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Standing Upright: The Moral and Legal Standing of Humans and Other Apes

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NOTES

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INTRODUCTION

In *The Common Law*, Oliver Wendell Holmes wrote that "even a dog distinguishes between being stumbled over and being kicked."[1] Holmes suggested that even dogs can tell the difference between intentional aggression and benign mistake, and his observation is often cited to show how a vague legal standard can still have clear applications.[2] Far less often is the quote considered as an empirical statement about the abilities of dogs. In that light, the quote suggests that dogs can understand humans well enough to discern the motivation (or lack thereof) behind some physical interaction between them. If dogs can understand the ways we treat them, we may think it matters more whether we treat them compassionately or cruelly.[3] And if dogs can make such distinctions, we may wonder how much more fine-grained and sensitive are the perceptions of smarter animals like chimpanzees and gorillas.

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1. OLIVER WENDELL HOLMES, THE COMMON LAW 7 (Mark DeWolfe Howe, ed., Little, Brown and Co. 1963) (1881).

2. For example, Justice Stevens noted Holmes' observation during oral arguments in *Bush v. Gore* regarding the standard of voter intent under Florida election law. Transcript of Oral Argument at 49, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949) (comments by Justice Stevens).

3. Arguably, even if a dog's suffering should be minimized, it does not matter whether the dog thinks a human intentionally or accidentally caused it pain. Nevertheless, perhaps because people do not want to be thought cruel and mean, even by a dog, human behavior is likely to be influenced by our assumptions about canine perceptiveness.

Calling the effort the Great Ape Project ("Project"), a number of scholars, scientists, and activists have organized to demand recognition of moral and legal rights for great apes. In the category of great apes, the Project includes chimpanzees, bonobos, orangutans, gorillas, and, surprisingly or not, humans. Supporters of the Project would like to see radical changes in the ways we treat great apes. These changes, if enforced globally, would mean an end to most biomedical experimentation on great apes; would largely eliminate the potential use of great apes for organ donations;[4] would prohibit, or at least require dramatic improvements, in the keeping of great apes in zoos; and would eliminate the use of great apes as a source of food.[5] Perhaps more radical sounding are the Project's claims that great apes should be considered equals with humans in the sense that the rights of apes should be respected no less than those of humans and that court-appointed guardians or other organizations should be enabled to protect the legal rights of great apes by bringing suit on their behalf. The Great Ape Project seeks nothing less than full moral and legal "personhood" for great apes.

Legal academia is awakening to the growing interest in the legal protection of apes and other animals. In 1999, Harvard Law School and Georgetown Law School announced that they would offer their first classes ever in animal law.[6] Less than a year later, Harvard's animal law instructor, Steven Wise, published a book demanding legal rights for chimpanzees and bonobos.[7] In what may be the clearest sign that discussion of great ape legal rights has entered mainstream legal discourse, Judge Richard Posner reviewed Wise's book in the *Yale Law Journal*.[8] Although Posner does criticize Wise's approach, he is surprisingly uncritical of Wise's aims and faults Wise principally on methodological grounds.[9]

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4. For views on transplanting animal organs into humans, known as xenotransplantation, see Arthur L. Caplan, *Is Xenografting Morally Wrong?*, *in* THE ETHICS OF ORGAN TRANSPLANTS 121, 123 (Arthur L. Caplan & Daniel H. Coelho eds., 1998); Traci J. Hoffman, *Organ Donor Laws in the U.S. and U.K.: The Need for Reform and the Promise of Xenotransplantation*, 10 IND. INT'L & COMP. L. REV. 339, 371-72 (2000). Xenotransplantations are controversial from the standpoint of animal advocates, since they usually require the killing of otherwise healthy animals.

5. Expressed more dramatically, apes are killed to feed "the growing fad for 'bush meat' on the tables of the elite in Cameroon, Gabon, the Congo, the Central African Republic, and other countries." Donald G. McNeil Jr., *The Great Ape Massacre*, N.Y. TIMES, May 9, 1999, § 6 (Magazine), at 54-55. Apes are also killed "so that their hands, feet, and skulls can be displayed as trophies." STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 5 (2000).

6. William Glaberson, *Legal Pioneers Seek to Raise Lowly Status of Animals*, N.Y. TIMES, Aug. 18, 1999, at A1.

7. WISE, *supra* note 5.

8. Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527 (2000) (reviewing WISE, *supra* note 5).

9. *Id.* at 539 ("There is a sad poverty of imagination in an approach to animal protection that can think of it only on the model of the civil rights movement. It is a poverty that reflects the blinkered approach of the traditional lawyer, afraid to acknowledge novelty

In Martha Nussbaum's review of Wise's book in the *Harvard Law Review*, Nussbaum reveals a basic sympathy for Wise's project:

> We live, many of us, in affectionate relationships with dogs and cats and horses. And yet a large population of us not only eat meat and eggs and wear leather, but we also collaborate in the appallingly cruel conditions under which those goods are produced these days, involving the torture of calves, chickens, and pigs.... [W]e have not defined very clearly the conceptual framework we should use to articulate philosophically what sympathy tells us in our lives.... Meanwhile, however, there are animals like [the apes that Wise describes] leading lives of agony, and there are activists, like Steven Wise, ready to move ahead with practical legal recommendations, even in the absence of conceptual and theoretical consensus.[10]

No country has granted great apes anything near the kinds of rights sought by Steven Wise or the Great Ape Project. However, some countries have enacted significant protections for great apes. In 1996, biomedical research on great apes was banned in Britain.[11] According to New Zealand's Animal Welfare Act of 1999,[12] "research, testing, or teaching" great apes requires approval from New Zealand's government official in charge of animal welfare.[13] The official can only give approval when satisfied that the activity in question benefits the individual ape or that it benefits the ape's species and "the benefits [of the activity] are not outweighed by the likely harm[s]."[14] Thus, the changes in New Zealand law mean that experimentation on great apes must, first and foremost, benefit great apes. The enactment of these protections can largely be traced to efforts by the Great Ape Project and its New Zealand affiliate.[15] Whether one likes or dislikes the efforts made by the

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and therefore unable to think clearly about the reasons pro or con a departure from the legal status quo.").

10. Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1509-12 (2001) (offering a philosophically-oriented discussion of WISE, *supra* note 5). Even more dramatically in the *California Law Review*, Robert Verchick writes that Wise's book "marks what could become one of the groundbreaking civil rights battles of the next generation." Robert R.M. Verchick, *A New Species of Rights*, 89 CAL. L. REV. 207 (2001) (reviewing WISE, *supra* note 5).

11. WISE, *supra* note 5, at 75 (indicating the British government's belief that the cognitive and behavioral capacities of great apes make it unethical to "treat them as expendable in research").

12. Animal Welfare Act (1999) (N.Z.), *available at* http://www.maf.govt.nz/biosecurity/legislation/animal-welfare-act/index.htm (last visited Sept. 7, 2001).

13. *Id.* at § 85(1)

14. *Id.* at § 85(5).

15. Paula Brosnahan, *New Zealand's Animal Welfare Act: What Is Its Value Regarding Non-Human Hominids?*, 6 ANIMAL L. 185, 187-90 (2000). The changes enacted fell far short of the changes sought by the Great Ape Project New Zealand. *Id.* Also, their impact on great apes is likely to be limited as New Zealand has few great apes, *id.* at 191, and no biomedical experimentation on great apes. *See* Seth Mydans, *He's Not Hairy, He's My Brother*, N.Y. TIMES, Aug. 12, 2001, § 4, at 5.

Great Ape Project, they are having an effect on the laws governing animal protection and experimentation.

Furthermore, moral and legal issues raised by the Great Ape Project have implications beyond the treatment of great apes. Researchers in Portland, Oregon recently reported success in inserting genes from a jellyfish into a rhesus monkey. The senior researcher said that "his ultimate goal was to create colonies of monkeys that had been genetically modified to develop a human disease."[16] At the same time that colonies of monkeys are being created to lose their lives to benefit humans, humans are risking their lives to save animals.[17] In Colorado, an eleven-year, seven billion dollar project is underway to clean up nuclear waste in order to create a wildlife preserve. At least ten workers on the project were exposed to radiation during this dangerous work.[18] We are frequently, though usually subconsciously, making tradeoffs between the interests of humans and the interests of nonhuman animals. How we decide to treat animals can affect our legal regimes related to the environment, animal welfare, endangered species, agribusiness, the consumption and production of food, animal testing, veterinary malpractice, and more.

More broadly still, our treatment of great apes raises questions about the principles which underlie human equality. We usually hold that human beings should have equal rights, regardless of their cognitive abilities. Yet, we deny great apes basic protections afforded to humans, often citing the lower intelligence of great apes as a factor. However, the cognitive capacities of great apes can rival or surpass those of very young children and humans with severe cognitive deficits.[19] Some commentators, including members of the Great Ape Project, compare great apes to these humans in order to argue, as a matter of equality, that great apes deserve the same moral and legal protections afforded to young children and humans with severe cognitive deficits. This move is certainly controversial, and Judge Posner has described it as "monstrous."[20] At a minimum, however, it has forced us to consider a new

16. Gina Kolata, *Monkey Born With Genetically Engineered Cells*, N.Y. TIMES, July 9, 1999, at A1. On the plus side, of course, the research is designed to someday help treat diseases in humans. It is also possible that such research could reduce the number of primates used in biological research by making more efficient use of primate subjects. Nevertheless, there is certainly something grim about designing monkeys to develop fatal diseases.

17. When I refer to "animals," I usually drop the implied qualification that I am referring to "nonhuman animals."

18. Michael Janofsky, *Workers Cleaning Nuclear Arms Site for Wildlife Preserve Test Positive for Radiation*, N.Y. TIMES, Dec. 8, 2000, at A19. Of course, it could be argued that wildlife preserves are intended solely for the benefit of humans who enjoy nature. I think it is hard to understand, however, how a person could care about nature without thinking that the well-being of its members is a good in its own right.

19. *See* Caplan, *supra* note 4, at 128.

20. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 49 (1999) ("Yet it would be monstrous in our culture to deduce that severely retarded human beings are entitled to no more consideration than animals or even that they are entitled to less

perspective on the principles underlying our concept of human equality and the boundaries that we give to morally- and legally-protected forms of life.

This Note explores some of the moral and legal arguments made for the protection of great apes and other animals. Part I provides basic information about great apes and their abilities and the laws protecting them in the United States. It also discusses the kinds of legal protections sought by the Great Ape Project. While the Great Ape Project and Steven Wise seek similar protections for great apes, I focus on the Great Ape Project since it has demonstrated its ability to influence legislation and its philosophical foundations lie at the heart of much of the "animal liberation" movement. This movement, as sparked in large measure by Peter Singer's 1975 book, *Animal Liberation*,[21] holds that the interests of all animals, human and otherwise, should be given equal moral consideration. A critical analysis of Singer's position forms the focus of Part II and sets the stage for a discussion of a particular policy proposal. This policy proposal, discussed in Part III, vastly restricts the discussion of great ape personhood to a much less ambitious legal issue in the law of standing. More specifically, I explore the argument that great apes (and perhaps other animals) should be granted standing to bring lawsuits, through a human guardian, under the Animal Welfare Act (AWA).[22] The law of standing currently prevents humans from suing on behalf of animals that suffer injuries under the AWA. I explore the idea that Congress could further the substantive goals of the AWA by granting standing to apes and other animals without upsetting constitutional standing requirements. Granting standing to great apes does not require us to accept arguments about ape personhood but merely requires recognition of certain obligations to protect animal interests. I argue that the standing proposal is far less radical than it might sound at first and that it is at least worthy of further consideration.

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consideration than the smartest animals, who are smarter than the dumbest people; just to refer to people as 'dumb' grates on our sensibilities."). For an in-depth discussion of the argument Posner addresses, sometimes called the "argument from marginal cases," see DANIEL A. DOMBROWSKI, BABIES AND BEASTS: THE ARGUMENT FROM MARGINAL CASES (1997). Such comparisons deeply touch the public conscience. In a recent discussion on parenting on Bill Maher's show "Politically Incorrect," Maher compared his dogs to "retarded children," saying "They're sweet. They're loving. They're kind. But they don't mentally advance at all." Lynda Van Kuren, spokeswoman for a group which advocates for children with disabilities said, "Those types of statements simply perpetuate the types of misconceptions that exist that are just wrong." Maher apologized profusely for the comment. *TV Host's Words Draw Criticism and Apology*, N.Y. TIMES, Jan. 18, 2001, at A20.

21. PETER SINGER, ANIMAL LIBERATION (1st ed. 1975).

22. 7 U.S.C §§ 2131-2159 (2001).

I. GREAT APES AND THE GREAT APE PROJECT

A. *Great Ape Biology and Ecology*

Most great apes are native to Africa, with the exception of orangutans which are native to the islands of Borneo and Sumatra in Asia. If we were focusing on the preservation of great apes as a species, our most important issues would be wildlife preservation in countries with native populations of great apes and the local and international laws protecting endangered species.[23] The focus of the Great Ape Project, however, is largely on individual great apes as potential rights-bearers. To that end, we will focus on great apes in the United States and the laws which protect (or fail to protect) them. An informal census of great apes living in the United States counted as follows:

> A few thousand great apes currently live in the United States. Some 2,000 chimpanzees are in laboratories, 800-900 in zoos, and a few in entertainment. Ten to twenty orang-utans are used for entertainment, fifteen to twenty in laboratories, and several hundred are kept in zoos. Almost 300 gorillas are in zoos, ten to fifteen in laboratories, and currently none are known to be used for entertainment, though one is kept on display in a shopping centre in Tacoma, Washington.[24]

Traditionally, taxonomists use the term ape (or "hominoid") to apply to certain primates, including humans, that split off from other primates approximately 20 millions years ago.[25] Apes differ notably from other primates because they have no tail and they habitually sit and sometimes stand upright.[26] Included in the ape superfamily are the "great apes" (the family *Pongidae*)[27] and the family which includes humans and some of our recently extinct ancestors (the family *Hominidae*).[28] To put it another way, humans have traditionally been considered apes but not "great apes."

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23. *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2001); *see also* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 8, 1973, 27 U.S.T. 1087; The African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, 1976 U.N.T.S. 4.

24. David Cantor, *Items of Property*, *in* THE GREAT APE PROJECT 280, 280 (Paola Cavalieri & Peter Singer eds., 1993).

25. FRANS DE WAAL, GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS 4 (1996).

26. ENCYCLOPEDIA OF MAMMALS 120 (Erwin Gould & George McKay eds., 2d ed. 1998); *see also* DARIS R. SWINDLER, INTRODUCTION TO THE PRIMATES 56 (1998) ("In contrast to most prosimians and all but two species of monkeys, apes lack tails.").

27. *See* SWINDLER, *supra* note 26, at 56; B.E. Schwimmer, *Pongids* (Oct. 1998), *at* http://www.umanitoba.ca/anthropology/courses/121/primatology/pongid.html (last visited Sept. 9, 2001).

28. B.E. Schwimmer, *Hominids* (Oct. 1998), *at* http://www.umanitoba.ca/anthropology/courses/121/primatology/hominid.html (last visited Sept. 9, 2001). Also included in the superfamily "hominids" are the Hylobatidae which include gibbons. B.E. Schwimmer, *Hylobatidae* (Oct. 1998), *at* http://www.umanitoba.ca/anthropology/courses/

The placement of humans and great apes into different biological families is a source of some disagreement. Gorillas and chimpanzees, for example, are great apes, while, traditionally, humans are not. Yet, according to most analyses, whether biochemical, morphological, or genomic, chimpanzees have a closer relationship to humans than they do to gorillas.[29] Furthermore, because humans are, in evolutionary terms, more closely related to chimpanzees and gorillas than either of those species is to orangutans (which are also "great apes"), some claim it is incorrect to separate the family containing great apes from the family containing humans.[30] Evolutionary biologist Richard Dawkins indicates that "[t]here is no natural category that includes chimpanzees, gorillas and orang-utans but excludes humans."[31] For such reasons, proponents of the Great Ape Project treat humans, along with chimpanzees, bonobos, gorillas, and orangutans as great apes.

Primate evolutionary history is certainly very interesting to consider. But clearly its implications for the moral and legal treatment of our closely related kin is limited. Perhaps this history only demonstrates that the uniquely important features of human beings evolved in, say, the last million years. If taxonomists chose to classify animals based on their intelligence, it is rather clear that humans would be substantially distanced from the other apes.

A similar skepticism might surround the oft-cited finding that human and chimpanzee DNA are more than 98% identical.[32] Does this information show that humans and apes are extraordinarily similar in biological terms? Or, does it show that a 2% difference in a DNA sequence is awfully significant? After all, genetically, humans are 99.99% identical to each other,[33] yet differences among humans are far from trivial. Similarly, recent findings by the Human Genome Project show that the number of distinct human genes is far closer to

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121/primatology/hylobatid.html (last visited Sept. 9, 2001).

29. *See* ENCYCLOPEDIA OF MAMMALS, *supra* note 26, at 128.

30. For example, evolutionary biologist Richard Dawkins writes that "[o]ur common ancestor with the chimpanzees and gorillas is much more recent than their common ancestor with the Asian apes–the gibbons and the orang-utans." Richard Dawkins, *Gaps in the Mind, in* THE GREAT APE PROJECT, *supra* note 24, at 80, 82.

31. *Id.*

32. *See, e.g.*, WISE, *supra* note 5, at 132 ("Our DNA and that of chimpanzees is more than 98.3 percent identical. Of the DNA that actually does something, humans and chimpanzees share, on average, more than ... 99.5 percent [of that DNA]."). Wise is alluding to the difference between coding and non-coding regions of DNA. Coding regions of DNA tell cells what proteins to produce but represent only a small portion of total DNA. Non-coding regions contain both "junk" DNA and DNA that switches coding regions on and off. Thus, saying that we share a certain percentage of DNA with another species could more accurately be rephrased as "We share X% of our coding regions, Y% of our non-coding junk regions, and Z% of our non-coding regulatory regions." Email from Robert Sapolsky, Professor of Biological Sciences and of Neurology and Neurological Sciences, Stanford University (July 10, 2001, 10:41:54 PDT) (on file with author).

33. Thomas Hayden, *Quantifiably Normal*, N.Y. TIMES, Mar. 3, 2001, § 6 (Magazine), at 98.

the number of distinct genes in other species than was commonly thought.[34] While an important discovery, such findings cannot place a value on the differences that are actually observed. At best, DNA evidence and evolutionary history can help remind us of our place in the universe. They remind us that nature does not carve a sharp dividing line between humans and the rest of the animal kingdom.

B. *Great Ape Cognitive Abilities*

In this brief section, I can only offer a small flavor of the skills and abilities of great apes. These stories are undeniably anecdotal, as is much of the literature on the subject. There are a few reasons for this. First, those who study great ape cognition are inclined to do so because they perceive the depth and breadth of great ape abilities. These same people are also unlikely to subject great apes to the more scientifically rigorous, though often less humane, kinds of experiments which would give us more confidence in our understanding. Nevertheless, when it comes to assessing the abilities of some being and what is at stake is the kind of treatment the being should receive, I believe it is appropriate to be somewhat charitable in our interpretations. The price of overstating the abilities of great apes is that they receive more protection than is minimally required. The price of understating their abilities may be to subject them to cruel and painful treatment which they recognize as such and perceive in ways that are not radically different than we would perceive the same treatment.

The biblical notion that humans and animals are radically different beings was modified dramatically by the Darwinian revolution nearly a century and a half ago. Darwin declared that any differences between the minds of humans and the minds of higher animals were "certainly one of degree and not kind."[35] We now know that all of the great apes can communicate symbolically with humans and sometimes with each other.[36] Great apes can recognize their own images in mirrors, which has led some to claim that they are uniquely self-reflective.[37] There is recent evidence that dolphins can also pass a mirror self-recognition test,[38] but other intelligent animals like monkeys, gibbons, and elephants "have the intelligence to use a mirror's reflection to find hidden food, and can recognize other individuals reflected in it, but never themselves."[39]

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34. Tom Abate, *Genome Discovery Shocks Scientists,* S.F. CHRON., Feb. 11, 2001, at A1.

35. CHARLES DARWIN, THE DESCENT OF MAN, AND SELECTION IN RELATION TO SEX 105 (John Tyler Bonner & Robert M. May eds., Princeton Univ. Press, 1981) (1871).

36. *See* ENCYCLOPEDIA OF MAMMALS, *supra* note 26, at 130.

37. *See id.*

38. Mark Derr, *Brainy Dolphins Pass the Human 'Mirror' Test,* N.Y. TIMES, May 1, 2001, at D3.

39. ENCYCLOPEDIA OF MAMMALS, *supra* note 26, at 130.

1. *Language and lust—the orangutan Rinnie.*

Birute Galdikas, a former student of famed paleontologist Louis Leakey, has been studying orangutans for nearly thirty years, mostly on the island of Borneo. In an interview with the New York Times, Galdikas was asked whether orangutans can learn language. She replied:

> I think orangutans can learn how to use language at the level of a 3-year-old child. I had a student in 1978, Gary Shapiro, who came to Camp Leakey and he taught an adult female, Rinnie, sign language. He could not believe how fast she learned it. Rinnie took the tutoring personally. One day, Rinnie took Gary by the hand and tried to seduce him. Gary pushed her away. She thereafter lost all interest in signing.[40]

The story suggests that orangutans can, to some extent, learn to communicate through sign language and can develop interpersonal connections with humans. A generous interpretation of the story would take it to show that orangutans can engage in long-term planning (for example, perhaps Rinnie had been waiting to make her move until the right time) and that orangutans have long-term memories (such that Gary's refusal to accept Rinnie's offer led to an ongoing grudge in which Rinnie refused to communicate further in sign language). A more skeptical conception of orangutan abilities might take the story to illustrate that orangutans do not so much learn language as engage in behaviors for which they perceive rewards (for example, sexual gratification) and that they cease those behaviors when perceived rewards disappear.[41] Let us remember though that the dangers of anthropomorphism work in two directions. We must also be careful not to create artificial differences between humans and apes where none actually exists.[42]

2. *Long term memory—the chimpanzee Washoe.*

Chimpanzees are usually considered our closest kin among nonhuman animals. Chimpanzees "regularly walk bipedally in the wild" and they "use

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40. Claudia Dreifus, *Scientist at Work/Birute Galdikas: Saving the Orangutan, Preserving Paradise*, N.Y. TIMES, Mar. 21, 2000, at F3. Famed paleontologist Louis Leakey recruited three young women in the 1960's to study great apes, including Dr. Galdikas. The other two were Dr. Jane Goodall, who discovered that chimpanzees made and used tools, and Dr. Dian Fossey, who lived and died among the gorillas of Rwanda and was played by Sigourney Weaver in the film Gorillas in the Mist. *Id.*

41. Or, such a view might challenge the accuracy of the anecdote, suggesting that that those who spend their lives studying animals are prone to anthropomorphize their research subjects.

42. Frans de Waal, an expert in primate behavior, has collected evidence indicating that apes can transmit cultural knowledge. *See* FRANS DE WAAL, THE APE AND THE SUSHI MASTER 28 (2001) ("The standard notion of humanity as the only form of life to have made the step from the natural to the cultural realm—as if one day we opened a door to a brand-new life—is in urgent need of correction.").

tools for various purposes."[43] Washoe was the first chimpanzee to communicate with humans in sign language.[44] She has also provided remarkable evidence of the ability of chimpanzees to retain long-term memories. Washoe was raised by Allen and Beatrice Gardner who began teaching her American Sign Language.[45] At five-years-old, Washoe left the care of the Gardners in order to be transferred to a primate institute. There was an eleven-year period in which she was separated from the Gardners.[46] When the Gardners made a surprise visit to Washoe after the eleven-year hiatus, Washoe remembered and spontaneously "signed their name signs."[47] Then, "Washoe signed 'COME MRS G'" to Beatrice Gardner "and led her into an adjoining room and began to play a game with her that she had not been observed to play since she was a five-year-old . . . ."[48] That chimpanzees can have such long-term memories suggests the possibility that they can have a fairly broad conception of a life. It certainly doesn't follow automatically that they do, but it gives us reason to think that they do not live merely from day-to-day but can reflect on events of the past and probably of the future.

3. *Human-like qualities—the bonobo Kanzi*

Closely related to chimpanzees are bonobos, formerly known as "pygmy chimpanzees." Harvard biology professor Edward Wilson tells the story of his first meeting with Kanzi, a young bonobo at the Language Research Center at Georgia State University. When the two first met, Wilson writes, "Kanzi reached out and touched my hand, nervously but gently, and stepped back a short distance to study me again."[49] Wilson was then given a cup of grape juice and continues, "I flourished a cup as if offering a toast and took a sip, whereupon Kanzi climbed into my lap, took the cup, and drank most of the juice. . . . Afterward everyone in the group had a good time playing ball and a game of chase with Kanzi."[50] On the surface, nothing about the story is so remarkable. What is remarkable, however, is the impression Kanzi made on Wilson:

> The episode was unnerving. It wasn't the same as making friends with the neighbor's dog. I had to ask myself: was this really an animal? As Kanzi was led away (no farewells), I realized that I had responded to him almost exactly

43. Adriaan Kortlandt, *Spirits Dressed in Furs?*, *in* THE GREAT APE PROJECT, *supra* note 24, at 137, 142.

44. Roger S. Fouts & Deborah H. Fouts, *Chimpanzees' Use of Sign Language*, *in* THE GREAT APE PROJECT, *supra* note 24, at 28, 28.

45. WISE, *supra* note 5, at 219.

46. Fouts & Fouts, *supra* note 44, at 37.

47. *Id.*

48. *Id.* at 38.

49. EDWARD O. WILSON, BIOPHILIA 129 (1984).

50. *Id.*

> as I would to a two-year old child—same initial anxieties, same urge to communicate and please, same gestures and food-sharing ritual.... I was pleased that I had been accepted, that I had proved adequately human (was that the word?) and sensitive enough to get along with Kanzi.[51]

Once again, this story could be interpreted merely to show that Wilson overly anthropomorphizes bonobos. Such first hand accounts are naturally limited in their ability to convince skeptics. Yet, his almost indescribable feeling was that he was interacting more with a child than with a pet. Such stories are not uncommon.[52] Given that most of us will not have the opportunity to have such interactions with great apes, we should give some weight to these stories barring evidence to the contrary.

4. *Language and mourning—the gorilla Koko.*

Koko is a gorilla who learned elements of sign language at Stanford University as part of Francine Patterson's psychology dissertation in the early 1970's.[53] Today, Koko is said to have advanced further with language than any nonhuman.[54] Koko has a working vocabulary of over 1000 signs and understands approximately 2000 words of spoken English.[55] Koko "laughs at her own jokes and those of others. She cries when hurt or left alone.... [She] talks about her feelings, using words like 'happy', 'sad', 'afraid', 'enjoy', 'eager', 'frustrate', 'mad' and, quite frequently, 'love'."[56] While most of us will not interact directly with great apes, we *can* watch them on videotape. Many of these behaviors have been documented on the *Nature* program, "A Conversation with Koko."[57]

Francine Patterson, still Koko's trainer, has helped to make Koko the most famous great ape of all, becoming the first gorilla to participate in an online chat session.[58] Koko has also appeared on the cover of *Life* magazine, where

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51. *Id.*

52. *See, e.g.*, Douglas Adams & Mark Carwardine, *Meeting a Gorilla, in* THE GREAT APE PROJECT, *supra* note 24, at 19-23; Adriaan Kortlandt, *supra* note 43, at 137-44; Geza Teleki, *They Are Us, in* THE GREAT APE PROJECT, *supra* note 24, at 296-302.

53. *Nature: A Conversation with Koko* (PBS), *available at* http://www.koko.org (last visited Sept. 9, 2001).

54. The Gorilla Foundation, *Koko's World* (2000), *at* http://www.koko.org/world (last visited Sept. 9, 2001).

55. Francine Patterson & Wendy Gordon, *The Case for the Personhood of Gorillas, in* THE GREAT APE PROJECT, *supra* note 24, at 58.

56. *Id.* at 59.

57. *Conversation with Koko, supra* note 53. Once again, of course, the criticism is open to us that the video does not show all of the times that Koko makes unintelligible remarks or behaves in otherwise unremarkable ways.

58. Press Release, America Online, Business Wire (Nov. 27, 2000). For better or worse, the press release also indicates that Koko is participating in a webcast to "children and netizens about her plans to celebrate" the holiday season and that Koko "has recently joined the e-commerce revolution by shopping online with her caregiver." *Id.*

she is pictured cuddling with a pet cat that she named "All-Ball."[59] All-Ball was hit by a car and killed, and Koko is reported to have grieved when told of the accident.[60] More recently, a gorilla named Michael, who had been Koko's companion for 24 years died of natural causes. In the weeks after Michael died, Koko "uttered frequent, mournful cries, particularly at night."[61] She purportedly did not want to be left alone and "indicated with sign language that she wanted a light left on at night when she went to bed."[62]

C. *Laws Protecting Great Apes*

As indicated above, some countries, including Great Britain and New Zealand have already enacted strong protections for great apes that are geared toward apes as individuals.[63] Laws in the United States are significantly less protective, particularly in the area of biomedical research, in part because, as we shall see later, the laws are underenforced. In this section, I describe some of the state, federal, and international protections that apply to great apes.

Legal protection for animals is largely based on the idea that they are the property of humans, and they are protected in much the same way and for many of the same reasons that inanimate property is protected.[64] Regardless of the purposes of the laws protecting animals, it would seem, at least from the legal language protecting animals, that the law does provide some significant protections. Most states have common law or statutory protections against animal cruelty that apply to great apes as they do to other animals.[65] Many states prohibit depriving an animal in one's care of "food, water, and shelter" or of "necessary sustenance." For example, New York law considers it cruelty to animals to deprive "any animal of necessary sustenance, food or drink, or [to] neglect to furnish it such sustenance or drink."[66] It also provides that an impounded or confined animal must be provided with "wholesome air, food, shelter, and water."[67] Many states also have provisions against abandonment[68]

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59. *Conversation with Koko*, *supra* note 53.

60. *See id.*; Patterson & Gordon, *supra* note 55, at 59.

61. The Gorilla Foundation, *Koko's Mourning for Michael* (Aug. 2, 2000), *at* http://www.koko.org/world/mourning_koko.html (last visited Sept. 9, 2001).

62. *Id.*

63. *See supra* text accompanying notes 11-15.

64. *See, e.g.*, GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 3-14 (1995). It has also been pointed out that the notion of animals as property may offer the most promising means of maintaining and expanding animal protections. *See* Posner, *supra* note 8, at 539.

65. The following state law citations and many others are well-documented in FRANCIONE, *supra* note 64, at 121.

66. N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 1991).

67. *Id.* at § 356.

68. *See, e.g.*, MONT. CODE ANN. §45-8-211(1)(d)(1993).

and poisoning.[69] South Dakota, as an example, requires provisions for sanitary living conditions,[70] and Vermont mandates that animals be transported humanely.[71] California is said to have some of the toughest laws against cruelty to animals.[72] Aside from provisions prohibiting intentional maiming, torturing, wounding, and killing of animals, it imposes liability on those who negligently or without culpable state of mind, overwork, overload, torture, or kill animals.[73] Importantly, however, state law protections generally do not apply to the use of animals for food and food production or the use of animals for medical or scientific purposes.[74]

There are a number of major federal statutes that protect animals.[75] The one most concerned with animal welfare and animal cruelty is the federal Animal Welfare Act (AWA).[76] The AWA provides federal protections for animals from some forms of cruelty and mistreatment.[77] By statute, the Secretary of Agriculture is required to issue "standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors."[78] These standards are supposed to include "minimum requirements" governing the "handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, [and] adequate veterinary care"[79] of animals. Importantly for the law governing great apes, a provision mandates minimum requirements "for a physical environment adequate to promote the psychological well-being of primates."[80] There are no psychological well-being provisions for dogs, cats, or horses.[81]

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69. *See, e.g.*, HAW. REV. STAT. §711-1109(1)(b)(1988).

70. S.D. CODIFIED LAWS ANN. §40-1-2.3 (Mitchie 1991).

71. 13 VT. STAT. ANN. tit. 13, § 352(a)(4), (10) (Supp. 1992).

72. FRANCIONE, *supra* note 64, at 119.

73. CAL. PENAL CODE §597(b) (West Supp. 1993).

74. *See, e.g.*, LA. REV. STAT. ANN. § 14:102.1(C) (West 1986) (stating that certain Louisiana animal cruelty statutes do not apply to "activities carried on for scientific or medical research governed by accepted standards").

75. *See, e.g.*, Humane Slaughter Act, 7 U.S.C. §§ 1901-1906 (2001); Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (2001); Bald and Golden Eagle Protection Act, 16 U.S.C. § 668-668d (2001); Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (2001); Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (2001); Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (2001); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2001).

76. Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (2001).

77. *Id.*

78. *Id.* § 2143(a)(1).

79. *Id.* § 2143(a)(2)(A).

80. *Id.* § 2143(a)(2)(B); *see also* Animal Legal Def. Fund, Inc. v. Sec'y of Agric., 813 F. Supp. 882, 886 (D.D.C. 1993), *vacated*, 29 F.3d 720 (D.C. Cir. 1994).

81. *See* Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1342 (2000).

Under the psychological well-being provisions, the Secretary of Agriculture has promulgated regulations to require "dealers, exhibitors, and research facilities" to "develop, document, and follow" a plan to promote the psychological well-being of primates.[82] These plans must address primate "social grouping"[83] and opportunities for "environmental enrichment" including, for example, opportunities to use "perches, swings, mirrors, and other increased cage complexities."[84] For great apes weighing over 110 lbs. (50 kg), regulations rather vaguely require "additional opportunities to express species-typical behavior."[85] Details of what plans should contain are virtually absent, except to say that the plan should accord with "professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian."[86] Many critics have argued that the regulations are inadequate because they delegate responsibility for promoting primate well-being to those being regulated and to the veterinarians in their employ.[87] In Part III, we will return to this provision in the context of *Animal Legal Defense Fund, Inc. v. Glickman*,[88] a groundbreaking case in animal law and an important case in its own right for the doctrine of standing.

Aside from weaknesses in the substantive provisions of the AWA, it has typically been underenforced.[89] This may have something to do with the fact that, before the U.S. Department of Agriculture (USDA) was assigned responsibility for enforcing the AWA, the department "dealt primarily with the production, treatment, and slaughter of food animals."[90] To the dismay of many animal activists, the AWA does not regulate animals used for food or clothing.[91] Also, although the AWA may apply to animals used for experimental purposes before or after the conduct of experiments, the AWA states that "nothing in this chapter shall be construed as authorizing the Secretary to promulgate rules, regulations, or orders with regard to design, outlines, guidelines, or performance of actual research or experimentation by a research facility as determined by such research facility."[92]

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82. 9 C.F.R. § 3.81 (2000).

83. *Id.*. § 3.81(a).

84. *Id.* § 3.81(b).

85. *Id.* § 3.81(c)(5).

86. *Id.* § 3.81.

87. *See, e.g.*, Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 439 (D.C. Cir. 1998) (finding that "placing such broad and unguarded discretion in the hands of the veterinarian in the exhibitor's own employ is an insufficient safeguard to protect primate well-being").

88. 154 F.3d 426 (D.C. Cir. 1998).

89. *See* notes 157-158 *infra* and accompanying text.

90. FRANCIONE, *supra* note 64, at 211.

91. "In fact, no federal statute regulates the treatment of animals used for food or food production on farms . . . ." Sunstein, *supra* note 81, at 1342.

92. 7 U.S.C. § 2143(a)(6)(A)(i) (2001). Section 2143(a)(6)(ii) applies this same prohibition to rules, regulations, or orders "with regard to the performance of actual research

State and federal laws on animal welfare are supposed to reflect both direct and indirect duties to animals. A direct duty to an animal is one we have because the animal itself has some interest, for example, to be nourished and avoid torture. An indirect duty to an animal is one we have by virtue of our relationship to other humans. For example, if we ban animal torture because animal torture encourages perverse human sentiments and thereby increases human suffering, then we have an indirect duty to protect animals by virtue of our relationship to other humans. Elements of both kinds of duties can be seen in our legal regime, though they may be hard to distinguish when a law's purpose is not clearly stated.

As long ago as 1892 in *Hunt v. State*,[93] an animal protection statute was said to protect animals by helping to develop "a humane regard for the *rights* and feelings of the brute creation by reproving evil and indifferent tendencies in human nature in its intercourse with animals."[94] The quote reflects direct duties to animals (their "rights") as well as indirect duties that stem from a desire to reduce cruel tendencies in people.[95] In contrast, the protection of endangered species as such does not provide for direct duties to animals. For example, the Endangered Species Act declares that threatened and endangered species are of "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[96] Distinctly lacking from direct consideration, however, are the animals themselves. At best, the Endangered Species Act provides for direct duties to animal *species*.

Nevertheless, because human activities have made all of the great apes endangered,[97] it happens that some of the strongest great ape protections come from the Endangered Species Act and related protections. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) oversees a large multinational treaty, to which the U.S. is a signatory, that has "drastically diminished the export of many species—including great apes—from their native habitats, though illegal shipments occur."[98] Endangered species protections mean that great apes are generally not used in dangerous experiments in the United States, although captive-bred chimpanzees may be used under some circumstances.[99]

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or experimentation." *Id.* at § 2143(a)(6)(ii).

93. 29 N.E. 933 (Ind. App. 1892) (emphasis added).

94. *Id.* at 933.

95. For evidence that anticruelty laws do not, in fact, reflect direct duties to animals, see FRANCIONE, *supra* note 64, at 4, 17-33.

96. Endangered Species Act of 1973, § (2)(a)(3) (1973).

97. Species considered threatened and endangered can be found at: http://endangered.fws.gov (last visited Sept. 9, 2001). All of the nonhuman great apes, including gorillas, orangutans, bonobos, and chimpanzees are considered endangered in their natural habitats. Chimpanzees, however, are in the less protected category of "threatened species" when held in captivity outside of their natural range. *Id.*

98. Cantor, *supra* note 24, at 280.

99. *See* ENCYCLOPEDIA OF MAMMALS, *supra* note 26, at 131.

D. *The Great Ape Project*

In 1993, a book called *The Great Ape Project* was published. Edited by Paola Cavalieri and Peter Singer, the book begins with "A Declaration on Great Apes" (the "Declaration") that describes the principle goal of the editors and contributors to the book—namely, to establish certain basic moral and legal rights for great apes.[100] Thirty-six people contributed to the book including philosopher Peter Singer, primatologist Jane Goodall, evolutionary biologist Richard Dawkins, and novelist Douglas Adams. The book, *The Great Ape Project*, led to the creation of an international organization with the same name "founded to work for the removal of the nonhuman great apes from the category of property, and for their immediate inclusion within the category of *persons*."[101]

The Great Ape Project's Declaration begins by identifying a class of beings said to be in "the community of equals." It asserts that the community of equals should, at a minimum, include all great apes: humans, chimpanzees, bonobos, gorillas, and orangutans.[102] According to the Declaration, the community of equals "is the moral community within which we accept certain basic moral principles or rights as governing our relations with each other and enforceable at law."[103] By its terms, the Declaration is intended to promote both a moral and a legal position that is not intended to be merely a statement of theoretical moral philosophy.[104]

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100. The Great Ape Project, *A Declaration on Great Apes*, *in* The Great Ape Project, *supra* note 24, at 4-7 [hereinafter *Declaration*].

101. The Great Ape Project International, *GAP-FAQ* (Oct. 22, 1996), *at* http://www.greatapeproject.org/gapfaq.html.#Section1_1 (last visited Sept. 9, 2001). The Great Ape Legal Project is a joint effort between the Great Ape Project International and the Animal Legal Defense Fund. Animal Legal Defense Fund, *Great Ape Legal Project*, *at* http://www.aldf.org/chimp.htm (last visited Sept. 9, 2001).

102. *Declaration*, *supra* note 100, at 4. Bonobos were originally thought to be "pygmy chimpanzees." Primatologists recently recognized them as a distinct species, and the Great Ape Project subsequently recognized them as an independent kind of great ape meant to be incorporated into the "community of equals." *See* The Great Ape Project International, *GAP-FAQ* (Oct. 22, 1996), *at* http://www.greatapeproject.org/gapfaq.html#Section5_1 (last visited Sept. 9, 2001).

103. *Declaration*, *supra* note 100, at 4. Notice too that the Declaration speaks in terms of "principles or rights." This is probably a compromise among those writers who would speak in terms of great ape rights and those utilitarians, like Peter Singer, who prefer to speak in terms of more flexible principles. For conciseness, I will call them principles. Singer writes, "The language of rights is a convenient political shorthand. It is even more valuable in the era of thirty-second TV news clips than it was in Bentham's day; but in the argument for a radical change in our attitude to animals, it is in no way necessary." PETER SINGER, ANIMAL LIBERATION 8 (2d ed. 1990).

104. In fact, Peter Singer, a leader in the efforts of the Great Ape Project, is often cited by Richard Posner as one of few academic moral philosophers who emphasizes creative "moral entrepreneurship" over the sometimes cold and calculating moral theorizing of which Posner is quite critical. *See* POSNER, *supra* note 20, at 43 n.67, 84 (1999) (discussing academic moralism).

The Declaration highlights three principles to protect great apes. They include a right to life, a right to be free from unlawful confinement, and a general prohibition on torture. The Project's right to life provides: "The lives of members of the community of equals are to be protected. Members of the community of equals may not be killed except in very strictly defined circumstances, for example, self-defence."[105] Euthanasia is probably also an excusing circumstance for taking a great apes' life, at least for many members of the Project, and it would be interesting to know what else would qualify. For example, the Project is silent about capital punishment; undoubtedly, it would oppose capital punishment of nonhuman apes, since nonhuman apes are not sufficiently responsible for their actions to have any sort of criminal liability.[106]

Attributions of criminal liability to animals, however, were once rather widespread. From the Ninth Century to as recently as the Nineteenth Century, animals throughout Europe and elsewhere were put on trial and held responsible for a variety of crimes,[107] sometimes punishable by death. E. P. Evans' classic book on the subject, *The Criminal Prosecution and Capital Punishment of Animals*, recounts the following story:

> On the 5th of September, 1379, as two herds of swine, one belonging to the commune and the other to the priory of Saint-Marcel-le-Jeussey were feeding together near that town, three sows of the communal herd, excited and enraged by the squealing of one of the porklings, rushed upon Perrinot Muet, the son of the swinekeeper, and before his father could come to his rescue, threw him to the ground and so severely injured him that he died soon afterwards. The three sows, after due process of law, were condemned to death; and as both the herds had hastened to the scene of the murder and by their cries and aggressive actions showed that they approved of the assault, and were ready and even eager to become *participes criminis*, they were arrested as accomplices and sentenced by the court to suffer the same penalty.[108]

Cases like this were featured in a 1993 Miramax film, The Advocate, which portrays a country lawyer in Fifteenth Century Europe who has a substantial practice defending animals charged with crimes.[109] As ludicrous as these stories sound to our modern sensibilities, they remind us of the dangers of anthropomorphizing animals by attributing thoughts and motivations which are

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105. *Declaration, supra* note 100, at 4.

106. *See, e.g.*, Gary L. Francione, *Personhood, Property, and Legal Competence, in* THE GREAT APE PROJECT, *supra* note 24, at 256. Also, it is clear that a very "strictly defined" research protocol calling for the killing and dissection of a laboratory chimpanzee would not qualify as an excusing circumstance in the minds of many Project proponents.

107. *See* Paul Schiff Berman, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288, 289; *see also* E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS (Faber & Faber 1988) (1906).

108. EVANS, supra note 107, at 144.

109. THE ADVOCATE (Miramax, 1993).

beyond their capabilities. Great Ape Project proponents, however, would remind us that animals are helpless victims of whatever policies and practices humans have toward them. In any event, our history of animal trials at least reminds us that our understanding of animal capacities affects the ways that we treat them. It also reminds us, as will be relevant in Part III, that the notion that a particular nonhuman animal can have its day in court is not quite so foreign as it now seems—in fact, it was once rather commonplace.[110]

The second principle of the Great Ape Project is the protection of individual liberty, meant to keep great apes out of laboratory cages and most zoo environments:

> Members of the community of equals are not to be arbitrarily deprived of their liberty; if they should be imprisoned without due legal process, they have the right to immediate release. The detention of those who have not been convicted of any crime, or of those who are not criminally liable, should be allowed only where it can be shown to be for their own good, or necessary to protect the public from a member of the community who would clearly be a danger to others if at liberty. In such cases, members of the community of equals must have the right to appeal, either directly or, if they lack the relevant capacity, through an advocate, to a judicial tribunal.[111]

As it is worded, this principle would seem to apply more to humans than to other great apes. After all, what legal process would be engaged in to determine if a nonhuman ape should be imprisoned? With respect to nonhuman animals, and that is certainly its implicit focus, the principle is designed to preclude keeping great apes in small cages in research laboratories and zoos. With respect to zoos, the Project:

> oppose[s] the keeping of apes in situations designed primarily for the benefit of human beings who observe them (zoos). Wherever possible, great apes should be released from captivity into a habitat where they can live freely. When this is not possible, we accept as an interim measure the provision of sanctuaries for great apes who cannot be returned to natural conditions. Individuals living provisionally in these sanctuaries must have the opportunity to remove themselves from humans as they please, and humans visiting them should be educated in the right of apes to live their own lives.[112]

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110. This is not meant to downplay the very important distinction between trying an animal for a criminal offense and giving an animal standing to sue, by way of a human guardian, under an existing animal protection statute.

111. *Declaration*, *supra* note 100, at 4.

112. The Great Ape Project International, *GAP-FAQ* (Oct. 22, 1996), *at* http://www.greatapeproject.org/gapfaq.html#Section3_3 (last visited Sept. 9, 2001). It goes on to say:

> We accept that, for reasons given above, or because they have been infected with a contagious disease, there may be some individuals who will never be able to live freely or in a group. In such cases, they should be provided with the space, facilities and opportunities for non-tactile interaction with others of their kind, or with humans, that best corresponds to their individual needs and interests.
>
> A guardian or guardians should be appointed to represent the interests of nonhuman apes living in sanctuaries or other human-controlled environments. In particular cases, guardians

The protection of individual liberty is also meant to preclude keeping great apes in laboratory cages. The Great Ape Project is replete with stories of apes that are caged in areas which are too small and poorly kept with fecal material caked on to bars and sides of cages.[113] Current law provides that primates should be kept under humane conditions but keeps the standard for humane treatment far below that sought by the Project.[114]

The third and final explicitly stated "right or principle" in the Declaration is a prohibition on torture: "The deliberate infliction of severe pain on a member of the community of equals, either wantonly or for an alleged benefit to others, is regarded as torture, and is wrong."[115] Much like the second principle which applies to animal liberties, this principle is designed to protect animals from suffering. In all likelihood, this principle is somewhat more focused on the conduct of biomedical experimentation on great apes. It suggests that pain cannot be inflicted on great apes for what is merely an "alleged benefit." Yet, the benefits from animal experimentation would seem to be more than just "alleged." Perhaps the benefits from great ape experimentation, when involving significant pain to great apes, are presumed to be merely "alleged." Biomedical experimentation may be an area where Project contributors had some disagreement. Adrian Kortlandt, a professor of animal psychology and ethology offered the following ambivalent discussion of experimentation on apes:

> I am aware, of course, that living and sometimes non-anesthetized subjects are needed in certain biomedical experimentation aiming to alleviate the suffering of humans. Those who have seen what is going on inside a hospital, and those who have lost a loved one owing to the impotence of medical science, will understand what I mean. I myself have seen some heart-breaking research in primate centres, particularly in the psychological and psychiatric field. However, as a student of psychology I have also seen enough in mental wards to appreciate the value of such research. On the other hand, how can we justify such research with our innocent ape cousins, while doing so is not allowed even with those humans who are guilty of the most horrifying crimes against humanity?[116]

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may approve limitation of their fertility, so that apes will not have to live in unacceptable conditions indefinitely.

It must be decided in each case whether it is best for individual great apes to be brought to sanctuaries or to remain where they are. Considerations such as available housing, stress created by the presence of humans, and existing bonds with caretakers will affect this decision.

In the rare cases that they do remain in the zoo, because it is in their own best interests, the priority in the power relationship should be given to the interests of the nonhuman apes. If they can voluntarily place themselves in view of the public, there should be a sign clearly saying that these are the last generation of great apes in zoo captivity.

Id.

113. Cantor, *supra* note 24, at 283.

114. *See supra* text accompanying notes 64-80.

115. *Declaration*, *supra* note 100, at 4.

116. Kortlandt, *supra* note 43, at 142.

In any event, the principle prohibiting torture would, at least, go well beyond our current protections for animals involved in lab experiments who, as discussed, currently have very few protections.[117]

Lastly, to avoid the criticism that the Great Ape Project draws an arbitrary cutoff line around great apes that leaves the rest of the primate and animal kingdom to the ravages of mankind, the Declaration remains agnostic as to whether or not other animals deserve the same protections that are demanded for great apes. The Declaration, reflecting the diversity of opinions among its contributors, says:

> No doubt some of us, speaking individually, would want to extend the community of equals to many other animals as well; others may consider that extending the community to include all great apes is as far as we should go at present. We leave the consideration of that question for another occasion.[118]

In Part II, we will explore the philosophical foundations of the Great Ape Project to help understand whether the interests of all animals should be treated equally or if those of human and nonhuman apes may be entitled to greater consideration.

II. PHILOSOPHICAL PERSPECTIVES

The Great Ape Project speaks with many voices in its exposition of the philosophical basis for extending rights to great apes. The explanation which is most widely cited and discussed comes from Peter Singer, currently a professor of bioethics at Princeton University. For Singer, human and nonhuman animals have interests if they have the ability to experience pains or pleasures. Singer cites an oft-quoted passage from Jeremy Bentham indicating that, when it comes to animals, "[t]he question is not, Can they *reason*? nor Can they *talk*? but, *Can they suffer*?"[119] Singer calls beings with the capacity to experience pleasures and pains "sentient," though he acknowledges that this is a special, narrow use of the term. The class of sentient beings includes humans, apes, monkeys, dogs, pigs, horses, rabbits, chickens, and more. Excluded from this category are non-sentient entities like rocks, trees, and computers as well as lower organisms like insects and bacteria.[120] While Justice Douglas suggested, in the context of environmental law, that legal standing might profitably be

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117. *See supra* text accompanying note 92.

118. *Declaration*, *supra* note 100, at 5.

119. SINGER, ANIMAL LIBERATION, *supra* note 103, at 7 (quoting Jeremy Bentham). Bentham's articulation of utilitarianism locates moral value, ultimately, in the mental states of sentient beings. As such, it is subject to Robert Nozick's critique of mental state theories of the good. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 42-45 (1974); *see also* J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM: FOR AND AGAINST 19-22 (1973). For reasons to question the force of Nozick's critique, see Adam Kolber, *Mental Statism and the Experience Machine*, 3 BARD J. OF SOC. SCI. 10 (1994/1995).

120. Singer can confidently respond in the negative to Richard Epstein's slippery slope challenge, "Would even bacteria have rights?" Glaberson, *supra* note 6.

granted to "the inanimate object about to be despoiled, defaced, or invaded,"[121] Singer need take no such view on the matter, as rivers, streams, and canyons are not sentient beings.

Singer rightly observes that most animals are capable of feeling pain. Although only humans and some nonhuman apes are capable of telling us that they are in pain, "[n]early all the external signs that lead us to infer pain in other humans can be seen in other species . . . ."[122] Singer notes that although pain "can never [directly] be observed,"[123] its "behavioral signs include writhing, facial contortions, moaning, yelping or other forms of calling, attempts to avoid the source of pain, appearance of fear at the prospect of its repetition, and so on."[124] And though we cannot have absolute certainty that even our human friends feel pain, "none of us has the slightest real doubt that our close friends feel pain just as we do."[125]

Importantly for Singer, the capacity to experience pleasure and pain "is not just another characteristic like the capacity for language, or for higher mathematics,"[126] which might arbitrarily determine whether a being's interests should count. Rather, the "capacity for suffering and enjoying things is a prerequisite for having interests at all, a condition that must be satisfied before we can speak of interests in any meaningful way."[127] Once we understand Singer's requirement for having an "interest," we can better understand his structure for resolving conflicts among the interests of different beings. Singer's principle of equal consideration of interests ("equal consideration") says that we should "give equal weight in our moral deliberations to the like interests of all those affected by our actions."[128] On this view, because a cow is sentient, its interests in avoiding painful electric shocks during a scientific experiment count as strongly as the interests that a chimpanzee or a human has in avoiding the same amount of pain.

Again, while Singer does not speak for all Project proponents, the language of equal consideration of interests is readily adopted by the Great Ape Project. The Declaration says that "a rational ethic has emerged challenging the moral significance of membership of our own species. This challenge seeks *equal consideration of the interests of all animals,* human and nonhuman."[129] Furthermore, were we to give great ape interests in experiencing pleasure and

121. Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting); *see also* Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

122. SINGER, ANIMAL LIBERATION, *supra* note 103, at 11.

123. *Id.* at 10.

124. *Id.* at 11.

125. *Id.* at 10.

126. *Id.* at 7.

127. *Id.* at 7.

128. PETER SINGER, PRACTICAL ETHICS 21 (2d ed. 1993).

129. *Declaration*, *supra* note 100, at 5 (emphasis added).

avoiding pain equal consideration to those interests held by humans, we would likely come to a proposal very much like the Great Ape Project's Declaration on Great Apes. We would, at a minimum, protect great apes from torture and unlawful captivity and would, perhaps, allow these protections to be enforced by guardians acting on behalf of apes.

The Declaration also provides for a right to life. Since a being's life can (we think) be taken painlessly, Project proponents need an explanation for why it harms great apes when their lives are taken quickly and painlessly. Proponents could appeal to the foregone pleasure that the ape would have experienced had it been allowed to live. This might be sufficient, particularly if we believe that the ape would lead a pleasant life if left alone.

Singer's answer goes further than that, asserting that great apes can have interests beyond mere pleasures and pains. A subset of sentient animals, including great apes, have more sophisticated interests, like interests in continuing to live in the future.[130] The discussion in Part I makes plausible the notion that some apes can be self-aware, have expectations about the future, and have memories that extend significantly into the past. When we kill a being that has an interest in continuing to live in the future, we have done something worse, all else being equal, than when we kill a being which is *merely* sentient, like a fish.

Nothing about the principle of equal consideration of interests implies that all humans and all animals have identical interests.[131] Some beings have an interest in life itself and recognizing that only some beings are capable of having that interest does not violate the principle of equal consideration. Equal consideration only tells us how to compare the relevantly similar interests of beings. When beings have different interests, we can compare those interests only by using our intuitions or by finding some other theoretical basis for making the comparison.

A. *Equal Consideration and Human Equality*

Much more needs to be said about how we understand human and nonhuman interests. However, before critically examining the principle of equal consideration in the context of nonhuman animals, it is important to see how the principle can be applied to humans. It is in this context that the principle holds much of its appeal, and most of those who cite Singer on behalf of animal rights are making arguments for animals that derive from intuitions about human equality.

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130. SINGER, PRACTICAL ETHICS, *supra* note 128, at 90.

131. Animal liberationists are seeking "equal rights" for animals, not "equal treatment," where equal treatment is understood to mean "identical treatment." *See, e.g.*, S.F. SAPONTZIS, MORALS, REASON, AND ANIMALS 78-79 (1987).

Singer uses the principle of equal consideration to explain remarkably well many of our beliefs about equality among humans. According to Singer, human equality is based not on some factual claim of equality but on equality as an ethical principle.[132] We think that human interests should count equally regardless of an individual's race, sex, strength, or intelligence. It is not the case that humans are actually equal in terms of their attributes, but their attributes are irrelevant to the ways in which their interests should be considered; humans are equal in the sense that they have interests that deserve equal moral consideration. Were we to base our principle of equality among humans on their attributes, we would see that people are plainly not identical in their abilities and attributes:

> Some are tall, some are short; some are good at mathematics, others are poor at it; some can run 100 metres in ten seconds, some take fifteen or twenty; some would never intentionally hurt another being, others would kill a stranger for $100 if they could get away with it.... And so we could go on. The plain fact is that humans differ, and the differences apply to so many characteristics that the search for a factual basis on which to erect the principle of equality seems hopeless.[133]

We might admit that not all humans are factually equal but deny that the factual differences among humans correspond with the typical boundaries along which human inequalities have typically been drawn (for example, race, gender, and sexual orientation). So "we can admit that humans differ as individuals, and yet insist that there are no morally significant differences between the races and sexes."[134] Nevertheless, Singer thinks that empirical arguments for equality along gender and racial lines are insufficient to refute the suggestion that, for example, everyone should be given an IQ test and those with the higher scores shall rule over those with the lower scores.[135] This sort of inegalitarianism is not refuted by arguments which say that humans are factually equal since such inegalitarianism is based on genuine (though irrelevant) differences. Singer writes, "We can reject this 'hierarchy of intelligence' and similar fantastic schemes only if we are clear that the claim to equality does not rest on the possession of intelligence, moral personality, rationality, or similar matters of fact."[136]

Singer's rejection of a "hierarchy of intelligence" also serves as a response to what we might call the "super-human hypothetical." Suppose that aliens someday land on Earth, and we come to understand that these aliens are far more intelligent than we are. We are also told that they love the taste of human flesh, and by the way, would we mind preparing ourselves into sandwiches so that the invaders may chew on our live flesh? We would all agree that humans

132. SINGER, PRACTICAL ETHICS, *supra* note 128, at 21.
133. *Id.* at 17-18.
134. *Id.* at 19.
135. *Id.* at 20.
136. *Id.*

should not submit to such treatment merely to satisfy the aliens' gustatory preferences. Equal consideration gets the right results. Under equal consideration, no matter how intelligent or artistic or emotionally astute are these aliens, human interests in avoiding the pain of being eaten alive outweigh the comparatively minor pleasures the aliens receive from eating us.[137]

B. *Equal Consideration and Animal Equality*

It is, therefore, Singer's view that "[t]here is no logically compelling reason for assuming that a difference in ability between two people justifies any difference in the amount of consideration we give to their interests."[138] This seems to jibe with the basic structure of our society in which rights are generally granted to people independently of their abilities. Yet, Singer's principle which embraces equality among all human beings "cannot be limited to humans."[139] Racists, on Singer's view, violate equal consideration by giving more consideration to the interests of members of their own race than to the interests of those of a different race.[140] Sexists violate equal consideration by giving more consideration to the interests of those of a particular gender. And, similarly, those who are speciesist "give greater weight to the interests of members of their own species when there is a clash between their interests and the interests of those of other species."[141] In order to avoid "speciesism,"[142] the prejudicial favoring of one species over another, we must treat the similar interests of all sentient animals equally.

At a time when Africans were enslaved in the British dominions, Jeremy Bentham wrote:

> The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognized that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a fullgrown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an

137. Of course, if the aliens had unimaginably strong desires for human flesh or perhaps required it in order to live, the hypothetical becomes more tricky and represents a classic challenge to utilitarianism.

138. *Id.* at 20-21.

139. *Id.* at 55.

140. *Id.* at 58.

141. *Id.*

142. This term is usually credited to Richard Ryder. *See* Richard Ryder, *Sentientism, in* THE GREAT APE PROJECT, *supra* note 24, at 220, 220. However, the term was popularized by Peter Singer. Can animals be speciesist against humans? The idea is parodied in *Animal Farm*'s reference to "Four legs good; two legs bad." *See* GEORGE ORWELL, ANIMAL FARM 40 (1946).

> infant of a day, or a week, or even a month, old. But suppose they were otherwise, what would it avail?[143]

As Singer reads Bentham, there is no "insuperable line" that distinguishes human and nonhuman animals. Singer is concerned with the utility of satisfying interests irrespective of the interest-holder. As long as a being has interests (which it will if it can experience pleasure or pain), the principle of equal consideration says that those interests weigh equally against the same kinds of interests of other beings. For Singer, the relevantly similar interests of humans and livestock animals, for example, are equally considered. When a human interest in tasty food is compared with a cow's interest in avoiding the pain of slaughter, Singer finds that the cow's interest is stronger. Our action, all else being equal, should be guided so as to respect the stronger interest of the cow over the lesser interest of the human.[144]

By demanding equal consideration of the interests of all sentient beings, Singer asks us to act in a way that is divorced from the current sentiments of most people. People often favor the interests of those they know over those they do not and those who remind us of ourselves over those who do not. Such feelings probably do help explain why we, in fact, favor humans over other species. Of course, these are exactly the kinds of provincial sentiments Singer is trying to repudiate.

Still, a potential objection to Singer is that the principle of equal consideration is too divorced from our actual human sentiments to provide meaningful guidance to our actions. Richard Posner has made this sort of challenge,[145] noting that human-centered sentiments may be hardwired into our brains:

> The main "reason" why the "philosophical" idea that... talking apes might have more rights than newborn or profoundly retarded children seems outlandish and repulsive may simply be that our genes force us to distinguish between our own and other species and that in this instance disembodied rational reflection will not overcome feelings rooted in our biology.[146]

Furthermore, perhaps if we try to treat the interests of all beings equally, we will so disperse our concern for others that we erode whatever non-self-serving interests human nature has granted us.

Singer, of course, believes that we should not let our current emotions dictate what is right and wrong, especially when these emotions have developed in a

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143. SINGER, ANIMAL LIBERATION, *supra* note 103, at 7 (quoting Jeremy Bentham).

144. For criticism of this utilitarian argument when applied in a society-wide context, see TOM REGAN, THE CASE FOR ANIMAL RIGHTS 220 (1983) and MARK ROWLANDS, ANIMAL RIGHTS: A PHILOSOPHICAL DEFENCE 84-86 (1998).

145. Posner and Singer recently engaged in a dialogue on animal rights. Richard Posner & Peter Singer, *Dialogue: Animal Rights*, SLATE, June 12-15, 2001, *available at* http://slate.msn.com/dialogues/01-06-11/dialogues.asp (last visited Sept. 9, 2001).

146. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 347-48 (1990); *see also* Posner, *supra* note 64.

speciesist society. Also, the fact that some people at least try to treat the interests of "talking apes" as equal to those of humans, suggests that our biological wiring is not our destiny. Clearly, however, the divide between our actual sentiments and Singer's theory presents a difficulty for Singer's position.[147]

C. *Proportional Consideration*

A view which more closely matches the views that a lot of people have toward nonhuman animals takes an animal's interests to be somehow related to its cognitive capacities. We might think, for example, that the value of a being's pleasures and pains (and the interests derived from those pleasures and pains) is in some way proportional to the being's cognitive abilities. Call this the principle of proportional consideration of interests ("proportional consideration"). On this view, the value of the experiences of a human and a baboon and a snake are all different because they have different cognitive abilities.

We might be led toward a view of proportional consideration if we understand animal pains and pleasures somewhat differently than does Singer. Certainly, our uncertainty about the nature of nonhuman experiences leaves room for disagreement. Though animals surely do feel pain, our confidence in our abilities to understand and evaluate the experiences of another being drops off as the being becomes more unlike ourselves. The more different a being is, the more limited are our inferences about its experiences. I can make better inferences concerning the experiences of Jimmy Carter than Koko the Gorilla, though I have met neither of them, because I know that one is a human and one is a gorilla. I can also make better inferences about the experiences of Koko than a mouse, because I know that Koko is anatomically more like me than is a mouse, and Koko is capable of communicating basic information about how she feels. My inferences are based on a combination of scientific knowledge (e.g., neuroanatomy and neurochemistry) as well as a perceived recognition of a being's experiences based on its external behavior including, if possible, a being's subjective reports of pleasure and pain.

Still these inferences are limited, even when other beings are quite like us. It is virtually impossible, for example, to know how an opposite-gendered sexual partner experiences sexual stimulation.[148] Even if male and female sexual stimulation creates similar physiological and hormonal responses in both genders, we know that their different sexual organs mean that men and women must be having experiences that differ in significant ways.

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147. For a discussion of conflict between moral sentiment and moral theory, see Adam Kolber, The Moral of Moral Luck, 45-66 (1996) (unpublished senior thesis, Princeton University) (on file with author).

148. Perhaps transgendered people have some knowledge of this sort.

Should we think that all animals which experience pain and pleasure, regardless of species, are experiencing the same kind of thing? Different kinds of animals have different brains and their states of pain and pleasure, we might expect, will be different in some ways. The more difficult it is to compare states of pleasure and pain across species lines, the more difficult it is to compare the interests to which these mental states give rise.

Singer is aware of some of the difficulties of making interspecies comparisons of utility. He believes, however, that although it may be difficult to know exactly how to compare states of pain and pleasure across species, the comparison is possible, at least in principle:

> If I give a horse a hard slap across its rump with my open hand, the horse may start, but it presumably feels little pain. Its skin is thick enough to protect it against a mere slap. If I slap a baby in the same way, however, the baby will cry and presumably does feel pain, for the baby's skin is more sensitive. So it is worse to slap a baby than a horse, if both slaps are administered with equal force. But there must be some kind of blow—I don't know exactly what it would be, but perhaps a blow with a heavy stick—that would cause the horse as much pain as we cause a baby by a simple slap.[149]

The problem may be more complicated than Singer's example of horse and baby pain suggests. It may be impossible to compare a baby's pain with a horse's pain, not because the former has soft skin and the latter has tough skin, but because they have different brains, and presumably, different mental states. We may think that pain is a mental state which all animals tend to avoid, and pleasure is a mental state which all animals tend to prefer. However, we do not know that these mental states are equally bad across species, because they may differ not only in duration and intensity but in other hard to define ways.

John Stuart Mill argued there are higher and lower pleasures and nonhumans can only have the latter. According to Mill, "Human beings have faculties more elevated than the animal appetites, and when once made conscious of them, do not regard anything as happiness which does not include their gratification."[150] When it comes to pleasures and pains, Mill emphasized that we must consider quality as well as quantity,[151] and the quality of human experiences is potentially higher than that of animals. As evidence, Mill argued that "[f]ew human creatures would consent to be changed into any of the lower animals, for a promise of the fullest allowance of a beast's pleasures."[152] Or, put more famously, "[i]t is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, is of a different opinion, it is because they

149. SINGER, PRACTICAL ETHICS, *supra* note 128, at 59.

150. JOHN STUART MILL, *Utilitarianism, in* ON LIBERTY AND UTILITARIANISM 145 (Alan M. Dershowitz ed., Bantam Books 1993) (1871).

151. *Id.* at 145-46.

152. *Id.* at 146-47.

only know their own side of the question. The other party to the comparison knows both."[153]

While I am not so sure that Socrates really knows what it is like to be a pig, it is fair to say that humans can experience depths of pleasure and suffering which nonhuman animals cannot. A chimpanzee cannot experience the pain felt by Hamlet in discovering that his uncle killed his father and married his mother (assuming that there really had been a Hamlet who had such experiences). It may be that chimpanzee pain differs not only in intensity from human pain but also in kind. In the case of interpersonal assessments of suffering among humans, we know that normal humans have brain structures that are, at some level, nearly identical. We can plausibly extrapolate that human states of pain and pleasure are also quite similar in kind. In the case of great apes and other animals, we have overwhelming scientific evidence that these beings experience pleasure and pain. We do not know, however, what their pain feels like from the inside and whether that pain is somehow not as bad in beings with lower cognitive functions.

Singer cites some neuroanatomical and evolutionary evidence indicating that animal pain is similar to human pain. Singer writes:

> Although human beings have a more developed cerebral cortex than other animals, this part of the brain is concerned with thinking functions rather than with basic impulses, emotions, and feelings. These impulses, emotions, and feelings are located in the diencephalon, which is well developed in many other species of animals, especially mammals and birds.[154]

Also, Singer indicates that human and animal nervous systems evolved in the same way and that the "evolutionary history of human beings and other animals, especially mammals, did not diverge until the central features of our nervous systems were already in existence."[155] In summary, then, "it is surely unreasonable to suppose that nervous systems that are virtually identical physiologically, have a common origin and a common evolutionary function, and result in similar forms of behavior in similar circumstances should actually operate in an entirely different manner on the level of subjective feelings."[156]

Even if Singer is right that human and other mammalian brains are substantially similar (certainly a controversial point), they still differ *somewhat.* It is very difficult to tell how important these differences are likely to be. The science of neurophysiology is only partly helpful in telling us about the internal experiences of other organisms. Certainly, neurophysiology alone will not tell us how to value different, if similar, experiences.

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153. *Id.* at 148.

154. SINGER, ANIMAL LIBERATION, *supra* note 103, at 11. Singer cites this point to the appropriately-named Lord Brain, Presidential Address, in THE ASSESSMENT OF PAIN IN MEN AND ANIMALS (C.A. Keele & R. Smith, eds., 1962).

155. SINGER, ANIMAL LIBERATION, *supra* note 103, at 11.

156. *Id.*

Furthermore, our higher cognitive functions may interact with our simple experiences of pleasure and pains in nonobvious ways. These higher cognitive functions may play a role in the value of our experiences such that we cannot really separate out simple pleasures and pains from the rest of our cognitive apparatus. It may be that human pain is generally worse than chimpanzee pain which is generally worse than tortoise pain, not because humans are more important than chimps which are more important than tortoises. Instead, it may be that the nature of their experiences, even when they are supposed to be simple experiences of "pain" or "pleasure," are qualitatively different.

The proportional consideration view is an arguably nonspeciesist way to achieve a speciesist result. It may be criticized for exploiting the difficulties in assessing interspecies utility in order to give a somewhat fanciful tale of the nature of experience that retains some level of human dominance. Singer might argue against it by first admitting that we cannot fully understand the nature of the experiences of a nonhuman being. And, in the absence of evidence to think, for example, that cow suffering is not as bad as human suffering, it is speciesist to assume that it is. In fact, it is possible that a cow's pain is somehow worse than a human's pain. When confronted with difficult questions of animal cognition and the philosophy of mind, Singer can respond, quite reasonably, by noting that the assumptions we make in the face of uncertainty often reflect an unjustified speciesist attitude.

Furthermore, the proportional consideration view falls completely flat when we reexamine issues of human equality. Proportional consideration yields the wrong results when applied to humans, since the principle would suggest that the interests of more intelligent humans are entitled to greater consideration than those of less intelligent humans. These views are inegalitarian in result. They provide only stronger moral support to our hypothetical ultraintelligent alien invaders who seek to satisfy their cravings for human flesh. The price of maintaining the dominance of humans over apes over chickens through proportional consideration arguments is that we no longer have principles that can be generalized throughout the animal kingdom, since they fall short as soon as we look to our fellow humans.

III. JURAL STANDING FOR APES AND OTHER ANIMALS

We need not resolve the deep questions raised by Singer and his critics in order to seek certain incremental changes in the law. So far, I have tried to establish two relatively uncontroversial points that will bear on the law of standing. The first point is that sentient animals do have interests and that these interests are recognized, to some degree, in our substantive laws. These interests are not as extensively recognized and protected as some animal liberationists would like them to be, but nevertheless, the law does recognize that we have direct duties to protect animals under certain circumstances.

The second point is that great apes have interests that are at least as substantial as those of other sentient animals and are probably quite a bit stronger. If one is convinced by Singer's principle of equal consideration, then the need to increase protection for great apes is strong because the need to increase protection for all sentient animals is strong. Great apes, perhaps having unique needs for cognitive stimulation and emotional interaction, are a logical starting point to focus protective efforts. If on the other hand, one views animal interests as deserving proportional consideration, one may still recognize that the interests of humans and nonhuman animals are close enough to require increased protections for all animals. Great apes, which can communicate with sign language and are surprisingly close to us in cognitive ability, are in the most urgent need of protective resources because, perhaps, their interests are somehow more intense and more deserving of our consideration than those of the rest of the nonhuman animal kingdom.

We do not need to think that the interests of nonhuman animals are anywhere near as strong as those of humans to recognize that the interests of nonhuman animals can figure into some sort of balancing, however weak, against our own. The discussion of the law of standing which follows will not be limited to concerns about great apes. Whatever protections we believe all animals to deserve (such as those protections provided by the Animal Welfare Act), great apes will deserve protections that are at least as strong.

A. *The Law of Standing*

It is sometimes noted that the biggest impediment to the protection of animal interests is not so much the weakness of substantive animal protections but rather the obstacles to their effective enforcement. With respect to the Animal Welfare Act, the USDA has frequently been accused of inadequate regulatory implementation[157] and insufficient enforcement.[158] Perhaps even more importantly, "[i]n virtually all AWA claims, legal failures result not from any deficiency on the merits of the cases brought before the courts, but rather from jurisdictional challenges to third parties."[159] Since animals cannot enforce their rights directly, they must depend on regulatory and other law enforcement to do the job. When regulators and police are too busy or uninterested to pursue violations of animal cruelty and related laws, private parties may try to step in. While these private parties might be thought ideal to help protect animals (notably because they invest their own resources), they are frequently

157. Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795, 796 (1997).

158. The Congressional Record indicates, for example, that in the first ten years after the implementation of what is now the Animal Welfare Act, the USDA brought only two enforcement actions. 132 CONG. REC. H1643-03 (statement of Rep. Chandler).

159. Mendelson, *supra* note 157, at 796; *see, e.g.*, Animal Legal Def. Fund, Inc. v. Espy, 23 F.3d 496, 498-99 (D.C. Cir. 1994).

limited from bringing suits on behalf of animals due to constitutional and statutory limits on access to federal courts.

Article III of the U.S. Constitution limits the jurisdiction of federal courts to "cases" or "controversies."[160] Along with the other doctrines of justiciability, standing requirements "state fundamental limits on federal judicial power."[161] They decide the question of "whether the litigant is entitled to have the court decide the merits of the dispute."[162]

A principal rationale for standing doctrine is to make sure that plaintiffs are sufficiently vested in the outcome of a case so that they seek to vigorously argue their position. As provided in *Baker v. Carr*,[163] litigants must have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues."[164] Standing doctrine also helps to preserve separation of powers principles. By limiting courts to the adjudication of cases of actual harm to actual litigants, courts are deterred from stepping on the political branch's role of shaping broad policies for the future.[165]

To meet standing requirements, a plaintiff must demonstrate having suffered 1) an injury-in-fact[166] that was 2) caused by the defendant's action and that 3) a favorable judicial ruling will redress the plaintiff's injury.[167] If a plaintiff had no injury or did not allege that the injury was caused by the party being sued or could not identify some appropriate form of judicial redress, there would not be much point in having a court hear the plaintiff's case. Aside from these requirements purportedly derived from the text of the Constitution, the Supreme Court has added the so-called "prudential requirements" for

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160. U.S. CONST. art. III, § 2, cl. 1. The clause states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;— between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

161. Allen v. Wright, 468 U.S. 737, 750 (1984).

162. Warth v. Seldin, 422 U.S. 490, 498 (1975).

163. 369 U.S. 186 (1962).

164. *Id.* at 204; *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14 (2d ed. 1988) (noting that "[s]tanding questions arise principally in challenges to government conduct, where litigants often lack the obvious stake normally present in most lawsuits between private parties").

165. Justice Scalia has taken this view in Lewis v. Casey, 518 U.S. 343, 349 (1996).

166. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982).

167. *See* Bennett v. Spear, 520 U.S. 154, 162 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

standing. Namely, courts will not adjudicate "generalized grievances," and ordinarily, they will not permit plaintiffs to claim the rights of third parties.[168] In the case of the Animal Welfare Act, prudential requirements for bringing suit are imposed by the Administrative Procedure Act (APA),[169] which provides for judicial review to any person "suffering legal wrong because of an agency action, or adversely affected or aggrieved by any agency action within the meaning of the relevant statute."[170] Importantly, the Supreme Court has found "that a plaintiff's injury must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked by the suit."[171] Therefore, in cases brought by plaintiffs under the Animal Welfare Act, the Act must either implicitly or explicitly grant that plaintiff a cause of action.

For an alleged injury to satisfy standing requirements, the injury must invade a legally protected interest which is a) concrete and particularized[172] and b) actual or imminent, not conjectural or hypothetical.[173] Suppose, for example, that I am having lunch with an accountant friend of mine. She tells me that, just a week ago, she was knocked down by a United States Postal Service delivery truck and had to be treated for severe bruises and lacerations at a nearby hospital. Apparently, the truck driver was assigned more hours than regulations permit and fell asleep at the wheel. I suggest that she consider bringing suit against the driver or the postal service. My friend satisfies the injury-in-fact requirement because she has a legally protected interest in her bodily integrity that is particular to her (concrete and particularized) and has already happened (so it is actual and not merely hypothetical). Nevertheless, my friend chooses not to pursue a case because she does not like getting involved in such matters. Despite whatever outrage I feel at the injustice of her situation, it is very unlikely that a federal court would give me standing to bring suit. I have not suffered an injury-in-fact that would establish standing under the Constitution because my generalized feeling of outrage at the action of a government employee is not legally recognized, and it did not affect me in a particular way that differentiates me from anyone else. Furthermore, my

168. Warth v. Seldin, 422 U.S. 490, 499 (1975).

169. 5 U.S.C. § 702 (1994).

170. *Id.*

171. Bennett v. Spear, 520 U.S. at 162.

172. *Defenders of Wildlife*, 504 U.S. at 560 (1992). In *Defenders of Wildlife*, plaintiffs sought to challenge the lack of extraterritorial enforcement of certain provisions of the Endangered Species Act. Although some of the plaintiffs had established themselves as interested in seeing and studying the animals at-risk, plaintiffs were denied standing for failing to demonstrate concrete plans to visit the animals. The Court implied that had the plaintiffs bought a plane ticket to visit the animals, they would have established the injury-in-fact requirement needed for standing. *Id.* at 564. A plurality of the Court, however, felt that even under such circumstances, the plaintiffs would still have failed to establish the redressability requirement. *Id.* at 568.

173. *Id.* at 560.

claims that I fear that I am at risk for being hurt in the future by a mail carrier will probably fail, as the danger is not actual but merely hypothetical.

Often, attempts to bring suit on behalf of animals fail because humans cannot meet the injury-in-fact requirement of standing law. Describing the kind of injury required to obtain standing, Judge Posner has written that the injury "must in short be fairly describable as an injury personal to the plaintiff—a deprivation of *his* right—rather than a concern with another's injury."[174] It is exactly this requirement that an injury be personal to a litigant that makes it hard for humans to obtain standing under the AWA. Since humans are not the principle locus of the inhumane treatment that the AWA was designed to protect, they have difficulty demonstrating injuries resulting from violations of the Act.

If animals were granted standing to sue, they could easily satisfy injury-in-fact requirements when suffering from violations of the AWA. Where an animal has been inhumanely treated in violation of the AWA, the animal has an injury-in-fact that the AWA expressly seeks to prevent. An animal's human representative could then plausibly show that USDA action or inaction in violation of the AWA caused the animal injuries that can be remedied by appropriate USDA action.

Contrary to the aspirations of the Great Ape Project and other animal liberationists, however, animals are not recognized as legal persons who can have independent standing.[175] There are, however, a number of suits in which animals are cited as named plaintiffs.[176] Often, these cases never directly address the animal standing issue. In at least one case, a federal court held that "[a]s an endangered species under the Endangered Species Act, the bird (Loxioides ballieu), a member of the Hawaiian honey-creeper family, also has legal status and wings its way into federal court as a plaintiff in its own right."[177] Other cases have held that animals do not have independent jural standing,[178] and this is widely taken to be positive law.[179]

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174. People Organized for Welfare and Employment Rights (P.O.W.E.R.) v. Thompson, 727 F.2d 167, 171 (7th Cir. 1984).

175. *See* Miles v. City Council, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983) (noting, while poking fun at the case, that a performing cat which could make human speech sounds had no right to free speech since it is not a "person" and is not protected under the Bill of Rights).

176. *See, e.g.*, Am. Bald Eagle v. Bhatti, 9 F.3d. 163 (1st Cir. 1993); Mt. Graham Red Squirrel v. Yeutter, 930 F.2d 703 (9th Cir. 1991); V.I. Tree Boa v. Witt, 918 F. Supp. 879 (D.V.I. 1996); Loggerhead Turtle v. City Council, 896 F. Supp. 1170 (M.D. Fla. 1995); N. Spotted Owl v. Lujan, 758 F. Supp. 621 (W.D. Wash. 1991); N. Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).

177. Palila v. Haw. Dep't of Land & Natural Res., 853 F.2d 1106 (9th Cir. 1988) (citation omitted).

178. Sunstein, *supra* note 81, at 1359; *see* Citizens to End Animal Suffering & Exploitation v. New England Aquarium, 836 F. Supp. 45 (D. Mass. 1993); Hawaiian Crow v. Lujan, 905 F. Supp. 549, 552 (D. Haw. 1991).

179. *See, e.g.*, Sunstein, *supra* note 81, at 1359 ("As a rule, the question is therefore

Granting animals standing to sue under the Animal Welfare Act is very different, however, from granting animals legal personhood. If animals had standing under the AWA, private plaintiffs could represent them to help enforce existing, congressionally-mandated laws protecting animals. For example, an animal advocacy organization *could not* represent a capuchin monkey in a suit against an organ grinder for intentional infliction of emotional distress. No such cause of action exists under current law. The organization might, however, be able to sue the USDA for inappropriately interpreting the AWA in such a way that led to the unlawful sheltering of the capuchin. Granting animals full legal personhood is a much vaguer notion that would require changes to the substantive laws protecting animals, rather than the more procedural laws that affect standing.

Why do animals lack standing under the AWA? Cass Sunstein writes that "[a]nimals lack standing as such, simply because no relevant statute confers a cause of action on animals."[180] Other statutes grant standing to persons who might otherwise not have it,[181] and Sunstein thinks it possible "that before too long, Congress will grant standing to animals to protect their own rights and interests"[182] through counsel with guardian-like obligations, not unlike the ways in which children or corporations are represented.[183] As for the constitutionality of such a legislative action given the "case" or "controversy" requirement, Sunstein sees no significant problem as "[n]othing in the text of the Constitution limits cases to actions brought by persons."[184]

Of course, an originalist interpretation of the Constitution might conclude that the founding generation did not intend to grant standing to anyone who is not a human being.[185] However, as a matter of positive law, standing is given to all sorts of entities, whether human or not. For example, corporations are juridical persons, and "legal rights are also given to trusts, municipalities, partnerships, and even ships."[186] Sunstein also notes that slaves were allowed

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quite clear: Animals lack standing as such, simply because no relevant statute confers a cause of action on animals.").

180. *Id.*

181. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 702 (2001); Marine Mammal Protection Act of 1972, 16 U.S.C. § 1377 (2001); Endangered Species Act of 1973, 16 U.S.C. § 1540 (2001).

182. Sunstein, *supra* note 81, at 1359.

183. *Id.*

184. *Id.* at 1360.

185. *Id.* On this originalist view, Justice Frankfurter argued that Article III means "that a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring); *see also* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394-96 (1988) (describing the historical evolution of standing doctrine).

186. Sunstein, *supra* note 81, at 1360-61; *see also* Christopher D. Stone, *Should Trees*

to bring causes of action, "often through a white guardian or 'next friend,' to challenge unjust servitude,"[187] even though slaves were not considered legal persons.

In *Sierra Club v. Morton*,[188] the United States Forest Service granted Walt Disney Enterprises a permit to construct a ski resort in Mineral King Valley in the Sequoia National Forest. The Sierra Club challenged this decision under the Administrative Procedure Act, which provides for judicial review to a person who suffers "legal wrong because of agency action, or [is] adversely affected or aggrieved by agency action within the meaning of a relevant statute."[189] Though the Sierra Club won a preliminary injunction in federal district court, the Ninth Circuit reversed the district court's decision,[190] finding that the Sierra Club lacked standing. The Sierra Club did not allege that the Forest Service's action, which they claimed violated the law, affected the Sierra Club's membership in its actual use of the forest; rather, the Sierra Club's members merely found the permit grant, in the words of the court, "personally displeasing or distasteful to them."[191] The Supreme Court affirmed the Ninth Circuit decision. In dissent, however, Justice Douglas wrote, "The critical question of 'standing' would be simplified and also put neatly in focus if we . . . allowed environmental issues to be litigated . . . in the name of the inanimate object about to be despoiled, defaced, or invaded . . . ."[192] In the same case, Justice Blackmun indicated some support for Justice Douglas' "imaginative expansion" of standing doctrine.[193] If U.S. Supreme Court Justices are willing to consider granting standing to inanimate objects like forests, even in the absence of congressional authority, then it becomes clear that standing requirements permit at least some degree of judicial flexibility.

B. *The Need for Stronger Protection*

The first reason for granting standing to great apes extends from the arguments made in Parts I and II of this Note. Namely, great apes have interests and current law does not adequately protect those interests. Granting standing to great apes, subject to some caveats to be discussed, would help

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Have Standing? Toward Legal Rights for Natural Objects, 45 S. CAL. L. REV. 450, 452 (1972).

187. Sunstein, *supra* note 81, at 1361 (referencing ROBERT B. SHAW, A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES 110-53 (1991)). No doubt, the animal rights movement may overstate analogies between animal rights and abolition. The point here is only about the constitutional meaning of "case" or "controversy."

188. 405 U.S. 727 (1972).

189. 5 U.S.C. § 702 (2001).

190. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

191. *Id.* at 33.

192. Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting); *see also supra* text accompanying note 121.

193. 405 U.S. at 757.

protect their interests. Consider for example the issue of experimentation on great apes and other primates.[194] Even if we believe that human interests in improved medical treatment outweigh the interest of great apes and other primates in continuing to live a natural life, we can still acknowledge that ape experimental subjects should receive humane care including pain relief medication and clean and capacious cages. Nevertheless, if inhumane conditions exist and the USDA does nothing about it, there is virtually no way for an animal advocacy group to gain standing to bring suit in order to gain enforcement of AWA regulations.[195]

Under current law, there are harms to animals for which no human is likely to have an injury-in-fact. Sunstein points to a proposed statutory ban on the importation of goods made from dogs or cats.[196] He notes the difficulties any individual concerned about animal interests would have in obtaining standing to sue an agency for improperly enforcing the ban since it is unlikely that the ban is uniquely injurious to some particular human plaintiff,[197] while it is clearly injurious to a slaughtered dog or cat. Additional reasons given for granting standing to animals are to "make a public statement about whose interests are most directly at stake."[198] Such a public statement has no symbolic meaning for animals, however, it could have a powerful indirect effect in preserving animal legal protections. In addition, granting standing to animals would increase private monitoring of violations.[199] Lastly, granting standing to animals would "bypass complex inquiries into whether prospective human plaintiffs have injuries in fact,"[200] a subject to which we now turn our attention.

C. *Aesthetic Injuries*

The most promising standing case for great apes and other primates is *Animal Legal Defense Fund, Inc. v. Glickman*.[201] In that case, Marc Jurnove claimed injuries associated with his repeated observations of the inhumane treatment of primates at a Long Island zoo. What he observed was isolation

194. I have added the "and other primates" simply because, as discussed, experimentation on great apes is strictly limited, for reasons independent of their individual welfare, by the Endangered Species Act.

195. FRANCIONE, *supra* note 64, at 66.

196. Sunstein, *supra* note 81, at 1360 (referencing Dog and Cat Protection Act of 1999, H.R. 1622, 106th Cong. (1999)).

197. *See id.* Sunstein notes, however, that those placed at a competitive disadvantage by strictly observing the ban might have standing to sue. *Id.* Of course, these competitors may have no interest in animal protection and may still have little incentive to take legal action.

198. *Id.* citing Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2044-45 (1996).

199. Sunstein, *supra* note 81, at 1360.

200. *Id.*

201. 154 F.3d 426 (D.C. Cir. 1998) (en banc).

and despondency among apes and other primates whom Jurnove, a lifelong animal lover, understood to be social animals in need of companionship.[202] For example, the zoo housed a large male chimpanzee in a solitary cage "where [h]e could not see or hear any other primate."[203] Perhaps this does not sound so terrible to us, since we have typically only seen chimpanzees in their sometimes depressed captive state. However, as suggested in Part II, chimpanzees and other apes are social by nature and have rather active mental lives. Chimpanzees can have stilted cognitive development if left alone in their cages.[204] While chimpanzees can engage in behavior in front of a mirror which demonstrates self-recognition and arguably self-awareness, they may lose this ability if they are deprived of human and chimpanzee contact.[205] Some psychologists have suggested that chimpanzees may lose their ability to imitate and transmit species-typical behavior in the dull, sterile environments in which some great apes are kept in captivity.[206]

As noted in Part I, the AWA requires the USDA to establish "minimum requirements" to protect primate psychological well-being,[207] and this law was implicated by the treatment at the Long Island zoo. In response to the law, the USDA issued regulations which required regulated entities, in this case the zoo, to set up plans that take care of the needs of primates in accordance with professional standards.[208] Marc Jurnove made repeated attempts to alert the USDA to the conditions of primates at the zoo, which he alleged were in violation of the law. While the USDA made several inspection trips, each time the zoo was found to comply with the law, although a number of primates remained alone in their cages without adequate stimulation, according to Jurnove. Jurnove alleged that the USDA violated the AWA by failing to directly establish minimum requirements for primate psychological well-being. Rather, the agency delegated its responsibility to the regulated entities and thereby failed to set "minimum standards."[209] Jurnove contended that the conditions that caused him injury "complied with current USDA regulations, but that lawful regulations would have prohibited those conditions and protected [him] from the injuries" he experienced.[210]

The key statement of Marc Jurnove's injury comes in the plaintiffs' complaint. It says, "Marc Jurnove experienced and continues to experience physical and mental distress when he realizes that he, by himself, is powerless to help the animals he witnesses suffering when such suffering derives from or

202. *Id.* at 429-30 (summarizing from Jurnove affidavit).
203. *Id.* at 429 (citing Jurnove affidavit).
204. *See* WISE, *supra* note 5, at 166.
205. *See id.* at 167.
206. *Id.*
207. *See supra* text accompanying notes 80-87.
208. 9 C.F.R. § 3.81.
209. Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 430 (D.C. Cir. 1998).
210. *Id.*

is traceable to the improper implementation and enforcement of the Animal Welfare Act by [the] USDA."[211] Jurnove was claiming that he was injured by the mistreatment of primates at the zoo. Namely, he claimed to have suffered a kind of aesthetic injury.

Federal courts have repeatedly acknowledged that aesthetic interests are judicially cognizable, and a D.C. district court agreed with Jurnove.[212] In an en banc rehearing of the case that was limited to the issue of standing, the D.C. Circuit Court also agreed that Jurnove had standing and, perhaps in tacit agreement, the Supreme Court refused to grant certiorari.[213] The majority opinion in Glickman noted that the "Supreme Court has repeatedly made clear that injury to an aesthetic interest in the observation of animals is sufficient to satisfy the demands of Article III standing."[214] For example, the court cited *Defenders of Wildlife* where the Court indicated that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."[215]

So current law does provide some means for humans to bring suit under the AWA. Clearly, however, the law has a strange implication. When it comes to access to courts, the interest that a human has in not seeing cruelty to animals (which can provide an injury-in-fact) counts for more than the interests of the animal in avoiding the cruelty itself (animals have no standing). This is certainly peculiar. Surely the reason why it pains people to see animals suffering is that they take the animal's pain to be significant. Perhaps we think that these people are overreacting to animal suffering, but then it seems odd to make their overreactions judicially cognizable injuries.

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211. 154 F.3d at 430-31 (citing the First Amended Complaint).

212. In U.S. District Court, Judge Charles R. Richey held that plaintiffs had standing to sue and, on the merits of the case, held that the USDA's regulations did violate the Administrative Procedure Act ("APA") by failing

> to set standards, including minimum requirements, as mandated by the AWA; that the USDA's failure to promulgate standards for a physical environment adequate to promote the psychological well-being of primates constitute[d] agency action unlawfully withheld and unreasonably delayed in violation of the APA; and that the USDA's failure to issue a regulation promoting the social grouping of nonhuman primates [was] arbitrary, capricious, and an abuse of discretion in violation of the APA.

Id. at 431 (summarizing the lower court decision). However, on appeal, the decision on the merits was overturned. *See* Animal Legal Def. Fund, Inc. v. Glickman, 204 F.3d 229 (D.C. Cir. 2000).

213. Nat'l Ass'n for Biomedical Research v. Animal Legal Def. Fund, Inc., 526 U.S. 1064 (1999).

214. 154 F.3d at 432.

215. 504 U.S. at 562-63. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 231 n.4 (1986) (finding that plaintiffs had "undoubtedly . . . alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting" (citation omitted)); *see also* Animal Legal Def. Fund, Inc. v. Espy, 23 F.3d 496, 505 (D.C. Cir. 1994) (Williams, J., concurring in part and dissenting in part) ("*Japan Whaling Association* and *Defenders of Wildlife* clearly recognize people's affirmative aesthetic interest in viewing animals enjoying their natural habitat.").

As mentioned, one of the justifications for standing doctrine is to ensure that parties have a strong enough stake in a case "to assure that concrete adverseness which sharpens the presentation of issues."[216] Yet, if we are interested in sharpening the issues, it would seem that judicial resources should focus on the party which is primarily injured, namely some animal, over a party which has some secondary injury, namely an aesthetic injury from observing the primary injury. "If you become indignant reading about a case of police brutality," Judge Posner notes, "you cannot sue the responsible officers in federal court under 42 U.S.C. § 1983."[217] Yet, what if you observe the brutality and claim an aesthetic injury? By analogy to Jurnove's case, it would seem that an aesthetically-injured observer could have standing to sue. But surely we would prefer, all else being equal, that suit be brought by the direct victim of the brutality since the victim will ordinarily have the most at stake in the litigation. Surely, we would prefer a policy where the direct victim at least had the opportunity to bring suit. Under the AWA, the direct victims of abuse are given no such opportunity. Of course, in animal contexts, there is probably no important difference between the kind of litigation which would be brought by Jurnove as the victim of an aesthetic injury compared to the litigation brought by Jurnove as the guardian of a particular group of primates. However, to the extent that we want standing doctrine to be based on a coherent set of principles, it would seem wise to have policies that prefer suits brought by direct victims of harm over those brought by indirect victims. Standing law under the AWA has the opposite result.

Aesthetic injuries are subjective and, in the animal welfare context, they are derivative of a greater harm. Allowing aesthetic injuries to satisfy injury-in-fact requirements may be a mere rationalization designed to bridge a procedural gap to enabling a plaintiff to argue the merits of her case. This casuistic leap over the injury-in-fact requirement may very well have an animal's best interests at heart; and it may be a better option than giving private plaintiffs no means of asserting animal protections. However, it may also open the door to claims of aesthetic injuries-in-fact where they should not otherwise be granted.

D. *Underrepresentation of Animal Interests*

Even the most ardent animal rights activists admit that equal consideration of the interests of animals does not entail giving them the right to vote. If the right to vote means the right to enter a ballot box and make a selection of candidates, then surely they are right—no animal benefits from such a right. However, if the right to vote is thought of as a proxy for political

216. Baker v. Carr, 369 U.S. 186, 204 (1962).

217. People Organized for Welfare and Employment Rights (P.O.W.E.R.) v. Thompson, 727 F.2d 167, 171 (7th Cir. 1984).

representation, then it seems that animals are being shortchanged. If we acknowledge that animals have legitimate moral and legal interests (even if not equal to our own) and we acknowledge that they have no political voice of their own, it is reasonable to think that their interests will be politically underrepresented.[218]

Surely, there are people and organizations who fight on behalf of animals. However, these people have finite resources to expend on political issues. Forcing them to expend their own resources to protect animal interests means that they must sacrifice their personal political interests to some extent. So, we are either underrepresenting the interests of animals or the interests of animal activists or some combination of both.[219] Perhaps this explains why laws like the AWA are more symbolic than forceful. Animal interests are sufficiently represented to enable relatively cost-free legislation to be passed but are not represented sufficiently for the more expensive task of enforcing legislation.

E. *Some Caveats*

My purpose here has *not* been to give an all-things-considered argument for granting standing to great apes. Many questions remain unanswered. To know if granting such standing would be a good idea, we would need to look more carefully at the USDA's enforcement problems. Perhaps it would be more effective to simply push for better USDA enforcement (despite my suggestion that animal interests will be systematically underrepresented in budgetary decisions). Also, were animals granted standing, we would need to be concerned about potential abuse by animal advocacy organizations. Requiring the loser to pay legal costs in such cases might reduce abuse, but the

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218. This argument applies, even more forcefully, to children and profoundly retarded people. If their guardians were granted the right to vote on their behalf, it is likely that their interests would be better represented. *See* Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: Toward a Controversial Understanding of American Democracy*, 94 NW. U. L. REV. 503 (2000); *see also* Barnett v. City of Chicago, 141 F.3d 699, 704 (7th Cir. 1998) (Posner, C.J.) ("It is not as if the proposal were to give extra votes to families with more than the average number of children, a bizarre suggestion in our political culture but one that could be defended with reference to the concept of virtual representation."). Unlike children and the mentally incompetent, animals are not citizens and so perhaps are not entitled to vote (even illegal aliens and permanent residents are not entitled to vote). On a proportional consideration view, however, each sentient animal could be entitled to some fraction of a full vote made by a guardian on its behalf. The practical difficulties of such a program, in the case of animals, are fairly obvious.

219. Again, this is based on the probably accurate assumption that were animal activists no longer required to fight for animal rights, they would use their energies to more forcefully pursue other political issues that concern them. Granted, it may seem odd that animal activist and animal welfare organizations could conserve resources by gaining the right to serve as legal guardians of animals. Certainly, however, to the extent that organizations would choose to pursue this option, they would do so because they can accomplish their goals (mainly deterrence) more cost effectively than by lobbying the government to spend more on enforcement resources.

novelty of animal standing would raise many complications that are difficult to foresee. We would also want to know more about the "guardian-like" arrangements that would be established to protect animals and what would happen when multiple groups sought involvement in the same case. To the extent that Congress made an incremental change in standing requirements, perhaps as a sort of legislative experiment, great apes would be logical starting candidates to qualify for standing since their numbers are relatively few and their needs are greater.

There are other ways to help great apes and other animals that are worthy of consideration. Many environmental statutes have citizen-suit provisions that allow private plaintiffs to bring suit against violators.[220] These provisions have helped Congress to improve enforcement of environmental laws by allowing citizens, in certain cases, to act as "private attorneys general" as an "alternative means of enforc[ing]" a statute.[221] The AWA does not contain such a provision and previous attempts to obtain such legislation have failed.[222] But even with a citizen suit provision, there are still standing requirements imposed by the Constitution, and private citizens would still need to show injuries-in-fact. A citizen suit provision would certainly strengthen protections for animals but would not alleviate the problem that courts countenance the weaker injuries of humans that derive from injuries to animals rather than recognizing those injuries directly.

My point has been to show that granting standing to animals (particularly great apes) is a plausible means of addressing inadequate regulatory enforcement of the AWA. Granting standing provides a means of satisfying reasonable constitutional limitations on federal court access by recognizing animals as injured parties rather than recognizing humans who have suffered simply by witnessing animal suffering. Also, granting standing to great apes, at least as a start, would acknowledge that these beings do have interests that should be respected, even at some cost to humans. In a country that recognizes the lawsuit, *U.S. v. 449 Cases, More or Less, Containing Tomato Paste*,[223] it

220. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619 (2001); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (2001); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365 (2001); Solid Waste Disposal Act, 42 U.S.C. § 6972 (2001); Clean Air Act, 42 U.S.C. § 7604 (2001); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9659 (2001); *see also* Rob Roy Smith, *Standing on Their Own Four Legs: The Future of Animal Welfare Litigation After* Animal Legal Defense Fund, Inc. v. Glickman, 29 ENVTL. L. 989 (1999); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992).

221. Stephen Fotis, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U. L. REV. 127, 136 (1985) (citation omitted).

222. Smith, *supra* note 220, at 1026, n.300.

223. 111 F. Supp. 478 (E.D.N.Y. 1953). Such titles are typical of cases involving civil property forfeiture. *See* Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Action Against Objects*, 11 YALE J.L. & HUMAN. 1 (1999).

should not be such a frightening prospect to allow apes or other animals, under specified conditions, to have their interests represented in court.