FROM PROPERTY TO PERSON: THE CASE OF EVELYN HART

Lee Hall and Anthony Jon Waters[*]

PREFACE: THE PURPOSE OF THIS BRIEF

This article is about the legal category "person." Personhood brings with it all manner of rights and protections. Human beings, for the most part, are persons; but not so long ago in this country, some were while others were not. Corporations, too, are relative newcomers to personhood and they, of course, are persons for some purposes, but not for others. Corporations were accorded limited personhood because it suited the capitalist system. Up to a point. Thus, corporations can be criminally liable but cannot be incarcerated; they must pay taxes, but cannot vote. The legal category of persons never has been fixed or static, and is not now limited to human beings.

We humans understand the other great apes much more completely than was possible even a few years ago.[1] We now know that chimpanzees gorillas, bono-

---

[*] Lee Hall (B.A., 1983, Northwestern University; J.D., 1999, University of Maryland) is a lawyer in Baltimore. Leehall@sprynet.com. Anthony Jon Waters (B.A., 1972, University of Keele; L.LM., 1974 Yale University) is a Visiting Professor of Law at the University of Oregon School of Law and Professor of Law at the University of Maryland School of Law. Awaters@law.uoregon.edu. The authors thank Gordon G. Young, Professor at University of Maryland's School of Law, who inspired us to transform our intuitions about basic principles of law into the legal arguments contained in this brief. As our knowledge of this subject evolves, Professor Young continues to provide guidance, references, and an exemplary model of personhood. We also respectfully thank Paula Casal, Paola Cavalieri, Maxwell O. Chibundu, Andrew Timothy Fenton, Gary L. Francione, Dietrich von Haugwitz, Jeff Perz, Diane Hoffmann, Peter Singer, David Sztybel, and Andrew D. Williams for their expertise and encouragement. We thank Jane Goodall for advising on factual questions relating to chimpanzees. Michael Maccini provided research and technical assistance. Anthony Smith of the Fauna Foundation graciously introduced us to fifteen chimpanzees, who subsequently allowed us to get to know them as persons.

[1] *See generally* THE GREAT APE PROJECT: EQUALITY BEYOND HUMANITY (Paola Cavalieri & Peter Singer, eds., 1994) (an anthology of the scholarship elucidating its opening sentence, "We are human, and we are also great apes"). Whereas species were once

bos, and human beings are all species of African great apes. Together with orang-utans, we are members of a slightly larger taxonomic group known as the great apes, or "hominoidea."[2] Not only do we have a new understanding of our biological kinship with the other great apes, but we have also gained an awareness about their complex emotional and social repertoires. This knowledge brings with it an ethical and constitutional issue which is fundamentally important to the system of values which informs and animates our society and, hence, our law. That issue is whether we can, in good conscience, maintain the legal distinction between persons and nonpersons by drawing a bright line around human beings (and a few of their creations), to the absolute exclusion of all others. More specifically, this Brief addresses the question whether the Constitution of the United States ought to accommodate non-human great apes by affording them the rudimentary protections afforded other persons. The concept of personhood serves a dual function: "it helps to protect those considered persons against suffering the hurts and indignities that the selfish tendencies of human psychology could inflict on them, and it helps to justify treating those creatures not considered persons selfishly."[3] To classify certain beings as persons is to grant them moral and legal rights which protect them from being treated as nothing but a means to human satisfaction. To deny such rights is to permit such beings to be used as property, or creatures of nature existing for the sake of human satisfaction. Our law currently views most beings as fitting into one of these two categories: persons with constitutional rights or items of property.

The laws of the United States place non-human great apes on the "property" side of the line that divides persons from property. Such classification parallels

---

were classified simply by outward appearance, today's sophisticated tools, such as DNA profiling and genetic mapping, permit accurate measurement both of variances and fundamental similarities among beings. *See* Jared Diamond, *The Third Chimpanzee*, *in* THE GREAT APE PROJECT, supra, at 93-96. Chimpanzees are more closely related to humans than to gorillas; Frans de Waal, director of the Living Links Project on human evolution at Yerkes, Atlanta, indicates the 98.4 percent overlap in DNA between humans and chimpanzees and bonobos as a salient factor in extrapolating scientific data among them. *See* Richard Saltus, *Scientists Plot Road Map of Human DNA*, THE NEW ORLEANS TIMES-PICAYUNE, June 27, 2000, at A01.

[2] *See generally* RICHARD BYRNE, THE THINKING APE: EVOLUTIONARY ORIGINS OF INTELLIGENCE (1995) (illustrating that Pan troglodytes, Gorilla gorilla, Pan paniscus, and Homo sapiens are all species of African great apes; and that, together with Pongo pygmaeus, they are members of a slightly larger taxonomic group known as the great apes, or "hominoidea"). It is interesting to learn, however, that the most recent edition of the Smithsonian's definitive classification, Mammal Species of the World has moved the non-human great apes into the family Homindae, previously reserved for humans alone. MAMMAL SPECIES OF THE WORLD (D. Wilson & D.M. Reeder, eds., 2d ed. 1993).

[3] STEVE F. SAPONTZIS, MORALS REASON, AND ANIMALS 67 (1987). Sapontzis has defined "person" simply as any being who can and should have moral rights.

the Cartesian view[4] of all non-human living beings as machinery. Yet modern knowledge indicates that volition versus mechanical response is not a dichotomy but a continuum.[5] The non-human hominids present compelling reasons for our law to move beyond the legal dichotomy that divides "persons" from "property." The plaintiff in this Brief argues that if only two categories exist in the modern legal mind, she belongs in the category of "persons" for the purpose of the constitutional protections whose benefits she now seeks.

The term "non-human rights" may sound odd or at least unfamiliar, but, as was explained in a famous legal essay, "each time there is a movement to confer rights upon some new 'entity,' the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a *thing* for the use of 'us'—those who are holding rights at the time."[6] Whenever humans have considered extending the scope of personhood, fear of the consequences has emerged as the prime argument for not doing it. John Stuart Mill asked:

> But was there any domination which did not appear natural to those who possessed it? . . .So true is it that unnatural generally means only uncustomary, and that everything which is usual appears natural. The subjection of women to men being a universal custom, any departure from it quite naturally appears unnatural.[7]

Because the property classification treats non-human apes as instruments, tools, and toys, their interests can be protected only by reclassifying them as persons. Our present knowledge about their abilities compels this reclassification. In 1997, the British Parliament acknowledged this when it announced a ban on invasive experiments on chimpanzees and other hominids. Lord Williams of Mostyn said, "This is a matter of morality. The cognitive and behavioural characteristics and qualities of these animals means it is unethical to treat them as

---

[4] The law that currently regulates the use and treatment of all non-humans is a vestige of Cartesian ethology. The Cartesian view (i.e., the view of French philosopher René Descartes) holds that animals are unfeeling automatons, devoid of sentience and emotion. *See generally*, POLITICAL THEORY & ANIMAL RIGHTS 14-17 (Paul A.V. Clarke & Andrew Linzey eds., 1990). Thus, Descartes advanced the theory that nonhuman animals were merely unfeeling machines. *See id.*

[5] *See* SAPONTZIS, supra note 3, at 38.

[6] CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS 8 (1974) (citations omitted) (emphasis in original).

[7] JOHN STUART MILL, ON LIBERTY 125-26 (1859).

expendable for research."[8] Thus a government has officially decided that the nature and capacities of certain non-humans demand that we no longer be entitled to treat them as property. This, without regard to any benefit to humans that might result from doing so.

On October 8, 1999, the New Zealand Parliament introduced, through the Animal Welfare Act, a prohibition of the use of all non-human great apes in research and testing, unless such use is in the best interests of the subject or her species.[9] This marks a dramatic change in the status of non-human hominids: they cannot be treated as research tools, to be used for the benefit of humans.

One potentially daunting aspect of extending rights anew is logistical. Often, these logistical problems have been given as reasons for opposing the recognition of the rights of a given group. But solutions to practical problems have often evolved only after society had determined to chart a new legal course. The history of school desegregation offers an example of this phenomenon. Moral and legal progress in the United States has enabled this society overcome deep-seated prejudices, and to develop practical solutions to difficulties arising from the new social landscape.

Furthermore, one salient factor should temper any concerns about the practical consequences of recognizing the rights of great apes. Free-living apes, or those in their natural habitats, do not attempt to invade our societies: it is we who invade and disrupt theirs, thus creating the problem.[10]

In this Brief we argue that our new knowledge of great apes mandates the protection of their fundamental interests by our legal system. Both those individuals living in captivity, and those still in their native environment[11]—whose

---

[8] *UK Bans Experiments on Great Apes*, BRIDGING THE GAP: NEWSLETTER OF THE GREAT APE PROJECT INTERNATIONAL, Autumn/Winter 1997 Extra, http://www.greatapeproject.org/newsletters/BtG2xtra.html (last visited Nov. 17, 2000).

[9] John Luxton, New Zealand's Minister for Food and Fibre, stated, "This requirement recognizes the advanced cognitive and emotional capacity of great apes." Peter Singer, *New Zealand Takes the First Step*, BRIDGING THE GAP: NEWSLETTER OF THE GREAT APE PROJECT INTERNATIONAL, Autumn/Winter 1999, Issue 3, http://www.greatapeproject.org/newsletters/btg991.html (last visited Nov. 17, 2000).

[10] A further question might be asked: if our legal system of rights could encompass the non-human great apes without social upheaval, what if baboons or dolphins can also be shown to be self-aware, reasoning beings? Clearly, it would be wrong to deny one group of persons their rights simply because another group might also be entitled to them. Although we cannot say with certainty that no other non-human animals are self-aware, rational, or otherwise endowed with the characteristics of personhood, the tremendous complexity of great apes' lives, including their ability to communicate, their social structures and emotional repertoires, are now well-known and scientifically established.

[11] *See generally* THANE MAYNARD, PRIMATES: APES, MONKEYS,

greatest need is simply to be let alone—are entitled to protection. Specifically, this Brief addresses the plight of non-human great apes in the United States, all of whom are living outside of their native environment.[12] It presents the case of a chimpanzee whose human guardian contests an order dispatching her to a government-funded biomedical research laboratory. The story of Evelyn Hart is a composite; Hart personifies every non-human great ape who is sold into human commerce. The cases and resources cited in footnotes are actual. The constitutional issues concern the actions of the state of Georgia and of the National Institutes of Health, a federal entity. Both entities now support invasive research on non-human great apes. Therefore, this Brief considers the application of constitutional law on a federal level, as well as its application to a state through the Fourteenth Amendment.

"Although the Constitution is a legal document," writes Professor Cass Sunstein, there will be a great deal of opportunity to adapt constitutional meaning to changes in both understanding and practice over time. Words are outrun by circumstances. They may be rendered ambiguous by the sheer passage of time. New problems will emerge, and constitutional text may well fail to solve them, or even to address them.[13]

Thus, advances in genetic research, anthropology, primatology, ethology, and psychology may challenge judges to recognize a new reality through a case resembling Evelyn Hart's in the near future. In the following Brief, we argue the moral imperative for this legal development, and we show how a plaintiff like Evelyn Hart can be accommodated within existing constitutional provisions.

Toshisada Nishida, a Professor of Zoology, has compared the other hominids, with their complex cultures and cognitive abilities, to members of hunter-

---

PROSIMIANS (Franklin Watts ed., 1994). Chimpanzees live north of the Zaïre River, from Tanzania west to Senegal. Bonobos, inaccurately called "pygmy chimpanzees," inhabit the swamp forests of central Zaïre. *Id.* Mountain gorillas live in Zaïre, Rwanda, and Uganda; and lowland gorillas inhabit central and west Africa, from the rainforest of the Atlantic coastal nations of Cameroon, Equitorial Guinea, and Gabon, east along the equator through Congo, Central African Republic, and eastern Zaïre. *Id.* Orang-utans are now found only in Borneo and Sumatra. *Id.* (Zaïre was renamed The Democratic Republic of Congo on May 17, 1997, as explained in *Rebellion as a Way of Life: Congo/Zaire's Bloody History*, AGENCE FRANCE PRESS, June 29, 2000. We retain the former name to avoid confusion, given its neighbor country which has the same name).

[12] Recognition of non-human apes' constitutional interests would conceivably have an indirect benefit for apes in their natural habitat: the incentive to capture free-living apes, at least for the purpose of sale to dealers within the United States, would be removed.

[13] Cass R. Sunstein, *An Eighteenth Century Presidency in a Twenty-First Century World*, 48 ARK. L. REV. 1, 21 (1994).

gatherer societies.[14] Were our government to import humans from such a society in order to subject them to lifelong confinement and use them in painful research for the benefit of U.S. citizens, the idea would be universally denounced as unconscionable, and our Constitution would be invoked to confirm what our moral senses tell us. In light of our knowledge about other great apes, their importation and enslavement ought to provoke the same responses.

The dual task of this Brief is to (i) demonstrate what we now know about certain non-human great apes, in the light of scientific evidence, which will itself establish the nature of the moral imperative, and (ii) to show how this new knowledge entitles Evelyn Hart, and others similarly situated, to the protection afforded "persons" under the Fifth, Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution.

[14] *See* Toshisada Nishida, *Chimpanzees are Always New to Me, in* THE GREAT APE PROJECT, *supra* note 1, at 26.

EVELYN HART,

BY HER GUARDIAN AD LITEM, ROBIN LANE,

PETITIONERS,

V.

DONNA E. DOE, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES,

RESPONDENT.

NO. 14-111.

UNITED STATES SUPREME COURT PETITIONER'S BRIEF.

OCTOBER TERM, 2006.

8 DECEMBER 2006.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

LEE HALL AND ANTHONY JON WATERS, ATTORNEYS FOR PETITIONER GUARDIAN AD LITEM

QUESTION PRESENTED FOR REVIEW

Is a non-human great ape a person for purposes of Due Process and Equal Protection components of the Fifth and Fourteenth Amendments of the United States Constitution? Do the Eighth and Thirteenth Amendments to the United States Constitution, as well as U.S. obligations under international law, additionally protect the non-human great ape's interest in freedom and bodily integrity?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "No person shall. . .be deprived of life, liberty, or property, without due process of law."

The Eighth Amendment to the Constitution of the United States provides in pertinent part: "[C]ruel and unusual punishment [shall not be] inflicted."

The Thirteenth Amendment to the Constitution of the United States provides in pertinent part: "Neither slavery not involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "No State shall. . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case raises the important issue of inclusion within the class of persons whose rights are constitutionally protected. Petitioner asserts that the U.S. Court of Appeals for the District of Columbia incorrectly determined that she is not a person for the purpose of the Constitution; and the consequent denial of protection to Petitioner's fundamental interests is therefore unconstitutional. The United States Court of Appeals for the District of Columbia declined to address this issue, invoking third-party standing barriers read into Article III of the Constitution in *Sierra Club v. Morton*[15] and *Lujan v. Defenders of Wildlife*.[16] Petitioner, however, brings her claim in her own name. Based on the clear and present evidence of her eligibility, Evelyn Hart appears today to assert her right to be removed from the legal category of "property" and included within the category of "person" in so far as the category to which she is assigned affects the protec-

[15] 405 U.S. 727 (1972).

[16] 504 U.S. 555 (1992).

tion of her fundamental interests in life and in freedom from captivity and torture.

PARTIES TO THE PROCEEDINGS

PETITIONER:

Evelyn Hart, also known as CH-594, through her Guardian Ad Litem, Robin Lane

RESPONDENT:

Donna E. Doe, Secretary, U.S. Department of Health and Human Services

STATEMENT OF JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1) and under the general federal question provision, 28 U.S.C. § 1331. The appeal was filed on 2 February 2006 from a Memorandum Opinion and Order, entered by the Court of Appeals on 1 January 2006, dismissing the case.

PROCEEDINGS BELOW

A. PROCEEDINGS BEFORE THE DISTRICT COURT

Robin Lane appeared before this Court as guardian ad litem on behalf of Petitioner. Evelyn Hart thus filed suit in U.S. District Court challenging the validity of the National Institutes of Health (NIH) documents that register her as property and authorize her removal to the Yerkes Regional Primate Research Center at Emory University for use as a subject in "invasive biomedical research."[17] Petitioner asserts the act of registering herself as property under NIH regulations violates the Due Process component of the Fifth Amendment, the equal protection component of the Fourteenth Amendment's Due Process Clause, the Eighth Amendment prohibiting cruel and unusual punishment, and the Thirteenth Amendment barring slavery. Respondents requested dismissal of the case for

[17] Although the Animal Welfare Act was designed to insure humane treatment, non-human subjects of biomedical research are often kept in cramped spaces where isolation, repeated handling, physical pain and injury are routine. For a detailed treatment of this issue, *see* Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFF L. REV. 765, 789-92 (1995).

failure to state a claim; Respondents further stated that Evelyn Hart did not exist and identified the Petitioner as CH-594. In a Memorandum Opinion and Order filed April 29, 2013, the case was dismissed by Judge Sue A. Sponte, United States District Judge for the District of Columbia, on the basis that Evelyn Hart lacked standing to challenge the NIH records defining her as NIH property, and that Evelyn Hart was legally under the ownership and control of the NIH and called CH-594.

B. PROCEEDINGS BEFORE THE COURT OF APPEALS

The Petitioner appealed to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals held that Professor Lane, in his own right, lacked standing to bring this action; and in light of controlling precedent, NIH owns the chimpanzee, who has no cause of action of her own. In addition to citing the stringent requirements for third-party standing,[18] the Court of Appeals cited *Int'l Primate Prot. League v. Adm'rs of the Tulane Educ'l Fund*[19] in support of the

[18] Courts have read Article III, §2 of the Constitution as restricting federal courts to disputes "traditionally thought to be capable of resolution through judicial process." Sierra Club v. Morton, 405 U.S. 727, 732 (1972); Flast v. Cohen, 392 U.S. 83, 101 (1968). Under the current doctrine of "standing," federal litigants must demonstrate (1) injury in fact; (2) which is caused by, or is fairly traceable to, alleged unlawful conduct; and (3) which is likely to be redressed by favorable decision of the court. Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 662-63 (D.C. Cir. 1996); Valley Forge Christian College v. Ams. United, 454 U.S. 464, 472 (1982). A party invoking judicial review in the hope of striking down legislation must show that the statute is invalid and that she has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not a generalized grievance. Lujan v. Defenders of Wildlife, 504 U.S. 555, 601 (1992). This ensures that the Court does not "assume a position of authority over the governmental acts of another and co-equal department. *Id.* For prudential standing, a plaintiff must additionally show that "'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute.'" Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 282 (D.C. Cir. 1988) (citing Ass'n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 153 (1970)). The test is whether Congress "intended for [a particular] class [of plaintiffs] to be relied upon to challenge the agency disregard of the law." Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399 (1987) (citation omitted). Congress is deemed to have intended to preclude the general public from bringing an action where oversight bodies known as Institutional Animal Care and Use Committees ("IACUCs") have been installed with the express purpose of ensuring the public interest that AWA minimum standards are met. *See* Int'l Primate Prot. League v. Adm'rs of the Tulane Educ. Fund, 895 F.2d 1056, 1058-59 (5th Cir. 1990).

[19] 895 F.2d 1056 (5th Cir. 1990). In Int'l Primate Protection League, groups and individuals sought custody of non-human primates who were then controlled by a scientist who had been charged with multiple counts of animal cruelty under Maryland state law. *Id.* The federal court held that the Plaintiffs lacked standing under Article III. *Id.* at 1058-59. This holding was in alignment with the view of the Fourth Circuit's previous af-

dismissal of Evelyn Hart's case. Specifically, because NIH research is overseen by Institutional Animal Care and Use Committees (IACUCs), the public interest in subjects' welfare is represented; thus Evelyn Hart's claims fall outside of the Animal Welfare Act "zones of interest."[20] Moreover, the Court held that no non-human member of the great ape species may present "cases" or "controversies" under Article III of the Constitution.[21]

Judge Wilde dissented. She concluded:

> The cases cited by the majority are not appropriate precedent to the case of Evelyn Hart, given modern scientific knowledge about great apes. Here we are asked to consider a plaintiff who can reason and communicate at the level of a young child. The majority fails to find standing for a laboratory tool, but Evelyn Hart defies such categorization. The court would find standing in cases of experimentation upon intellectually incapacitated humans; of that, there is no doubt. Evelyn Hart has a greater capacity to reason and to suffer than some humans, whom we rightly protect, and we pay homage to an arbitrary distinction if we refuse to consider her capacity to suffer simply because she does not look like us. In light of current knowledge about the social and psychological needs and capacities of the great ape species as demonstrated by evidence sub-

---

firmation of the District Court's dismissal of the case. Judge Wilkinson of the Fourth Circuit stated: "In fact, we are persuaded that Congress intended that the independence of medical research be respected and that administrative enforcement govern the Animal Welfare Act." Int'l Primate Prot. League v. Inst. for Behavioral Research, Inc., 799 F.2d 934, 935 (4th Cir.1986). Deference to the independence of medical research is deference to an entity that cannot be expected to act disinterestedly in the matter. Such deference is not appropriately exercised in the case of research subjects who are persons. Acknowledging that Evelyn Hart's interests merit judicial protection might seem more difficult than merely deferring to legislative wisdom; as Professor Tribe writes, "it always looks more legitimate, at first glance, to defer to others. But even that may entail an assumption of power, especially when the decisionmaker exercises discretion in deciding when to defer and when to intervene, as the Court obviously has done ever since Marbury v. Madison." Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1087 (1977).

[20] *See* Animal Legal Defense Fund, Inc. v. Glickman, 130 F.3d 464 (D.C. Cir. 1997); Animal Legal Defense Fund, Inc. v. Nat'l Ass. for Biomedical Research, 136 F.3d 829 (D.C. Cir. 1998). The Animal Welfare Act (AWA) mandates establishment of IACUCs at research sites that use animals covered under the Act. *See* 7 U.S.C. § 2143(b)(1) (1994). *See also* David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 765-68 (1995) (claiming that the Animal Welfare Act codifies the human right to use non-humans in research).

[21] *See* U.S. CONST. art. III, § 2.

mitted, Evelyn Hart presents a compelling case, deserving of review.

This Court thereafter granted certiorari.

STATEMENT OF FACTS

Petitioner Evelyn Hart was born on or about 8 April 2007. She is a seven-year-old chimpanzee. Hart is also identified by the number CH-594, used in place of her name to preclude any tendency on the part of doctors, researchers, and laboratory technicians to become emotionally involved with her, [22] a technique also used for prisoners and inmates of concentration camps. It is not known whether Evelyn Hart, along with twenty-six of her lab mates, would survive the onset of full-blown symptoms of the planned laboratory-induced illness.

Evelyn Hart is currently in good health, with the exception of some evident damage to the tissue of her right leg, reportedly caused by an accident during training to ride a motorbike in a night club act, before her second birthday. At the age of three, she was spotted by an unmarried septuagenarian, Hildegarde Hart, who was a well-known nightclub singer in the 1950s. Ms. Hart adopted the chimpanzee, named her Evelyn, and treated her much as she would have treated her own human child. Evelyn became known in the social circle at events hosted by Ms. Hart, where the chimpanzee would pass hors d'oeuvres and play games with the guests.

On 15 March 2013, Ms. Hart passed away. Her will named Evelyn and a local Christian Scientist church as legatees to the house, an extensive art collection, and stocks valued at $840,000. Dr. Laughlin Ayre, a second cousin whom Ms. Hart had not seen for more than fifteen years, successfully contested her will as a product of an insane delusion. Dr. Ayre removed the art collection from the Hart home, and proceeded to list the home for sale. Although he clearly knew of Evelyn's existence, Dr. Ayre apparently ignored her presence in the house at that time.

Robin Lane is a lecturer in psychology and a Christian Scientist practitioner. In April, Professor Lane met Dr. Ayre on the Hart property, as Ayre was removing the furniture from the Hart home. Lane explained that he had come to

---

[22] Francis J. Novembre of Emory University's Yerkes laboratory presents an example of a scientist who prefers to refer to chimpanzees by serial number rather than by name. *See* Abstract of Project No.5 R01 AI40879-02, Emory University, http://www.ncrr.nih.gov/grants/crisp.html (visited August 11, 1998). The abstract reports, "At the time that C499 developed illness, blood was transfused from this animal to an uninfected animal, C455, to further examine the pathogenesis of virus infection." *Id.* Novembre was avoiding saying that before Jerom (C499) died, he was forcibly paralyzed with a drug so that some of his blood could be taken. Then his blood was injected into Nathan (C455) to see if he would also become sick and die. *Id.*

find Evelyn, and that, in spite of Ayre's prevailing suit in orphan's court, Lane was willing to look after Evelyn even without a precatory inheritance. Ayre had Lane barred from the property.

The Humane Society of Eden Falls, Maryland was called to the late Ms. Hart's home on 26 June 2013 by a neighbor who noticed Evelyn attempting to open a first-floor window. Tracy Quinn, one of the animal control officers who responded to the call, found Evelyn in the late Ms. Hart's bedroom, rocking, and later diagnosed as suffering from early stages of malnutrition and dehydration. A veterinarian was called to the shelter where Evelyn had been taken; he administered a subcutaneous saline solution to Evelyn. The officers contacted Dr. Ayre after looking into the property records. According to their reports, Dr. Ayre was gruff initially; but he grew increasingly attentive and, by the end of the telephone conversation, promised to drive to the shelter immediately. He arrived, carrying a case of wine for the shelter employees and a fruit basket for Evelyn. He demanded that Evelyn be surrendered to him, showing as proof of ownership a document issued by the probate court. Two days later, Dr. Ayre walked into the National Institutes of Health in Rockville, Maryland, holding Evelyn's hand. When he walked back out, he held only a receipt.

Evelyn Hart is slated for use in invasive biomedical research as part of an ongoing project funded by the National Institutes of Health ("NIH"). She is to be shipped to Emory University, in Atlanta, U.S., and placed in a viral disease study currently in progress.

Evelyn Hart's case was dismissed by the Court of Appeals, where she was deemed to be property. She appeals to the United States Supreme Court, challenging precisely such classification through this claim.

SUMMARY OF ARGUMENT

Plaintiff Evelyn Hart is a member of a class known as the non-human great apes— a category that includes chimpanzees, gorillas, bonobos and orang-utans. The core problem she faces is that the law, as it now stands, distinguishes between the "personhood" of human beings and the property status—that is, the denial of personhood—to non-human great apes.

The Supreme Court should change that by recognizing that, with respect to the essential purposes of the Fifth, Eighth, Thirteenth, and Fourteenth Amendments, Evelyn Hart is a person. Her confinement, torture, and death must be prohibited because there is no moral quality which separates her from other people who are rightly protected under the Constitution. In common with many mentally disabled people, Hart has capacities which differ from those of most human adults. But even when mentally disabled humans function only on a basic level, they are "persons" in the eyes of the law. Therefore, the government's interest in performing highly dangerous and painful research on Evelyn Hart must be subjected to the most stringent level of scrutiny.

Regulations would differentiate between human and non-human apes. There are various ways to apply the Bill of Rights. The Supreme Court has held, however, that where certain fundamental rights are involved, regulation limiting these rights may be justified only by a compelling state interest. The legislative enactments must be narrowly drawn to express only the legitimate interests at stake.[23] Unjustified deprivation of liberty, the infliction of severe pain, and the killing of any individual great ape, human or non-human, violates fundamental rights.

Being a legal person, Evelyn Hart has a fundamental interest in life and liberty. The Fifth Amendment Due Process Clause, as well as the Equal Protection and Due Process provisions of the Fourteenth Amendment, expressly protect "any person."[24] Moreover, a denial of legal protection would violate the Thirteenth Amendment's prohibition of "involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted."[25] Petitioner notes that she has committed no crime and has never been convicted of any; therefore her involuntary servitude to the state university or to the National Institutes of Health is unconstitutional. Finally, Petitioner argues that because she is a legal person, the plans of the National Institutes of Health and Emory University offend the Eighth Amendment to the United States Constitution, as well as the prohibition of torture, a basic principle of customary international law referenced by implication in the United States Constitution in article. 1, § 8, clause 10.

Petitioner presents a justiciable controversy and has a stake in its outcome. The "logical nexus between the status asserted and the claim sought to be adjudicated"[26] and the "necessary degree of contentiousness"[27] are both present. In short, the answer to the question "is there an injured person speaking?" is yes.[28] Because of the serious impact the outcome of this case will have on her life, and because of the importance of the issues presented by this pressing legal question, Evelyn Hart asks this Court to review the merits of her plea, and to grant her freedom.

---

[23] Roe v. Wade, 410 U.S. 113, 155 (1973).

[24] U.S CONST. amend. V; U.S. Const. amend. XIV, § 1.

[25] U.S. CONST. amend. XIII, § 1.

[26] *See* Roe v. Wade, 410 U.S. at 124.

[27] *Id.*

[28] *See* JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 144 (1978).

ARGUMENT

I. NON-HUMAN GREAT APES ARE PERSONS FOR THE PURPOSE OF THE CORE PROTECTIONS OF DUE PROCESS AND EQUAL PROTECTION

A. LEGAL RECOGNITION OF CANDIDATES FOR INCLUSION AS PERSONS HAS ALWAYS DEVELOPED IN ACCORDANCE WITH HUMAN KNOWLEDGE AND THE MORES OF THE TIME

The Constitution includes no definition of a person.[29] Therein lies much of the dynamism of our constitutional jurisprudence. Professor Tribe explains this eloquently when he notes that "[a]ny fundamental rights of personhood and privacy too precisely or inflexibly defined defy the seasons and are likely to be bypassed by the spring floods."[30] By any meaningful set of criteria, modern knowledge demonstrates that non-human great apes are persons, morally and legally entitled to certain basic rights under the Constitution. Non-human hominids might have a less complex set of values than humans have.[31] But legal equality does not mean equivalence: it does not mean that all individuals are the same, or have the same needs. Petitioner makes no demand for permission to vote or to hold public office, but for freedom from dire physical and emotional pain. Although Petitioner does not need each and every right that is secured for humans by means of constitutional protections, her demonstrated capacities belie any claim that she merits no basic rights. Classifying her as property—like a building or a desk—ought to shock the conscience, because it condemns her to a life of severe distress. Because Hart satisfies the most fundamental criteria of personhood, she must be classified accordingly: as a person who merits an appropriately limited set of constitutional rights.

We now know that the members of the great ape family—the chimpanzee,

---

[29] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §15-3, at 1308 (2d ed. 1988).

[30] *Id.*

[31] The point, however, cannot be stated with absolute certainty. Frans de Waal, a primatologist at the Yerkes Regional Primate Center in Atlanta, U.S., felt compelled to describe the ape personalities and politics he observed in human terms, stating that they "can only be portrayed accurately by using the same adjectives as we use to characterize our fellow human beings." H. LYN WHITE MILES, *Language and the Orang-utan: The Old 'Person' of the Forest, in* THE GREAT APE PROJECT, *supra* note 1, at 43.

the bonobo, the gorilla, the orang-utan, and the human—are all rational beings with complex emotional lives and strong social bonds that last a lifetime.[32] All can be harmed, and they are aware that they are being harmed.[33] The fact that the framers of the Constitution did not know these facts does not render our modern understanding unfaithful to their essential objectives. Western science has only recently begun to learn about the social structure of non-human great apes. Not until the 1960s did we know that tools are an integral part of their lives in nature.[34] It would have been impossible to anticipate such discoveries two centuries earlier. Nevertheless, the Constitution is able to adapt to the knowledge and social realities of its time.[35]

Petitioner does not deny the importance of stability in the interpretation of individual rights; but "[t]he crucial stability in any case is that of integrity: the system of rights must be interpreted, so far as possible, as expressing a coherent vision of justice."[36] This legal evolution attests to one of the distinguishing features of the Constitution: its flexibility.[37]

---

[32] *See generally* JANE GOODALL, THE CHIMPANZEES OF GOMBE (1990).

[33] After more than three decades of studying chimpanzees, Dr. Jane Goodall affirms that our closest living relatives are so similar to us that they feel pain and suffering in much the same way that we do. *See Jane Goodall, Chimpanzees – Bridging the Gap*, THE GREAT APE PROJECT, *supra* note 1, at 13.

[34] *See, e.g.*, Jane Goodall, *Tool Using and Aimed Throwing in a Community of Free-Living Chimpanzees*, 201 NATURE 1264-1266 (1964).

[35] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (invalidating sex discrimination by a State, observing that the "attitude of 'romantic paternalism' . . . put women, not on a pedestal, but in a cage").

[36] RONALD DWORKIN, LAW'S EMPIRE 368 (1986). *See also* RONALD DWORKIN, LIFE'S DOMINION 26 (1994) ("This more difficult issue requires us to decide the broader question of whether the Constitution should be understood as a limited list of the particular individual rights that statesmen now dead thought important, or as a commitment to abstract ideals of political morality that each generation of citizens, lawyers, and judges must together explore and reinterpret").

[37] *See* Sunstein, *supra* note 13, at 19-20. In this article Sunstein notes the following:

[C]onstitutional law in America (and in many other nations as well) has many features of the common law process. In that process, no one sets down broad legal rules in advance. The meaning of the Constitution is not a product of antecedent rules. Instead, the rules emerge narrowly as judges decide individual cases. Governing principles come from the process of case-by-case adjudication, and sometimes they cannot be known in advance. It does seem clear that much of constitutional law in the United States comes not from the constitutional text itself, but from judge-made constitutional law, interpreting constitutional provisions. For

The framers of the Fourteenth Amendment did not presume that "equal protection of the laws" meant a society free from segregated schooling.[38] Yet in 1954, eighty-six years after the ratification of the Fourteenth Amendment, the Court did in fact decide that segregated schools could not continue to co-exist with the Amendment.[39]

Scientific knowledge, and the view of our society and our universe it creates, evolves over the centuries.[40] Knowing, then, that the public's morality and sense

---

this reason, the meaning of the document is not rigidly fixed when the document is written and ratified.

Id. at 14.

[38] *See* DWORKIN, LAW'S EMPIRE, *supra* note 36, at 360, 388; *see also Proceedings of the Forty-Seventh Annual Judicial Conference of the District of Columbia Circuit*, 114 F.R.D. 419, 447 (1987) (statement of Lawrence H. Tribe, Professor of Law).

[39] The Supreme Court, in Brown v. Board of Education, 347 U.S. 483 (1954), stated that segregation with the sanction of law tends to retard the educational and mental development of African-American children and to deprive them of some of the benefits they would receive in an integrated system. "Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson," stated the Court, "this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected." *Id.* at 494-95. Plessy v. Ferguson, 163 U.S. 537 (1896), sustained a Louisiana law of 1890 that segregated railroad passengers by race. In challenging the law, Plessy alleged that he was "seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernable in him; and that he was entitled to every right [of] the white race." *Id.* at 538. Dworkin acknowledges the importance of construing the framers' declarations, which are certainly "part of the community's political record." DWORKIN, LAW'S EMPIRE, *supra* note 36, at 365. "But we noticed how sensitive this argument is to time," adds Dworkin. *Id.*

It could not be weaker than it is in the present context, when the declarations were made not just in different political circumstances but to and for an entirely different form of political life. It would be silly to take the opinions of those who first voted on the Fourteenth Amendment as reporting the public morality of the United States a century later, when the racial issue had been transformed in almost every way. It would also be perverse; it would deny that community the power to change its public sense of purpose, which means denying that it can have public purposes at all.

Id.

[40] We are grateful for a discussion with Professor Laurence Tribe that further expanded this idea. E-Mail from Laurence Tribe, Professor of Law, Harvard Law School (October 12, 1999) (on file with the author). As Professor Tribe observed, "[T]he time may come when genetic engineering and the computer sciences have created creatures that fill the supposed gaps between [human and non-human apes], on the one hand, and between computers and people, on the other. Once the lines are blurred by the introduction of numerous in-

of purpose do change, we turn now to the philosophical elements of personhood.

B. NON-HUMAN GREAT APES MEET THE PHILOSOPHICAL CRITERIA FOR PERSONHOOD

Philosophers, ancient and modern, agree on the basic components of personhood. The word "person" was introduced into philosophical discourse by the Stoic philosopher Epictetus, who used it to describe the role one played in life.[41] Theologian Joseph Fletcher provided a list of "indicators of humanhood" that includes self-awareness, self-control, a sense of the future, a sense of the past, the capacity to relate to others, concern for others, curiosity, and communication.[42] Bioethicist Peter Singer speaks of the same qualities, but notes that they do not define the biological species Homo sapiens so much as they describe elements of personhood.[43] John Locke defined a person as a "thinking intelligent being that has reason and reflection and can consider itself as itself, the same thinking thing, in different times and places."[44] Locke's definition makes "person" close to Fletcher's "human" except that it selects thinking and self-awareness as the central characteristics.[45] The attributes of personhood most frequently mentioned and accepted are clearly present in all of the non-human great apes.[46]

Being a member of the class of non-human great apes, Petitioner Hart meets the relevant philosophical criteria of personhood in a similar manner to the way humans meet those same criteria. Thus her exclusion from our moral consideration is irrational and arbitrary—not only morally unjustifiable.[47] This becomes

---

termediate points, courts will have to start rethinking what the lines are all about anyway." *Id.*

[41] PETER SINGER, RETHINKING LIFE AND DEATH 180 (1994).

[42] PETER SINGER, PRACTICAL ETHICS 86 (2nd ed. 1998).

[43] *Id.*

[44] JOHN LOCKE, ESSAY ON HUMAN UNDERSTANDING, Bk. II, ch. 9, ¶ 29 (1690), quoted by Singer, supra note 42, at 87.

[45] *See* SINGER, *supra* note 42, at 87.

[46] *See* Gary L. Francione, *Personhood, Property and Legal Competence, in* THE GREAT APE PROJECT, *supra* note 1, at 252.

[47] *See id.* at 253 (arguing cogently that moral consideration should adhere at sentience, but observing that wherever we "draw the line" to include beings for this consideration, it is clear that non-human great apes are on the same side as humans: "it would be irrational to place some great apes on one side, and some on the other.").

clear when we consider and apply the indicators of "personhood" recognized by Locke and, more recently, by Singer.

1. Rationality and self-awareness. Dr. Goodall's thirty-eight years of observing chimpanzees at the Gombe Stream Reserve in Tanzania have been described as a longitudinal study of another culture.[48] Goodall's writings include the best-known descriptions of non-human tool-making and tool-using in natural environments; these skills were previously considered unique to humans.[49] Non-human hominids' comprehension of the causality of fashioning and employing tools reflects the capacity for complex problem-solving abilities.[50] Pressures associated with complex social living require cognitive characteristics that have been observed in the social interactions of other great ape species.[51] Among these are the ability, also once thought uniquely human, to appreciate the perspective of another individual.[52] With respect to what Locke terms "reflection,"

---

[48] Mark A. Krause, *Biological Continuity and Great Ape Rights*, 2 ANIMAL L. 171, 173 (1996).

[49] *See* Elizabeth Pennisi, *Are Our Primate Cousins 'Conscious'? New Tests for Animal Intelligence*, 284 SCIENCE 2073 (1999) (explaining that in the 1950s, anthropologists drew a line between human and other apes at the use of tools; thus any ancient hominid associated with stone tools was automatically assigned to our genus, Homo). Jane Goodall's observations revised this paradigm. *See generally* Goodall, *supra* note 34. Gloria Grow and Dawna Grow of the Fauna Foundation in Québec, Canada have recorded details of the daily uses to which chimpanzees at their sanctuary put tools, as well as their impressive dexterity. Telephone Interview with Gloria Grow, Co-Founder of the Fauna Foundation (April 10, 2000). Fourteen of the fifteen chimpanzees open their own bottle tops; one ties and unties shoelaces; and most have no difficulty using keys, locks and bolts. *Id.* Several are adept at tea-making and washing dishes and toys. *Id.* Annie, the eldest chimpanzee at Fauna, frequently uses the squeeze nozzle to adjust the flow and direct the spray of a water hose in order to clean and remove foreign objects from gutters. *Id.* A chimpanzee who was extremely antisocial upon her arrival at the sanctuary has demonstrated a talent for removing splinters from Gloria's and Dawna's hands. Pepper removes the splinters with great care, using her thumbs as humans would. *Id.*

[50] *See* S.T. Boysen and G.T. Himes, *Current Issues and Emerging Theories in Animal Cognition*, ANN. REV. OF PSYCHOL., Jan. 1, 1999, at 683. See also, e.g., BMF Galdikas, *Orang-utan tool-use in Tanjung Puting Reserve, Central Borneo (Kalimantan Tengah)*, 10 J. HUM. EVOL. 19-33 (1982).

[51] *See generally* Goodall, *supra* note 34; see ALSO R.W. BYRNE & A. WHITEN, MACHIAVELLIAN INTELLIGENCE: SOCIAL EXPERTISE AND THE EVOLUTION OF INTELLECT IN MONKEYS, APES AND HUMANS. (Oxford Univ. Press. 1991)

[52] *See* Boysen and Himes, *supra* note 50, at 683 (describing the research of D. Premack & G. Woodruff, *Does the Chimpanzee Have a Theory of Mind?* 1 BEHAV. BRAIN SCI. 515-26 (1978)).

we might ask whether a non-human hominid recognizes an experience as her own experience, and whether she is able to think about an experience without prompting from external stimuli. Self-consciousness encompasses an awareness of oneself and others;[53] as we shall see below, non-human great apes demonstrate this quality at a sophisticated level, displaying their understanding that others also have mental states and thoughts.[54]

Before one can conceive of another's perspective, one must understand one's own self-image.[55] In 1970, G.G. Gallup, Jr. first demonstrated that chimpanzees could recognize themselves in a mirror after being marked with vibrant red dye while asleep; they later used the mirror to investigate areas of their bodies which they could not otherwise see.[56] Passing the mirror self-recognition test continues to be most widely accepted as evidence for self-recognition and, in turn, some facet of self-awareness.[57]

2. Self-control. Tetsuro Matsuzawa and his team at Kyoto University in Japan studied food retrieval by pairs of chimpanzees—a "witness" who had seen

---

[53] *See id.*

[54] Although it provides further evidence of a consciousness which deserves consideration for Lockean personhood, this "sophisticated level" of mental activity is not necessarily a valid test for determining whether an individual should have rights. *See* Gary L. Francione, *Personhood, Property and Legal Competence*, *in* THE GREAT APE PROJECT, *supra* note 1, at 253. Professor Francione has argued that it is not necessary to have human characteristics to have the right not to be treated as a human resource. Personal Interview with Gary L. Francione (Philadelphia, January 8, 2001). In contrast to Singer, Francione argues that the cognitive states attributable to most humans should not be the standard that defines personhood. *Id.* Sentience, argues Professor Francione, is sufficient evidence of self awareness:

To be sentient means that when I hold a lighter to you, you have a mind that prefers or wants or desires not to feel pain. If I am conscious of pain, then logically I am self-conscious, because I know that it is I who am feeling the pain and not some third party.

Id. For related discussion, see GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS 114-15, 140-41 (2000).

[55] *See* Boysen and Himes, *supra* note 50, at 683.

[56] *Id.* (citing GG Gallup, Jr., *Chimpanzees: self-recognition*. 167 SCIENCE 86-87 (1970)).

[57] *Id. See also* GG Gallup, Jr., *Self-awareness and the emergence of mind in primates*, 2 AM. J. PRIMATOL. 237-48 (1982); GG Gallup, Jr., *Toward a comparative psychology of self-awareness: species limitations and cognitive consequences, in* THE SELF: AN INTERDISCIPLINARY APPROACH 121-35 (GR Goethals & J. Strauss, eds. (1991).

food being hidden and a "bystander" who hadn't.[58] The "bystander" chimpanzee tended to follow the "witness," apparently understanding the witness's knowledge.[59] Self-control was exhibited by the witness, who would occasionally deceive the other by avoiding the food and leading the bystander to an empty box.[60]

3. A sense of the future. Frans de Waal has discussed Kakowet, a bonobo who spotted zoo keepers turning on water valves that threatened to flood a nearby moat where infant apes were playing.[61] Kakowet warned a zoo keeper and helped rescue the babies.[62] This demonstration of the bonobo's ability to know that babies would be in the path of rushing water and unable to save themselves is an example of advanced thinking which, like the abilities to make and to use tools, was once considered uniquely human.[63]

4. A sense of the past. Gloria Grow runs the Fauna Foundation, a sanctuary for fifteen chimpanzees who were released from a New York laboratory that closed in 1997.[64] She has written a number of accounts evidencing chimpanzees' memory of the past.[65] Among many such events recorded by Grow, a few stand out as particularly disturbing. An example is an incident which took place when Grow received a shipment of wood pellets for the gas stove, got a trolley from behind the sanctuary building, loaded the bags of pellets on to the trolley, and pulled it past the chimpanzees to the stove.[66] As she did so, chimpanzees Tom and Pablo simultaneously emitted a piercing shriek, whereupon all fifteen

---

[58] *See* Elizabeth Pennisi, *supra* note 49.

[59] *Id.*

[60] *Id.*

[61] *See* Lauran Neergaard, *Startling insights about apes and us: Quick-thinking bonobo suggests human mental traits not unique*, THE TORONTO STAR, May 24, 1998, at F8.

[62] *Id.*

[63] *Id.*

[64] *Fauna Foundation Home Page*, at http://www.faunafoundation.org/home.html (last visited Nov. 17, 2000).

[65] Telephone Interview with Gloria Grow, Co-Founder of the Fauna Foundation (April 10, 2000).

[66] *Id.*

of the chimpanzees lunged to the front where Grow was pulling the trolley.[67] Within seconds, all fifteen were clinging to the bars, rocking back and forth, screaming aggressively and staring angrily at Gloria.[68] Then Gloria remembered: this was the trolley that came from the laboratory, and this was the first time the chimpanzees had seen it in two years.[69] That trolley had been used in the lab to transport unconscious chimpanzees from their cages to the surgery room.[70]

This capacity to recall traumatic events indicates not only the depth of the psychic pain the great apes can experience, but also the intensity of fear they can feel in anticipation of continued and future suffering.[71] Thus when non-human great apes are held for biomedical research, they are forced to endure not only the physical pain, but also the memory of past injuries, together with the reality that they are trapped and helpless to avoid the imposition of future pain.[72]

5. Capacity to relate to others. Sarah, an adult female chimpanzee, was presented a series of videotaped sequences depicting a human experiencing some type of problem.[73] One scene showed a human being shivering violently while standing next to a disconnected portable heater.[74] As Sarah watched, the video was interrupted just when the actor would have likely thought of a solution.[75] Sarah was then required to choose the best of several photographs showing a viable solution.[76] Sarah selected a picture of a connected heater. Of eight problems shown to her on videotape, Sarah correctly answered seven problems.[77] Thus

---

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Telephone Interview with Gloria Grow, Co-Founder of the Fauna Foundation (April 10, 2000).

[72] *Id.*

[73] *See* Boysen & Himes, *supra* note 50 (citing D. Premack & G. Woodruff, *Chimpanzee problem-solving: a test for comprehension*, 202(3) SCIENCE 532-35 (1978)).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

Sarah demonstrated the ability of non-human great apes to interpret a situation from another's point of view.

Another example of non-human hominids' capacity to relate to others is described by Roger Fouts, a psychology professor at Central Washington University, and Co-director of the Chimpanzee and Human Communication Institute.[78] He recounts an interaction between Washoe, an adult chimpanzee, and a volunteer who worked every day with her.[79] When the volunteer became pregnant, Washoe, who had had two pregnancies of her own (both ending in early death), was very attentive and would ask the volunteer, through sign language, about the baby.[80] At one point, the volunteer stopped coming to see Washoe.[81] When she returned, Washoe acknowledged the volunteer but kept her distance, as if hurt by the volunteer's absence.[82] The volunteer explained to Washoe that she had miscarried, signing, "My baby died." Washoe looked at the volunteer, and signed, "Cry." Later, as the volunteer was leaving, Washoe signed, "Please person hug."[83]

6. Concern for others. From John Locke's perspective, concern for others is irrelevant to the question of Hart's personhood; it is, however, relevant to establishing, in a fuller sense, the arbitrariness of denying basic legal protections to some hominids, but not all.[84] The concern that non-human hominids are able to extend to others is illustrated by the U.S. publication People Magazine, which features articles about people whose situations appeal to the general interest. Among the "twenty-five most intriguing people" of 1996, the magazine listed a gorilla named Binti Jua.[85] Binti was decorated with a medal from the American Legion, and presented with an honorary membership in a Downey, California Parent-Teacher Association, after she rescued a three-year-old child who fell

---

[78] *See* ROGER FOUTS & STEPHEN TUKEL MILLS, NEXT OF KIN: MY CONVERSATIONS WITH CHIMPANZEES (1997).

[79] *Id.*, at 291.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *See* PETER SINGER, PRACTICAL ETHICS, *supra* note 42, at 86.

[85] *The 25 Most Intriguing People '96, Binti-Jua: She Gave a Helping Hand to a Distant—Very Distant—Relation*, PEOPLE, Dec. 30, 1996, at 66.

twenty-four feet to the cement floor of the gorilla enclosure at Brookfield Zoo in Illinois.[86] In a widely televised scene, Binti, with her own infant on her back, lifted the unconscious human child, carried him across the compound and, rocking him softly, laid him before the entrance where the paramedics and zoo staff were waiting.[87] The child recovered.[88]

We may ask whether Binti could comprehend the moral significance of her act. Philosophers have argued the same question, but in the context of human acts of altruism.[89] Yet, as Sapontzis so eloquently puts it, if we ascribed moral actions only to those who could answer the questions of moral theory, "there would be very few moral actions."[90]

Roger Fouts commented thus on Binti's act: "Binti clearly demonstrates that, just as some humans are capable of compassion, caring, and altruistic acts, so too are some members of the gorilla species. . . . .Obviously compassionate empathy is an adaptive trait. If it were not, very few infants of any species with long childhoods that depend on their mother's compassionate empathy would survive."[91] This story affords substantial evidence that moral responsibility is not the exclusive domain of human beings and that concern for others is felt, and acted upon, by persons like Binti Jua.

7. Curiosity. Roger Fouts describes in detail a rather entertaining demonstration of chimpanzee Washoe's curiosity—and of her ability to contrive an ex-

---

[86] *Id.*

[87] Anne Marie O'Neill, Mary Green, and Paul Cuadros, *One Great Ape: Binti-Jua, A West African Gorilla, Flexes Her Maternal Muscles to Save a Little Boy's Life*, PEOPLE, Sept. 2, 1996.

[88] *The 25 Most Intriguing People '96, Binti-Jua: She Gave a Helping Hand to a Distant—Very Distant—Relation*, PEOPLE, Dec. 30, 1996, at 66.

[89] *See* SAPONTZIS, *supra* note 3, at 36.

[90] *Id.* Sapontzis notes that morally-based actions on the part of non-humans, especially when such actions are associated with cognitive abilities, have been repeatedly unrecognized by scientists, who have been "complacently sure that animals were not aware and could not think." *Id.* at 61. Sapontzis compares this attitude with "the complacent assurance of gentlemen from ancient Greece to Victorian England concerning the intellectual and moral inferiority of women and of the embarrassing blindness to which that assurance led otherwise perceptive men." *Id.*

[91] *Binti Jua: Returning the Favor*, BRIDGING THE GAP, NEWSLETTER OF THE GREAT APE PROJECT INTERNATIONAL, Mar. 1997, http://www.greatapeproject.org/newsletters/BtG1P5.html (last visited Nov. 17, 2000).

periment to satisfy that curiosity. Fouts purchased a doormat for Washoe.[92] He waited for her to inspect it carefully, as she did with all new objects.[93] But she took one look at the mat and jumped back, and crouched in a corner.[94] Suddenly she stood up, grabbed one of her dolls, approached the mat within the distance of her own height, and tossed the doll on top of

the mat.[95] She watched intently for several minutes, but nothing happened to the doll.[96] Then, Washoe approached the mat, snatched the doll, and carefully inspected it. After that, Washoe began using the doormat with no evident fear.[97]

8. Communication. Although not a criterion for Lockean personhood, the ability to communicate underscores the richness of all great apes' social lives.[98] Sue Savage-Rumbaugh, Professor of Biology and Psychology at the Georgia State University, has studied cognition in humans and non-human apes since 1972.[99] In her study, and in others,[100] gorillas, orang-utans, bonobos, and chim-

---

[92] FOUTS & MILLS, NEXT OF KIN, *supra* note 78, at 44.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] This factor is therefore considered by Peter Singer in PRACTICAL ETHICS, *supra*, note 42, at 86, although linguistic ability is not necessarily a valid test for determining whether an individual should have rights. As Patterson and Gordon point out, "[m]any human beings—including all infants, severely mentally impaired people and some educationally deprived deaf adults of normal intelligence—fail to meet the criteria for 'having language' according to any definition. . .[b]ut the existence of even basic language skills does provide further evidence of a consciousness which deserves consideration." Francine Patterson & Wendy Gordon, *The Case for the Personhood of Gorillas*, in THE GREAT APE PROJECT, *supra* note 1, at 61.

[99] *See generally* SUE SAVAGE-RUMBAUGH & ROGER LEWIN, KANZI: THE APE AT THE BRINK OF THE HUMAN MIND (1994).

[100] For various descriptions and further references, see Roger S. Fouts & Deborah H. Fouts, *Chimpanzees' Use of Sign Language*, *in* THE GREAT APE PROJECT, *supra* note 1, at 28-41; Francine Patterson & Wendy Gordon, *The Case for the Personhood of Gorillas*, *in* THE GREAT APE PROJECT, *supra* note 1, at 58-77; and H. LYN WHITE MILES, *Language and the Orang-utan: The Old 'Person' of the Forest*, *in* THE GREAT APE PROJECT, *supra* note 1, at 42-57.

panzees have proved capable of grasping various components of human language in the forms of signs, symbol, and spoken English.[101] They use sign language to converse with humans, with each other, and to themselves.[102] They laugh at their own jokes and those of others.[103]

Francine Patterson was awarded a doctorate in developmental psychology for her studies of several gorillas who are able to communicate in human language.[104] One of these gorillas, Koko, has acquired a vocabulary in sign language exceeding 1,000 words and replies to both signed and spoken questions.[105] Koko, who has achieved scores between 85 and 95 on the Stanford-Binet Intelligence Test,[106] differentiates between words used in a concrete sense and in the abstract. For example, when asked to define "hard," she has answered with "work" as well as "rock."[107] She shortens words and creates puns (for example, using the sign for "knock" as a substitute for the word "obnoxious" based on the auditory similarity in the spoken versions of the two words.)[108] She invents terms when no appropriate name is available (for example, "bottle necklace" for a six-pack soda can holder.)[109]

Koko makes faces and examines herself in a mirror; she enjoys imaginary play, alone and with others.[110] She has been known to scream when angered,

---

[101] *See generally* SUE SAVAGE-RUMBAUGH & ROGER LEWIN, *supra* note 99.

[102] *See, e.g.*, Mark D. Bodamer et al., Functional Analysis of Chimpanzee (Pan troglodytes) Private Signing, *in* 9 HUMAN EVOLUTION 281-296 (1994); and Roger S. Fouts & Deborah H. Fouts, *Chimpanzees' Use of Sign Language*, *in* THE GREAT APE PROJECT, *supra* note 1, at 34.

[103] *See* Francine Patterson & Wendy Gordon, *The Case for the Personhood of Gorillas*, in THE GREAT APE PROJECT, *supra* note 1, at 58-59.

[104] *Id.* at 58.

[105] *Id.*

[106] *Id.* at 58; *see also id.* at 61 (for a chart that tracks the intelligence tests taken in 1975 and 1976, chronological age in months, mental age in months, and specific results).

[107] *Id.* at 64.

[108] *Id.*

[109] *Id.*, at 65.

[110] *Id.* at 58-59.

and to cry when left alone.[111] She anticipates others' reactions to her acts, and sometimes lies to avoid disapproval.[112] She becomes visibly uneasy when asked to discuss death—her own, or that of others.[113] Her reaction to the idea of facing death in her future matches, at a sophisticated level, Locke's view of one's ability to perceive oneself as oneself, "in different times and places," as necessary for personhood.

Describing the chimpanzee's emotional complexity, Goodall observes, "a young chimpanzee who loses his or her mother will show signs very similar to clinical depression in humans, signs which we describe as grief."[114] Dr. Goodall has informed scientists, many of whom inject diseases into great apes, test drugs on them, and dissect them, that the apes are not only like us physiologically, which they find useful, but also psychologically.[115]

C. CONTINUED CLASSIFICATION OF NON-HUMAN GREAT APES AS MERE PROPERTY IS BOTH MORALLY AND LEGALLY INTOLERABLE

The capacities of non-human great apes correspond with the core elements of personhood. This fact renders their continued classification as property intolerable. In recognition of the special burden a court faces when asked to apply ex-

---

[111] *Id.* at 59.

[112] *Id.* at 58. *See also* SINGER, *supra* note 41, at 175-176 (describing similar behavior in other non-human great apes).

[113] *See* Francine Patterson & Wendy Gordon, *The Case for the Personhood of Gorillas*, *in* THE GREAT APE PROJECT, *supra* note 1, at 58.

[114] *See* The Great Ape Trial, Channel Four Television broadcast, December 27th, 1995, produced by Wall to Wall Television, 8-9 Spring Place, Kentish Town, London, http://www.greatapeproject.org/archives/gatrial.html. Goodall cites apes' interests as they correspond to those that underlie human rights:

the family bonds that last through life, a life-span of fifty to sixty years, the fact that there's a long childhood dependency, as in our own species, the fact that learning plays a very important part in the acquisition of adult behaviour, co-operation, [and] true altruism, which we've observed in the wild.. . .

Id. Great apes kiss, hold hands, slap each other on the back, and show aggression—much as humans do. *Id.* For a related discussion on the similarities of human and chimpanzee psychology, including mourning the death of mothers, see Roger Fouts, *My Best Friend is a Chimp*, PSYCHOLOGY TODAY, July 1, 2000, at 68.

[115] *See generally* DALE PETERSON AND JANE GOODALL, VISIONS OF CALIBAN (2000).

isting law to a new type of plaintiff, Petitioner has provided the underpinnings—philosophical, historical, and legal—for her identity before the court. For persons do not appear before a court self-defined or ready-made. A court must make a judgment before it can perceive, hear, or talk about "she," "you," "the plaintiff," or whatever other term is used to address one who argues the merits of her case.[116]

In books and in common speech, "person" is often used as meaning a human being, but the *legal* meaning of a "person" is one who has legal rights and duties.[117] Whether an entity ought to be considered a legal person depends on whether the entity can and should be afforded a set of legal rights and duties.[118] The particular bundle of rights and duties that accompanies legal personhood already varies according to the nature of the entity. For example, corporations are legal persons, but they have different sets of legal rights and duties from natural persons.[119]

Plaintiff Hart urges this Court to deal with her on the basis of her capacities—that is, what her intellectual and emotional life is like. Hart asks this Court to put aside any prejudices which are based on the fact that she is not a member of our species, or that she looks different from other plaintiffs. The law recognizes all human beings as having some basic rights and interests that must be protected. Hart shares morally relevant traits with humans, which underscores the need to respect her rights and interests. In addressing the objection that rights should not be given without duties, it is essential to remember that the intellectually disabled have rights, although we would not hold them responsible

---

[116] *See* VINING, *supra* note 28, at 144.

[117] JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (Roland Gray ed., MacMillan 1921) (1909).

[118] *Id.*

[119] The idea of a "corporate person" is by no means new to the law, but one commentator has observed recently that the recognition of "corporate personality" incorporates an unspoken "agreement no longer to ask difficult questions about the "essence" of personality." David Graver, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. CHI. L. SCH. ROUNDTABLE 235, 239 (1999) (citation omitted). Nevertheless, the court has had to deal with the "essence" of corporate personality on a case by case basis, and has held that the corporate person does not have all the rights of a natural person. *See, e.g.*, Bell v. United States, 417 U.S. 85 (1974) (holding that a corporation has no right against self-incrimination, that right being limited to natural persons); Hague v. Comm. For Indus. Org., 307 U.S. 496, 514 (1939) (holding that a corporation is not entitled to the benefits of the Privileges and Immunities Clause); Fed. Deposit Ins. Corp. v. Hulsey, 22 F.3d 1472, 1489 (10th Cir. 1994) (holding that a corporation is not entitled to damages for emotional distress because "it lacks the cognizant ability to experience emotions").

for their actions in all cases.[120] The situation is quite the same here. Hart is a sentient, self-aware being. In human terms, she may not be at the level at which we would attribute responsibility to her, as we would to a mature human, but that is no reason for denying her basic rights. This is consistent with the fundamental legal premise that the particular bundle of rights and duties that accompanies legal personhood varies according to the nature of the entity.

Professor Singer explains that admitting non-human great apes into a community of equals can be urged without asserting "equivalence":[121]

> When people first hear the term "the community of equals", they sometimes think "equal" means "the same", or that members of the "community of equals" should be treated in exactly the same way. This is not true for humans, nor is it true for the other great apes.
>
> For instance, considering human physiology and the strength of human arms, it would be absurd to insist that all humans should have an opportunity to live in trees. For orang-utans, however, with their greater strength and agility when off the ground, and their preference for living in trees, such a demand makes considerable sense.
>
> When we include our fellow apes in the community of equals, we assert that they are our *moral* equals in the crucial areas of right to life, protection of freedom, and prohibition of torture.[122]

---

[120] *See* Youngberg v. Romeo, 457 U.S. 307, 324 (1982).

[121] *See* Attachment following this Brief.

[122] *What is the 'Community of Equals'?*, The Great Ape Project – GAP FAQ, Section 3: Principles and Policies, 3.1, http://www.greatapeproject.org/gapfaq.html (last visited Nov. 17, 2000) (emphasis in original).

II. RELIEF IS NECESSARY TO PROTECT PETITIONER'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

A. INFRINGEMENT ON PETITIONER'S LIFE, LIBERTY, AND BODILY INTEGRITY OFFENDS THE DUE PROCESS CLAUSE IN THE FIFTH AND FOURTEENTH AMENDMENTS

In 1982, the Supreme Court considered for the first time the substantive due process rights of the involuntarily-committed mentally disabled, and held that the Constitution protected Nicholas Romeo, a profoundly mentally disabled man, from bodily injury and bodily restraints at the institution.[123] Thus the majority duly found constitutional protection under the Fourteenth Amendment's Due Process Clause for a person who, although 33 years old, had the mental capacity of an 18-month-old child, with an I.Q. between 8 and 10, unable to talk and lacking in the most basic self-care skills.[124] The Court stated that in the past, courts have noted that "the right to personal security constitutes an 'historic lib-

---

[123] *See Romeo*, 457 U.S. at 314 (1982). Substantive due process concerns involve the area of law surrounding the rights of "privacy and personhood." Justice Louis Brandeis defined the constitutional right of privacy as "the right to be let alone," calling it "the most comprehensive of rights." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting opinion); *see also* Tribe, *supra* note 29, §15-1, at 1302. In *Washington v. Harper*, 494 U.S. 210 (1990), the United States Supreme Court addressed the issue of a prison inmate given anti-psychotic drugs by the state of Washington, finding that an inmate's interest in avoiding involuntary administration of antipsychotic drugs was protected under the Fourteenth Amendment's Due Process Clause. The Court stated that "forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Id.* at 229. T.D. v. N.Y. State Office of Mental Health, 650 N.Y.S.2d 173, 186 (1996), recognized that the right to reject treatment with anti-psychotic medication is not absolute, and that in certain emergency situations, "such as where the individual presents an imminent danger to himself or those in immediate proximity to him, that right may yield to compelling State interests." The Court stated, however, that State interests unrelated to the well being of the individual and others in immediate proximity do not outweigh the individual's fundamental autonomy interest. *Id.*

[124] Youngberg v. Romeo, 457 U.S. 307 (1982). Justice Blackmun's concurrence is even more properly aligned with world opinion on the matter, in the Declaration 2856 (XXVI): Declaration on the Rights of Mentally Retarded Persons is an indication. Art 1 of the Declaration states that "the mentally retarded person has . . .the same rights as other human beings." Declaration on the Rights of Mentally Retarded Persons, G.A. Res 2856, U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429 (1971).

Art 2 asserts a right to "such education, training, rehabilitation and guidance as will enable [development of] ability and maximum potential." *Id.*

erty interest' protected substantively by the Due Process Clause."[125]

The social skills that guide our lives, a measure of our ability to think our way into the minds of other individuals, does not appear until about the age of three or four in normal human children.[126] Many autistic humans never develop to that stage.[127] Non-human great apes exceed the capabilities of autistic humans individuals in those key social skills.[128] Jane Goodall has analyzed how chimpanzees communicate feelings such as fear, stress, anger, and pleasure.[129] She includes visual, tactile, auditory, the use of symbols, and other forms of communication, posture, and smell.[130] There is a documented overlap between these forms of communication and those observed in the severely mentally disabled.[131] In fact, apes' ability to communicate in sign language by initiating conversation and inventing new words demonstrates that there is much that a chimpanzee or a gorilla can do that a profoundly mentally disabled human cannot do.[132] The fact that Evelyn Hart has greater and more fully developed cognitive capacities than Nicholas Romeo makes plain that a mechanical denial of all Constitutional protections to her is no longer legally or morally tolerable.

---

[125] *Romeo*, 457 U.S. at 315 (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)).

[126] *See* S.T. Boysen and G.T. Himes, *Current Issues and Emerging Theories in Animal Cognition*, ANN. REV. OF PSYCHOL., Jan. 1, 1999, at 683.

[127] Christoph Anstötz, *Profoundly Intellectually Disabled Humans and Apes: A Comparison, in* THE GREAT APE PROJECT, *supra* note 1, at 161-62.

[128] *Id.*, at 165. In tests developed to measure the intelligence of human children, the abilities of non-human great apes have generally correlated with those of humans between two and three years old, with some skills of even older children. *See* H. Lyn White Miles, *Language and the Orang-utan: The Old "Person" of the Forest, in* THE GREAT APE PROJECT, *supra* note 1, at 49. Such cognitive assessments are necessarily conservative, for they require non-human hominids to make sense of human meanings, in human settings. See Barbara Noske, *Great Apes as Anthropological Subjects: Deconstructing Anthropomorphism, in* THE GREAT APE PROJECT, *supra* note 1, at 266.

[129] *See* Jane Goodall, *Chimpanzees – Bridging the Gap, in* THE GREAT APE PROJECT, *supra* note 1, at 13. *See also* Christoph Anstötz, *Profoundly Intellectually Disabled Humans and Apes: A Comparison*, in THE GREAT APE PROJECT, *supra* note 1, at 164.

[130] Christoph Anstötz, *Profoundly Intellectually Disabled Humans and Apes: A Comparison*, in THE GREAT APE PROJECT, *supra* note 1, at 164-65 (for an analysis of Goodall's study).

[131] *Id.* at 165.

[132] *Id.*

In the instant case, the purpose of the proposed involuntary confinement of Evelyn Hart at Emory University is to subject her to non-therapeutic invasive research, a severe burden on her most fundamental interests. The imposition of this burden is not for her own protection: she stands to gain no benefit from it. Moreover, Petitioner would suffer greatly from laboratory confinement itself.[133] Thus, the effect of the protection given by due process, and the importance of her liberty, have as much validity to Evelyn Hart as to most human beings.

Petitioner does not ask this Court to unearth any new fundamental rights which might be embedded in the Due Process Clause. That clause expressly protects life and liberty, the core interests claimed by Petitioner.[134] Indeed, the protection of individual interests in life and liberty is one of the defining characteristics of our constitutional system. The tradition of flexible interpretation of a living constitution permits the courts to adjust the scope of these fundamental protections to the needs of the times.[135]

Petitioner appreciates that no constitutional right, not even liberty, is absolute. But absent an extremely compelling interest, fundamental rights cannot be violated.[136] What type of state interest would permit *human* confinement, mutilation, and so forth? The interest would have to be extraordinary; otherwise the violations of basic rights involved would be unconscionable, as it is in situations described in later sections of this Brief. If this Court were to deny Evelyn Hart's standing, it would call into question the foundation of certain recently acknowl-

---

[133] *See* Jane Goodall, *Chimpanzees – Bridging the Gap*, THE GREAT APE PROJECT, *supra* note 1, at 13 (discussing chimpanzee's capacity for suffering); see also Jane Goodall, *supra* note 32, at 241 (describing non-human great apes as naturally sociable and extremely active).

[134] U.S. CONST. amend. V, "No person shall be. . .deprived of life, liberty, or property, without due process of law. . ." U.S. CONST. amend. XIV, § 1, "nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

[135] Justice Harlan once explained,

[T]radition is a living thing. . .[The] full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points. . .It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . .which also recognizes [that]. . .certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Poe v. Ullman, 367 U.S. 497, 542-543 (1961) (Harlan, J., dissenting).

[136] *See* WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 892-893 (2d ed. 1995).

edged rights of the mentally disabled. Petitioner asserts that the Due Process Clause protects her life and future; and that because she has the psychological capacity to appreciate both liberty and the deprivation of liberty, she is entitled to be classified as a person for purposes of Due Process under the Fifth and Fourteenth Amendments.

B. FORCING THE PETITIONER TO SUBMIT TO INVASIVE RESEARCH WOULD VIOLATE CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION OF THE FEDERAL AND STATE LAWS

1. PETITIONER'S MENTAL AND PHYSICAL SUFFERING WOULD BE COMPARABLE TO THE SUFFERING OF A HUMAN SUBJECTED TO INVASIVE SCIENTIFIC RESEARCH; A FAILURE TO PROTECT HER WOULD BE A VIOLATION OF THE GUARANTEE OF EQUAL PROTECTION OF FUNDAMENTAL RIGHTS.

The test of constitutional validity traditionally applied in the area of social and economic legislation is whether or not a law has a rational relation to a valid state objective.[137]

The present case involves a most fundamental aspect of liberty: the plan to restrain her and to force her to submit to harmful physical intrusions. Petitioner therefore asks this Court to exercise the heightened scrutiny reserved for those instances where the Court reviews practices affecting fundamental rights.[138]

Petitioner further asserts that characteristics attributed to her and to other non-human great apes necessarily implicate equal protection concerns.[139] Evelyn Hart is a member of the group "Hominoidea," the taxonomical group to which human beings also belong.[140] Being a non-human great ape means she

---

[137] Williamson v. Lee Optical Co., 348 U.S. 461, 466 (1955).

[138] *See* Murphy, *supra* note 136, at 892-893.

[139] Charles Darwin acknowledged that species distinctions are not truly boundaries but merely categories of convenience. CHARLES DARWIN, ORIGIN OF SPECIES 98 (1859). Darwin wrote, "It is immaterial for us whether a multitude of doubtful forms be called species or sub-species or varieties. . . .The mere existence of individual variability and of some few well-marked varieties, though a necessary foundation of the work, helps us but little in understanding how species arise in nature." *Id.* By 1872, Darwin had shown by detailed observations that the expression of emotions in nonhuman primates is closely analogous to that in human beings. *See generally* CHARLES DARWIN, THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS (3d ed. 1998).

[140] "There is no natural category that includes chimpanzees, gorillas and orangutans but excludes humans." Richard Dawkins, *Gaps in the Mind*, *in* THE GREAT APE PROJECT, *supra* note 1, at 82; *see also* FOUTS & MILLS, *supra* note 78, at 51-57.

can be bought and sold, treated as an object of commerce, and exploited for profit.[141] Others invoke her non-human status to justify future confinement and involuntary submission to what can only be called torture, with the real possibility of death resulting.[142] Hart argues that each of these three predicaments interferes with, and has an intolerable impact on, her most fundamental needs and interests. A prejudice essentially involves a failure to treat a group appropriately, based on arbitrary or irrelevant grounds.[143] Although Evelyn Hart and those in her class possess characteristics and needs that are relevant to decisions about how she should be treated, this factor is not controlling where the most fundamental rights of life and liberty are concerned. In light of the competitive aspects of medical research,[144] the systematic abuse of non-human great apes is unlikely to be eliminated voluntarily by those in the field.[145] Because legislative action to rectify her situation is extremely unlikely, Petitioner Hart urges this

---

[141] *See* David Cantor, *Items of Property, in* THE GREAT APE PROJECT, *supra* note 1, at 280-89. Hundreds of chimpanzees, bonobos, gorillas, and orang-utans are used by the entertainment and advertising industries, kept on display at zoos, or sold to private owners. *Id.* at 280. About 2000 great apes, primarily chimpanzees, live in laboratory cages in at least seven biomedical research institutions in the United States. *Id.*

[142] *See id.* at 284 (for a detailed description of the conditions in laboratories, and cases of resultant psychosis and deaths of non-human hominids).

[143] *See, e.g.*, Reed v. Reed 404 U.S. 71 (1971) (holding that an Idaho statute which provides that as between persons equally qualified to administer estates males must be preferred to females, was based solely on a discrimination prohibited by, and violative of, the equal protection clause of the Fourteenth Amendment).

[144] *See* Jay Katz, *Health Law Symposium: Human Experimentation and Human Rights*, 38 ST. LOUIS U. L.J. 7, 15 (1993).

[145] *See, e.g.*, T.D. v. N.Y. State Office of Mental Health, 650 N.Y.S.2d 173, 193 (1996). In *T.D.*, the Supreme Court of New York took notice of the competition among players in the pharmaceutical industry to market new psychiatric drugs. *Id.* Justice Ross wrote,

It is evident that, given the motivation to test these medications and quickly bring them to market, industry-sponsored studies, which will not rely on Federal funds and therefore will not be strictly subject to Federal guidelines and oversight, will proliferate. These developments serve to highlight the importance of safeguarding the rights of incapable adults and minors, who may be potential subjects of greater than minimal risk studies involving psychiatric medications, through constitutionally acceptable protocols and guidelines promulgated by the appropriate agency.

Id. at 194.

Court to outlaw such discrimination.[146]

As one member of this present Court once said: "through ignorance and prejudice, [they] have been subjected to a history of unfair and often grotesque mistreatment."[147]

Justice Stevens was referring to the plight of mentally disabled humans, but he could as well have been describing the grotesque mistreatment of the other great apes, by humans. Human knowledge about the sensitivities of the other great apes is, admittedly, a recent phenomenon, but it is precisely because we are no longer ignorant about those sensitivities that nothing can justify the continuing, grotesque mistreatment of chimpanzees and other great apes.

2. THE SUBJECTION OF PETITIONER TO SALE AND SUBSEQUENT INVASIVE RESEARCH VIOLATES THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT

The protections invoked in the previous section apply with equal force against the federal government. In Petitioner's case, the National Institutes of Health decision to dispose of her as an item of property violates the equal protection component of The Fifth Amendment's Due Process clause. Although the Fifth Amendment (which is applicable to the federal government and the District of Columbia)[148] does not contain an equal protection clause like that found in the Fourteenth Amendment (which applies only to the states),[149] this Court has recognized that "discrimination may be so unjustifiable as to be violative of due process."[150] The "equal protection of the laws" is a more explicit safeguard against prohibited unfairness than "due process of law," and consequently, the latter can encompass the former. Thus:

---

[146] *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (describing racial classifications as "constitutionally suspect" under Bolling v. Sharpe, 347 U.S. 497, 499, and subject to the "most rigid scrutiny," under Korematsu v. United States, 323 U.S. 214, 216 (1944), and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose under Hirabayashi v. United States, 320 U.S. 81, 100 (1943)); *see also* Graham v. Richardson, 403 U.S. 365, 374-75 (1971) (holding that provisions of Arizona and Pennsylvania welfare laws conditioning benefits on citizenship were violative of the Equal Protection clause of the Fourteenth Amendment because "an alien as well as a citizen is a 'person' for equal protection purposes").

[147] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 454 (1985) (Stevens, J., concurring) (discussing the mistreatment of the mentally disabled).

[148] U.S. CONST. amend. V.

[149] U.S. CONST. amend. XIV, § 2.

[150] Bolling v. Sharpe, 347 U.S. 497, 498 (1954).

Particular constitutional rights that follow from the best interpretation of the equal protection clause, for example, will very likely also follow from the best interpretation of the due process clause. The Supreme Court had no difficulty in deciding that although the equal protection clause does not apply to the District of Columbia, racial segregation in the District's schools is nevertheless unconstitutional under the due process clause, which does apply to it.[151]

3. THE SUBJECTION OF PETITIONER TO INVASIVE RESEARCH AT THE STATE UNIVERSITY IS NOT NARROWLY TAILORED TO THE STATE INTEREST INVOKED, AND VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws,"[152] and mandates the states to treat all persons similarly situated, alike.[153] In determining which classifications may be unconstitutionally discriminatory, this Court has never been wedded to fixed concepts of equality.[154] "[H]istory makes it clear that constitutional principles of equality, like those of liberty, property, and due process, evolve over time. . . ."[155]

The right to life is implicitly protected by the Constitution.[156] The liberty interest in bodily integrity and physical freedom is also fundamental.[157] Where

---

[151] *See* DWORKIN, LIFE'S DOMINION, *supra* note 36, at 128.

[152] U.S. CONST. amend. XIV, § 2.

[153] *See* Plyler v. Doe, 457 U.S. 202, 216 (1982).

[154] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 623 (1996).

[155] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part). Justice Marshall invited the reader to contrast Plessy v. Ferguson, 163 U.S. 537 (1896) and Bradwell v. Illinois, 16 Wall. 130, 141 (1873) (Bradley, J., concurring), with Brown v. Bd. of Educ., 347 U.S. 483 (1954), and Reed v. Reed, 404 U.S. 71 (1971). *Id.*

[156] The Fifth and Fourteenth Amendments to the Constitution expressly protect life against any government action taken without due process. U.S. CONST. amend. V ("No person shall be. . .deprived of life, liberty, or property, without due process of law. . ."); U.S. CONST. amend. XIV § 1 (". . .nor shall any state deprive any person of life, liberty, or property, without due process of law. . .").

[157] The Supreme Court has decided that certain rights not specifically enumerated in the Constitution are still fundamental ones. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1956). *See also* Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 43 (1973). For a thorough analysis of substan-

legislation affects these rights, the government must show a compelling interest at stake; a "narrowly tailored" connection between the challenged governmental action and the governmental interest;[158] and that the government could not secure its compelling interest by a different classification or by less drastic means.[159]

In 1996, the National Institutes of Health ("NIH") announced a decision to "redirect some of the $10 million that the National Center for Research Resources now spends on chimpanzee based research."[160] The NIH cited time expenditures and failure to find applicable results. Thus, the State's interest in general research using non-human hominids is not, in fact, narrowly tailored and is not claimed to be an immediate or unique method for curing disease. Alternative methodologies to effectively promote the public interest can and should be made available.

But even if they were not, Petitioner insists that the government must still demonstrate a compelling interest in continued discrimination against Petitioner and all members of her class. This is because whenever an illegitimate intrusion is alleged, "[t]he inquiry must examine likely results. It must seek out submerged classifications or differential impacts. In an epidemic the state assuredly has the power to require testing, vaccination, and quarantine, but those intrusions must be measured for their necessity and efficacy, and if the intrusions are extreme alternatives must be considered."[161]

In the present case, we must consider the purpose asserted by the National Institutes of Health: that is, the goal of public health. Petitioner acknowledges the legitimacy and the importance of this objective, but argues that the government has failed to establish a compelling or immediate need for biomedical experiments involving non-human great apes to achieve that stated objective. Petitioner's particular and fundamental interests outweigh whatever generalized interest the state may have in the goal of attaining knowledge about human disease. As the reason for carrying out the experiment becomes less about individual therapy, and more about a quest for general knowledge, the value of the

---

tive due process concerns involving the rights of privacy and personhood, *see* Tribe, *supra* note 29, ch. 15.

[158] The Supreme Court has required such a connection in, e.g., Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097, 2114, 2117 (1995).

[159] *See* MURPHY, *supra* note 136, at 892-93.

[160] Jon Cohen, *Overhauling AIDS Research: Views from the Community*, 271 Sci. 590 (1996).

[161] TRIBE, *supra* note 29, §15-2, at 1306.

government interest in protecting the research is correspondingly diminished.[162] Obviously, neither Evelyn Hart nor her class is in any way helped by the research in issue. Accordingly, we urge that the permission for this research be declared an invalid infringement of the plaintiff's Due Process and Equal Protection rights.

C. SAFEGUARDING THE RIGHTS OF PERSONS SUBJECTED TO SCIENTIFIC EXPERIMENTATION IS A CRITICAL COUNTERVAILING CONCERN TO THE STATE

The government contends that the possible benefits to society resulting from medical experimentation are the only state interest raised in Hart's case. Petitioner asserts, on the contrary, that safeguarding the rights of individuals in the conduct of research projects is a momentous countervailing concern to the state. The asserted interest in health implicates much more than just anatomy and pharmacology; it involves helping people instead of harming them. In a country that spends many billions of dollars each year on the consequences of societal violence,[163] the state interest in public health and safety is more effectively served by promoting respect for life. As applied to the lives of non-human great apes, recognition of this principle would reflect the

increased understanding of them that science has gained over the past thirty years. Field studies, laboratory work, and language-acquisition research demonstrate that human and non-human great apes are very similar, and could benefit from legal protections for similar reasons.

Thus, although both human and non-human great apes provide effective models in some studies, this fact does not justify their use.[164] The best research tool for the study of human diseases is a human being, but it has generally not been argued, for example, that the great benefits of experimenting on human beings with IQs below a certain number would justify an abrogation of their status of persons. For example, not even anencephalics—human babies born

---

[162] *See, e.g.*, 45 C.F.R. §§ 46.05-46.06 (requiring stricter standards for research involving no prospect for direct benefit to the research subject).

[163] For example, according to the National Association of Crime Victim Compensation Boards, $248,717,660 was paid to crime victims by state compensation boards in 1997 alone. *Statistics Bear out the Toll Crime Takes on Society*, SUNDAY PATRIOT – NEWS (Harrisburg, PA), Ap. 25, 1999, at A. When the cost of medical care, lost earnings, pain, suffering, and diminution of the quality of life are all considered, it is estimated that the annual cost of violent crime in this country is $450,000,000,000. *Id.*

[164] *See* Geraldine Brooks, *In Chimp Sell-Off, Military Finds It Has Monkey on Its Back*, THE WALL STREET JOURNAL, Dec. 30, 1997, at A1.

with a only a brain stem and with no chance of ever becoming conscious—may be used as the subjects of lethal experimentation, or for organ donations to save other babies' lives.[165] Frederick Coulston resorted to testing on chimpanzees "when his work with human subjects—prisoners—was halted in the 1960s."[166] Roger Fouts has commented:

> "'Eventually we realized it was wrong to experiment on prisoners, and our closest relatives, the chimpanzees, are the next step'. . .'People say, "You'd want to use a chimp's organs if it would save your child." Well, I'd want to use my neighbor's organs if it would save my child, but that doesn't mean I should.'"[167]

Hippocrates warned physicians: "As to diseases, make a habit of two things—to help, or at least to do no harm."[168] In Hippocrates's day, physicians carried out experiments, but they did so primarily to help individuals who did not respond to customary remedies.[169] In modern medical science, experimentation is widespread, not for individual therapy, but in the hope of advancing scientific knowledge.[170] In any constitutional analysis of each experiment, individual liberty interests must be balanced against the relevant state interests.[171] Therapeutic experimentation, which attempts to address a concrete health problem, implicates a stronger state interest than does research done in the hope, or even the expectation, of acquiring generalized scientific information.[172] That an alarming

---

[165] *See* In Re T.A.C.P., 609 So. 2d 588 (Fla. 1992).

[166] Brooks, *supra* note 164, at A1.

[167] *Id.*

[168] THE OATH OF HIPPOCRATES, *reprinted in* JAY KATZ, EXPERIMENTATION WITH HUMAN BEINGS 311 (1972).

[169] *Id.*

[170] *Id.* For a general discussion of this trend, see Michael J. Loscialpo, *Nontherapeutic Human Research Experiments on Institutionalized Mentally Retarded Children: Civil Rights and Remedies*, 23 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 139 (1997). For a specific example, *see* Gary Lee, *Final Data Released on Tests Involving Radiation Exposure*, THE WASHINGTON POST, August 18, 1995, at A23 (reporting that the United States Department of Energy found that researchers used 16,000 children, men, and women in radiation experiments from World War II to the mid-1970s).

[171] *See* Youngberg v. Romeo, 457 U.S. 307, 321 (1982).

[172] *See generally* Loscialpo, *supra* note 170.

number of ethically questionable experiments done for informational purposes—combined, perhaps, with the promise of prestige or financial gain for the investigators—shows us that "even medical progress can exact an intolerable price."[173]

A disturbing number of recent and dangerous experiments have used vulnerable and uninformed subjects.[174] A 1966 survey by U.S. physician Henry Beecher found widespread disregard of the best interests of human subjects.[175] For example, in 1993, the Boston Globe disclosed that more than one hundred youngsters at the Fernald School for mentally disabled children were fed cereal containing radioactive isotopes during an experiment in the 1940s and 1950s.[176]

---

[173] Jay Katz, *Health Law Symposium: Human Experimentation and Human Rights*, *supra* note 144, at 8.

[174] *See, e.g.*, Mackey v. Procunier, 477 F.2d 877, 877-78 (9th Cir. 1973) (prisoners); Begay v. U.S., 768 F 2.d 1059 (9th Cir. 1985) (Native American uranium mine workers); Mink v. Univ. of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978) (pregnant women); Burton v. Brooklyn Doctors Hosp., 452 N.Y.S.2d 875 (N.Y. App. Div. 1982) (infants); United States v. Stanley, 483 U.S. 669, 671 (1987) (members of armed forces); Claire Alida Milner, *Gulf War Guinea Pigs: Is Informed Consent Optional During War?* 13 J. CONTEMP. HEALTH L. & POL'Y 199 (members of the armed forces). For an account of involuntarily hospitalized adults and children at Office of Mental Health psychiatric facilities who were adjudicated mentally incapable of giving or withholding informed consent to experimentation, see T.D. v. N.Y. State Office of Mental Health, 650 N.Y.S.2d 173 (1996) (citing failure to adequately protect common-law privacy and Fourteenth Amendment due process rights of potential subjects).

[175] *See* Henry K. Beecher, *Ethics and Clinical Research*, 274 NEW ENG. J. MED. 1354 (1966).

[176] Scott Allen, *Radiation Used on Retarded*, BOSTON GLOBE, Dec. 26, 1993, at 1. The non-therapeutic experiments, performed on adolescent subjects whose I.Q.s ranged from 46 to 75, led to the doctoral thesis of a Massachusetts Institute of Technology faculty member. *See* Loscialpo, *supra* note 170, at 143. The Quaker Oats Company provided funding, and the United States Atomic Energy Commission (AEC, now the Department of Energy) provided the radioactive isotopes. *Id.* at 143-44. *See also* Associated Press, *Radioactive Oatmeal Suit Settled for $1.85 Million*, THE WASHINGTON POST, Jan. 1, 1998, at A17 ("reporting that the group of former students who ate radioactive oatmeal as unwitting participants in a food experiment will share a $1.85 million settlement from Quaker Oats and the Massachusetts Institute of Technology"). In an unrelated Fernald experiment, researchers justified the administration of an extremely dangerous amount of radiation to one ten-year-old child on the grounds that he was severely retarded and terminally ill with Hurler-Hunter syndrome. *A Report on the Use of Radioactive Materials in Human Subject Research That Involved Residents of State-Operated Facilities Within the Commonwealth of Massachusetts From 1943 Through 1973*, Task Force on Human Subject Research, Department of Mental Retardation B18, B27 (1994). The researchers requested permission from the AEC to inject fifty microcuries of Ca-45 into the "moribund gargoyle," as the child was called in the report by Fernald's superintendent. Nonterminally ill retarded children were given one microcurie. *Id.*

In addition, from the 1950s to the 1970s, researchers infected institutionalized mentally disabled children at the Willowbrook School with hepatitis as part of a study to develop a vaccine.[177] The leading researcher, Dr. Saul Krugman of New York University, reasoned that the school's filthy conditions would cause most new arrivals to develop the disease anyway.[178] Testimony in the ensuing trial described beaten children, maggot-infested wounds, and cruel and inappropriate use of restraints.[179]

By 1974, responding to public reaction to these and other abuses, Congress established the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.[180] The Commission concluded that "persons having limited capacity to consent are vulnerable or disadvantaged in ways that are morally relevant to their involvement as subjects of research."[181] Being a person with limited capacity to consent, Petitioner Hart urges the application of this standard to her case. She asserts that, as outlined under the rules issued by the Department of Health and Human Services,[182] the Department should limit the conducting and funding of research involving greater than minimal risk on Evelyn Hart to situations where: (1) the experiments would directly benefit her, or (2) the experiment is likely to yield generalized knowledge about her own disorder.[183] These two prongs can be usefully compared with the legislation re-

---

[177] Robert I. Field, *Children as Research Subjects: Science, Ethics & Law* (M. Grodin & L. Glantz, eds., 1994), 16 J. LEGAL MED. 311, 311 (1995) (book review).

[178] *Id. See generally* DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS (1984); PAUL R. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS (1976).

[179] PAUL R. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 65 (1976).

[180] *See generally* Nat'l Research Act, Pub. L. No. 93-348, 88 Stat. 342 (1974) (codified as amended at 42 U.S.C. § 241 (1994)).

[181] *See* ROBERT J. LEVINE, ETHICS AND REGULATION OF CLINICAL RESEARCH 236 (1988).

[182] *See* Loscialpo, *supra* note 170, at 148. The DHHS was a separate agency from the DHEW until 1980.

[183] *See* 45 C.F.R. §§ 46.405-46.406 (1994) (elucidating the standards for children as vulnerable subjects; additionally in cases of "[r]esearch not involving greater than minimal risk" under § 46.404, "adequate provisions" must be made "for soliciting the assent of the children and permission of their parents or guardians," as set forth in § 46.408). Under 45 C.F.R. § 46.407(a) and (b), research in pursuit of generalized knowledge, i.e., "[r]esearch not otherwise approvable which presents an opportunity to understand, prevent, or alleviate a serious problem affecting the health or welfare of children," will be conducted or performed

cently introduced by New Zealand as part of that nation's acknowledgement of the unconscionability of the use of non-human hominids in research.[184]

These safeguards address the dangerous premise underlying research abuses: that ends can justify any means. Nowhere is the danger more evident than in biomedical research upon our closest living relatives. Although her class is numerically small, an understanding of Evelyn Hart's position has wide significance, because it arises within the larger context of medical experimentation on persons. The issue is the balancing of the government's responsibility to protect vulnerable individuals who are incapable of speaking for themselves against its goal of encouraging better methods to diagnose, treat, and otherwise care for persons. To protect Evelyn Hart is to strengthen the protections of all subjects who lack free power of choice, the legal capacity to consent, or the ability to comprehend what is happening to them.

Evelyn Hart is a person for purposes of the Fifth and the Fourteenth Constitutional Amendments. She has a demonstrable interest in remaining alive as long as life holds the possibility of enjoyment or fulfillment.[185] To incarcerate her and then to subject her to physical and psychological distress violates her fundamental rights. The burden of proof is on those who would sacrifice her interests for the general good, just as the burden of proof is on those who would sacrifice the interests of some humans to benefit others.[186] That justification must be

---

only if the research "presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children; and the HHS Secretary," after consultation with a panel of experts in pertinent disciplines and following opportunity for public review and comment, has determined that

[t]he research presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children; [t]he research will be conducted in accordance with sound ethical principles; and [a]dequate provisions are made for soliciting the assent of children and the permission of their parents or guardians.

Id.

[184] *See supra* note 9.

[185] *See* SAPONTZIS, *supra* note 3, at 174-175 (providing a discussion of the philosophical basis underlying a sentient being's interest in life).

[186] *See* Meyer v. Nebraska, 262 U.S. 390, 399-400 (stating that the liberties, such as those protected by the Due Process Clause of the Fourteenth Amendment, "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect"). Moreover, the Supreme Court has ruled that even though a governmental purpose is legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Kusper v. Pontikes, 414 U.S. 51, 59 (1973); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 102 n.8 (1972);

based on more than a speculative or even marginal benefit.[187]

III. FORCING PETITIONER TO SUBMIT TO INVASIVE, NON-THERAPEUTIC RESEARCH IS REPUGNANT TO INTERNATIONAL LAW AND VIOLATES THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

A. THE USE OF PLAINTIFF IN NON-THERAPEUTIC BIOLOGICAL EXPERIMENTS CONSTITUTES TORTURE UNDER INTERNATIONAL LAW

Invasive biomedical research, when it is neither therapeutic nor voluntary, is torture. Torture can be aimed at extracting information as well as, or instead of, being designed to punish or humiliate.[188] The United Nations General Assembly

---

Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 602 (1967); Elfbrandt v. Russell, 384 U.S. 11, 18-19 (1966); Aptheker v. Sec'y of State, 378 U.S. 500, 508 (1964); *see also* Miller v. Murphy, 143 Cal. App. 3d 337, 342-43 (1st Dist. 1983) (under strict scrutiny analysis of a legislative regulation, in order to by upheld, it is required that the law be shown "necessary, and not merely rationally related to, the accomplishment of a permissible and compelling interest" (citation omitted)).

[187] The "compelling interest" prong of strict scrutiny requires not only that a compelling government interest exist, but also that the conduct be a substantially effective means for advancing that interest: if the challenged government action makes only a remote or speculative contribution to achieving the government's purpose, strict scrutiny is not satisfied. *See, e.g.*, The Fla. Star v. B.J.F., 491 U.S. 524, 540 (1989) (holding that strict scrutiny was not satisfied in part because of "serious doubts whether Florida is, in fact, serving, with this statute, the significant interests"); Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 226 (1989) (explaining that, in the particular case, the government failed to show how the government action advanced its asserted interest); McDaniel v. Paty, 435 U.S. 618, 628-29 (1978) (concluding that the alleged threat addressed by the statute under review (an infection of the political process by clerical participation) was speculative, as it did not have a historical record of occurrence, and was therefore insufficient to establish the act's constitutionality under strict scrutiny).

[188] The General Assembly of the United Nations has defined torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons." *See* The Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc. A/1034 (1975), art. I. The Declaration expressly prohibits any state from permitting or tolerating torture or other cruel, inhuman or degrading treatment or punishment. *Id.* at art. III. The Declaration directs each state to take

has recognized a prohibition of torture under international *jus cogens* norms that can neither be waived nor excused.[189] Exceptional circumstances such as a state of war or any other public emergency may not be invoked as a justification.[190] Generally accepted definitions of torture appear in United Nations treaties, and underscore the worldwide interest in protecting all persons from torture and "cruel", "inhuman," or "degrading" treatment or punishment.[191] Evelyn Hart, having shown that she is entitled to be classified as a person for purposes of fundamental rights, contends that the stated intentions of the National Institutes of Health constitute torture, inhuman treatment, and willful killing.[192] Enduring

---

effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practiced within its jurisdiction, and to "ensure that all acts of torture as defined in article I are offenses under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture." *Id.* at art. VII. Legislative history of United Nations organs underscore the view that nonconsensual biomedical experiments are torture. The United Nations Preparatory Committee on the Establishment of an International Criminal Court included biological experiments, unlawful deportation and confinement as sub-categories of "offences as willful killing, torture or inhuman treatment." *See Preparatory Committee for International Criminal Court Concludes Session*, M2 Presswire, Dec.18, 1997.

[189] *See* Declaration on the Protection of All Persons from Being Subjected to Torture, *supra* note 188, art. III. A *jus cogens*, or peremptory, norm is defined by article 53 of the Vienna Convention as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), reprinted in 8 I.L.M. 679-713 (1969), entered into force Jan. 27, 1980, art. 53.

[190] Declaration on the Protection of All Persons from Being Subjected to Torture, *supra* note 188, art. III.

[191] *See* Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Model Treaty on Extradition, G.A. Res. 45/116, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49 (1991). The international consensus surrounding torture has found expression in numerous international treaties and accords. *See, e.g.*, The American Convention on Human Rights, art. 5, OAS Treaty Series No. 36 at 1, OAS Off. Rec. OEA/Ser 4 v/II 23, doc. 21, rev. 2 (English ed., 1975) ("No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment"); International Covenant on Civil and Political Rights, U.N. General Assembly Res. 2200 (XXI)A, U.N. Doc. A/6316 (Dec. 16, 1966) (identical language); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 211 (semble). Because Evelyn's personhood places her within the curtilage of humanity for the purposes of these fundamental rights, petitioner invokes such conventions before this Court.

[192] That such plans fit the definition of torture is clear upon consideration of life in the laboratory. The history of Jean, an actual laboratory chimpanzee, is typical. Pharma-

physical pain, confinement, isolation, overwhelming anxiety, irreversible injury, and even threats to life itself, a non-human great ape suffers as a human would suffer in similar circumstances. There is no morally or legally acceptable reason to permit the subjection of any great ape to these procedures.[193]

The issue here is not whether these experiments may prove useful. The issue is whether there exist the kind of compelling circumstances that justify the severe deprivation of liberty and the physical intrusions involved in such experiments.[194] Finally, bodily intrusion should not be permitted where there is no possibility of benefiting the subject of the intrusion.[195] Here, no benefit is being sought for non-human great apes themselves. This Court's recognition of Evelyn Hart's personhood would bar the imposition of invasive, nonconsensual procedures upon her, just as the law now prohibits such impositions upon humans.

---

ceutical giant Merck, Sharp & Dohme donated Jean (CH-562) to the Buckshire Corporation in 1981, when she was six years old. In 1988 she arrived at the Laboratory for Experimental Medicine and Surgery in Primates (LEMSIP), at New York University. There, she was continually given vaginal washes and cervical biopsies, and often reported to have self-inflicted wounds. In 1993 she was inoculated with HIV. Following a subsequent study in 1995, Jean suffered a nervous breakdown. She was heavily medicated for the next two years; yet throughout this time she experienced a series of aggressive seizures during which she removed her own fingernails, screamed incessantly, and thrashed out at anyone who came near her. In 1997 LEMSIP shut down and most of its non-human residents were shipped to Frederick Couslton's laboratory in New Mexico for further invasive research. Jean, along with fourteen of her lab mates, was released to a private sanctuary at the insistence of Gloria Grow of the Fauna Foundation, who built a spacious indoor and outdoor facility to house as many chimpanzees as village zoning rules would allow. To this day, Jean suffers from "phantom hand" syndrome, a disorder that causes her to fight off her own hand as though it were attacking her. See Carlos Soldevila, Reuters News Service, Carignan, Québec (July 16, 1998, "A dozen chimpanzees used for biomedical research went out recently for a breather." Further information about Jean and the Fauna Foundation is available from <fauna.found@sympatico.ca>.

[193] *See* GOODALL, *supra* note 133 (discussing non-human great apes' capacity for suffering).

[194] *See, e.g.*, Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 909-10 (1986) ("[If] there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means'" (citation omitted)).

[195] *See* TRIBE, *supra* note 29, § 15-9, at 1334-35. Professor Tribe discusses the reciprocity requirement in physical intrusions, noting that such a requirement "serves to minimize the danger that a bodily invasion will be justified solely on the basis that the greater good of the society is served thereby; that one person's two good eyes, distributed to two blind neighbors, might yield a net increase in happiness on the theory that one blind person will experience less misery than two, cannot justify a governmental decision to compel the exchange." *Id.*

B. THE GOVERNMENT'S PLAN OFFENDS U.S. OBLIGATIONS UNDER INTERNATIONAL LAW AND THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION

1. THE UNITED STATES RECOGNIZES INTERNATIONAL NORMS PROHIBITING TORTURE.

The United States recognizes that international law prohibits torture, under The Declaration on the Protection of All Persons from Being Subjected to Torture (the "Torture Convention").[196] The United States has ratified the Torture Convention;[197] thus, under Article VI of the Constitution, it is the supreme law of the land.

The Torture Convention embodies an essential principle of international legal norms. Theodor Meron recognizes the "irreducible core" of four fundamental rights: "the right to life and the prohibitions of slavery, torture and retroactive penal measures."[198] Freedom from torture has been treated as a fundamental legal right under domestic as well as international law.[199] International law is di-

---

[196] The Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc. A/1034 (1975).

[197] Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L. L. 341, 347-48 (1995)

In 1988 President Reagan sought Senate consent to United States ratification of the Convention against Torture with reservations, and with a declaration that it shall not be self-executing. The executive branch apparently decided that the Convention should not be ratified until Congress enacted implementing criminal legislation required by the Convention. Congress finally enacted such legislation in April 1994 and the United States ratified the Torture Convention in October 1994.

Id.

[198] Theodor Meron, *On A Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 11 (1986). Meron explains that the prohibition against torture is a fundamental right, observing its status as a non-derogable right under the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673, art. 4(1).

[199] *See* Filartiga v. Peña-Irala, 630 F.2d 876, 882. (2nd Cir. 1980). Stating that "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody," id. at 881, the *Filartiga* court found the prohibition against torture to be a basic principle of customary international law: "The treaties and accords. . . as well as the express foreign policy of our

rectly enforceable through the Supremacy Clause of the United States Constitution,[200] which ensures that ratified treaties become part of the supreme law of the United States, equal in status to a federal statute.[201]

2. THE EIGHTH AMENDMENT MAY ACQUIRE MEANING AS PUBLIC OPINION BECOMES ENLIGHTENED BY A HUMANE JUSTICE, AND IS BROAD ENOUGH TO PROHIBIT THE ACT OF TORTURE.

Not only has the United States ratified the Torture Convention;[202] torture is also repugnant to the Eighth Amendment.[203] Although the Eighth Amendment refers only to punishment, the Supreme Court in *In re Kemmler* held that the Eighth Amendment does indeed prohibit torture.[204] In *Weems v. United States*, the Supreme Court noted that the Eighth Amendment may be "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes en-

---

government, all make it clear that international law confers fundamental rights upon all people vis-à-vis their own governments. . .[W]e hold that the right to be free form torture is now among them." *Id.* at 885.

[200] The Constitution states:

[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2, cl. 2 (emphasis added). *See generally* Kathryn Burke, et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291 (1983).

[201] *See* U.S. CONST. art. VI, § 2, cl. 2. *See also* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), reprinted in 8 I.L.M. 679-713 (1969), entered into force Jan. 27, 1980, art. 2. Treaties prevail over conflicting state law. Missouri v. Holland, 252 U.S. 416, 432 (1920). A treaty is ratified when the President signs it on the Advice and Consent of two-thirds of the United States Senate. U.S. CONST. art. II, § 2, cl. 2.

[202] The U.S. has also ratified the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, reprinted in 6 I.L.M. 368 (1967), adopted by the United States Sept. 8, 1992.

[203] U.S. CONST. amend. VIII prohibits "cruel and unusual punishment."

[204] 136 U.S. 436, 447 (1890).

lightened by a humane justice."[205] For example, a majority of the Court indicated that "deliberate indifference to serious medical needs" of prisoners would violate the Eighth Amendment.[206] In *Trop v. Dulles*,[207] the Court observed that "evolving standards of decency that mark the progress of a maturing society" should inform interpretation of the Eighth Amendment.[208]

The prohibition of cruel and unusual punishment has always focused on the right to be free from physical and mental torture. Recalling Kafka's story "The Penal Colony," Professor Tribe wrote that "even the most awful tortures, it must be remembered, can be cloaked with such clockwork logic that many become persuaded of their perverse justice."[209] The court has addressed "serious constitutional questions respecting cruel and unusual punishment" in a case in which a prisoner was alleged to have been forced into medical and psychological experimentation.[210] If cruel and unusual punishment of convicted prisoners is forbidden by the United States Constitution, then, it is hard to find any principle permitting cruel and unusual punishment of innocent individuals.[211]

3. THIS CASE SHOULD BE HEARD AND DECIDED, BECAUSE EVELYN HART'S CAUSE OF ACTION REFLECTS IMPORTANT WAYS IN WHICH INTERNATIONAL LAW INFLUENCES THE SCOPE OF PROTECTIONS AGAINST ABUSES UNDER NATIONAL LAW IN STATE AND FEDERAL COURTS.

In the early nineteenth century, in *Foster v. Neilson*,[212] the Supreme Court

---

[205] 217 U.S. 349, 378 (1910). Justice McKenna's majority opinion stated that "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." *Id.* at 373.

[206] Estelle v. Gamble, 429 U.S. 97, 106 (1976).

[207] 356 U.S. 86 (deeming §401(g) of the Nationality Act of 1940 unconstitutional).

[208] *Id.* at 100-01.

[209] *See* TRIBE, *supra* note 29, §15-9, at 1332.

[210] Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973).

[211] In the words of Justice Powell, "if it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." Youngberg v. Romeo, 457 U.S. 307, 316 (1982).

[212] 27 U.S. (2 Pet.) 253, 314-15 (1829).

introduced a significant restraint on the application of treaties in domestic law: the doctrine of self-execution.[213] The Court held that a treaty is directly implementable in the United States only if "it operates of itself without the aid of any legislative provision."[214] In determining whether a treaty may be deemed self-executing, the Third Restatement of the Foreign Relations Law of the United States advises courts to consider the intent of the signatory parties, and any statements that the executive or legislative branches made concerning the treaty.[215] Some international legal scholars, however, have argued that United States courts neglect their duty under the Supremacy Clause if they do not faithfully implement the terms of a ratified treaty.[216]

The issue of whether human rights clauses of the United Nations are self-executing in the United States, once ratified, is unsettled. The International Court of Justice has ruled that the human rights provisions of the United Nations Charter impose binding obligations on all United Nations member states.[217] The Supreme Court of California, however, in *Sei Fujii v. State*,[218] ruled that articles 55(c) and 56 of the United Nations Charter, which stipulate that member nations will promote the observance of human rights without discriminating on the basis of race, could not form the basis of a suit absent domestic implementing legisla-

---

[213] *See* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INTL. L. 760, 782 (1988) (concluding that all treaties are presumptively self-executing, but excepting those which, by their terms considered in context, require domestic implementing legislation or seek to declare war on behalf of the United States: "All treaties are supreme federal law, but some treaties, by their terms, are not directly operative.")

[214] *Foster*, 27 U.S at 314-15 (where Chief Justice Marshall analogized such a treaty to a contract that awaited congressional "execution").

[215] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987). The intent of the United States determines whether an agreement is to be self- executing in the United States or should await implementation by legislation or appropriate executive or administrative action. *Id.* Persuasive evidence of U.S. intent includes "any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement." *Id.*

[216] See, e.g., RICHARD LILLICH & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 71 (1979) ("At a minimum, [the Supremacy Clause] means that treaty obligations are automatically incorporated into U.S. domestic law, a situation that contrasts with that of most other domestic legal systems").

[217] Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), 1971 I.C.J. 16, 57.

[218] 242 P.2d 617 (Cal. 1952).

tion.[219] Former California Supreme Court Judge Frank Newman has pointed out that subsequently ratified United Nations treaties such as the International Covenant on Civil and Political Rights (ICCPR) contain a degree of specificity not found in the United Nations Charter, increasing the likelihood that those subsequent treaties are self-executing.[220]

Although The Vienna Convention recognizes that states may enter a reservation when ratifying a particular provision of a treaty unless the reservation is incompatible with the object and purpose of the treaty, [221] some treaty provisions are considered so fundamental that no limitations can be contemplated in their ratification.[222] It is this non-derogability that distinguishes a peremptory from a customary norm.[223] A norm retains its peremptory character so long as a sub-

---

[219] *Id.* at 621-22. For a critique of the Sei Fujii decision, and the failure of federal courts to accommodate international law, most notably the United Nations Charter and the Universal Declaration, *see* Richard B. Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms, in* INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE: THE ROLES OF THE UNITED NATIONS, THE PRIVATE SECTOR, THE GOVERNMENT AND THEIR LAWYERS, 105, 130-31 (James C. Tuttle, ed., 1978). *See also* Virginia Leary, *When Does the Implementation of International Human Rights Constitute Interference Into the Essentially Domestic Affairs of a State?, in* INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE, *supra*, at 15, 21. Leary concludes that "gross violations of human rights can no longer be considered a matter essentially within the domestic jurisdiction of the offending state under the U.N. Charter, although there are limitations on the permissible actions of the U.N. in response to such violations in the absence of the finding of a direct threat to international peace." *Id.*

[220] *See* People v. Mirmirani, 636 P.2d 1130, 1138 n.1 (Cal. 1981) (Newman J., concurring); *see also* F. NEWMAN & D. WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS 294 (1990) (citing Frank Newman, *Interpreting the Human Rights Clauses of the U.N. Charter*, 1972 Revue des Droits de l'Homme 283). Newman and Weissbrodt argue that the International Bill of Human Rights provides the authoritative interpretation of the more vague language of articles 55 and 56 of the United Nations Charter. *Id.* at 582. The greater specificity that the International Bill of Human Rights offers therefore rebuts any suggestion that its provisions may be considered non-self-executing due to vagueness. *Id.* This position is known as the Newman-Berkeley thesis. *Id.* at 582 n.14.

[221] Vienna Convention on the Law of Treaties, *supra* note 189, at art. 2(1)(d), and art. 19.

[222] Art. 4(2) of International Covenant on Civil and Political Rights ("ICCPR"), *supra* note 191, stipulates that State parties may not derogate from article 7: "[N]o derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision."

[223] *See* Vienna Convention on the Law of Treaties, *supra* note 189 at art. 53 (defining a peremptory norm as a norm from which no derogation is permitted); *see also* Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 816 (1990) (defining customary norms as "those that are so widely accepted by the international

stantial majority of nations recognize it.[224] Peremptory norms include "gross violations of human rights" such as torture.[225]

Torture is expressly or implicitly prohibited by the constitutions of more than fifty-five nations,[226] including this one through the Eighth Amendment.[227] Chief Justice Marshall stated that when acts are proscribed by the law of nations, such prohibitions are binding on the United States courts.[228] This case should be heard and decided, because Hart's claim flows directly from the United States ratification of the Torture Convention, and her cause of action can be addressed through her substantive right as embodied in the Eighth amendment. International Law and the Eighth Amendment operate no less than the Fourteenth Amendment to afford protection to legal persons. Evelyn Hart requests a prohibition of the treatment planned by the government and the University, because that treatment constitutes torture, and because in the context of both the Eighth Amendment and International Law, Petitioner meets the definition of a person entitled to legal protection.

---

community that they are binding even on states that have not ratified treaties embodying them").

[224] Vienna Convention on the Law of Treaties, *supra* note 189, at art. 53.

[225] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporter's n.6 (1987); *see also* David Heffernan, *America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 CATH. U. L. REV. 481 (1996).

[226] 48 Revue Internationale de Droit Penal Nos. 3 & 4 at 208 (1977).

[227] *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

[228] As stated by Chief Justice Marshall in The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815), in the absence of a congressional enactment, United States courts are "bound by the law of nations, which is a part of the law of the land."

IV. FORCING THE PETITIONER TO SUBMIT TO CONFINEMENT AND BIOMEDICAL RESEARCH VIOLATES THE THIRTEENTH AMENDMENT'S REPUDIATION OF SLAVERY

A. TREATMENT OF NON-HUMAN GREAT APES AS CHATTELS IS REPUGNANT BOTH TO THE SPIRIT AND PURPOSE OF THE THIRTEENTH CONSTITUTIONAL AMENDMENT

From time to time, the legal meaning of "person" has had to be revised to include someone who had been excluded. Former slaves and their descendants were accorded personhood because sensitivities changed, so that what had become socially abhorrent became legally intolerable. As a society, we observed that the essence of slavery is the assignment of a lower valuation to individuals based upon morally arbitrary characteristics. Enslaved individuals are valued as mere commodities rather than as persons, who must have the higher valuation of respect.[229]

When non-human great apes are treated as objects to be bought and sold, their unique individual natures and capacities are subverted to the purposes of others. *They are enslaved.* Our knowledge of the capacities of the non-human great apes demands a serious and urgent reconsideration of their inclusion in the legal category "property." Recategorization of this kind is not without precedent.

In 1865, the Thirteenth Constitutional Amendment pronounced that "[n]either slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[230] With that announcement, an entire class of individuals was legally relocated from the category called "property" to the category called "person." For it was not nature that made their class into property; it was law, and it was law that changed their classification.[231] Discussing the impact of this legal development on U.S. property law, Justice Swayne wrote in 1866:

> The thirteenth amendment. . .[t]renches directly upon the powers of the states and of the people of the states. . .It destroyed the most important relation between capital and labor in all the states where slavery existed.

---

[229] *See* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 71 (1993).

[230] U.S. CONST. amend. XIII, § 1.

[231] *See* The Civil Rights Cases, 109 U.S. 3, 33 (Harlan, J., dissenting).

> It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions and a conflict of interests, real or imaginary, as old as the constitution itself.[232]

The lead of the Thirteenth Amendment was not immediately followed throughout the nation. In the case of the General Rucker,[233] a boat worker with a skull injury explained to the court how the mate of the boat beat him with a tool until he fell overboard.[234] The mate forced him back to work by threatening to shoot him. Judge Hammond opined, "Of course it is possible that this negro man of inferior intelligence conceived the idea. . .of taking advantage of the circumstance that in falling he had cut his head to wholly fabricate a story. . .[but] it was well said by the learned counsel of libelant that these simple-minded negroes are scarcely equal to such a scheme as that."[235] The Judge surmised that

> this mate was pursuing the usual method—to which they are nearly all addicted, and which they dislike to give up—of enforcing obedience to his orders by physical force. . .It is fairly to be inferred that. . .the mate was engaged in driving the hands to the speedy work necessary to enable the boat to leave that evening, and . . .he tapped him on the head with the monkey-wrench. . .severely enough to make an ugly wound.. . .[236]

A modern reader will recoil at the thought that beating people was a common addiction, and that the plaintiff could be assaulted yet again in court by the prejudice apparent in the judge's derisive handling of his case. Sadly, the pernicious "addiction" to cruelty plays out today, but the most blatant examples include those of humans enforcing their will upon non-human "workers." There is an uncanny parallel between the beating of the ship worker "by the usual method" and the treatment of non-human great apes in profit-making ventures. We saw an example of this when a dancer in a Las Vegas nightclub videotaped widely-known ape "trainer" Bobby Berosini back-stage before the beginning of his show.[237] The tape shows Berosini, immediately before going on stage, grab-

---

[232] United States v. Rhodes, 27 F. Cas. 785, 788 (D. Ky. 1866).

[233] Hall v. Sims, District Court, 35 F. 152 (1888).

[234] *Id.* at 152-53.

[235] *Id.*

[236] *Id.* at 154.

[237] *See* People for the Ethical Treatment of Animals v. Bobby Berosini,

bing, slapping, punching, and shaking orang-utans while several handlers hold the animals in position.[238] The tape also shows Berosini striking the animals with a rod.[239] At least nine separate incidents were taped in the short period between the 9th and the 16th of July, 1989.[240]

Aristotle considered slavery an intolerable condition—for Greeks.[241] On the other hand, he believed that the physical characteristics of some living beings made them slaves by "nature":[242]

> . . .so is it naturally with the male and the female; the one is superior, the other inferior; the one governs, the other is governed; and the same rule must necessarily hold good with respect to all mankind. Those men therefore who are as much inferior to others as the body is to the soul, are to be thus disposed of, as the proper use of them is their bodies, in which their excellence consists; and if what I have said be true, they are slaves by nature, and it is advantageous to them to be always under government. He then is by nature formed a slave who is qualified to become the chattel of another person, and on that account is so, and who has just reason enough to know that there is such a faculty, without being indued of the use of it; for other animals have no perception of reason, but are entirely guided by appetite, and indeed they vary very little in their use from each other; for the advantage which we receive, both from slaves and tame animals, arises from their bodily strength administering to our necessities. . .[243]

Modern society can no longer justify treating some humans as "slaves by na-

---

Ltd., 895 P.2d 1269, 1271 (Nev. 1995).

[238] *Id.* at 1272-73.

[239] *Id.*

[240] *Id.* Similar accounts are available in the context of the circus industry. *See, e.g.*, Helen Johnstone, *Chipperfield Admits She was Wrong to Whip Chimp*, THE TIMES (London), Home News, Feb. 8, 1999 (describing circus trainer Mary Chipperfield's conviction for twelve counts of cruelty to an 18-month-old chimpanzee who was kicked and whipped and spent fifteen hours out of twenty-four in a darkened box).

[241] *See* GEORGE CHRISTIE & PATRICK MARTIN, JURISPRUDENCE 90 (2d ed. 1995).

[242] Aristotle, *Animals are for Our Use, reprinted in* POLITICAL THEORY AND ANIMAL RIGHTS 57 (Paul A.B. Clarke & Andrew Linzey eds., 1990).

[243] *Id.* at 56-57.

ture." Given what we now know about non-human great apes, slavery is every bit as intolerable when imposed upon them. Geza Teleki provides accounts of the modern chimpanzee trade, explaining that at least ten chimpanzees die for every young one that survives more than one year at the overseas destination.[244] The details are shockingly reminiscent of the methods of the human slave trade:

Most prized by the dealers and their clients are nursing infants who are less than two years of age and totally dependent on their mothers for survival. The slaughter begins in the wilderness as hunters with shotguns or flintlocks loaded with pebbles or metal shrapnel attack mothers and other protective group members. Many infants die when this crude ammunition scatters to hit both mothers and their clinging offspring. Pit traps, poisoned food, wire snares, nets and even dog packs are also used to kill adults defending the youngsters. More deaths occur during transport to villages. Infants are often tied hand and foot with wire, causing circulation loss and septic wounds, and are trucked to urban centres in tiny cages or tightly bound sacks, often under heavy suffocating loads to avoid detection at checkpoints. Few receive care *en route*, so starvation and dehydration are commonplace. While awaiting shipment overseas, more die of neglect in filthy holding pens and at airports where flight delays lead to exposure. Cramped in tiny crates, even carried in personal luggage, the victims often must endure days of travel through several transit points which offer ample opportunities for falsifying documentation. Some infants manage, against all odds, to survive this ordeal only to die at the final destinations from cumulative physical and psychological trauma.[245]

Shaking in cages, ravaged by malnutrition, negligently or deliberately injured by handlers, the young chimpanzees who survive are brought to dealers who sell them to private collectors for thousands of dollars each.[246] Similarly, international investors put up considerable sums of money to trade in humans.[247] Historians estimate that between thirty and sixty million Africans were caught up in fours centuries of slave trade, but most did not survive the march to the ships, the wait in holding stations or the voyage itself:[248]

---

[244] Geza Teleki, *They Are Us, in* THE GREAT APE PROJECT, *supra* note 1, at 301.

[245] *Id.*

[246] Two investigators, posing as buyers, were offered five chimpanzees in one day in the markets of Istanbul. *See* Gareth Jenkins, *Baby Chimps Starve in Booming Turkish Trade*, THE SUNDAY TIMES (LONDON), July 5, 1998, at 20.

[247] ROBERT LISTON, SLAVERY IN AMERICA 32 (1970).

[248] John Henrik Clarke, *Introduction* to TOM FEELINGS, MIDDLE PASSAGE: WHITE SHIPS/BLACK CARGO (1995).

> On many of these ships, the sense of misery and suffocation was so terrible in the 'tween-decks—where the height was only 18 inches, so that the unfortunate slaves could not turn round, were wedged immovably, . . . and chained to the deck by the neck and legs—that the slaves not infrequently would go mad before dying or suffocating.[249]

Cases heard prior to the passage of the Thirteenth Amendment give us an idea of how slaves were bought and sold. In an 1848 court document valuing "certain goods and chattels,"[250] each adult male, regardless of listed skill, was valued at $2,000.[251] Each woman was valued at $1,000, including "one negro woman, a tanner by trade, and skilful therein."[252] Children were appraised at $500.[253]

Enslavement transcended economics. It quashed autonomy and the most basic individual dignity. Slave families were broken up at court sales in order to release more capital.[254] Neither slave marriages nor parental relationships had legal standing.[255] Although slaves had no recourse to the law, the law could be applied to terrorize them. For runaways, laws encouraged scalping, whipping, branding, amputations, castrations, (via a statute providing a slave "shall be gelt"), and death.[256] Virginia law exculpated whites for homicide of slaves.[257] In

---

[249] Liston, *supra* note 247, at 35-36.

[250] The term "chattel" symbolizes the parallel between the institution of human slavery and the exploitation between species; the word "cattle" is derived from "chattel." *See* Paola Cavalieri & Peter Singer, *The Great Ape Project – and Beyond, in* THE GREAT APE PROJECT, *supra* note 1, at 304.

[251] Daggs v. Frazer, 6 F.Cas. 1112 (D. Iowa. 1849).

[252] *Id.*

[253] *Id.*

[254] Thomas D. Russell, *Articles Sell Best Singly: The Disruption of Slave Families at Court Sales*, 1996 UTAH L. REV. 1161, 1162 (1996).

[255] *See* Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CALIF. L. REV. 447 (1997).

[256] 7 Statutes of South Carolina, at 359-60 (Act of 1696, ch. 314). Barbara L. Bernier noted that castration was deemed a medical procedure, and state laws throughout the south permitted it to be performed by slaveholders. Barbara L. Bernier, *Class, Race, and Poverty: Medical Technologies and Sociopolitical Choices*, 11 HARV. BLACKLETTER L. J. 115, 121 (1994). Bernier refers to WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, 154, 156 (1968), which explains the common

response to a 1712 insurrection, New York judges sentenced twenty-five slaves to death.[258] Three were sentenced to be burned at the stake - "one by slow fire in torment for eight to ten hours and until consumed by ashes; one to be broken on the wheel and so languish until dead; and one to be hung in chains without sustenance until dead."[259] One of the convicted was pregnant; her sentence was reprieved until she had given birth; then she was hanged.[260]

HOW ON EARTH WERE THESE ACTS JUSTIFIED IN THE MINDS OF THOSE WHO CARRIED THEM OUT?

The rationale for such monumental atrocities had to be accumulated over a vast period of time.[261] The ancient concept of the Great Chain of Being ranked creation from inanimate forms such as rocks, to plants, to non-human animals, to humans, to the many ranks of heavenly creatures, with God at the pinnacle.[262] The "lowest" humans ranked just over the "highest" non-human animal, presumably simian.[263] This mythical Chain "universalize[d] the principle of hierarchy."[264]

Carolus Linnaeus elaborated on the principle, in his Systema Naturae.[265]

---

practice as stemming from the perception of slaves as chattel to be controlled by their owners, and a method of both punishment and sexual control.

[257] WILLIAM W. HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 (1823) 481 (Act of 1680, ch. 10).

[258] Kenneth Scott, *The Slave Insurrection in New York in 1712*, 45 N.Y. HIST. SOC'Y Q. 43, 62 (1961).

[259] *Id.*

[260] *Id.*

[261] *See* William M. Wiecek, *Part I: The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1733 (1996).

[262] *Id.* at 1734; *see also* ARTHUR O. LOVEJOY, THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA (1936).

[263] *Id.*

[264] WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 228 (1968).

[265] *Id.* at 218-21 (examining Linnaeus's 1758 work SYSTEMA NATURAE).

Although all humans appeared within the category of Homo Sapiens, Linneas divided them into seven variations: American, European, Asiatic, African, wild men, Monstrosus, and Troglodytes.[266] In the 1770s, Dutch anatomist Peter Camper found in his collection of skulls a "facial angle" that revealed a gradation of similarity starting from non-human apes and continuing through Africans to Europeans.[267] The theory that races of humans are separate species appears in philosopher David Hume's division of humans according to his opinion of their cultural merits:

> I am apt to suspect the negroes, and in general all the other species of men (for there are four or five different kinds) to be naturally inferior to the whites. There never was a civilized nation of any other complexion than white, nor even any individual eminent either in action or speculation. No ingenious manufactures amongst them, no arts, no sciences.[268]

In other words, Africans were to be subjected to grotesque abuse because they were considered less than human by those who wished to popularize a certain worldview. Racism, in its origins, was speciesism.

Modern scholarly debate has sought the origins of the "law of slavery." Slave law can be regarded as a social custom congealed into legal precedent.[269] This principle was used to legitimate slavery by British courts[270] and the United States Supreme Court.[271] The British government recognized slavery in the

---

[266] *Id.* at 220-21.

[267] *See* THOMAS GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 69-70 (1997).

[268] William M. Wiecek, *supra* note 261, at 1734-35 (quoting David Hume, *Of National Characters* (1753-54 ed.), *in* ESSAYS MORAL, POLITICAL, AND LITERARY (1898)). Similarly, Dr. Samuel Morton in *Crania Americana* stated that skulls from different races consistently differed from ancient times. Morton expounded the idea of race as a separate species. *See* D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L. J. 437, 481 n.178 (1993).

[269] *See, e.g.*, J. A. C. THOMAS, THE INSTITUTES OF JUSTINIAN: TEXT, TRANSLATION AND COMMENTARY 6 (Book I, Tit. II) (1975) ("long-practiced customs endorsed by the acquiescence of those who observe them take on the mantle of law").

[270] *See* The Slave, Grace, 2 Hag. 94 (1827) (stating that "ancient custom is generally recognised [sic] as a just foundation of all law").

[271] *See* The Antelope, 23 U.S. (10 Wheat) 66, 115 (1825) (noting that the slave trade, and a fortiori slavery itself, "has claimed all the sanction which could be derived from long usage, and general acquiescence").

colonies as an object of both private and public international law by the nineteenth century,[272] providing one of the most stable foundations for the legitimacy of slavery in the United States.[273]

South Carolina derived the legal precedent for lifetime, race-based slavery from seventeenth century Barbadian laws.[274] Although some ostensibly "welfarist" legislation was extended,[275] historian Winthrop Jordan called Carolina's slavery "the most rigorous deprivation of freedom to exist in institutionalized form anywhere in the English continental colonies."[276] By the mid-1700s, slaves were definitively categorized as chattels.[277]

In 1641, Massachusetts adopted the Body of Liberties, cited "the law of God" to differentiate between free people and those permitted to be enslaved.[278] The framers incorporated the detailed regulations in Leviticus 25:39-55, including the distinction between "your brethren the children of Israel"[279] and "the heathen

---

[272] *See* Wiecek, *supra* note 261, at 1775.

[273] *See generally* The Antelope, 23 U.S. (10 Wheat.) 66 (1825).

[274] Regarding the influence of Barbados on mainland slave codes, see M. Eugene Sirmans, *The Legal Status of the Slave in South Carolina, 1660-1740*, 28 J. S. HIST. 462, 462-73 (1962). Beginning with the premise that Africans were "brutish," the Barbadian 1661 slave code imposed a violent police regime. *Id.; see also* Richard S. Dunn, SUGAR AND SLAVES: THE RISE OF THE PLANTER CLASS IN THE ENGLISH WEST INDIES, 1624-1713 283-342 (1972).

[275] *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, 189 (1978)

Gradually, the legislature began to realize that slaves were subjected to brutal acts by their masters, whether in the form of physical injury or failure to provide adequate provisions, and the legislature then made some efforts to protect the slaves. The tension between the master's absolute right to control his slave and a societal concern for the minimum well-being of slaves and for maintaining a viable slave system becomes apparent. However, the statutes were devoid of any enforcement power to protect the slave from his master's abuses.

Id.

[276] *See* Wiecek, *supra* note 261, at 1778-79.

[277] *See id.* at 1779.

[278] *See id.* at 1743, (citing Article 91, The Laws and Liberties of Massachusetts 4 (Max Farrand ed., 1929)).

[279] *Leviticus* 25:46.

that are round about you."[280] Theophilus Eaton, a founder of the New Haven colony, claimed to own Africans in 1658 as "servants forever or during his pleasure, according to Leviticus, 25: 45 and 46."[281]

The year of 1705 saw Virginia's first comprehensive slave "code."[282] Africans were deemed more economical than white servants, because the planters and government were willing to control them with measures they considered too extreme to impose on other English people.[283] Virginia's leaders banned lifetime enslavement of Christian people, implicitly limiting slavery to Africans and Native Americans.[284]

Slavery, then, entered into law gradually, yet through deliberate legislation. By entering the realm of property relationships, slaves were diminished considerably from human stature, by the operation of law. They became the objects of inheritances, creditors' rights, warranty, life estates and mortgages.[285] They were subjects of import duties and property taxes.[286] Any initial claim to free status and of legal protection of inherent basic rights was invisible by the early eighteenth century.[287] Commercial implications of the developments in exploitation of human beings became fully evident just before the Civil War, by which

---

[280] *Leviticus* 25:44.

[281] Wiecek, *supra* note 261, at 1741-42 (quoting Simeon E. Baldwin, *Theophilus Eaton, First Governor of the Colony of New Haven, in* 7 NEW HAVEN COLONY HIST. SOC'Y PAPERS 11 (1908)).

[282] *See* Wiecek, *supra* note 261, at 1753.

[283] *Id.*, at 1754.

[284] *Id.*

[285] *See generally* REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA (Thomas Jefferson ed., 1829) (reporting forty-two cases, twenty-three of which involve slavery).

[286] *See Letter from Emanuel Downing to John Winthrop, 1745, in* DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE SLAVE TRADE TO AMERICA 7 (Elizabeth Donnan ed.).

[287] *See* T.H. Breen, *A Changing Labor Force and Race Relations in Virginia 1660- 1710*, 7 J. SOC. HIST. J 3, 18 (1973) (stating that, despite the possibility for a few decades "to overlook racial differences, a time when a common experience of desperate poverty and broken dreams brought some whites and blacks together," "[b]y 1700, whites had achieved a sense of race solidarity at the expense of blacks. Negroes were set apart as objects of contempt and ridicule. The whites, even the meanest among them, always knew there was a class of men permanently below them").

time corporations had begun to own slaves.[288]

The case of Dred Scott and his family held that descendants of emancipated slaves were not "citizens" of the several states at the adoption of the Constitution.[289] There was more. Slaves and their descendants, free or not, were not "acknowledged as a part of the people, nor intended to be. . . ."[290] Chief Justice Roger B. Taney stated as the reason for their exclusion that: "they had for more than a century before been regarded as beings. . . so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit;" that a slave was "bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it;" and that

> this opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute, and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.[291]

We now know that the society based upon the supposed moral inferiority of human slaves was based on dangerous illusions. As a result, constitutional law has since been amended. The idea of moral inferiority of women to men has likewise been outgrown.[292] Industrial society, with its increasingly sophisticated knowledge in social and scientific fields, has neither belief in nor use for involuntary servitude. Contemporary scientific knowledge is demonstrating the connection between ourselves and our fellow great apes at the same time that new techniques render our use of the non-human great apes in research unnecessary. The prohibition of slavery is already part of our Constitution. Therefore, no Constitutional Amendment is needed for Evelyn Hart and her class.

B. EVEN POTENTIAL SUCCESSES IN MEDICAL RESEARCH DO NOT SUMMARILY JUSTIFY THE SUBJECTION OF A CLASS TO NON-

---

[288] Wiecek, *supra* note 261, at 1713.

[289] Dred Scott v. Sandford, 60 U.S. 393, 404-05 (1856).

[290] *Id.* at 407.

[291] *Id.*

[292] Contrast Frontiero v. Richardson, 411 U.S. 677 (1973) with *Muller v. Oregon*, 208 U.S. 412 (1908).

CONSENTUAL EXPERIMENTATION

The use of human slaves in medical experimentation was widespread,[293] and the techniques applied blur the line between research and torture, as evidenced by the following examples. Dr. Thomas Hamilton's search for a remedy for sunstroke involved placing a slave in an open-pit oven in rural Georgia.[294] J. Marion Sims repeatedly performed painful surgery on twenty-six Alabama slave women who needed treatment, but underwent surgery without anesthesia despite its availability.[295] In 1849, after the thirtieth operation on his first subject, Sims found a cure for vesico-vaginal fistulae.[296]

The arguments advanced to justify such experiments are the same as those used to defend research on the Petitioner in this case: the quest for advances in medicine. Where slaves were used, medical experimentation appears to have worked. For example, Thomas Jefferson personally conducted smallpox vaccination experiments on his slaves, and his efforts met with success.[297] Some such experiments surely increased life expectancies in the United States, but the price paid by the slaves was often irreversible damage, or death.[298] As Justice Ross of the New York Supreme Court wrote in a modern case involving subjects who were involuntarily hospitalized at various psychiatric institutions:

> The benefits of, and needs for, the medical research at issue are clear and evident; but at what cost in human pain and suffering to those subjects who are not capable of expressing either their consent or objection to participation? . . .[H]owever laudable the ends which defendants seek to achieve may be, those results must be gained through means within their grant of authority and which properly safeguard the rights of the plaintiffs. It may very well be that for some categories of greater than minimal risk non-therapeutic experiments, devised to achieve a future benefit, there is

---

[293] *See* Barbara L. Bernier, *supra* note 256, at 120.

[294] TODD L. SAVITT, MEDICINE AND SLAVERY: DISEASES AND HEALTH CARE OF BLACKS IN ANTEBELLUM VIRGINIA 293 (1978).

[295] Barbara L. Bernier, *supra* note 256, at 118-119.

[296] *Id.* at 119.

[297] *Id.* at 120 (explaining that, "[a]s a result of Jefferson's efforts, vaccinations became an established procedure in Virginia and ultimately throughout the United States").

[298] *Id.* at 119-120.

> at present no constitutionally acceptable protocol for obtaining the participation of incapable individuals. . .The alternative of allowing such experiments to continue, without proper consent and in violation of the rights of the incapable individuals who participate, is clearly unacceptable.[299]

Thus, even where results are perceived to have considerable value, the core problem remains unaffected: namely, the disregard for the violation of the individual's right to give or to withhold consent. Concern for the well being of potential subjects, the paramount concern in the treatment setting, must also be the overriding concern in research. To disregard this principle is to lead society down a dangerous path.

V. SANCTUARY IS AN APPROPRIATE ANSWER FOR THE SPECIFIC CIRCUMSTANCES OF PETITIONER'S CASE

Once we have recognized an individual's claim to certain basic rights, the next step is to frame a system in which these rights can and will be meaningfully enforced. As Ronald Dworkin has put the point, "Any plausible interpretation of the rights people have under the Constitution must be complex enough to speak to the remedy as well as the substance."[300] In the case of non-human great apes, once the immorality of capturing them from their habitat and/or forcing them to breed in captivity is appreciated, and then recognized by the law, there remains the practical issues of how we are to treat those non-human hominids already living in the U.S. In discussions about liberty, the idea of "benign captivity" of non-human great apes in zoos and other institutions that are designed for human education or entertainment is sometimes advanced.[301] Some zoos and educa-

---

[299] T.D. v. N.Y. State Office of Mental Health, 650 N.Y.S.2d 173, 177 (1996).

[300] RONALD DWORKIN, LAW'S EMPIRE, *supra* note 36, at 390.

[301] *See, e.g., Prepared Statement of Richard Lattis, Senior Vice President and General Director, Zoos and Aquarium Wildlife Conservation Society [and] President, American Zoo and Aquarium Association, Before the House Committee on Resources Subcommittee on Fisheries Conservation, Wildlife and Oceans*, FEDERAL NEWS SERVICE, June 20, 2000. Testifying on H.R. 4320 - the Great Ape Conservation Act - Richard Lattis stated that the American Zoo and Aquarium Association [AZA] mission is "to support membership excellence in conservation, education, science and recreation." *Id.* Collectively, AZA institutions "teach more than 12 million people each year in living classrooms, dedicate over $50 million annually to education programs that focus on, among other things, the devastating effects of the loss of vital species habitat and the illegal trade in endangered species parts and products, invest over $50 million annually in scientific research and support over 700 field conservation and research projects in 80 countries." *Id.* Lattis also stated, "AZA member institutions have

tional institutions maintain healthy great ape populations for scientific study.[302] The message this conveys is that human education is more important than the freedom of non-human great apes. The zoo, like the laboratory, benefits from the unexamined assumption that the liberty interests of nonhuman great apes matter so little that their confinement is appropriate.

Despite the demeaning implications of captivity, there may be instances in which some form of confinement of non-human great apes is necessary, particularly when an individual has become so conditioned to life away from her natural habitat that survival in true freedom is not possible. In such a case, confinement in a sanctuary is appropriate.[303] A decision that confinement is in the best interest of the individual does not mean that public exhibition is also warranted. One commentator, on the issue of constitutional privacy rights, referred to "sanctuary" as an element of privacy that involves "protection against intrusive observation."[304]

Because each chimpanzee, gorilla, bonobo, and orang-utan is a unique and complex personality, each situation should be assessed in terms of the individual

---

established the Species Survival Plan (SSP) program- longterm plan involving genetically-diverse breeding, habitat preservation, public education, field conservation and supportive research to ensure survival for many threatened and endangered species, including all the great apes—chimpanzees, gorillas, orangutans and bonobos (a.k.a., pygmy chimpanzees)." *Id.*

[302] *Id.* (testifying that "the AZA Ape Advisory Group scientifically manages apes in zoological environments and promotes primate conservation in the wild.")

[303] *See What is the Great Ape Project's policy on sanctuaries for non-human great apes?*, The Great Ape Project – GAP FAQ, Section 3: Principles and Policies, 3.2 http://www.greatapeproject.org/gapfaq.html (visited Nov. 17, 2000).

[304] *See generally* Gary L. Bostwick, Comment, *Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447 (1976). Repose refers to privacy as (i) freedom from unwanted stimulii; (ii)sanctuary, which is protection against intrusive observation; and (iii) intimate decision, which is the autonomous making of life choices. Id. The importance of the interest in sanctuary can be brought into sharp focus when we consider the now-famous Mende group, captives from the mutineered ship "Amistad." Although they were not made slaves, the group's members lived in a New Haven jail for two years, ostensibly for their own safety. Jean Thompson, *Where the Walls Speak*, THE BALTIMORE SUN, Mar. 1, 1998, at 1R. There, they were tutored in English speech and etiquette, and examined by phrenologists, who believed that the shape of one's head revealed intellect and personality. *Id.* Plaster casts were made of their heads, followed by wax figures designed for a travelling exhibit. *Id.* The jailer, meanwhile, collected 12½ cents from thousands of tourists who came to have a look at the captives. *Id.* The U.S. District Court declared them free in January 1841, a decision upheld by Supreme Court in March of the same year. *Id.*; *see also* Jean Thompson, *Tracing the Steps of Amistad Survivors*, THE BALTIMORE SUN, Mar. 1, 1998, at 1R (describing the Mende group's subsequently restricted lives in Connecticut, where slavery continued until 1848).

whose life and future is being considered.[305] Evelyn Hart, like some other great apes in similar situations, cannot regain her freedom by returning to Africa. Many non-human great apes who have lived in captivity lack the skills necessary for survival in the wild; moreover, the return journey would be physically and psychologically hazardous.[306] Often, as in this case, a private sanctuary may present the best answer.[307] Evelyn Hart's guardian, Professor Robin Lane, has specified the Fauna Foundation sanctuary as the preferred destination. The sanctuary has made arrangements for her to become a permanent resident.

CONCLUSION

From time to time, but not too often, society as a whole must admit that it was wrong. Collectively, we grow out of certain habits of mind, certain modes of behavior. Examples abound, but human slavery and its abolition is a familiar example as is, more recently, the end of apartheid in South Africa. When the collective prejudices, or unexamined assumptions, which have shaped a particular set of laws are later shown to be wrong—morally wrong, perhaps, as a result of changed morality; factually wrong, perhaps, in light of advances in our knowledge—the right response is for the law to take account of the changed morality, or the new knowledge, or, as in this case, both. We now know that it was wrong to classify Evelyn Hart, and others like her, as property. The law as it now stands cannot be defended, save as a product of the ignorance of its time.

But even recognizing and accepting our moral obligation to the Evelyn Harts in this country does not conclude our inquiry. The next question we must ask is whether the practical consequences of affording Evelyn Hart the minimal protections she seeks would be so far reaching, so disruptive of the status quo, as to render the idea infeasible.

Let us look, then, at the consequences. We may assume that if there were a well organized, well funded group opposed to protecting non-human great apes,

---

[305] *See What is the Great Ape Project's policy on great apes kept in zoos?*, The Great Ape Project – GAP FAQ, Section 3: Principles and Policies, 3.3 http://www.greatapeproject.org/gapfaq.html (last visited Nov. 17, 2000).

[306] *See What is the Great Ape Project's policy on sanctuaries for non-human great apes?*, The Great Ape Project – GAP FAQ, Section 3: Principles and Policies, 3.2, http://www.greatapeproject.org/gapfaq.html (last visited Nov. 17, 2000).

[307] The Great Ape Project defines a sanctuary as an institution where the needs, interests and rights of the apes come first, and where the facilities, long-term financing, expertise and resources necessary to satisfy those needs, interests and rights are provided. *See id.*

we would be treated to a parade of horrors. "Next President Could Be A Chimpanzee," the New York Post might proclaim. "Orang-utans To Get Drivers' Licences?" asks the New York Times, reporting that "people on the street worry that it will be difficult to determine which rights non human great apes do have, and which they do not. 'I don't want come in one day and find that I've been replaced by an orang-utan,' observed Anil Khan, a driver with the Yellow Cab Company."

There are at least two good answers to this anticipated parade of horrors. The first is that a moral imperative is just that: imperative. Worldwide condemnation of apartheid and resultant pressure for its abolition were not, in the main, tempered or restrained by questions of practicality. The fact of the moral imperative was enough. And so it is here.

The second answer to the parade of horrors is that they bear no relation to what Petitioner is asking of this Court. She is asking, quite simply, for the same fundamental protections as are afforded other persons. This Court can, of course, grant Petitioner rudimentary protections against physical and psychological harm without also being understood to have granted her the right to vote, to drive, or to hold public office. To be free from abuse, and to be free to accept the sanctuary being offered her: that is all she is asking.

Evelyn Hart has answered the philosophic objection that there can be no rights without duties. The answer is two-fold. First, as a matter of law, there is nothing novel about protecting those in need without imposing a countervailing obligation on them. *Youngberg v. Romeo* demonstrates that United States law can recognize rights commensurate with a Plaintiff's needs and capacities, despite the fact that there may be no correlative responsibilities imposed.[308] Second, although one consequence of this reclassification—from Property to Person—is that arrangements must be made for her care, we would do well to remember how she came to be "property" in the first place. We have invaded, disrupted, and largely destroyed her world, for our purposes.[309] Therefore, if non-human great apes who were long ago captured in the wild, enslaved, and shipped here, are no longer able to fend for themselves in what was their natural habitat, the very least we can do is to provide safe and peaceful sanctuary.

---

[308] 457 U.S. 307, 314 (1982).

[309] *See Prepared Statement of Richard Lattis, supra* note 301. Lattis called the severe endangerment of non-human hominids' lives "an ecological and societal problem of enormous proportions. *Id.* It is a problem of political unrest compounded by unregulated resource exploitation through logging, mining, farming and poaching. It is also a problem which is not specifically limited to the African continent as similar situations have arisen in Brazil, Sumatra, and Borneo, where the orangutan population has declined by 90%. *Id.*

A primary purpose of justice is to correct "the arbitrariness of the world."[310] The plight of Evelyn Hart demonstrates that such arbitrariness is not limited to human relations. But here, the arbitrariness is of human making. For all of these reasons, the Petitioner respectfully requests this Court to reverse the judgment of the District of Columbia Circuit of the Court of Appeals, and to enjoin the National Institutes of Health from assuming ownership of her.

ATTACHMENT: THE DECLARATION ON GREAT APES[311]

We demand the extension of the community of equals to include all great apes: human beings, chimpanzees, bonobos, gorillas and orang-utans. 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. Among these principles or rights are the following:

I. THE RIGHT TO LIFE

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-defense.

---

[310] JOHN RAWLS, A THEORY OF JUSTICE 141 (Cambridge: Harvard University Press, 1971); see also Sapontzis, supra note 3, at 108 (for a similar analysis with respect to relations among species).

[311] The Declaration on Great Apes was first published in THE GREAT APE PROJECT: EQUALITY BEYOND HUMANITY (Paola Cavalieri & Peter Singer eds., 1994). *See What is the 'Community of Equals'?*, The Great Ape Project – GAP FAQ, Section 3: Principles and Policies, 3.1, http://www.greatapeproject.org/gapfaq.html (last visited Nov. 17, 2000). The long-term goals of the Declaration supporters are: (1) a United Nations Declaration of the Rights of Great Apes; and (2) the designation of guarded territories to enable chimpanzees, bonobos, gorillas, and orang-utans to live freely in their own ways. See What is the Great Ape Project?, The Great Ape Project – GAP FAQ, Section 3: Principles and Policies, 1.1, http://www.greatapeproject.org/gapfaq.html (last visited Nov. 17, 2000).

II. THE PROTECTION OF INDIVIDUAL LIBERTY[312]

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.

III. THE PROHIBITION OF 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.

---

[312] In arguing for this right, The Great Ape Project does not advocate throwing the gates open at every zoo. *See What is the Great Ape Project's policy on great apes kept in zoos?*, The Great Ape Project – GAP FAQ, Section 3: Principles and Policies, 3.3, http://www.greatapeproject.org/gapfaq.html (last visited Nov. 17, 2000). The overarching concern is that liberty not be denied for the purpose of human gratification. *Id.* The concerns of the individual in confinement are considered paramount. *Id.* A sanctuary conducive to future safety, designed in such a way that privacy and autonomy are maximized, may be the best possible life for great apes who could not be expected to revert successfully to survival in the wild. *Id.* Recognition of the liberty interest would mean that in the future, non-human hominids would not be captured or bred for human purposes of experimentation, entertainment, or public display. Thus, if non-human hominids 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. *See id.*