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Great Ape Personhood

Justin Fox

I. Introduction

Every movement in favor of protecting animals, sheathed under the broad umbrella of anti-cruelty measures, invariably invokes the notion that we ought to be “humane” towards animals. Our language gives away the core of the issue: that ethical treatment is determined in relation to humanity. This paper proposes a limited expansion of that concept. Great apes should be recognized as having a limited form of personhood akin to that of the cognitively challenged. To achieve that objective, those of us who advocate great ape personhood should primarily pursue a legislative strategy on the state level that seeks to grant legal standing to great apes. Great apes are defined as members of the class of hominidea, consisting of chimpanzees, orangutans, gorillas, bonobos, and humans.¹ By according rights to our nearest biological relative on basis of their superior intellect, we will begin to transform the concept of personhood.

Prior to this writing, all fifty states have enacted anti-cruelty statutes.² Nevertheless, a major impediment to the realization of rights for great apes thus far has been their categorization as property.³ Because they are defined as property, great apes are incapable of recognizing any genuine recourse for harms done to them.⁴ Recognizing personhood for apes would allow them a genuine path of recourse, by functionally

¹ Lee Hall and Anthony Waters, *From Property to Person: The Case of Evelyn Hart*, 11 Seton Hall Const. L.J. 1, 1-3 (2000).

² *Statutes/laws*, ANIMAL LEGAL & HISTORICAL CENTER, <http://www.animallaw.info/statutes/topicstatutes/sttoac.htm> (last visited April 15, 2012). The author would like to point out that this is the best database of state anti-cruelty statutes he found in his research.

³ Carole Lynn Nowicki, *The Animal Welfare Act: All Bark and No Bite*, 23 Seton Hall Legis. J. 443, 447-448 (1999).

⁴ Hall and Waters *supra* note 1.

conferring personhood.⁵ This would thereby allow advocates to work within the existing legal system to achieve a more equitable existence for great apes. While this may seem far-fetched, there have been incidents where animals have been named as plaintiffs and, importantly, there exists a centuries-old structure for conducting these cases.⁶

While this question presents a plethora of moral, ethical, political, economic and other issues, this paper will limit its inquiry to the issue of great ape personhood, though it is necessarily grounded in earlier general animal anti-cruelty efforts. This paper will explore various existing approaches towards expanding and transforming the concept of personhood by expanding legal recognition of great apes. Advocates of great ape personhood should focus on progressive legislation at the state level and allow for federal impact litigation as a dual-pronged approach to advancing the cause of great apes. This paper will take into account applicable international, national, and state law, in addition to scientific and historic evidence tending towards the recognition of animal personhood.

II. Background

A. A Brief History of the Progress from General Animal Rights Advocacy to Great Ape Personhood

There is a widespread notion that the accordance of limited personhood to great apes will act as a beachhead in expanding animal rights.⁷ The question of great ape

⁵ Limited personhood does not include the full bundle of rights associated with personhood, but it would confer the vital property of standing, thereby creating the necessary legal infrastructure for great apes to establish and enforce the integrity of their own rights with the help of interested guardians. For a lengthier philosophical discussion of the “form” of personhood, the author submits Judith Butler. Judith Butler, *Appearances Aside*, 88 Calif. L. Rev. 55. (2000).

⁶ E.P. Evans, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* 310 (1906).

⁷ Wesley J. Smith, *Transhumanists Launch Campaign for Animal Personhood*, SECONDHAND SMOKE (Sunday, February 13, 2011, 6:39 PM) <http://www.firstthings.com/blogs/secondhandsmoke/2011/02/13/transhumanists-launch-campaign-for-animal-personhood/>.

personhood and associated rights expansion is linked inexorably to the question of general animal welfare. Jeremy Bentham is oft cited as starting the modern conversation on animal rights.⁸ Bentham drew a distinction based on whether or not the creature in question was capable of suffering (“the insuperable line”):

What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? The question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?⁹

The question remains hotly debated, but it seems that some consensus, at least among most philosophers and scientists, has formed against the infliction of needless pain at least to the higher species of animals.¹⁰

Peter Singer has been one of the foremost proponents of expanding animal rights. Starting with the 1975 publication of “*Animal Liberation*”, Singer has raised awareness of the abuses faced by animals in modern society.¹¹ Singer initially focused on the issue of animal cruelty, shedding light on mainstream scientific testing practices that subject animals to extremely painful conditions.¹² Building on Bentham, Singer’s work has focused on the utility of animal life while still aiming to curtail the most extreme, painful,

⁸ PETER SINGER, *ANIMAL LIBERATION* 7 (1st ed. 1975). Singer’s work is deeply connected to and grounded in Jeremy Bentham’s construction of utilitarianism. Bentham explored the cognitive ability of fully developed animals in relation to babies, in addition to their capacity for pain (“the insuperable line”), in considering humanity’s treatment of animals. The author strongly suggests reading Bentham for a better understanding of the origins and underpinnings of modern animal welfare philosophy. Bentham considered the cognitive ability. See Bentham *infra* note 8.

⁹ JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 283 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1789).

¹⁰ *Animal Cruelty Facts and Statistics*, THE HUMANE SOCIETY OF THE UNITED STATES, http://www.humanesociety.org/issues/abuse_neglect/facts/animal_cruelty_facts_statistics.html#Legislative_Trends (last visited April 1, 2012). Per the Humane Society, 47 of 50 states have felony anti-cruelty statutes.

¹¹ Adam Kolber, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 *Stan. L. Rev.* 163, 167 (2001).

¹² See generally Singer note 7.

and harmful practices animals are subjected to.¹³ Singer advocates a progressive approach that builds within existing legal infrastructure, seeking to expand animal rights without radically altering human exceptionalism.¹⁴

As Singer's renown grew, he eventually channeled his energies into helping to found the Great Ape Project.¹⁵ The Great Ape Project began with the publication of an eponymous book containing "A Declaration of the Great Apes", which seeks to establish "certain basic moral and legal rights for great apes."¹⁶ "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."¹⁷ The Great Ape Project describes itself as an organization that "aims to defend the rights of the non-human great primates - chimpanzees, gorillas, orangutans and bonobos, our closest relatives in the animal kingdom."¹⁸ The goal of the Great Ape Project is to have the United Nations pass a declaration expanding personhood to include apes, thereby recognizing their rights legally and socially.¹⁹

While the Great Ape Project has done a great deal to advance and expand our

¹³ Martha Nussbaum, *Book Review: Animal Rights: The Need for a Theoretical Basis* 114 Harv. L. Rev. 1506, 1529 (2001). (reviewing STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS*.)

¹⁴ Ruth Payne, *Animal Welfare, Animal Rights, and the Path to Social Reform: One Movement's Struggle for Coherency in the Quest for Change*, 9 Va. J. Soc. Pol'y & L. 587, 594-595 (2002). It is important to note that there is a significant fracture within the animal welfare and advocacy community on this point. Rutgers Law Professor Francione argues that animals should be accorded full equality with humans, whereas Singer advocates a limited grant of rights. While this dispute is largely beyond the scope of this paper, it is important to recognize because it represents a major schism in the animal rights community. However, as this paper is concerned with the legal approach and effect of a gradualist approach in keeping with the work of Singer and other like-minded intellectuals, it is beyond the scope of this paper to delve further into this conversation. additionally, see generally Gary L. Francione, *ANIMAL RIGHTS: THE ABOLITIONIST APPROACH*, <http://www.abolitionistapproach.com/> (last visited April 15, 2012).

¹⁵ *History*, THE GREAT APE PROJECT, <http://www.greatapeproject.org/en-US/oprojetogap/Historia> (last visited April 17, 2012).

¹⁶ Kolber Kolber *supra* note 11 at 178.

¹⁷ *Id.* at 179.

¹⁸ THE GREAT APE PROJECT, <http://www.greatapeproject.org/en-US> (last visited April 17, 2012).

¹⁹ THE GREAT APE PROJECT 4-7 (Paola Cavalieri & Peter Singer eds., 1993).

understanding of personhood and the capacity for it, Professor Francione of Rutgers Law School argues that, morally, the Great Ape Project stands on shaky ground because it reinforces anthropocentrism:

We proclaim human intelligence to be morally valuable per se because we are human. If we were birds, we would proclaim the ability to fly as morally valuable per se. If we were fish, we would proclaim the ability to live underwater as morally valuable per se. But apart from our obviously self-interested proclamations, there is nothing morally valuable per se about human intelligence.²⁰

However, Great Ape Project co-founder Paola Cavalieri has described the Project as an essentially gradualist approach, as it seeks to break the “barrier” separating humans from non-humans by focusing on the “grey zone” created by non-human primates who can communicate with us in human language.²¹ “Reformers can only start from a given situation, and work from there; once they have made some gains, their next starting-point will be a little further advanced, and when they are strong enough they can bring pressure to bear from that point.”²²

The founders of the Great Ape Project aim towards a gradualist yet transformative approach in expanding the spectrum of animal rights, using great apes as a vehicle for an

²⁰ Gary L. Francione, *A Note On Humanlike Intelligence and Moral Value*, ANIMAL RIGHTS: THE ABOLITIONIST APPROACH <http://www.abolitionistapproach.com/a-note-on-humanlike-intelligence-and-moral-value/> (last visited April 15, 2012). Francione has written at length about “full equality” for animals and an abolition of their status as property. This is reflective of that approach insofar as it demonstrates the essential anthropocentrism that is central to the Great Ape Project. In Francione’s view, great ape advocates are promoting human exceptionalism and anthropocentrism by explicitly promoting humanity’s closest relative. Even if the approach embraces transhuman rights, its gradualist approach is, in Francione’s view, largely continuing and promoting the current hierarchy.

²¹ Cavalieri *supra* note 19 at 304-312 THE GREAT APE PROJECT 304-312 (Paola Cavalieri & Peter Singer eds., 1993).

²² *Id.*

initial expansion of rights.²³ Paola Cavalieri has said that the “radical enfranchisement” of great apes will be significant for “its symbolic value as a concrete representation of the first breach in the species barrier.”²⁴ Likewise, co-founder Peter Singer has declared, “there is no sound moral reason why possession of basic rights should be limited to members of a particular species.... At a minimum, we should recognize basic rights in all beings who show intelligence and awareness (including some level of self-awareness) and who have emotional and social needs.”²⁵ This gets to the core of Singer’s philosophy and the Great Ape Project: to begin to legally and culturally recognize the inherent self-interest of other self-aware beings, focusing initially on the compelling cause of great apes, however gradual the initial steps may be. Opinions regarding animal enfranchisement are diffuse, and the distinctions between rights and welfare are contentious.²⁶ However, Cavalieri maintains that affording basic rights to great apes widens the possibility of granting limited rights to members of other species in accordance with their needs and capabilities.²⁷

B. *Why Apes?*

Great apes are our closest biological relatives in the animal kingdom.²⁸ Great apes are defined as chimpanzees, gorillas, bonobos (sometimes known as “pygmy chimpanzees”), orangutans, and humans, forming a class known scientifically as “hominidea.”²⁹ We share 99.4% of our DNA with chimpanzees, a figure so astounding as

²³ *Id.*

²⁴ *Id.*

²⁵ Peter Singer, *The great ape debate unfolds in Europe*, JAPAN TIMES, (May 22, 2006). <http://www.japantimes.co.jp/text/eo20060522a1.html>.

²⁶ Payne *supra* note 14.

²⁷ Cavalieri *supra* note 19.

²⁸ Hall *supra* note 1 at 1-2.

²⁹ *Id.*

to have led some scientists to identify chimpanzees as being human.³⁰ Human understanding of chimpanzees in particular has advanced dramatically in recent decades.³¹ Consequently, it is now widely understood that apes have shown the ability to perform acts of higher cognition, including the ability to master language.³² Dr. Jane Goodall, who has dedicated her life to the study of great apes, argues that it is the incredible behavioral similarity between humans and great apes that makes them exceptional.³³ Steven Wise asserts, “the power of the arguments for basic liberty rights for great apes is illuminated by the incredible mental and cognitive abilities of chimpanzees, bonobos, orangutans and gorillas.”³⁴ It is precisely because great apes are the most human-like and intelligent of all animals other than humans that they are championed for personhood. Granting limited personhood to great apes embraces our nearest relative in a way that simultaneously recognizes their capacity for higher cognition while maintaining our existing hierarchy and human exceptionalism.³⁵

³⁰ Jeff Hecht, *Chimps are Human, Gene Study Implies*, NEW SCIENTIST (May 19, 2003) <http://www.newscientist.com/article/dn3744> “The new study found that 99.4 percent of the most critical DNA sites are identical in the corresponding human and chimp genes. With that close a relationship, the two living chimp species belong in the genus *Homo*, says Morris Goodman of Wayne State University in Detroit.”

³¹ Steven M. Wise, *The Entitlement Of Chimpanzees To The Common Law Writs Of Habeas Corpus And De Homine Replegiando*, 37 Golden Gate U.L. Rev. 219, 225 (2007).

³² Katrina L. Schrengost, *Cultivating Compassionate Law: Unlocking the Laboratory Door and Shining Light on the Inadequacies & Contradictions of the Animal Welfare Act*, 33 W. New Eng. L. Rev. 855, 866 (2011). Stories of apes mastering sign language are plentiful in the modern conscience, most famously including Koko the gorilla. Koko seems to have learned to communicate in American Sign Language, and she has communicated emotively and rationally with her caretakers. This has generated considerable press, and generated at least some discussion of what it means to participant in society. Through sign language, Koko has demonstrated an ability to convey emotions such as sadness at death and a sense of humor.⁹ <http://www.straightdope.com/columns/read/2443/are-gorillas-using-sign-language-really-communicating-with-humans>

³³ Symposium, *Ten Years of Animal Law at Lewis & Clark Law School: Remarks: The Evolving Legal Status of Chimpanzees*, 9 Animal L. 1, 3-4 (2003).

³⁴ *Id.* at 30

³⁵ Kolber *supra* note 11 at 168-170. Human exceptionalism here refers to the notion that humans are significant among all other animals based on their innate capabilities, chief among them cognitive capacity.

C. A Brief History of Animal Trials

The concept of animal standing is nothing new; animal trials were conducted during the medieval and early modern periods.³⁶ These trials create a template that can be used to model a modern form of animal standing.³⁷ As discussed below, granting standing recognizes the inherent self-interest animals have as members of society and enfranchisement enables participation within existing societal norms for the redress of grievances.³⁸ These animal trials demonstrate societal recognition of animal self-interest and acknowledge the rights thereby associated with some form of personhood.³⁹

During such trials, animals were held responsible, furnished with counsel, and punished – but virtually all were convicted.⁴⁰ In his classic treatment on the topic, E.P. Evans described an example of a trial:

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

³⁶ Katie Sykes, *Human Drama, Animal Trials: What the Medieval Animal Trials can Teach Us About Justice for Animals*, 17 *Animal L.* 273, 276 (2011)

³⁷ *Id.*

³⁸ *Id.* at 276-277. It is important to note that, as Sykes describes, “Modern animal law scholars tend to mention the animal trials in passing but pay relatively little attention to them, perhaps because (with some reason) they see them as mere historical curiosities, artifacts of a superstitious and ritualistic culture with little relevance to present-day efforts to ameliorate animal suffering and exploitation.” However, as Sykes persuasively argues, this is because modern theorists have simply deemed the idea too farcical in its application, and are consequently willfully ignoring an important part of legal history. That “legal history” demonstrates that at least some societies have long considered animals deserving of legal protections similar to or closely related to those accorded to humans. Moreover, this topic is covered in much greater detail below *infra* part II, section B “Standing.”

³⁹ *Id.*

⁴⁰ *Id.* at 281.

ready and even eager to become *participes criminis*, they were arrested as accomplices and sentenced by the court to suffer the same penalty.⁴¹

Interestingly, there were at least a few cases in which animals were acquitted, demonstrating, at least historically, that it is possible for humans to accord animals standing and find in their favor.⁴²

While these trials are a thing of the past, animals have occasionally been named as plaintiffs in the United States, and thus these cases provide a window into how animals might function in a court system in which they are granted standing.⁴³ These trials embraced concepts similar to our modern notion of guardianship for the defendant-animals. Were great apes to be accorded a limited form of personhood, they would require guardians in order to function within our legal framework.⁴⁴ It is certainly possible that modern trials would bear at least a bit of resemblance to their forbearers.

II. Personhood and Standing

A. *Constitutional Personhood*

The United States Constitution does not contain a definition of “person.”⁴⁵ Yet persons are given specific and significant rights in the Constitution, particularly in the Fourteenth Amendment.⁴⁶ Consequently, it is important to consider whether or not apes meet a general conception of personhood in order to determine their eligibility for enfranchisement.

⁴¹ Evans *supra* note 6 at 310.

⁴² *Id.* at 150-151 A donkey was acquitted of bestiality charges after villagers came forth to attest to her good character.

⁴³ N. Spotted Owl v. Lujan, 758 F. Supp. 621 (W.D. Wash. 1991). A spotted owl was named as a plaintiff in this case. However, this has proved aberrational and is not precedential.

⁴⁴ David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 Marq. L. Rev. 1021, 1037-1038 (2010).

⁴⁵ Laurence H. Tribe, *American Constitutional Law* 15-3, at 1308 (2d ed. 1988).

⁴⁶ U.S. Const. amend. XIV, 2.

Significantly, apes display a greater ability to communicate through language than some cognitively disabled humans.⁴⁷ In *Youngberg v. Romeo*, the Supreme Court found that a severely disabled man was guaranteed physical and mental protection under the Due Process Clause of the 14th Amendment.⁴⁸ In language stunningly applicable to the dire conditions faced by chimpanzees subject to testing, the Court held that

respondent thus enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests. Such conditions of confinement would comport fully with the purpose of respondent's commitment. In determining whether the State has met its obligations in these respects, decisions made by the appropriate professional are entitled to a presumption of correctness. Such a presumption is necessary to enable institutions of this type -- often, unfortunately, overcrowded and understaffed -- to continue to function.⁴⁹

Notably, the Supreme Court has also distinguished between “artificial” and “natural” persons, holding that artificial persons do not enjoy the full breadth of rights bestowed upon natural persons.⁵⁰ In *Levy v. Louisiana*, the Court listed three criteria for natural personhood: humanness, aliveness, and being.⁵¹ Consequently, it is doubtless that being born a human is a key factor in establishing personhood because under current law one must either be a natural born human or a legal fiction affirmatively created by humans. Great apes are incapable of meeting any of the currently established, narrow definitions of personhood because they are neither natural born persons nor are they capable of forming corporations. But it is submitted that primates may have a much stronger claim to “personhood” than that accorded through the fiction of granting

⁴⁷ CHRISTOPH ANSTÖTZ, PROFOUNDLY INTELLECTUALLY DISABLED HUMANS AND APES: A COMPARISON *supra* note 19, at 164-65.

⁴⁸ *Youngberg v. Romeo*, 457 U.S. 307, 324-325 (1982).

⁴⁹ *Id.*

⁵⁰ *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907).

⁵¹ *Levy v. Louisiana*, 391 U.S. 68, 70 (1968).

enhanced status to inanimate corporations.

Any discussion of the meaning of personhood leads to deep moral and philosophical groundings to the issue of personhood that are, frankly, largely beyond the scope of this paper. However, this paper argues that great apes have demonstrated sufficient cognition and self-awareness to merit legal recognition and enfranchisement through a more limited form of personhood. Importantly, the Supreme Court's recognition of the cognitively disabled demonstrates its willingness to recognize a form of personhood with limited rights. Therefore, it is asserted that the cognitive capacity of great apes, in addition to their significant biological and cultural similarities to humans, ought to merit legal recognition in preservation of their inherent self-interest.

One potential strategy of advocates of such rights, as outlined by Lee Hall and Anthony John Waters, would be to pursue impact litigation and attempt to force the Supreme Court to recognize Great Ape personhood.⁵² However, this path is likely to be fraught with initial difficulty because of the standing barrier preventing great apes from asserting claims due to their present lack of personhood under the Supreme Court's current, rather narrow jurisprudence.

B. *Standing*

A major problem facing animal rights advocates has been the issue of achieving standing in court. Standing with respect to the United States Constitution is conferred under Article III.⁵³ Article III limits standing before federal courts to "cases" or "controversies."⁵⁴ Under *Baker v. Carr*, the Supreme Court held that litigants must have

⁵² Hall *supra* note 1 at 1. The authors created a model brief for impact litigation that would seek to assert standing for a fictitious plaintiff gorilla named Evelyn Hart.

⁵³ U.S. Const. art. III, 2, cl. 1.

⁵⁴ *Id.*

"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." ⁵⁵

To illustrate, in *Lujan v. Defenders of Wildlife*, certain wildlife organizations sought to challenge regulations issued by the Secretaries of the Interior and Commerce.⁵⁶ In rejecting the challenge, the Supreme Court held that there are "three irreducible elements" of standing.⁵⁷

First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical [.]'"
Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."⁵⁸

Furthermore, plaintiffs were required to support each element of standing with the "manner and degree of evidence required at the successive stages of the litigation."⁵⁹

In a prior case, *Sierra Club v. Morton*, the Sierra Club had sought standing for its organization to prevent a development from being constructed.⁶⁰ Although the challenge was rebuffed, the Court in *Lujan* construed *Sierra* to hold that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."⁶¹ However, under *Sierra*, plaintiff must have more

⁵⁵ *Baker v. Carr*, 369 U.S. 186, 204 (1962).

⁵⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).

⁵⁷ *Id.* at 560.

⁵⁸ *Id.*

⁵⁹ *Id.* at 561.

⁶⁰ *Sierra Club v. Morton*, 405 U.S. 727, 730 (1972).

⁶¹ *Lujan*, 504 U.S. 555 at 562-563.

than a “mere interest” in a problem to assert a third party interest.⁶² Thus, *Sierra* stands for the proposition that under the Federal Administrative Procedure Act, “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not in itself sufficient, to render the organization ‘adversely affected’ or “aggrieved.””⁶³

There are also prudential requirements involved with standing, which the Supreme Court has indicated “can be modified or abrogated by Congress.”⁶⁴ Prudential requirements necessitate that the “plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.”⁶⁵ Furthermore, “that injury [must] not be widely generalized; that is, it must not be shared by all or most citizens” in order to be cognizable.⁶⁶

As a consequence of these rules, citizen-suit provisions on behalf of animals at the federal level seem unlikely to gain traction, at least in the near future. Thus, they will likely be circumscribed to such an extent as to greatly limit the potential universe of plaintiffs who would advance the cause of great apes.

III. Great Apes and the Federal Government

The federal government of the United States has taken some steps to ensure protectionist rights of Great Apes through the passage of such legislation as the CHIMP Act.⁶⁷ Moreover, in late 2011, the National Institute of Health (NIH) suspended all

⁶² *Sierra Club*, 405 U.S. at 739.

⁶³ *Id.*

⁶⁴ *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

⁶⁵ *Id.*

⁶⁶ Cass Sunstein *A Tribute To Kenneth L. Karst: Standing For Animals (With Notes On Animal Rights)*, 47 *UCLA L. Rev.* 1333, 1354 (2000).

⁶⁷ Chimpanzee Health Improvement, Maintenance, and Protection Act, 42 U.S.C. § 287a-3a(a) (2012).

grants for chimpanzee research.⁶⁸ However, attempts towards expanding personhood at the federal level are likely to be fraught with difficulty. This follows directly from the Supreme Court's narrow construction of the doctrines of personhood and standing. Consequently, it is unlikely that Congress will pass any legislation expanding standing or recognizing personhood for great apes. Thus, there is effectively no federal right of action available to aggrieved non-human hominids, rendering them devoid of any semblance of personhood.

A. Attempted Relief Under the Endangered Species Act

Because animals have no legal personhood and, as a result, only limited legally enforceable rights, they cannot typically bring suit on their own behalf, though there may be an exception to this under the Endangered Species Act ("ESA").⁶⁹ The ESA aims to protect endangered species, and because the chimpanzee is only a "threatened species", opportunities for recourse under the ESA are dubious at best.⁷⁰ However, gorillas, bonobos and orangutans are considered endangered.⁷¹

The language of the ESA seems to allow for a broad power by citizens to file suit in the name of endangered animals in the event of a "taking."⁷² A taking is defined under the ESA as "harassment, wounding or causing harm."⁷³ However, as provided in *Baker*, litigants must have "such a personal stake in the outcome of the controversy as to assure

⁶⁸ James Gorman, *U.S. Will Not Finance New Research on Chimps*, N.Y. TIMES, (Dec. 15, 2011), <http://www.nytimes.com/2011/12/16/science/chimps-in-medical-research.html>.

⁶⁹ Lauren Magnotti, *Pawing Open The Courthouse Door: Why Animals' Interests Should Matter When Courts Grant Standing*, 80 St. John's L. Rev. 455, 465 (2006).

⁷⁰ Schrengost, *supra* note 32 at 885. "The ESA, however, does not provide a remedy for chimpanzees bred in captivity and used in laboratory research because they are classified as a 'threatened species,' rather than an 'endangered species.'"

⁷¹ *Listed Animals*, U.S. FISH & WILDLIFE SERVICE SPECIES REPORTS, http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp (last visiting April 23, 2012).

⁷² 16 U.S.C. 1540(g)(1) (2012).

⁷³ 16 U.S.C. 1532(19) (2012).

that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues." ⁷⁴

As stated above, under *Lujan*, the Supreme Court has construed the ESA's citizen-suit provision extremely narrowly.⁷⁵ The Court has explicitly rejected the " 'animal nexus' approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the 'vocational nexus' approach, under which anyone with a professional interest in such animals can sue."⁷⁶ Moreover, as established in *Sierra*, the injury-in-fact requirement presents a heavy bar towards limiting action on behalf of otherwise interested potential plaintiffs. Thus, the ESA is unlikely to prove a reliable tool in advancing potential great ape litigation.

B. *The Animal Welfare Act*

The Animal Welfare Act ("AWA") is a federal anti-cruelty statute that covers a limited variety of animals.⁷⁷ The AWA is enforced by the United States Department of Agriculture ("USDA").⁷⁸

Following a scandal involving baboon abuse in 1985, the AWA was amended to provide special protection to apes.⁷⁹ This demonstrates that Congress appears willing to take explicit action taken by the federal government in observance of the unique character of non-human hominids. Importantly, the AWA contains a provision concerning requiring handlers of primates to preserve the psychological wellbeing of

⁷⁴ *Baker*, 369 U.S. 186, at 204.

⁷⁵ *Lujan*, 504 U.S. 555 at 560-561.

⁷⁶ *Id.* at 566.

⁷⁷ 7 U.S.C. § 2131-2156 (2012).

⁷⁸ 7 U.S.C. § 2143 (2012).

⁷⁹ Joseph Mendelson, III *Should Animals Have Standing? A Review Of Standing Under The Animal Welfare Act* 24 B.C. Env'tl. Aff. L. Rev. 795, 799 (1997).

primates, indicative of unique preferential treatment.⁸⁰ Specifically, “dealers, exhibitors, and research facilities’ [must] ‘develop, document, and follow’ a plan to promote the psychological well-being of primates.”⁸¹ Furthermore, plans must also allow for “environmental enrichment” and “social grouping.”⁸² However, the AWA has proven to be limited in its application towards great ape rights.⁸³

In *International Primate Protection League v. Institute for Behavioral Research, Inc.*, animal rights advocates sought to use the AWA to end abuses towards research monkeys in a lab.⁸⁴ Experiments were being conducted on “the capacity of monkeys to learn to use a limb after their nerves had been severed.”⁸⁵ Furthermore, plaintiffs alleged that the lab “did not provide the monkeys with sufficient food or water, a sanitary environment, or adequate veterinary care.”⁸⁶ Nevertheless, the Fourth Circuit Court of Appeals held that the AWA did not encompass “private right of action for individuals.”⁸⁷ Instead, the court held that Congress had already delineated its preferred method of enforcement.⁸⁸ Furthermore, relying on *Sierra*, the court held that “the commitment of an organization may enhance its legislative access; it does not, by itself, provide entry to a federal court.”⁸⁹

Conversely, *Animal Legal Defense Fund v. Glickman* is sometimes held as example of expansive third party standing on behalf of animal rights. However, as

⁸⁰ Animal Welfare Act, 7 U.S.C. 2131-2159 (2012).

⁸¹ 9 C.F.R. 3.81 (2012)

⁸² *Id.* “These minimum standards apply only to live nonhuman primates, unless stated otherwise.”

⁸³ 132 Cong. Rec. H1643-03 (statement of Rep. Chandler). Only two enforcement actions were brought within the first decade following the implementation of the AWA.

⁸⁴ *International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d 934, 936 (4th Cir. Md. 1986)

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 939

⁸⁸ *Id.*

⁸⁹ *Id.* at 938

Professor Francione points out, this view is inconsistent with the D.C. circuit court's narrow holding.⁹⁰ In *Glickman*, the plaintiff Marc Jurnove, a lifelong associate of primates, asserted that he had suffered injury from encountering various primates in what he thought to be distress.⁹¹ Jurnove sought standing based on the theory that his aesthetic injury made him an interested party.⁹² The court held that plaintiff did meet the standing requirements, and noted that "legislative history shows, the AWA anticipated the continued monitoring of concerned animal lovers to ensure that the purposes of the Act were honored."⁹³ However, as Professor Francione notes, the holding was "limited only to whether the advocate had sufficient standing to challenge the failure of the agency to promulgate regulations as required under the Act."⁹⁴

C. *The NIH Suspends Research*

As mentioned above,⁹⁵ in late 2011, NIH director Frances Collins announced that the NIH would suspend grants towards experimentation and research on chimpanzees.⁹⁶ Collins stated that, chimps "as the closest human relatives, deserve 'special consideration and respect'."⁹⁷ Moreover, the NIH was accepting recommendations made by the Institute of Medicine, "which concluded that most research on chimpanzees was unnecessary."⁹⁸ The NIH has also put forth new criteria requiring that such experimentation be utilized only for "research, [necessary] for human health, and that

⁹⁰ Gary L Francione, *Reflections On Animals, Property, And The Law And Rain Without Thunder*, 70 *Law & Contemp. Prob.* 9, 27 (2007).

⁹¹ *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998)

⁹² *Id.* at 430-431.

⁹³ *Id.* at 445.

⁹⁴ Francione *supra* note 90 at 28.

⁹⁵ Gorman, *supra* note 68.

⁹⁶ *Id.* "The National Institutes of Health on Thursday suspended all new grants for biomedical and behavioral research on chimpanzees and accepted the first uniform criteria for assessing the necessity of such research. Those guidelines require that the research be necessary for human health, and that there be no other way to accomplish it."

⁹⁷ *Id.*

⁹⁸ *Id.*

there be no other way to accomplish it.”⁹⁹ However, the ban covers only the 612 chimpanzees available for government research, rather than entire body of 937 research chimps because NIH policy only directly affects facilities receiving federal funds.¹⁰⁰ The decision was made in compliance with the CHIMP Act.

D. Federal Legislative Efforts Dealing Directly with Great Apes

The Chimpanzee Health Improvement, Maintenance, and Protection Act (“CHIMP”) was passed in 2000 amidst much fanfare.¹⁰¹ The purpose of the CHIMP Act was to create a national sanctuary system for chimpanzees that are no longer being used for medical research.¹⁰² “The CHIMP Act was described as ‘fiscally sound legislation that will better serve the taxpayers as well as the animals.’ Animal advocates also promoted the legislation as cost-efficient.”¹⁰³

Moreover, The Great Ape Protection and Cost Savings Act (“GAC”) was recently introduced.¹⁰⁴ As is obvious from the title of GAC, there is a strong cost-control aspect to rationale behind the act that is consciously being promoted because less experimentation would prove cost less.¹⁰⁵ Moreover, GAC does not create any right of standing.¹⁰⁶ While the enforcement mechanism of GAC is unclear, it would protect chimpanzees by phasing out invasive research, requiring the retirement of chimpanzees to sanctuaries, and

⁹⁹ *Id.*

¹⁰⁰ *Id.* “Use of chimpanzees has already been waning, partly because it is expensive. The report covers only chimps owned or supported by the government, 612 of a total of 937 chimps available for research in the United States. Only a few are in experiments at any one time.”

¹⁰¹ Francione *supra* note 90 at 17.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ The Great Ape Protection and Cost Savings Act, S. 810, 112th Cong (2011).

¹⁰⁵ *Id.* GAC’s findings state that “maintaining great apes in laboratories costs the Federal Government more than caring for great apes in suitable sanctuaries that are specifically designed to provide adequate lifetime care for great apes.”

¹⁰⁶ *Id.*

prohibiting the breeding of chimpanzees for further invasive research.¹⁰⁷

While this may be viewed as promising legislative progress, one must consider that both pieces of legislation were written with cost savings in mind. While this may be advantageous for the taxpayer, it is unlikely much comfort to advocates of non-human hominid rights that their interests are recognized only when they offer some financial incentive.

E. *International Progress Towards Recognizing Animal Personhood*

The Great Ape Project and other, similar organizations, have had significant success abroad in broadening the scope of protection afforded to great apes.¹⁰⁸ Progress has been concentrated in post-industrialized nations.¹⁰⁹ The greatest progress has in the UK, Spain, and New Zealand.¹¹⁰

In 1997, the United Kingdom established a ban on chimpanzee research as a matter of public policy.¹¹¹ This was the first national ban on great ape research to be enacted.¹¹² However, in 2006, the United Kingdom's Medical Research Council began the process of reviewing the ban on research through the release of the "Weatherall Report".¹¹³ In 2011, a further study suggested that non-hominid primate research was

¹⁰⁷ *Id.*

¹⁰⁸ While the Great Ape Project was the first non-human hominid advocacy organization and remains the most high profile, other organizations such as GRASP (Great Ape Standing and Personhood), <http://www.personhood.org/>, and the International Primate Protection League, <http://www.ippl.org/>, are also dedicated towards making expanding the rights and protections of great apes however possible.

¹⁰⁹ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1_1,00.html (last visited April 11, 2012). All nations which have made progress towards protecting the rights of great apes have been member states of the OECD, which is often-referred to as a club for so-called "first world" nations.

¹¹⁰ Peter Singer, *Of Great Apes and Men*, THE GUARDIAN (Jul. 17, 2008), <http://www.guardian.co.uk/commentisfree/2008/jul/18/animalwelfare.animalbehaviour>.

¹¹¹ New England Anti-Vivisection Society, International Bans, PROJECT R&R: RELEASE & RESTITUTION FOR CHIMPANZEES IN U.S. LABORATORIES, <http://www.releasechimps.org/mission/end-chimpanzee-research/country-bans>.

¹¹² *Id.*

¹¹³ SIR DAVID WEATHEALL, MEDICAL RESEARCH COUNCIL, THE WEATHEALL REPORT, *available at*

justified on a cost-benefit basis, and should only be allowed to go forward because "in general, primate research is productive and high-quality" but that "it was actually quite difficult to identify grants that had substantial medical benefits."¹¹⁴ The findings of the report represent a step backwards, for non-human hominid advocates, as they begin to re-open the door to great ape experimentation.

In 1999, New Zealand took a major step forward by ratifying its Animal Welfare Act.¹¹⁵ This landmark legislation bestowed rights upon great apes and created an affirmative duty of supportive care and greatly restricted the use abusive research techniques.¹¹⁶ Specifically, "research, testing, or teaching" requires government approval, and can only be granted when the activity benefits the ape in question or the ape's species.¹¹⁷ Moreover, the "benefits of the activity must not be outweighed by the harms."¹¹⁸ The legislation was the result of heavy lobbying by pro-animal welfare groups and academics.¹¹⁹ This was landmark legislation was so advanced because it represented the first national legislative recognition of great ape rights.¹²⁰ In the context of the gradualist approach advocated by the Great Ape Project and this paper, this is the kind of "first step" which open the door to more expansive enfranchisement of great apes. Following New

www.mrc.ac.uk/consumption/idcplg?IdcService=GET_FILE&dID=9323&dDocName=MRC003440&allowInterrupt=1 (last visited April 14, 2012).

¹¹⁴ Gretchen Vogel, *U.K. Panel: Primate Research Is Justified, But Don't Overstate Its Benefits*, SCIENCE MAGAZINE (Jul. 27, 2011) <http://news.sciencemag.org/scienceinsider/2011/07/uk-panel-primate-research-is-justified.html>.

¹¹⁵ Animal Welfare Act, 1999, 85 (N.Z.). available at <http://www.legislation.govt.nz/act/public/1999/0142/latest/DLM49664.html> (last visited April 11, 2012)

¹¹⁶ *Id.*

¹¹⁷ Kolber, *supra* note 11 at 165.

¹¹⁸ *Id.*

¹¹⁹ Allan Coukell, *New Zealanders Press Plan for Apes' Rights*, N.Y. TIMES (Mar. 16, 1999) <http://www.nytimes.com/1999/03/16/science/new-zealanders-press-plan-for-apes-rights.html>. "The group, representing 38 New Zealand scientists, conservationists and academics, is affiliated with the Great Ape Project International, which was formed in 1993 to campaign for a United Nations charter on great apes."

¹²⁰ Peter Sankoff, *Five Years Of The "New" Animal Welfare Regime: Lessons Learned From New Zealand's Decision To Modernize Its Animal Welfare Legislation*, 11 Animal L. 7, 9-10 (2005).

Zealand's bold legislation, other countries have expanded recognition of non-human hominid rights.

In a further legislative success, Spain became the first nation to acknowledge great ape personhood in 2008.¹²¹ The lower house of its Parliament passed a non-binding resolution granting legal personhood to apes.¹²² The resolution embraced the platform of the Great Ape Project, marking a significant victory for the organization.¹²³ Compliance with the Great Ape Project would have limited use of great apes for entertainment purposes, while preserving the existing zoo infrastructure.¹²⁴ It is important to note that the Spanish parliament's actions were preceded by a similar recognition of legal rights to great apes by the Spanish province of the Balearic Islands in 2007.¹²⁵ This is emblematic of a gradualist approach, as local legislation led to the eventual ascension of an issue to the national level.

Several additional European countries have made remarkable strides made towards adopting constitutional amendments that recognize the general rights of animals, even if not NHPs specifically.¹²⁶ For example, in Germany, Section 20(a) of the federal constitution has been amended to confer an affirmative duty of decency towards animals upon the state.¹²⁷ Moreover, the Swiss Constitution has also been altered to expressly

¹²¹ Singer *supra* note 110.

¹²² Susanna Vera, *In Spain, Human Rights for Apes*, TIME MAGAZINE (Jul. 18, 2008) <http://www.time.com/time/world/article/0,8599,1824206,00.html>

¹²³ Singer *supra* note 110.

¹²⁴ Lee Glendinning, *Spanish parliament approves 'human rights' for apes*, The Guardian.

¹²⁵ Jessica Eisen, *Liberating Animal Law: Breaking Free From Human-Use Typologies* 17 Animal L. 59, 69-70 (2010).

¹²⁶ Kate M. Natrass, " . . . Und Die Tiere" *Constitutional Protection For Germany's Animals*, 10 Animal L. 283, 302 (2004). "The three words, 'und die Tiere,' did not give any rights to animals in Germany. Rights are reserved for humans, and human well-being remains at the center of the Grundgesetz. The Directive of the State (Staatszielbestimmung Tierschutz) declares protection of animals a value and goal of the state, and mandates the state to exercise this value in all its official capacities. By committing itself to protecting animals, the state holds itself to a much higher standard for fulfilling its obligations to animals."

¹²⁷ 8 Lauren Magnotti, *Pawing Open The Courthouse Door: Why Animals' Interests Should Matter When*

protect animals.¹²⁸

F. Protectionist State Laws In the United States

While anti-cruelty laws enacted in all states, none rise to the level of granting extensive legal rights to non-human hominids. Moreover, there is significant variance in the protective legislation that has been enacted amongst the states.¹²⁹ Consequently, the degree of protection afforded to a great ape is as much a matter of geographical happenstance as anything else. In many states, the law does not more rights to non-human hominids than it does most other mammals.

However, Connecticut is one of the few states that explicitly contemplate the inclusion of great apes in its adopted anti-cruelty legislation.¹³⁰ The private ownership of “gorillas, chimpanzees, or orangutans” is banned under Connecticut law.¹³¹ However, the state does not have any general citizen-suit provision or enforcement mechanism for cruelty towards apes.¹³² Connecticut’s explicit policy is to “conserve, protect, restore and enhance any endangered or threatened species and essential habitat.”¹³³ However, the state permits experimentation to the extent that it is compliant with federal law.¹³⁴

Conversely, legislation was recently introduced into the Missouri House of Representatives that, if enacted, would prevent recognition of animal personhood.¹³⁵ The

Courts Grant Standing, 80 St. John's L. Rev. 455, 490 (2006). "the State, in a spirit of responsibility for future generations, also protects the natural living conditions and the animals within the framework of the constitutional rules through the legislation and as provided by the laws through the executive power and the administration of justice."

¹²⁸ Swiss Fed. Const. art. 80 (available at <http://aceproject.org/ero-en/regions/europe/CH/Switzerland Constitution 2002.pdf> at download/file (accessed Feb 23, 2012))

¹²⁹ ANIMAL LEGAL & HISTORICAL CENTER, ANIMAL LEGAL & HISTORICAL CENTER, *supra* note 2.

¹³⁰ *Primate: Related Statutes*, ANIMAL LEGAL & HISTORICAL CENTER, ANIMAL LEGAL & HISTORICAL CENTER, <http://www.animallaw.info/statutes/speciesstatutes/stspprimate.htm>.

¹³¹ CT ST § 26-40a; § 26-55 (2012).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ H.R.96th Gen. Assemb., Reg. Sess. 1513 (Mo. 2012).

bill states that “the laws of this state shall not confer upon any animal a right, privilege, or legal status that is equivalent or that exceeds a right, privilege, or legal status as that which this state confers by law upon a human being.”¹³⁶ This language clearly rejects the notion of animal personhood, and even the limited personhood advocated by the Great Ape Trust and in this paper. However, this bill is important precisely because it is targeted against recognition of animal personhood. This demonstrates the increasing visibility of the cause pioneered by the Great Ape Project. Importantly, the bill also states that “this provision shall not be construed as limiting laws that protect the welfare of animals in the state.”¹³⁷ This draws a distinction between the recognition of animal rights and animal welfare. However, as discussed throughout this paper, animal rights and animal welfare are deeply intertwined.

Interestingly, North Carolina’s anti-cruelty statute recognizes a citizen-suit provision on behalf of injured animals. “A real party in interest as plaintiff shall be held to include any person even though the person does not have a possessory or ownership right in an animal; a real party in interest as defendant shall include any person who owns or has possession of an animal.”¹³⁸ This provision is very important because it realizes the full extent of what ESA-expansion advocates seek. It is suggested that the North Carolina statute be used as a model for sister states to follow.

IV. Analysis of Existing and Proposed Legislation

A. What Won’t Work

Peter Singer, upon passage of a Spanish resolution accepting the platform of the Great Ape Project, remarked, “recognition by a government that it can be wrong to

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ NC ST §19A-2. (2012).

enslave animals is a significant breach in the wall of exclusive moral significance we have built around our own species.”¹³⁹ This language is similar to the language provided for in the ESA. However, this law remains inapplicable to “activities conducted for purposes of biomedical research.”¹⁴⁰

It is submitted that animal personhood must necessarily be legislatively accomplished in order to be lasting. This is because legislative accomplishments are more difficult to overturn than case law.¹⁴¹ While impact litigation may also be a worthwhile avenue to pursue, its chances appear murky in light of the United States Supreme Court’s narrow jurisprudence. Moreover, court decisions are less likely to be popularly accepted than legislative enactments.¹⁴² So, while taking a case all the way to the United States Supreme Court may seem to some advocates like a silver bullet it is best to focus on smaller scale advancements that have less of a chance of misfiring.

Finally, it is imprudent to rely on the fiat of the NIH’s new ban on research. This is because that ban is mere policy and while it will undoubtedly have a major effect on the progression of scientific research in the United States, it remains possible that the NIH may, in the future, be persuaded by research that advocates a resumption of testing on chimpanzees may regain the upper hand. In the United Kingdom there is a similar controversy about “use” of great apes, in which proponents of research are attempting to

¹³⁹ Singer *supra* note 110.

¹⁴⁰ NC ST § 19A-1.1(2) (2012).

¹⁴¹ Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases* 15 *Law & Sex*. 11, 26-27 (2006). Jacobi has an interesting discussion of the politics of judicial decisions in the gay marriage context and their impact on public perception of gay marriage. Generally, there is a backlash to judicial rights expansion. Some GAP advocates, Peter Singer included, have compared the struggle for ape personhood to the abolition of slavery, and there was obviously significant backlash there as well. While it appears that public sentiment is slowly growing more supportive of the bold judicial initiatives embraced in several states, it is important to recognize that because primates are incapable of advocating in their own self-interest, the prudent approach for great ape advocates is to move conservatively, particularly due to the controversial nature of non-human hominid rights.

¹⁴² *Id.*

scale back barriers against research.¹⁴³ The current NIH policy leaves this window open.¹⁴⁴ At that point, the progress previously made would be undone and the cause of great ape personhood would take a step backwards. Conversely, were great ape advocates to pursue legislative enactment of their unified platform, they would stand a much greater chance of seeing the platform become law and likely with greater acceptance.¹⁴⁵

The Great Ape Project itself embraces and advocates a United Nations declaration accepting non-hominid primate personhood.¹⁴⁶ While this would certainly be impactful, there is no guarantee that an aspirational declaration (or even a binding one) would in fact be enacted.¹⁴⁷ Moreover, the machinations of the United Nations are time-consuming and capricious such that it may be impractical to commit limited resources to passage of a declaration that may well prove non-binding.¹⁴⁸ These problems are likely to be mirrored in any attempt to pass domestic federal legislation.

While the Great Ape Project may have encountered some success in the lower house of Spain's parliament, the legislation was never enacted. Moreover, there is no reason to believe that similar success would be found in the United States House of Representatives or Senate. The Great Ape Cost Savings and Protection Act has not been enacted and even if it were, it still would not have the transformative effect which the

¹⁴³ Vogel *supra* 114.

¹⁴⁴ Gorman *supra* note 68.

¹⁴⁵ *Id.*

¹⁴⁶ Chris Wold, *World Heritage Species: A New Legal Approach to Conservation*, 20 Geo. Int'l Envtl. L. Rev. 337, 387-388 (2008). See generally for an in-depth discussion of the aspirational nature of a UN declaration. "By testing the World Heritage Species concept using charismatic great apes, proponents hope to simultaneously advance two objectives: one, that more attention and resources will be devoted to all the ecosystems on which the apes depend and, two, that governments and conservationists give more attention to implementation of the World Heritage Species idea and existing international treaties. Designating these gorilla populations as World Heritage Species would continue their reputation as flagship species and hopefully provide more structure and institutional support to governments that have designated them as World Heritage Species"

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Great Ape Project envisions because it lacks the landmark language conferring standing.¹⁴⁹

B. Potential Solutions

From a legal perspective, being accorded standing effectively confers personhood. In turn, standing allows for the redress of harms. Thus, by conferring recognition of limited personhood on great apes, such an action would allow for the easier redress of injuries.

1. Impact Litigation

Attempts at impact litigation, while not discouraged, will certainly face many barriers due to the groundbreaking nature of the issue.¹⁵⁰ The greatest initial hurdle is that animals are not constitutional persons under current legislation and jurisprudence.¹⁵¹ As noted above, there have been several instances in the lower courts in which animals have been conferred standing. Nevertheless, there is little sign that the United States Supreme Court is ready to grant a potentially revolutionary expansive reading to standing, particularly as it would have a broad impact on many other types of litigation. Such a decision would depart from the generally narrow interpretation of standing the Court has recently embraced. Circumscribing the ESA's citizen-suit standing provision does not easily lead to recognizing the capacity of great apes to bring suit, and thereby necessarily expanding massively the universe of potential claimants. The potential backlash, as well

¹⁴⁹ The Great Ape Protection and Cost Savings Act, S. 810, 112th Cong (2011).

¹⁵⁰ Impact litigation is a suit brought to vindicate or advance rights or interests and advancing public policy. The impact litigation homepage on the Washington College of Law at American University website is instructive. *Impact Litigation Project*, WASHINGTON COLLEGE OF LAW AT AMERICAN UNIVERSITY, <http://www.wcl.american.edu/ilp/> last visited April 25, 2012. An example of successful impact litigation, in which a plaintiff is specifically sought to maximize chances for victory, is *Brown v. Board of Education of Topeka*. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

¹⁵¹ Mendelson *supra* note 79 at 805.

as the near-certain burden of expanded court filings would also likely prove disincentives, at least in the near term. Building off the concept of ripeness,¹⁵² it is important to develop an issue to the point where it is ready to be embraced by the Court.

2. *States and the Pet Trust*

One potential approach to be considered is a state-by-state litigation advocacy program. Due to the potentially explosive nature of expanding personhood by conferring standing on great apes, advocates may be better off steering away from national efforts and directing their energy towards statewide efforts. It is important to note that the advances made in New Zealand, Spain, Germany, and Switzerland have all been accomplished through parliamentary systems.¹⁵³ Parliamentary systems tend to be more conducive to efficient and cooperative governance than presidential systems like the one in the United States.¹⁵⁴ Given the current combative climate in Congress, it is reasonable to assume that the potentially explosive issue of granting standing to NHPs would likely not get very far.¹⁵⁵

States have long enjoyed a reputation as “laboratories of democracy”, showing

¹⁵² *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149 (U.S. 1967). The basic rationale of the ripeness doctrine “is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”

¹⁵³ *Switzerland*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/sz.html> last visited April 11, 2012; Central Intelligence Agency, “CIA – The World Factbook” available at <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html> last visited April 11, 2012; *New Zealand*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/nz.htm> last visited April 11, 2012; *Spain*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/sp.html> last visited April 11, 2012

¹⁵⁴ Mark Freeman, *Constitutional Frameworks and Fragile Democracies: Choosing between Parliamentarianism, Presidentialism, and Semi-Presidentialism*. 12 Pace Int'l L. Rev. 253, 257 (2000).

¹⁵⁵ As of this writing, it is reasonable to assert that there is significant gridlock amongst national lawmakers to dissuade any hopes of bipartisan consensus on an issue as groundbreaking as transhuman enfranchisement. The current climate is one of historic disharmony, as evidenced by the record breaking use of the filibuster. *Senate Action on Cloture Motions*, UNITED STATES SENATE, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm last visited April 25, 2012.

greater willingness to adopt and experiment with new legislative policies on a state-by-state basis.¹⁵⁶ Consequently, it would behoove advocates of great ape personhood to concentrate on a state-by-state approach. The historic role of states as a place for legislative experimentation may mean that at least some will be more likely to embrace statutes conferring greater rights.¹⁵⁷ Because states already have diverse, and in some cases extremely progressive, anti-cruelty statutes, there is a great deal of precedent for states moving towards greater protection of great ape rights.¹⁵⁸

The adoption of the Uniform Trust Act of 2000 (“UTA”) represents a “conceptual breakthrough” through recognition of animal personhood.¹⁵⁹ As of this writing, pet trusts have been adopted in 45 states.¹⁶⁰ Under the UTA, animals are granted personhood for the purposes of enforcing trusts.¹⁶¹ Professor David Favre has commented that this “demonstrates that there is no inherent limitation of the legal system of the states that limits the interests of animals, even though they are still considered property. For the narrow purpose of probate and trusts, animals are juristic persons with equal rights before the court.”¹⁶² This concept could be extended into other areas, so as to expand the rights of primates and companion animals.

In order for states to properly confer a limited form of personhood upon great apes, it is necessary that they adopt a form of guardianship law. This is essential because

¹⁵⁶ Susan P. Fino, *Perspectives: Federal Jurisprudence, State Autonomy: De Tocqueville or Disney? The Rehnquist Court's Idea of Federalism*, 66 Alb. L. Rev. 765, 766 (2003).

¹⁵⁷ Edward A. Purcell, Jr. *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y.L. Schl. L. Rev. 635, (2005). A contemporary example of this is the expansion of great ape protection by Connecticut.

¹⁵⁸ Richard L. Cupp, Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status*, 60 SMU L. Rev. 3, 4-5 (2007).

¹⁵⁹ Unif. Trust Code 408, 4 U.L.A. 408 (2000).

¹⁶⁰ *Pet Trusts*, ANIMAL LEGAL & HISTORICAL CENTER, <http://www.animallaw.info/articles/armpuspettrusts.htm> last visited April 25, 2012.

¹⁶¹ David Favre, *Integrating Animal Interests into Our Legal System*, 10 Animal L. 87, 94 (2004).

¹⁶² *Id.*

it allows for the redress of grievances by the plaintiff ape within our legal framework. Guardianship would be modeled after the approach used for children, where “ (1) there is a prima facie showing of need within the legal system and (2) the party asking for the guardianship is capable of representing the child.”¹⁶³ Thus, potential non-human hominid litigants could be brought to court under a statute that used language modeled loosely after the citizen-suit provision of North Carolina’s anti-cruelty statute, and incorporating standards akin to typical guardianship language.

The pet trust, which requires a guardian to be effective, demonstrates the synchronicity of this approach. Through the enactment of pet trusts and the appointment of guardians, animals are conferred genuine personhood. Given the extensive promise demonstrated by great apes, it is plausible that they could eventually be treated for purposes of litigation in a way similar to children or the cognitively disabled in litigation, thereby tremendously expanding the ultimate goal of providing equitable protection of non-human hominid self-interest within the framework of our legal system.

The pet trust is not an ideal vehicle for personhood, but could become a highly workable tool in the advance of great ape protection. Because this approach relies on a state level advocacy program, it could be suited to the particular jurisdiction in which it is being adopted. Further, because this proposed advancement would occur on the state level, it is reasonable to believe that there could be competition amongst states in developing the best model. Moreover, the pet trust model of personhood still inherently acknowledges human primacy, while still allowing for a significant expansion in both the legal and cultural prominence of great apes. It appears to be one of the best ways to

¹⁶³ Favre *supra* note 44.

advance my proposal of a gradualist approach to improving the rights and recognition of non-human hominids.

C. Analysis of What Might Work

The previously cited Ninth Circuit Court decision in *Glickman* raised the hope of many animal advocates by seemingly recognizing creating a citizen-suit provision in the AWA that allows for suit based on “aesthetic” harm.¹⁶⁴ However, as noted above, this viewpoint may be too broad an interpretation.¹⁶⁵ Moreover, this represents a limited view of the interests of apes: it accounts for harm to persons without taking into account the harm to the animal itself. The NIH ban, while encouraging for animal rights advocates, does not represent a paradigm shift in the recognition of non-human hominid rights. Existing federal legislation, while a positive development, has been much too gradual a climb. In order to protect and advance the interests of great apes, it is necessary to create, as stated by Cass Sunstein:

If Congress seeks to give standing to people to protect interests relating to the well-being of animals, it must comply with the injury-in-fact requirement. That requirement is met if a person has a nonspeculative plan to visit, study, or see the animals in question. Under the APA, the same conclusion follows, with two qualifications: Plaintiffs must show that they fall within the zone of interests protected by the statute, and they must also show that in terms of their interests and concerns, they are different from citizens generally.¹⁶⁶

Due to their intellectual capacity, non-human hominids should be treated as akin to children or cognitively disabled adults under the law. As Stephen Wise argues “justice entitles chimpanzees and bonobos to legal personhood and to the fundamental legal rights

¹⁶⁴ Animal Legal Def. Fund, 154 F.3d 426 at 445.

¹⁶⁵ Francione *supra* note 90 at 17.

¹⁶⁶ Sunstein *supra* note 66 at 1354.

of bodily integrity and bodily liberty.”¹⁶⁷ Nevertheless, it is important to remember that courts will likely be hesitant to extend personhood to any non-human entity, as it would substantially upset present jurisprudence. However, personhood can be granted without extending the full panoply of rights, as seen in the case of children set forth in the trust model discussed above.¹⁶⁸ While there are currently anti-cruelty statutes in every state that are broadly applicable,¹⁶⁹ the creation of citizen-suit provisions which would also name animals as plaintiffs would dramatically enhance their standing, both legally and culturally.

It is submitted that the enactment of positive law affirming great interests at the state level could and likely would prove transformative. Were New York, California, Texas or another large state to recognize the interest of non-human hominids in a new and significant fashion, it would provide an opportunity for the national dialogue of animal rights to shift away from what is cruel or humane and towards the way in which we conceive of sentience and personhood.

Acknowledging the standing of great apes in court as plaintiffs with the capacity to protect their own self-interest would prove transformative for several reasons. First, and most importantly, it would force the legal system to reconsider our understanding of “civilization” and the rights accorded thereto. Faced with considerable research indicative of ape society,¹⁷⁰ Americans would be forced to acknowledge, on at least some level, the intelligence of other species and the ramifications of existing patterns of

¹⁶⁷ STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* 7 (2000).

¹⁶⁸ U.S. Const. amend. XXVI imposes an age limit of eighteen years for voting. This demonstrates that there is already acceptance of some forms of limited personhood in our society based on a generalized understanding of intellectual capacity. Put shortly, American society accepts that while children are people with rights, they are not, as a group, competent bear the heavy burden of the right to vote.

¹⁶⁹ *Statutes/laws*, ANIMAL LEGAL & HISTORICAL CENTER *supra* note 2.

¹⁷⁰ Eisen *supra* note 125 at 72.

treatment towards those species. The NIH's chimpanzee ban, in addition to the non-binding declaration of the Spanish parliament, can be construed as representing initial steps towards recognition of the unique status of great apes.

Second, and very importantly, great ape recognition is a relatively minimal but essentially non-threatening first movement away from absolute anthropocentrism. Because great apes are our closest biological relatives, they are a logical first step in recognizing the value of other life forms in a way that is not inherently dependent on human interest.¹⁷¹ This is the flaw in the *Glickman* holding: its result is still based on an aesthetic harm to a person, rather than the basic harm arising from the situation - the blighted condition of the primates.

There remains concern that an increase in the recognition of great ape rights could be a "Trojan horse", the first step in eventually enabling every creature on earth to have its day in court.¹⁷² However, this is unlikely to be the case due to the exceptional nature of non-human hominids, in both intellectual capacity and in their biological similarity to humans. While it is conceivable that the great ape advocacy movement, if ultimately successful, could spawn a successor group aimed at extending rights to dolphins or other animals with highly developed cognition, that day remains far off. Moreover, any subsequent consideration would be informed by whatever standards ultimately constitute the consensus opinion towards NHPs. In my view, the present dilemma facing non-human hominids is too great for this important conversation to be put aside based on abstract fears of what may come subsequently.

¹⁷¹ *Id.*

¹⁷² *Id.*

V. Conclusion

Fortunately, it seems as though the purpose of the Great Ape Project is slowly being met. As evidenced by the NIH's recent decision to limit experimentation, there is growing agreement through the industrialized world that most scientific testing on apes can be avoided. Domestically, the very introduction of GAC is indicative of significant progress in the national conversation about non-human hominid rights.

However, there remains a very long road ahead. To truly advance the cause of animal rights, it is necessary to expand the potential universe of persons by initially extending limited personhood to great apes. This stepping stone approach should be primarily focused on state legislative advancements, due to the inherent flexibility of state law. While impact litigation should still be pursued, the primary focus of advocates should be towards enacting expansive state level legislation. The adoption of the "pet trust" and its accompanying guardian model offers flexibility at the state level, and promotes a conservative approach towards rights expansion. With success will come transformation away from anthropocentrism and towards a more equitable legal system that recognizes the self-interests of our fellow primates.