge DiFiore was joined by Judges Garcia, Singas, Cannataro, and Troutman. *Id.* at *43.

[20] *Id.* at *1.

[21] *Id.* at *4.

and declare that all wildlife not privately owned is property of the State.[22] Although "the writ of habeas corpus is flexible" and has been used to secure liberty for "those whose rights had not yet been properly acknowledged through established law," Chief Judge DiFiore declined to extend the breadth of the writ's precedent to encompass nonhuman animals.[23] Despite the numerous biological experts and cognitive scientific evidence introduced by the appellant, the majority relied on a definition of legal personhood that describes persons as those "connected with the capacity, not just to benefit from the provision of legal rights, but also to assume legal duties and social responsibilities."[24]

Finally, the majority stated that the extension of nonhuman personhood should be left to the legislature, as a contrary decision would create an "inevitable flood" of litigation against "farmers, pet owners, military and police forces, researchers, and zoos."[25] Before concluding, the majority attempted to dispel any notion that the court's holding would further cruel treatment of nonhuman animals by emphasizing that New York law already requires humans to "treat nonhuman animals with dignity and respect."[26]

The heart of Judge Wilson's dissent was the Latin maxim "[*t*]*empora mutantur et leges mutantur in illis*," that is, that "[t]imes change and the laws change with them."[27] Judge Wilson began by describing the unfortunate life of Ota Benga, "a member of the Mbuti people," who had been put on "display in the [Bronx] Zoo's monkey house[] behind iron bars" in 1906.[28] Judge Wilson made much of the similarities between Mr. Benga's and Happy's respective imprisonments at the Bronx Zoo; notably that both confinements, "though not in violation of any statutory law, produced little or no social benefit."[29] He redefined the legal question identified by the majority, asserting that this case was not about Happy's personhood, but rather "whether the detention of an elephant can ever be so cruel, so antithetical to the essence of an elephant, that the writ of habeas corpus should be made available under the common law."[30] In his view, this case presented a novel issue for the court to resolve, and the majority's reliance on the historical use of habeas

---

[22] *Id.*

[23] *Id.*

[24] *Id.* This definition was consonant with the personhood of corporate and partnership entities because "[c]orporations are simply legal constructs through which human beings act and corporate entities, unlike nonhuman animals, bear legal duties in exchange for legal rights." *Id.* at *5 (citing Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888)).

[25] *Id.*

[26] *Id.* at *7.

[27] *Id.* at *12 (Wilson, J., dissenting).

[28] *Id.* at *7.

[29] *Id.* at *8.

[30] *Id.*

corpus was "an argument against all progress, one that flies in the face of legal history."[31]

Judge Wilson next chronicled precedent of the writ of habeas corpus's application to enslaved persons.[32] Although "the various rights held by animals today . . . are far greater than those held by enslaved persons," the writ of habeas corpus was still available to the latter.[33] These stories proved that the writ of habeas corpus could be invoked to challenge legal confinements on behalf of chattel and persons with negligible rights and no legal existence, even when such applications were unconventional.[34] Judge Wilson then detailed the difficulties that arise when using the stories of enslaved and subjugated persons to advocate for animal rights.[35]

Judge Rivera also dissented,[36] arguing that "if humans without full rights and responsibilities under the law may invoke the writ to challenge an unjust denial of freedom, so too may any other autonomous being, regardless of species."[37] Judge Rivera underscored that the majority's opinion was "glaringly absent [of] any explanation of why some kinds of animals — i.e., humans — may seek habeas relief, while others — e.g., elephants — may not."[38] Embracing the equitable nature of habeas corpus proceedings, Judge Rivera deduced that such questions fall within the purview of the courts as the "difficultly [sic] of the task . . . is no basis to shrink from our judicial obligation."[39] Judge Rivera concluded her dissent with the proclamation that Happy's captivity is "an affront to a civilized society, and every day she remains a captive — a spectacle for humans — we, too, are diminished."[40]

Ultimately, the utilization of precedent involving enslaved persons likely contributed to NhRP's loss. For Happy to avail herself of the writ of habeas corpus, the appellant needed to demonstrate either that Happy is a person (the "personhood" argument) *or* that the writ is applicable to nonpersons (the "flexibility" argument).[41] To meet this burden, NhRP analogized to precedent involving enslaved persons, a familiar technique of animal advocacy. However, under both theories, analogies between Black people and animals cannot be uncoupled from racism because the user intends to equate the horrors of enslavement with the horrors of animal captivity; or operate within, and validate, the legal frameworks constructed by enslavers. Even if an advocate wishes to assert that

---

[31] *Id.* at *11.
[32] *See id.* at *14–17.
[33] *Id.* at *14.
[34] *Id.* at *22.
[35] *Id.* at *26.
[36] *Id.* at *34 (Rivera, J., dissenting).
[37] *Id.* at *36.
[38] *Id.* at *38.
[39] *Id.*
[40] *Id.* at *43.
[41] The majority and dissents fractured on the legal issue at hand.

nonhuman animals are equal to *all* humans, the targeted use of precedent involving enslaved persons still encourages racial harm without furthering this equitable goal.

A lawyer's sword is the analogy;[42] the distinction, their shield. When a lawyer cites precedent, they are asserting that there is *something* to be learned from the reference.[43] When utilizing an analogy, the lawyer argues that the similarities between two cases call for a judge to recreate the result of the earlier case.[44] Indeed, the appellant quoted *Enright v. Eli Lilly & Co.*[45] for the proposition that "[i]t is 'a fundamental principle of justice' under the common law that 'like cases should be treated alike.'"[46]

NhRP asserted that refusing to recognize Happy's right to habeas corpus "echoes a long and deeply regrettable history of naked biases."[47] The appellant pointed to *Dred Scott v. Sanford*,[48] which stated that Black people "had no rights which the white man was bound to respect."[49] NhRP also offered *Somerset v. Stewart*,[50] a British case "successfully brought by [a] slave," which was relied upon by the New York Court of Appeals in *Lemmon v. People*[51] to free enslaved persons through the writ of habeas corpus.[52] For these analogies to be of any use, the appellant must allege that there exists some material similarity between the enslaved persons described in *Somerset* and *Lemmon*, and Happy; otherwise, these citations would represent nothing more than historical fluff.[53] The appellant's brief sets out to prove the equitable nature of the writ of habeas corpus[54] (the "flexibility" argument) and that persons can "have only one or any number of rights"[55] (the "personhood" argument). The dissents relied solely on the flexibility argument.[56]

---

[42] *See* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741 (1993) ("Reasoning by analogy is the most familiar form of legal reasoning.").

[43] *See Precedent*, BLACK'S LAW DICTIONARY (4th ed. 1968).

[44] *See* Sunstein, *supra* note 42, at 745.

[45] 570 N.E.2d 198 (N.Y. 1991).

[46] *See* Brief for Petitioner-Appellant, *supra* note 3, at 37 (quoting *Enright*, 570 N.E.2d at 204).

[47] *Id.* at 42.

[48] 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[49] Brief for Petitioner-Appellant, *supra* note 3, at 42 (quoting *Dred Scott*, 60 U.S. (19 How.) at 407).

[50] (1772) 98 Eng. Rep. 499; 12 Geo. 3 (KB) (enslaved person at issue).

[51] 20 N.Y. 562 (1860).

[52] Brief for Petitioner-Appellant, *supra* note 3, at 14.

[53] It is improbable that the similarities are alleged to be merely between Happy's *confinement* and the *confinement* of these enslaved persons; if that were the case, then the appellant could have relied solely on cases that did not involve enslaved individuals.

[54] *See* Brief for Petitioner-Appellant, *supra* note 3, at 13–17.

[55] *See id.* at 20.

[56] *See Nonhum. Rts. Project, Inc.*, 2022 WL 2122141, at *20 (Wilson, J., dissenting); *id.* at *34 (Rivera, J., dissenting).

If the appellant sought to compare the dehumanization of enslaved Africans to Happy's nonpersonhood, it created an "odious comparison with concerning implications."[57] As Professor Bénédicte Boisseron notes, "[t]he black-animal subtext is deeply ingrained in the cultural genetics of the global north, an inherited condition informed by a shared history of slavery and colonization."[58] Regrettably, animal advocates from Jeremy Bentham to the People for the Ethical Treatment of Animals (PETA) have contributed to this legion of "odious comparisons."[59] At their best, these invocations of race co-opt the Black struggle in order to advocate for another, unrelated cause.[60] At their worst, these appropriations suggest that the differences between white people and Black people parallel the differences between humans and nonhuman animals.[61]

Denials of personhood based on species cannot be conflated with denials of personhood based on race. As Professor Ian Haney López observes, "races do not have a biological basis,"[62] and instead must be

---

[57] *See id.* at *4 (majority opinion).

[58] BOISSERON, *supra* note 1, at ix.

[59] For example, in 1789, Jeremy Bentham "famously drew attention to the connection that one should make between the movement to end slavery and the need to extend moral considerations to animals." *Id.* at 4 (citing JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (London, W. Pickering & E. Wilson 1823) (1789)). In 1988, Marjorie Spiegel published *The Dreaded Comparison: Human and Animal Slavery*, a book that compares the horrors faced by enslaved people to the horrors of animal cruelty. *See* MARJORIE SPIEGEL, THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY 14, 17 (1988). In 2020, PETA compared "speciesism" to "racism" in a "Colin Kaepernick–inspired ad" that was allegedly banned by the National Football League. *See Banned! NFL Blocks PETA's Award-Winning Super Bowl Commercial*, PETA, https://headlines.peta.org/super-bowl-end-speciesism [https://perma.cc/G849-MSMH].

[60] *See* Katherine Compitus, *What Does the BLM Movement Have to Do with Animal Rights?*, PSYCH. TODAY (Aug. 31, 2020), https://www.psychologytoday.com/us/blog/zooeyia/202008/what-does-the-blm-movement-have-do-animal-rights [https://perma.cc/5QNC-9LQ5] (interviewing Boisseron who states that "[i]n more general terms, the problem with this type of comparison is that it instrumentalizes one cause for the benefit of another, without much regard for the former cause"); *cf.* Jay Shooster, Note, *Justice for All: Including Animal Rights in Social Justice Activism*, 40 THE HARBINGER 39, 41 (2015) ("Just like racism, sexism, and classism, speciesism focuses on one morally arbitrary characteristic: species, and uses that to justify violence and inequality.").

[61] *See, e.g.*, Adrian Brune, *PETA Exhibit Provokes Anger from Blacks*, ORLANDO SENTINEL, (Oct. 5, 2005, 12:00 AM), https://www.orlandosentinel.com/news/os-xpm-2005-10-05-peta05-1-story.html [https://perma.cc/B4LN-HBUA] (describing public reaction to PETA exhibit featuring "photograph of a lynching of a black man in Indiana offset by an Angus cow hanging by its feet at a slaughterhouse" and "an African-American's chained foot opposite the equally shackled limb of a circus elephant," among other provocative pieces). Judge Wilson, who is Black, *see* Glenn Blain & Kenneth Lovett, *Senate Approves Gov. Cuomo's Pick for Court of Appeals*, N.Y. DAILY NEWS (Feb. 6, 2017, 6:03 PM), https://www.nydailynews.com/news/politics/senate-approves-gov-cuomo-pick-court-appeals-article-1.2965743 [https://perma.cc/RZ85-ZNRJ] (stating that Judge Wilson would be "the second current member of the seven-member court who is black"), attempted to assuage the fear of false equivalency between Black people and nonhuman animals by including a discussion of the racist implications historically used by animal rights advocates to obtain nonhuman animal justice. *See Nonhum. Rts. Project, Inc.*, 2022 WL 2122141, at *26–27 (Wilson, J., dissenting).

[62] Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 11 (1994).

understood as mere "social construction[s]."[63] Thus, extending the writ of habeas corpus to enslaved persons is not revolutionary; it is instead demonstrative of basic empathy — the belated recognition that another human being is a person for the exact same reason as any other human. The personhood of enslaved Blacks was merely obscured and minimized by the racist and sexist attitudes of predominantly white, cisgender male legislatures.[64] Contrarily, the determination of species is almost entirely a biological endeavor.[65] Therefore, when asking if a nonhuman animal species is a person, the determination is about more than empathy — it entails determining whether the species has a similar capacity for sentience as human beings.[66] The use of precedent involving enslaved humans does not provide support for this determination.

Even within the "flexibility" argument, appeals to precedent involving enslaved African Americans still further racial harm. The "flexibility" argument only falls in Happy's favor if one assumes that there is something materially different between enslaved African Americans and white men. If enslaved African Americans and white men are identical, then the writ of habeas corpus is as flexible as a board. As NhRP and the dissenting judges demonstrate, it can be tempting to identify differences between enslaved African Americans and white men and articulate them as merely "legal." However, to utilize such an argument is to operate within the moral and ethical frame constructed by enslavers. That is, when discussing the personhood of *human beings* and divorcing legal personhood from true personhood, one assumes that there is some tangible, logical (perhaps, microscopic) basis for this distinction other than pure racism.[67] But enslaved people are persons for the same reason that adult, white cisgender men are persons: we belong to a species with the same capacity for thought, love, and responsibility.[68] In contrast, Happy the Elephant *is* an elephant.[69] Even under the most flexible

---

[63] *Id.* at 27.

[64] *See* Henry L. Chambers, Jr., Dred Scott*: Tiered Citizenship and Tiered Personhood*, 82 CHI.-KENT L. REV. 209, 212–13 (2007).

[65] *See, e.g.*, James MacDonald, *What Makes a Species?*, JSTOR DAILY (Sept. 21, 2016), https://daily.jstor.org/what-makes-a-species [https://perma.cc/2KLE-UPNW]. It should be noted that determination of species is frequently a tricky endeavor, as the traditional reproduction-based methods of determining distinct species are not always accurate. *See Species*, NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/species [https://perma.cc/2U3G-6ZYE].

[66] This point is proven by the fact that NhRP introduced mountains of expert evidence regarding Happy's intelligence and capability for autonomy. *See Nonhum. Rts. Project, Inc.*, 2022 WL 2122141, at *2.

[67] One such justification could be the presumed validity of statutes passed by democratic legislatures in societies with limited suffrage.

[68] For a brief examination of the ways that science has been used to entrench and justify racial hierarchies, see generally William H. Tucker, *The Ideology of Racism: Misusing Science to Justify Racial Discrimination*, UNITED NATIONS CHRON., https://www.un.org/en/chronicle/article/ideology-racism-misusing-science-justify-racial-discrimination [https://perma.cc/2FH9-HUVW].

[69] Bridges, *supra* note 10.

personhood standard, it is likely that some species of nonhuman animals would fail.[70]

A little over one hundred years ago, Ota Benga looked through the iron bars that confined him, and saw faces just like his own — whiter skin, of course — but each with two eyes, a mouth, and a nose configured in much the same manner as almost every other human in the world.[71] When those white masks contorted into giggles, stretched into gasps, and exploded into wonder, perhaps he recognized those sensations as things he himself had experienced in Congo before he was imprisoned like a *monkey* in a *zoo*.[72] Even as he was overwhelmed by his own dread, Ota Benga could still contemplate the sensations of joy within the mind of each onlooker. Maybe this understanding led to the despair which drove him to take his own life.[73]

Targeted reliance on the struggles of Black people to advocate for nonhuman animals is an offense to the legacies of those who were enslaved or imprisoned. As Professor Justin Simard states, "relying on a case based in human bondage proves more complicated than a narrow focus on the holding would suggest."[74] Hence, when referencing a case in which a Black person's subpersonhood is material to the legal conclusion, one is faced with an unspoken choice: to either (a) accept the logic of the case or (b) *throw it all out*. The appellant (and, to a lesser degree, the dissents) elected for the former.[75] While Happy the Elephant still suffers in solitude, perhaps *Nonhuman Rights Project, Inc. v. Breheny* portends the deserved demise of offensive, ineffective analogies to abolition precedent in the realm of animal advocacy.

---

[70] *See, e.g.*, Melissa Gaskill, *No Brain? For Jellyfish, No Problem*, PBS: NATURE (Nov. 20, 2018), https://www.pbs.org/wnet/nature/blog/no-brain-for-jellyfish-no-problem [https://perma.cc/J2H7-FYZW].

[71] *See generally* Pamela Newkirk, *Caged Congolese Teen: Why a Zoo Took 114 Years to Apologize*, BBC (Aug. 27, 2020), https://www.bbc.com/news/world-africa-53917733 [https://perma.cc/PJY5-YNA9].

[72] *See id.*

[73] *See id.*

[74] Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 99 (2020).

[75] As NhRP's brief stated: "[I]n the early nineteenth century Black slaves in New York only had statutory rights to a jury trial, to own and transfer property by will, to marry, and to bear legitimate children. They were not 'persons' in 'the whole sense' because they lacked every other right." Brief for Petitioner-Appellant, *supra* note 3, at 20 (footnote omitted) (quoting Byrn v. N.Y.C. Health & Hosps. Corp., 286 N.E.2d 887, 888 (N.Y. 1972)) (citing EDGAR J. MCMANUS, A HISTORY OF NEGRO SLAVERY IN NEW YORK 63, 65, 177–78 (1st ed. 1966)). This observation, when utilized for the purposes of justifying the extension of some rights to a nonhuman animal, validates the assumption that some persons can be and *have been* "more" of a person than others.