

*WELCOME TO PRIMATES' PARADISE, HUMAN
RIGHTS NOT ALLOWED: UNRAVELLING THE GREAT
APE PROJECT*

*By Antionette Duck**

INTRODUCTION

Is man simply the “perfection of the ape”?¹ Some believe that man is intrinsically valuable, that he possesses an essence unlike any other creature, and thus possesses a value greater than that of the ape. Others believe that man is neither special nor unique, and when man describes himself as “human,” he is merely using an adjective to describe his animal nature.² Thus, once man admits he is not the only being that possesses certain abilities, he will finally realize that the line between human beings and great apes is not sharp but blurred.³ Indeed, the debate between man and the ape raises difficult questions while yielding equally alarming implications. How do we balance animal protections with what appears to be an increasing threat to human dignity? How much value should we grant to the animal? Moreover, how will a shift in our view of the animal affect our view of human beings?

This Article examines the Great Ape Project (“GAP”), a project that has existed with a single purpose: to grant certain fundamental human rights to great apes, specifically the chimpanzee (and its cousin

* *Juris Doctor* 2010, Regent University School of Law; B.A., 2004, University of Notre Dame. I sincerely thank my Lord and Creator, for enabling my mind to think, my hand to write, for my value and equipping me to share the truth of that value with others; Regent Law Professor Kathleen McKee for her overwhelming generosity, abundant enthusiasm and inspiring direction; Lee Metzger for his incredible, hilarious insight; and my mother, for her unwavering faithfulness, ceaseless encouragement and challenge to embrace what is true.

¹ MORTIMER J. ADLER, *HOW TO THINK ABOUT THE GREAT IDEAS* 51 (Max Weismann ed., 2000).

² Jane Goodall, Remarks on the Evolving Legal Status of Chimpanzees, Symposium at Harvard University, *in* 9 *ANIMAL L.* 1, 10 (2003) [hereinafter *Evolving Legal Status*].

³ The Jane Goodall Institute, *So Like Us*, <http://www.janegoodall.ca/about-chimp-so-like-us.php> (last visited Feb. 17, 2009).

the bonobo), the gorilla and the orangutan.⁴ Part I of this Article explores the GAP's fundamental principles. Part II analyzes the history behind the human-animal debate. Part III examines the case for great ape personhood. Part IV questions the role of man. Part V examines the lack of autonomy and accountability in the great ape, and Part VI explores the effect of animal equality on our humanity.

If man is simply a perfection of the ape, then our entire societal structure and its underlying foundation *must* be re-evaluated. However, if man is not simply the perfection of the ape, but rather a unique, set-apart species, then our entire societal structure and its underlying foundation face the gravest of threats. There are certain ideas that do not merely remain ideas. They find their way into the societal consciousness, and there they take root. There, they transform society. If we are not careful, we will soon find that ideas with devastating consequences have taken root; they have transformed society. If we are not careful, "we will soon find that these ideas have become a part of our social fabric"⁵ – and in the face of that societal shift, we will be powerless to stop it.

I. FUNDAMENTAL PRINCIPLES OF THE GAP

Since 1993, *The Great Ape Project: Equality Beyond Humanity* has sought to extend certain human rights and liberties to non-human great apes, specifically the chimpanzee, the gorilla and the orangutan.⁶ Propelled by Peter Singer⁷ and Paola Cavalieri,⁸ the GAP was estab-

⁴ *A Declaration on Great Apes in THE GREAT APE PROJECT: EQUALITY BEYOND HUMANITY* 4 (Paola Cavalieri & Peter Singer eds., St. Martin's Griffin 1996) (1993) [hereinafter *Declaration*].

⁵ Interview with Kathleen McKee, Professor, Regent University School of Law, in Va. Beach, Va. (Nov. 10, 2008).

⁶ *Declaration*, *supra* note 4, at 4.

⁷ Peter Singer, Peter Singer's University Website, <http://www.princeton.edu/~psinger/faq.html> (last visited February 12, 2009). Australian philosopher and author Peter Singer is considered the father of the "animal liberation" movement which seeks equal human rights for all animals. He is currently a professor at Princeton, and authored the book, *Animal Liberation*. *Id.*

⁸ Matthew Calarco, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (reviewing PAOLA CAVALIERI, *THE ANIMAL QUESTION: WHY NONHUMANS DESERVE HUMAN RIGHTS* (2001)), *available at* <http://www.faculty.sbc.edu/mcalarco/Cavalieri.htm>. Italian philosopher and author, Paola Cavalieri has become a more prominent figure in the movement to grant equal rights to the great ape. *Id.* The GAP has been joined by dozens of other prominent supporters which include Jane Goodall, Dr. Roger Fouts, Richard Dawkins, and Steven Wise. *Declaration*, *supra* note 4, at v-viii.

lished with the objective of re-classifying great apes as persons and asserts through the “Declaration on Great Apes” (“Declaration”) that all great apes are entitled to the right to life, the protection of individual liberty, and the prohibition of torture.⁹

The philosophy underlying the GAP is not simply that animals should have rights or that man should not be cruel to animals. Rather, the GAP’s philosophy strikes at the uniqueness of man and questions whether man’s humanity is reason enough to set him apart.¹⁰ GAP advocates view their membership in the human species as granting them undeserved moral status, and believe it is for that reason alone that they, as humans, are included in a protected class.¹¹ However, rather than acknowledging their humanity and the unique differences that humanity produces, GAP advocates believe that human beings should focus on the similarities they share with the great ape, such as intelligence and a “rich and varied social and emotional life.”¹² Furthermore, GAP proponents assert that science has produced sufficient research to disprove the notion that human beings are superior moral beings.¹³ Acting within this mindset that challenges the “moral significance of [the human] species,” the GAP seeks to extend equality to the

⁹ *Declaration, supra* note 4, at 4. The Declaration on Great Apes defines the right to life, protection of individual liberty and prohibition of torture in the following ways:

1. 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-defence [sic].
2. The Protection of Individual Liberty: 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.
3. 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.

Id.

¹⁰ *Id.* at 1.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

great ape.¹⁴ Thus, for the GAP advocate, it is because we share basic similarities and abilities that human beings must reassess the value and status of the great ape.¹⁵

In June of 2008, only fifteen years after the GAP's inception, the Spanish Parliament passed a resolution not only to protect the great ape, but more importantly, to compel compliance with the specific tenets of the Great Ape Project.¹⁶ This resolution, effective 2009, made Spain the first country in the world to recognize nonhuman great apes as *legal subjects*.¹⁷

A glimpse of things to come is reflected in the case of "Matthew Pan," an Austrian chimpanzee "seeking" legal recognition as a person. As a direct result of Spain's resolution, animal rights advocates appealed to the European Court of Human Rights on Matthew's behalf, in an attempt to secure the chimp personhood status.¹⁸ The chimpanzee's lawyer, Eberhart Theuer, claims that chimps not legally recognized as persons can be bought or sold for any reason¹⁹; and because the sanctuary that currently houses Matthew is on the verge of bankruptcy, advocates worry that unless the chimpanzee's personhood is secured, he will likely be sold as property to the highest bidder.²⁰ Moreover, since Matthew's allies firmly believe that the chimp is capable of owning property as well as managing his own money,²¹ they see no reason to deny Matthew personhood—the legal status that would prevent the chimp from being bartered away as property in the future—should the sanctuary be unable to support him.²²

Cases like this may soon become a common occurrence. Given Spain's resolution stipulating that its law will be passed in compliance with the GAP, and, that the GAP specifically lists the right to liberty, which includes due process for all great apes, the courts may quickly find themselves inundated with great apes—and the lawyers who rep-

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Great Ape Project Spain Visits Austrian Chimp Matthew Pan*, Aug. 25, 2008, <http://www.vgt.at/publikationen/texte/artikel/20080118Hiasl.htm> [hereinafter *Matthew Pan*].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Lee Hall, *Rights for Other Apes, They Insist: Are They Serious?*, DISSIDENT VOICE, Aug. 27, 2008, <http://www.dissidentvoice.org/2008/08/rights-for-other-apes-they-insist-are-they-serious/>.

²² *Matthew Pan*, *supra* note 16.

resent them.²³ Because the GAP requires that no great ape can be detained or held captive (i.e. kept in a research lab, zoo, sanctuary, or private home without first being convicted of a crime), gorillas, chimpanzees, and orangutans will be given the legal right to appeal these detentions, whether they be housed in a zoo, sanctuary or as a caretaker's pet.²⁴

Moreover, since Spain's resolution grants life, liberty and freedom from bodily interference as these terms have been defined in the GAP, the practical implications will affect a wide range of change. The resolution prohibits the purposeful killing, hunting, and consumption of the great ape,²⁵ and furthermore, expressly prohibits the commercial and experimental use of great apes. This virtually guarantees the elimination of great apes from all commercial operations, animal research facilities, circuses, and zoos to animal parks, breeding facilities, and pet stores.²⁶ Certain types of medical research will be required to stop until an alternative test subject can be found, effectively forcing doctors, surgeons, and veterinarians to train themselves on subjects other than great apes.²⁷ Finally, the natural habitats of all great ape populations will be protected, something of particular importance to GAP advocates as the great ape faces extinction.²⁸ Any violation of the new laws will be considered an offense under the Spanish penal code.²⁹

The approach taken in Spain—to push for legislative changes that will preserve human rights for great apes and ensure their personhood—reflects a larger goal as well: obtaining a United Nations resolution declaring the fundamental rights of great apes.³⁰ More importantly, certain proponents of the GAP openly acknowledge that their

²³ *Declaration*, supra note 4, at 4.

²⁴ *Id.* at 6; *The Animal Rights Debate: Practical Implications*, <http://www.libraryindex.com/pages/2160/Animal-Rights-Debate-PRACTICAL-IMPLICATIONS.html> (last visited Feb. 17, 2009) [hereinafter *Practical Implications*]. The author argues that if it is determined that the great ape could no longer function in the wild because of captivity, then the zoo or sanctuary housing the apes should raise its housing standards to be adequate for *human beings*. *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Evolving Legal Status*, supra note 2, at 10-11.

²⁹ Martin Roberts, *Spanish Parliament to Extend Rights to Great Apes*, REUTERS, June 25, 2008 <http://www.reuters.com/article/idUSL256586320080625>.

³⁰ *Matthew Pan*, supra note 16.

ultimate goal is to extend the "community of equals" to include the majority of the animal kingdom.³¹

If the goal of the GAP was protection and preservation of the great ape, then perhaps common ground could be sought and implemented under the animal defense laws already in place.³² However, if, as it appears, the goal of the GAP is not protection and preservation but rather, to establish the great ape's personhood and subsequently to grant great apes fundamental human rights, then there is no common ground to be sought—only sides to be taken. Thus, to fully understand the GAP's ultimate objective, it is necessary to first understand the history behind the man and animal debate.

³¹ *Declaration, supra* note 4, at 5; *Practical Implications, supra* note 24. If animals are given the rights to life, liberty and freedom from bodily interference as these terms have been defined in the GAP, no animal could be purposely killed, harmed, or kept in captivity by humans.

Further, implementation of the GAP on an "animal-kingdom" scale would guarantee the elimination of all commercial animal operations, including livestock and fur farms, animal research facilities, circuses, zoos, animal parks and aquariums, game ranches, and hunting lodges to animal breeding facilities, pet stores, horse races, and dog tracks. The economic effect would be astronomical as all of the people employed by these businesses would be forced to find new employment. Moreover, the food industry would likely find itself in total upheaval, as all meat and dairy products would be completely banned, which would directly affect the cattle industry and Wall Street.

Aside from suffering the economic costs, the scientific community would bear the burden as well. Medical research has relied on animal testing for hundreds of years. Certain types of research would be required to stop until an alternative test subject could be found. Doctors, surgeons, and veterinarians would be forced to train themselves on subjects other than animals, and students would be required to learn anatomy and biology without actually dissecting the animals. Eliminating the use of animals would, unquestionably, disrupt the entire scientific community.

Moreover, private individuals would be greatly affected in terms of dining, fashion, sport, recreation, and leisure. Every activity that currently includes the personal use of animals would be banned entirely. Private citizens could no longer hunt, fish, eat meat, wear leather or fur, or keep pets.

Perhaps, most unbelievably, laws would need to be rewritten. Because current law classifies great apes as "things" instead of "persons," if the great ape is later classified as a person, then each law currently referring to human beings alone as persons would have to be rewritten to encompass the great ape. Property, torts, contracts and evidence statutes, to name a few, would each need to be changed. For example, would the non-verbal communication of the great ape be admissible against a defendant in court? Would it be sufficient to form an oral contract? *Id.*

³² *See infra* pp. 6-11.

II. THE GREAT DEBATE

In the late sixties to early seventies, the U.S. Congress began enacting legislation specifically intended to provide legal defenses and protections for certain animals. These laws act as both a sword and a shield for animals, in that, under them, an animal must be fed and properly cared for, and in the event that an owner mistreats an animal, legal action may be brought against the owner for animal cruelty.³³ Two of the most important Acts, particularly to the great ape, are the Animal Welfare Act (“AWA”) and the Endangered Species Act (“ESA”).³⁴

Animal advocates admit that the federal statute “most concerned with animal welfare and animal cruelty is the federal Animal Welfare Act.”³⁵ The AWA, first enacted in 1966, seeks primarily to protect animals used for teaching, testing and researching purposes.³⁶ The list of protected animals originally included dogs, cats, non-human primates (great apes), guinea pigs, hamsters, and rabbits.³⁷ The regulations impose standards that at a minimum require “handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperature, and adequate veterinary care.”³⁸ In 1985, the AWA was amended to include a provision that required dealers, exhibitors, and research facilities to “develop, document, and implement” a plan solely intended to promote the “psychological well-being” of non-human primates—the great apes.³⁹ Since 1966, the AWA has been amended six times, each amendment further restricting man’s behavior and granting greater animal “rights.”⁴⁰

³³ Benjamin Adams & Jean Larson, *Legislative History of Animal Welfare Act*, ANIMAL WELFARE INFORMATION CENTER, <http://www.nal.usda.gov/awic/pubs/AWA2007/intro.shtml> (last visited Feb. 27, 2009).

³⁴ Adam Kolber, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 167, 177 (2001).

³⁵ *Id.* at 175.

³⁶ Adams & Larson, *supra* note 33.

³⁷ *Id.*

³⁸ Kolber, *supra* note 34, at 175.

³⁹ *Id.* Under the psychological well-being provisions, the Secretary of Agriculture has promulgated regulations to require dealers, exhibitors, and research facilities to develop, document, and follow a plan to promote the psychological well-being of primates. These plans must address primate social grouping and opportunities for “environmental enrichment,” including opportunities to use perches, swings, mirrors, and other increased cage complexities. *Id.*

⁴⁰ Adams & Larson, *supra* note 33. The AWA was amended in 1970, 1976, 1985, 1990, 2002, and 2007. *Id.*

Similarly, in 1973, Congress enacted the ESA to protect plants and animals susceptible to extinction,⁴¹ and as advocates admit, the ESA has wrought some of the “strongest protections of the great ape.”⁴² From 1973 to the present, susceptible species have been placed on a federal list, either as “endangered” (in danger of extinction throughout all or a significant portion of its habitat) or “threatened” (one that is “likely to become endangered” within the foreseeable future).⁴³ Consequently, humans are prohibited from “taking” both plants and animals, making it unlawful to significantly modify the habitat of any listed species.⁴⁴ Furthermore, the ESA applies not only to public land, but to private land and private parties as well. For example, under the ESA, a private landowner is prohibited from harming both the endangered animal and that animal’s habitat.⁴⁵ Moreover, the ESA imposes a duty on federal agencies to ensure that their actions, as well as the actions of private parties, are not likely to jeopardize the existence of a listed species or to result in the destruction or modification of the species’ habitat.⁴⁶

Today, the ESA continues to protect only plants and animals that have been officially listed as endangered or threatened.⁴⁷ However, since the ESA was enacted, Congress has refined the definitions of endangered and threatened, naming five criteria that will validate a listings claim: (1) “impacts to the species’ habitat or range”; (2) “overuse of the species by humans”; (3) “disease or predators”; (4) “inadequacy of existing legal protections”; or (5) “other natural or man-made factors affecting the species’ continued existence.”⁴⁸ Most importantly, the decision to list a species is not made in consideration of the local or national economy; rather, the decision to list a species is made independent and “without reference” to economic impacts.⁴⁹

⁴¹ National Oceanic and Atmospheric Administration Office of Protected Resources, *Endangered Species Act (ESA)*, <http://www.nmfs.noaa.gov/pr/laws/esa/> (last visited Mar. 26, 2009).

⁴² Kolber, *supra* note 34, at 177.

⁴³ James Christman & Virginia Albrecht, *The Endangered Species Act*, <http://library.findlaw.com/1999/Jan/1/241467.html> (last visited Mar. 6, 2009).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

A. *The ESA, AWA and the Courts*

The ESA and AWA have provoked quite a bit of controversy in the courts, and in most cases, the consequence has been to set man against animal. Consider the following cases: *Tennessee Valley Authority v. Hill*,⁵⁰ and *Animal Legal Defense Fund, Inc. v. Glickman*.⁵¹

Tennessee Valley Authority v. Hill involved the Tellico Dam project which was forced to cease operations when it was discovered that the project encroached on the habitat of the snail darter, a small fish listed as endangered.⁵² While Congress eventually ordered the project to be completed, and other populations of the snail darter were discovered, the Court initially found that the ESA required construction on the dam to stop. The Court noted that the value of endangered species was “incalculable,” and thus, these species should be afforded the highest priority in order to halt and reverse extinction – regardless of the economic outcome.⁵³ Through *Tennessee Valley Authority*, the Court clearly indicated not only that the ESA was to be taken seriously, but also that the ESA would be implemented even to the detriment of human beings.

Similarly, in *Animal Legal Defense Fund, Inc. v. Glickman*, Marc Jurnove, an animal rights advocate, visited a game farm where he observed primates living in what he considered inhumane conditions.⁵⁴ After reporting the conditions to the U.S. Department of Agriculture (“USDA”), the USDA inspected the facility and found no violations. In response, Jurnove filed a complaint alleging that he suffered aesthetic injury because the USDA failed to adopt sufficient standards to protect the primates’ “psychological well-being” as required by the AWA. In reply, the USDA asserted that the claim lacked standing. On appeal, the court en banc held that Jurnove had satisfied the requirements for standing because he had suffered a personal injury when he observed what he perceived to be violations of the primates’ living conditions.⁵⁵ The court continued, stating that the USDA could have prevented the injury through more stringent regulations, and these interests were legally protected.⁵⁶ While ultimately the court found that

⁵⁰ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

⁵¹ *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (en banc) cert. denied, 526 U.S. 1064 (1999).

⁵² *Tenn. Valley Auth.*, 437 U.S. at 159.

⁵³ *Id.* at 174, 187.

⁵⁴ *Animal Legal Def. Fund*, 154 F.3d at 426.

⁵⁵ *Id.* at 433.

⁵⁶ *Id.*

the game farm was not in violation of AWA standards, the decision to award standing not only supported animals' "rights," but further paved the way for others to make the case for animals' legal standing as well.⁵⁷

Undeniably, implementation of the ESA and the AWA has proven incredibly beneficial to the animal population.⁵⁸ Few species have become extinct while listed under the ESA, and over 90% in the northeastern U.S. have had their populations increase or remain stable since being listed as threatened or endangered.⁵⁹

However, opponents of animal rights argue that laws like the ESA may encourage "preemptive habitat destruction" when landowners fear losing their land because a new species is discovered.⁶⁰ Moreover, those who support the human community have claimed that it is human society that has had to bear the brunt of the cost, including, "the reduced economic profit from restricted or altered development projects including agriculture production, timber harvesting, mineral extraction, and recreation activities, as well as wages lost by displaced

⁵⁷ Animal Legal Def. Fund, Inc. v. Glickman, 204 F.3d 229 (D.C. Cir. 2000).

⁵⁸ Adams & Larson, *supra* note 33; Christman & Albrecht, *supra* note 43.

⁵⁹ Center for Biological Diversity, *The Road to Recovery: 100 Success Stories for Endangered Species Day 2007*, <http://www.esasuccess.org/reports/> (last visited Mar. 16, 2009). (Species which increased in population size since being placed on the endangered list include:

Bald Eagle (increased from 417 to 11,040 pairs); removed from list 2007

Whooping Crane (increased from 54 to 436 birds)

Kirtland's Warbler (increased from 210 to 1,415 pairs)

Peregrine Falcon (increased from 324 to 1,700 pairs); removed from list

Gray Wolf (increased dramatically in the Rockies, Southwest, and Great Lakes)

Gray Whale (increased from 13,095 to 26,635 whales)

Grizzly bear (increased from about 271 to over 580 bears); removed from list 2007

California's Southern Sea Otter (increased from 1,789 to 2,735)

San Clemente Indian Paintbrush (increased from 500 plants to over 3,500)

Red Wolf (increased from 17 to 257)

Florida's Key Deer (increased from 200 to 750)

Big Bend Gambusia (increased from for a couple dozen to over 50,000)

Hawaiian Goose (increased from 400 birds to 1,275)

Virginia Big-Eared Bat (increased from 3,500 to 18,442)

Black-Footed Ferret (increased from 18 to 600)).

Id.

⁶⁰ Jason F. Shogren, *Economics and the Endangered Species Act*, <http://www.umich.edu/~esupdate/library/97.01-02/shogren.html> (last visited Feb. 18, 2009).

workers who remain unemployed or who are re-employed at lower pay.”⁶¹

Proponents of community rights make two arguments specifically relating to private land interests. The first argument is that ESA regulations may often detrimentally impact interests of private landowners, and therefore, the lands of private parties should only be affected where there “is adequate biological data to demonstrate that there is an imminent threat to a species of concern.”⁶² The second argument is, when a private party sues on the endangered species behalf, the private party “need[s] to show that the defendant’s activities are an *actual* cause of harm to a species of concern.”⁶³ If that data does not demonstrate that a property owner’s activities are a cause of actual harm to the species concerned, then the property rights should remain in the hands of the people.⁶⁴

B. *The ESA, AWA and the Great Ape*

In many ways, the great ape already enjoys significant protection and preservation. Arguably, if the GAP only sought to protect and preserve the animal, it could be accomplished under the ESA and AWA. Rather than set man against animal, the GAP could protect and preserve the great ape by seeking greater restrictions regulating wildlife preservations in countries with great ape populations, as well as enlarging the local and international laws protecting endangered species.⁶⁵

However, the GAP does not merely seek to protect and preserve the great ape. Instead, the GAP seeks to grant the great ape fundamental *human* rights. If man and animal are one and the same, then there is no reason to deny animals equality with man. If, on the other hand, animals are not one and the same with human beings, then they cannot be considered a human being’s equal and should not be held in equal esteem. Thus, the question is, does humanity’s value exist absolutely, making it impossible to equate man and animal, or conversely, does humanity’s value exist on a continuum, thus allowing for the equality of man and ape?

⁶¹ *Id.*

⁶² James A. Adkins, *Ethical Treatment of Private Property Owners when Implementing Protection Measures for Rare and Endangered Species*, 26 N. KY. L. REV. 421, 429-30.

⁶³ *Id.* at 430 (emphasis added).

⁶⁴ *Id.*

⁶⁵ Kolber, *supra* note 34, at 168.

III. THE CASE FOR GREAT APE PERSONHOOD

A. *Proponents of the GAP: Personhood Based on Abilities*

In seeking personhood status for the ape, two primary arguments are made, one building on the other. The first approach provides a comparison of basic similarities between humans and animals and proposes that because great apes possess certain abilities that both man and the ape share, great apes should be afforded human rights.⁶⁶ The second approach bases its argument for personhood in the law, contending that the great ape possesses cognitive abilities which the law recognizes as conferring personhood; and thus, by implication, the ape should be considered a person since it meets the "definition" of person under the law.⁶⁷

This first argument analyzes basic abilities that humans possess (e.g. the use of tools, non-verbal communication, emotion and personality) and compares those abilities to similar behaviors in the great ape.⁶⁸ For instance, great apes have been discovered using various tools just as humans do.⁶⁹ It was reported from observations in Africa that chimpanzees were seen using as many as nine different tools, such as sticks, which, while not the conventional hammer and nail, were objects the great apes used for opening, retrieving, and spearing.⁷⁰ Moreover, great apes live and hunt in communities as humans do; and researchers have observed that great apes form strong social bonds and relationships with other great apes in their communities.⁷¹ Where a young ape is orphaned, an older ape will adopt it and act as its provider and protector within the group.⁷² Furthermore, advocates claim great apes not only experience physical pain, but emotional pain as well, and usually for the same reasons human beings experience these

⁶⁶ Jane Goodall, *Chimpanzees: Bridging the Gap in THE GREAT APE PROJECT: EQUALITY BEYOND HUMANITY* 12-17 (Paola Cavalieri & Peter Singer, eds., 1996) (1993).

⁶⁷ Robin Dougherty, *The Line that Divides Human from Animal*, BOSTON GLOBE, May 26, 2002, available at <http://www.maninnature.com/Management/ARights/Rights1j.html>.

⁶⁸ Evolving Legal Status, *supra* note 2, at 5, 17.

⁶⁹ *Id.* at 2, 7.

⁷⁰ *Id.* at 4-6.

⁷¹ *Id.* at 4-5.

⁷² Goodall, *supra* note 66, at 11-12.

emotions.⁷³ A clear example can be seen most vividly in one ape mourning the loss of a fellow ape.⁷⁴

Undeniably, man and the great ape share similarities, and as primatologist Jane Goodall once opined, “[o]nce we admit that we are not the only beings with personality, reasoned thought, and above all, the ability to feel and express emotions . . . we [should] develop a new respect for chimpanzees.”⁷⁵ Certainly, human beings should respect other creatures. It does not follow, however, that respect for the great ape should translate into conferring personhood.⁷⁶

The second approach, most often promoted by Steven Wise,⁷⁷ argues that because the law deems a human being a “person” based on cognitive abilities, the great ape should share the rights that the human enjoys based on the great ape’s cognitive abilities.⁷⁸ This approach begins by dividing the animal kingdom into four categories.⁷⁹ Those with the lowest cognitive ability are placed in category four, while those with the highest cognitive ability comprise category one.⁸⁰ Advocates argue that it is the animals in category one that should be granted human rights because, as advocates claim, at a category one level of cognitive ability, the animal has become “practically autonomous.”⁸¹

GAP advocates claim research has proven that the great apes’ cognitive abilities are roughly equivalent to those of a three-year-old child, which Wise claims includes the “ability to desire, to act intentionally. . . [and to possess] a sense of self.”⁸² Using the same examples of the use of tools, non-verbal communication, emotion and personality, Wise concludes that the great ape is in fact demonstrating desire, intentional action and a sense of self.⁸³ Because the cognitive abilities of great apes are roughly equivalent to those of a three-year-

⁷³ *Id.*

⁷⁴ *Evolving Legal Status*, *supra* note 2, at 7-8.

⁷⁵ Goodall Institute, *supra* note 3.

⁷⁶ *Contra Declaration*, *supra* note 4, at 4.

⁷⁷ *Evolving Legal Status*, *supra* note 2, at 1, 24. Steven Wise has been a practicing animal rights lawyer for over two decades and served as president of the Animal Legal Defense Fund. *Id.*

⁷⁸ Lisa Capone, *Wise Counsel for Animals; Steven Wise, Animal Rights Activist*, ANIMALS, Mar. 2000, available at http://findarticles.com/p/articles/mi_m0FRO/is_2_133/ai_60129620.

⁷⁹ Dougherty, *supra* note 67.

⁸⁰ *Id.*

⁸¹ *Evolving Legal Status*, *supra* note 2, at 29.

⁸² Dougherty, *supra* note 67.

⁸³ *See generally id.*

old human being, (as Wise believes research has proven is a generality for the chimpanzee), then the great ape is not only acting at the legally accepted level of practical autonomy, but more significantly, the great ape should be granted the same legal rights as human children of the same age.⁸⁴

On the other hand, where an animal lacks these cognitive abilities, it is not entitled to the same rights because it is deemed to have no "practical autonomy."⁸⁵ Research has shown that the animals in category four fail to display the same qualities that the great ape possesses.⁸⁶ Furthermore, because the animals in category four fail to produce the same cognitive abilities that are readily recognizable in the great ape, they are not entitled to the basic legal rights under the practical autonomy argument.⁸⁷

It is important to understand what the GAP advocate means when he argues for practical autonomy. As Wise explained it, "[t]he idea of practical autonomy is a liberty right."⁸⁸ Human beings are entitled to liberty based on their makeup, "how [they] are put together," what qualities they possess, and because they, as individuals, are similar to others who have liberty rights.⁸⁹ Given that the great ape, like a child, possesses the ability to desire, act intentionally and possesses a sense of self, (an inference drawn from the great apes' use of tools, non-verbal communication, emotional display and personality), then the logical conclusion for a GAP advocate is that the great ape is entitled to the same liberties that child enjoys.⁹⁰ A child is not classified as a thing but as a person and so too should the ape be classified.⁹¹

Admittedly, granting autonomy to certain animals while excluding others can grow complicated, particularly because the primary purpose underlying the GAP is not "necessarily for legal personhood for each member of these animal species but for individuals of the species with certain mental capacities."⁹² While the bar remains low to achieve le-

⁸⁴ Capone, *supra* note 78.

⁸⁵ *Evolving Legal Status*, *supra* note 2, at 30.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Dougherty, *supra* note 67.

⁸⁹ *Id.*

⁹⁰ Capone, *supra* note 78. Also, if an animal could "intend" to do certain things, as Steven Wise claims, why could the animal not intend to murder? How ironic that by virtue of being an animal, advocates could attribute rights to the animal that would free it from accountability, no matter how atrocious its behavior.

⁹¹ *Id.*

⁹² *Id.*

gal personhood, the principles implemented through the GAP and the “legal personhood” argument would necessarily require the exclusion of certain members of the human species, including newborns, the severely retarded, and coma victims.⁹³

How sobering to realize that as Wise asserted, “[o]nce the first animals are given the first rights, the question will shift from ‘Are you a human being?’ to ‘What kind of animal are you?’”⁹⁴ According to Wise, this shift will provide a far “more sophisticated inquiry than just arbitrarily drawing the line.”⁹⁵

B. Proponents of the Uniqueness of Man: Personhood Based on Intrinsic Value

Years ago, it was maintained that because a chimpanzee was discovered using a tool the world would have to “redefine man, redefine tool or accept chimpanzees as human.”⁹⁶ Is this true? Does it logically follow that simply because a chimpanzee was discovered acting in a way that human beings act, society must take seriously the idea that great apes should be accepted as human? For the sake of argument, we could imagine that this great ape, as those previously described, could also communicate, experience emotions, and express personality—these are the “criteria for personhood” used by proponents of the GAP.⁹⁷ The question is, are these abilities enough? Do these abilities alone make us human? Does it hold that if these criteria are met, the line is blurred?

Proponents of the GAP argue that “if we are prepared to admit that we are not the only beings with personalities, minds, and feelings, then we [should] gain a new respect for [the great apes].”⁹⁸ They use this – in conjunction with the great apes’ ability to use tools, communicate, and experience emotion – to blur the distinction between man and animal. However, is that the logical conclusion to their argument? Proponents of man’s uniqueness argue no. The distinction between man and animal is blurred only if the elements the GAP relies on *are* fundamental elements that define what is human. If these characteristics of tool making, non-verbal communication, and emotional display are truly what make human beings valuable as creatures, then, by default,

⁹³ *Id.*

⁹⁴ Dougherty, *supra* note 67 (emphasis added).

⁹⁵ *Id.* (emphasis added).

⁹⁶ Evolving Legal Status, *supra* note 2, at 4.

⁹⁷ *Id.* at 4, 5-10.

⁹⁸ Goodall Institute, *supra* note 3.

those who lack these abilities and characteristics would necessarily lack value.

C. The Distinction Between Man and Animal: A Fundamental Difference in Kind

The difference between man and animal is a difference in kind, not a difference in degree, as advocates of the GAP claim. A difference in kind implies that the difference between man and animal is fundamental—that while possessing similarities, man and animal are not and will never be the same kind, regardless of time and circumstance.⁹⁹ A difference in degree, on the other hand, assumes that man and animal are fundamentally the same, separated only by degrees of difference.¹⁰⁰

Take, for example, a circle and a square. The circle and square are two fundamentally different objects. Regardless of how many sides are added to the square to make it look more and more like a circle, the square will remain a polygon.¹⁰¹ Perhaps after adding hundreds of sides to the square, the square would essentially look like a circle—and yet, the square will never be a circle.¹⁰² Regardless of how close the square comes to approaching the circle, the square will never *become* the circle.¹⁰³ That is a difference in kind.¹⁰⁴

While great apes might possess certain characteristics that make them similar to human beings, those similarities should not be equated with sameness. Despite their similarities, great apes lack inherent characteristics that humans possess, and like the circle and the square, regardless of how similar the great ape might appear, regardless of how closely the ape “approaches” humanity, the great ape will never *become* a human being. The reason for this is simple: man and the great ape are not merely different in degrees. They are different in kind. Consider the following three distinctions: animals do not make artistically, think discursively, or associate politically.¹⁰⁵

This first distinction concerns the difference in the way humans and animals build. In making and building, animals “make” by in-

⁹⁹ ADLER, *supra* note 1, at 63.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 80. Notable distinctions also include an animal’s lack of history. *Id.* at 88-89.

instinct, while human beings “make” by art and by inspiration.¹⁰⁶ This difference between man and animal is not simply indicative of a difference in preference; it is indicative of a difference in the ability to reason.¹⁰⁷ Whereas animals make by instinct, human beings make by “influence of human reason.”¹⁰⁸

In any given animal species, whether a bird and its nest or a beaver and its dam, the production of the nest and the dam will always be the same, year after year, century after century, because the instincts governing these animals are the same.¹⁰⁹ From one generation of birds to the next, the instincts do not change; and consequently, the “making” of these animals will not change.¹¹⁰ Human production, however, is different. Works of art, architecture, designs, and creations will change, not just from century to century but from generation to generation. Perhaps more importantly, in human beings, one sees not only an improvement of the art, but a perfection of it.¹¹¹ With animals, on the other hand, one will not see a progression of the art, much less the perfection of it.¹¹² Regardless of its magnificence, the animal’s product will remain the same.

Moreover, animals do not create “fine art.”¹¹³ Notice that the bird’s nest and the beaver’s dam are both created to meet biological needs; they are not built for the animals’ pleasure.¹¹⁴ Neither the bird nor the beaver will pause after completion and admire their constructions because the nest and the dam are not built for pleasure. The nest and the dam are built to meet a need.¹¹⁵ Man alone creates a thing that “satisfies no biological need at all.”¹¹⁶

Consider a bird’s nest. The nest, while perhaps intricate and magnificent, is the same as the next nest and the next and the next after that.¹¹⁷ The bird does not create its nest and later sit back to enjoy its creation.¹¹⁸ While the bird makes its nest intricately, even magnifi-

¹⁰⁶ *Id.* at 81.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 82.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

cently, it does so instinctively; the bird builds to meet a biological need.¹¹⁹ However, the same bird will not later be inspired to create its nest in a new way.¹²⁰ The bird simply does not make artistically.

The second distinction that shows a fundamental difference in man and animals is that animals do not think discursively. While animals solve problems, those problems stem from basic biological needs; those problems must be solved to secure the animal's survival in its "struggle for existence."¹²¹ Granted, an animal does solve problems confronting its existence and survival in the same way that a human being would solve them. Both the animal and the human being might use trial and error, and in the case of great apes, a certain amount of "perceptual insight."¹²² Certainly, a man locked in a room would likely use trial and error and any other insight he might possess in order to fight his way out of the room.¹²³

"Problem-solving," however, is not the only way in which man thinks. Human beings think of problems that do not necessarily require a solution; they think about problems that are not required to be solved in order to meet a biological need.¹²⁴ Outside of a human being's struggle for survival, humans are concerned with issues of philosophy, theology, mathematics and sciences.¹²⁵

Additionally, the manner of man's thought process and the animal's thought process are quite different.¹²⁶ An animal is active in solving his problems—using all its senses, flailing its limbs and running from place to place.¹²⁷ Man, however, thinks in a different way. When man sits deep in thought, his body posture is intensely *inactive*. Only man sits and ponders what is "important but not urgent."¹²⁸

Finally, only man thinks in words and in words that are abstract.¹²⁹ While research has discovered that chimpanzees, the highest form of great apes, are capable of using 250 "words" to communicate, researchers also found that these words were all "emotional outcries,

119 *Id.*

120 *Id.*

121 *Id.* at 83.

122 *Id.*

123 *Id.*

124 *Id.* at 84.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

expression of need, pain, pleasure, rage, hate, hunger and sex.”¹³⁰ Certainly, human beings use these expressions as well; yet, human beings possess a far greater ability in their “syntactical” language, having “parts of speech” and the ability to form whole sentences.¹³¹

The third distinction indicating a fundamental difference in man and animal is that animals do not associate politically. While many animals are sociable, only human beings associate politically, or perhaps, even more specifically, only humans associate constitutionally.¹³² All other animals that associate socially do so by instinct.¹³³ The lion pride, wolf pack, and ape tribe each act under an instinctive form of organization.¹³⁴ From generation to generation, century after century, these animals and their organizational structures have not changed.¹³⁵

Humans, however, form their political structures, constitutions, and laws by *reason*.¹³⁶ It is through reason that men form societies and then consciously subject themselves to that society’s laws.¹³⁷ History clearly shows these laws and conventions have changed from century to century and from generation to generation.¹³⁸ Man remains the only creature who crafts the laws and constitutions under which he will live, further evidence of man’s reason. Man is the only constitutional being.¹³⁹

In the case of an infant or mentally deficient person, some assert there is no difference between the human being and the animal as long as the human being remains in his infant or handicapped state.¹⁴⁰ Yet, while the human being may at some point be an infant and may not have fully developed his rational capacities, the human infant will likely develop those capacities one day.¹⁴¹ The animal, on the other hand, will never develop the rational capacities of a human being.¹⁴² Additionally, consider a mentally deficient human and a mentally de-

130 *Id.*
 131 *Id.*
 132 *Id.* at 85.
 133 *Id.*
 134 *Id.*
 135 *Id.*
 136 *Id.*
 137 *Id.*
 138 *Id.*
 139 *Id.*
 140 *Id.*
 141 *Id.* at 86.
 142 *Id.*

ficient animal.¹⁴³ The mentally deficient human may one day be cured or be able to develop greater abilities.¹⁴⁴ The animal, on the other hand, will always be mentally deficient. Thus, while in both the infant as well as in the mentally deficient there exists a potential for reason, in the animal, a rational mind does not exist at all.¹⁴⁵

Finally, to say that man alone is rational does not mean that man always acts rationally; however, only man is said to act irrationally.¹⁴⁶ An animal, even acting in a horrific, gruesome way, is said to be exhibiting its natural character, its wildness.¹⁴⁷ Conversely, a man who acted as a wild animal, would be regarded as acting irrationally.¹⁴⁸

While there are significant differences in kind between man and the ape, an argument asserting the value of man should not be interpreted as asserting a worthlessness of the ape. Highlighting man's uniqueness does not and should not render the animal somehow valueless. Not only are apes intelligent, but they also communicate, demonstrate skill, and display personality. However, the fact that an ape might possess one or all of these abilities does not make the ape human.¹⁴⁹ These criteria do not and should not impart value to the ape that the ape does not possess. More importantly, extending the argument to its logical conclusion, will we not be determining value based on the abilities and skills an individual possesses? If by chance, a human being does not possess the abilities an ape possesses—if a human being is in a coma and cannot communicate, if a human being is considered mentally impaired and cannot laugh or cry or hug, if a human being has down-syndrome or autism or is not cognizant of his surroundings—will these deficits render that human being sub-human?¹⁵⁰ We must decide whether man's value exists absolutely, and in doing so, perhaps we will realize that there is a proper role for man to

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See Tom Geoghegan, *Should Apes Have Human Rights?*, BBC NEWS, March 29, 2007, <http://news.bbc.co.uk/2/hi/6505691.stm> (quoting Steve Jones, a geneticist at University College, London, who opposes the Great Ape Project: "Defining creatures and allowing them rights based on criteria invented by one group is itself an enormous breach of human rights . . . and one need look no further than Austria 1939 to see why.").

¹⁵⁰ It is, after all, illogical to argue that animals deserve human rights based on a certain skill set when humans who lack those skills retain their rights.

fill, a role that protects the animal and yet maintains the dignity of humanity.

IV. THE ROLE OF MAN

The responsibilities and duties that exist toward animals are uniquely and specifically human. Why? Because man is a moral being, and the animal is not.¹⁵¹ Animals do not protect other animals' rights. Animals are not subject to "animal duties" toward one another. Rather, "animals' rights" are asserted against humanity, against mankind. If being human is not what burdens man with the obligation to treat animals humanely, then nothing does. It is man's humanity that burdens him with his duty toward the animals. It is man's humanity that burdens him with the responsibility of stewardship.¹⁵²

It would be difficult to imagine the zebra worrying whether the lion will kill the gazelle.¹⁵³ The zebra does not worry. The zebra does not care. Whether the lion kills the gazelle or allows the gazelle to roam free, the zebra will remain unchanged,¹⁵⁴ and yet, the zebra will never be accused of neglecting its duty to the gazelle. Similarly, the lion does not concern itself with the gazelle's well-being; the lion does not care whether the gazelle lives or dies. Yet, the lion will *never* be accused of neglecting its duty to the gazelle, even though the lion will continue to deprive countless gazelles of their "right to life." Why? Because the lion is not a moral being.¹⁵⁵ It is an animal. While the lion may stalk, kill and eat the gazelle, the lion will *never* be guilty of violating the gazelle's "rights." However, were a human being to act as the lion, it would be considered the cruelest, most gruesome type of murder.

The responsibility to care for animals is specifically a human *duty*. Animals do not have a "right" to proper care. Humans have a duty to care for animals properly—a duty that exists independent of the animal's understanding. One animal advocate claimed, "If dogs can understand the way we treat them, we may think it matters more whether we treat them compassionately or cruelly."¹⁵⁶ This argument misses

¹⁵¹ Wesley J. Smith, Senior Fellow, Discovery Institute, Address: Human Exceptionalism, June 2008.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ It is fascinating to note that animal advocates do not push the lion to become a vegetarian.

¹⁵⁶ Kolber, *supra* note 34, at 163.

the point. Humans do not care for the animal because that animal can understand whether it is being mistreated. Humans properly care for the animal because it is the human's *duty* to do so.

Currently, one of the primary arguments supporting great ape protection is the "bush-meat" trade.¹⁵⁷ Hunters in the African forests are killing great apes without restraint and selling them for their meat; and consequently, the existence of great apes is increasingly threatened.¹⁵⁸ GAP advocates have repeatedly cited these circumstances, arguing that given their basic similarities to human beings and the increasing threat they face, great apes should be granted human rights. However, if the bush-meat trade is threatening the existence of the great ape, is the answer to grant those apes human rights? Or, conversely, is the answer to exercise our human *duty* to end this unrestrained killing of the great ape?

It does not logically follow that granting human rights to great apes will stop all harm done to them anymore than our being human stops others from acting cruelly toward us. One need only to read a newspaper to understand the reality of the horrors that humans perpetrate against other humans. Recall too that GAP proponents have argued that the great ape's capabilities are comparable to those of a three-year-old. Even if this fact is true, it is irrelevant in arguing for protection of the ape. A child's "being human" does not save the child. It is others advocating for the protection of the child that saves the child. It is because human beings act within their *duty* to the younger and weaker in society that children are protected. Similarly, it is others advocating for the protection of the ape that will save the ape. It is because human beings exercise their *duty* to the weaker, more dependent creatures that great apes are protected.

Where protection and preservation are the goal, there is no need to reclassify apes as persons, because ultimately what will protect the ape is the rule of law. Thus, in determining whether to grant the great ape human rights, we must determine whether advocates are actually shifting the responsibility that rightfully burdens man. The proper care and treatment of animals is not an animal right. It is a *human duty*, and we, as human beings, have an obligation to execute that duty with diligence. Is it possible that in seeking to simply grant the great ape equal rights, man is shirking a responsibility that is his alone to carry? Animals are not autonomous decisions makers. Animals are not bound by

¹⁵⁷ Evolving Legal Status, *supra* note 2, at 10.

¹⁵⁸ *Id.* at 10-11.

human law. In seeking to grant the great ape human rights, the GAP is burdening the apes with a responsibility too great to bear.

V. LACK OF AUTONOMY AND ACCOUNTABILITY IN THE GREAT APE

A. *Animals Are Not Autonomous Decision Makers*

Proponents of the GAP have argued that although a great ape may lack the abilities of a human adult, that same great ape still possesses the cognitive abilities of a three-year-old child and thus, should be afforded the same rights that the human toddler enjoys.¹⁵⁹ In advocating for those equal rights, however, GAP proponents miss several key components.

First, an adult human who possesses the cognitive abilities of a three-year-old is not legally considered autonomous, whether “practically autonomous” or otherwise; rather, an adult with such cognitive abilities is considered deficient, mentally disabled, and “child-like.” This adult would be incapable of advocating his own interests and would require a guardian to advocate for him. Similarly, in any given court, and regardless of intellectual ability, a human child still requires that an adult enforce the child’s rights. Because of his frailties and vulnerabilities, the child will not be accorded equal rights, even though the child remains just as intrinsically valuable as his parent. The law understands that the child is not an autonomous decision maker, and consequently, the law requires that someone else advocate for him.

The same argument can be made for the great ape with one key distinction. While a child is not an autonomous decision maker for a time, the law understands that the child will likely mature and eventually be capable of forming his own decisions. Great apes, on the other hand, will never be autonomous decision makers. If great apes were truly a human’s equal, then either the ape would not need human beings to enforce its rights (as in the case of the average human adult) or conversely, the ape would eventually mature and develop the capacity to advocate for itself (as in the case of the average child). Neither, however, is true. The great ape will always be at the mercy of a human being who must advocate for it.

Second, the law does not hold children as equal to their adult counterparts. While the law does recognize a child’s intrinsic value, the fact that a child is human does not allow him to act as an autonomous deci-

¹⁵⁹ Capone, *supra* note 78.

sion maker. The child must first reach a certain age, and even then, the child must possess a certain intelligence level. In fact, rather than grant them unbridled life, liberty and bodily integrity, children are prohibited from doing many things. Children cannot marry, drink, or vote. Children cannot drive, open bank accounts, join the military, or hold certain jobs. Children are a protected class—from security against faulty contracts to shields against sexual predators. Thus, in actuality, even though children share an intrinsic value equal to their parents, the law does not grant those children the same rights and advantages their parents enjoy.

Third, and perhaps most importantly, while the law does not grant children a level of freedom equal to their parents, the law does not subject children to a level of accountability equal to their parents either. So too is the case with the great ape. While the great ape has not, to this point, been granted liberties equal to those of a human being, neither is the great ape bound to the same restraints human beings are subject to.

B. Animals Are Not Moral Beings Bound by Human Law

As animals are not bound by the same law humans are subject to, to grant great apes human rights would be to give them an extraordinary liberty without requiring any sort of accountability in return.¹⁶⁰ As one opponent of the GAP stated, “I’ve yet to see a chimp imprisoned for stealing a banana,” the reason being that animals are not subject to human law.¹⁶¹ One can only imagine how swiftly justice would be executed if the perpetrators in the following examples were human.

Tribal Warfare. In her years of research in the jungle, Jane Goodall observed the systematic annihilation of one group of apes by another group of apes.¹⁶² Although all of the apes had once been a single community, the community split, causing half of the apes to migrate to the south while the other half remained to the north.¹⁶³ After the split, the northern herd of apes began to brutally attack the southern apes, “systematically” annihilating the southern ape herd one by

¹⁶⁰ Geoghegan, *supra* note 149. Steve Jones argued that, “[r]ights and responsibilities go together . . . [and animals] don’t have a moral sense of what’s right and wrong. To give them rights is to give them something without asking for anything in return.” *Id.*

¹⁶¹ *Id.*

¹⁶² Evolving Legal Status, *supra* note 2, at 6.

¹⁶³ *Id.*

one. The “war” lasted for four years, and in that time, the entire southern group was destroyed.¹⁶⁴

Sexual Aggression. In each group of great apes, (i.e. orangutans, chimpanzees and gorillas), researchers found males exhibited a heightened sexual aggression toward females and often forced their female counterparts to copulate.¹⁶⁵ Male orangutans typically forced females to copulate where either the male met the female for the first time, or where the male and female met again after a period of separation.¹⁶⁶ Male chimpanzees forced females to copulate where the female was a new acquaintance, where the female was isolated from the chimpanzee herd, and where the female was unable to escape from the male chimp.¹⁶⁷ Male gorillas, rather than simply forcing copulation, first charge and struck their female counterparts where the female initially rejected the male’s sexual advances.¹⁶⁸

Violent Tendencies. In 2005, two chimps escaped from their cages and viciously attacked a man visiting the Animal Haven Ranch in California.¹⁶⁹ The man was standing outside of the chimps’ cage when the chimps, unprovoked, began to attack him.¹⁷⁰ The doctor who treated the man reported that the chimps not only “chewed off most of the man’s face,” but then proceeded to sever the man’s testicles and foot – both of which would require extensive surgery.¹⁷¹ A primate expert consulted for the story further reported that chimpanzees, which weigh between 120 and 150 pounds and have at least five times the strength of humans,¹⁷² “are known to kill chimps from neighboring groups, hunt other primates and even attack humans in the wild.”¹⁷³ Employees were forced to shoot the chimps in order to stop their attack.¹⁷⁴

In each of these three scenarios, the great ape acted in a way that is incompatible with human law. Yet, acting within the realm of nature, these actions would not be prohibited. Why? Because animals are not

¹⁶⁴ *Id.*

¹⁶⁵ Ronald Nadler, *Sexual Aggression in the Great Apes: Implications for Human Law*, 39 JURIMETRICS J. 149, 153 (1999).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Birthday Party Turn Bloody When Chimps Attack*, USA TODAY, March 4, 2005, available at http://www.usatoday.com/news/nation/2005-03-04-chimp-attack_x.htm.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

moral beings bound by human law. If one chimpanzee happens to steal its neighbor's banana, the chimp is not imprisoned for petty larceny.¹⁷⁵ Similarly, if one group of great apes "systematically annihilates" another group, or if one male ape sexually assaults a female ape, or if one great ape severs the hand and foot of another great ape, those actions would not be prohibited in the animal kingdom. A great ape is not morally responsible for its actions in the jungle, nor are such actions seen as "irrational behaviors." A great ape is a great ape, and in its natural habitat, the great ape is allowed the freedom to behave in these ways. It is a wild animal by nature, regardless of the training it might receive, and should not be required to act like a human being.

A problem arises, however, where, without notice or cause, the great ape acts to the detriment of human beings, and yet, cannot be held accountable for those actions. Society cannot hold a great ape accountable for its behavior. The great ape is not a moral being. Yet, it is to *this* animal, unbound by human law, that GAP advocates seek to award human rights. In all likelihood, by granting great apes human rights, advocates are in essence bestowing on them a burden too great for them to bear.

C. A Burden Too Great

The incidents described above illustrate behavior that would arguably be considered immoral if a human being were to act in the same way. If a group of human beings were to "systematically annihilate" another group, if a man were to sexually assault a woman, or if one human were to maliciously sever the hand and foot of another human, those individuals would be subject to arrest, jail upon conviction and perhaps even death. In the animal kingdom, however, apes act without fear of criminal liability.¹⁷⁶

In relaying the brutal and admittedly cruel behavior of apes, Goodall defended them by emphasizing the ape's inability to curb its impulses.¹⁷⁷ Thus, animals should not be faulted for their failure to control their more primal urges because animals lack the brain sophistication we freely enjoy.¹⁷⁸ Human beings, unlike the great apes, can

¹⁷⁵ See Kolber, *supra* note 34, at 179.

¹⁷⁶ Kolber, *supra* note 34, at 179.

¹⁷⁷ Evolving Legal Status, *supra* note 2, at 4.

¹⁷⁸ *Id.*

“analyze their feelings,” “control their aggressive impulses,”¹⁷⁹ and even create social systems to enforce the control of those impulses.

Human beings do possess the capacity to control their mental and emotional states. Human beings do possess the ability to control their behavior, both individually and communally. Great apes, on the other hand, cannot and do not control their behavior. They act by instinct. They act by imitation. They do not, however, possess the capacity to control those instincts. They do not control their impulses. They are not masters of their emotions. Nonetheless, it is to *these* animals—which cannot control their impulses, are capable of incredible harm, and yet free from liability—that the GAP seeks to grant fundamental human rights.

The GAP imposes neither accountability to authority nor responsibility for behavior on the great ape. There is no ultimate judge for ape behaviors that would be considered immoral acts in human society.¹⁸⁰ The GAP would impose liberties on the great ape without requiring that the great ape account for them. Moreover, how can the GAP claim that there is equality under the law if certain creatures are bound to it and others are not? It is a distinct probability that by granting apes liberties for which there is no accountability, man will soon find himself on the descent. After all, if the ape can do it, why can't man?

VI. THE EFFECT OF ANIMAL EQUALITY ON OUR HUMANITY: THE SOBERING REALITY OF THE GAP

A. *The End Of Equality*

Do equal rights exist where an ape can do what a man cannot? Before the demands of the GAP can be seriously deliberated, GAP advocates must address the ramifications of the inequality that will result under the tenets of the GAP. If man and ape are equal, then legally, may a man behave as an ape behaves and yet remain free from criminal liability? Further, under the tenets of the GAP, what is to stop man from doing so? If, as GAP advocates claim, man and ape are equal, differing in degree but *not* in kind, then how can the law prohibit man from acting in ways similar to his “equal?”

Recall that in her years of jungle research, Jane Goodall watched the systematic annihilation of one tribe of apes by another tribe of apes—and later used this information in efforts to prove the apes’ “per-

¹⁷⁹ *Id.*

¹⁸⁰ Kolber, *supra* note 34, at 179.

sonhood.” If man and animal are equal and the great ape engages in tribal warfare and systematic annihilation, then by implication, man should be at liberty to partake in the same type of activity. If great ape males are by nature sexually aggressive toward females, and great apes are equal to human beings, then by extension, the law should not prohibit men from being sexual aggressors and forcing themselves on women. If man and the ape are morally equal beings, and the apes are given to bouts of unprovoked violence, the law cannot claim to be the great equalizer and yet prohibit human beings from bouts of unprovoked violence. What if certain great apes began to exhibit behavior akin to pedophilia? Could the law rightfully deny a human being the right to sexual intercourse with a five-year-old? That lifestyle could hardly be denied to human beings if, in fact, apes and men are equals, if they are truly only different in degree, rather than different in kind.

Indeed, in a world where man and ape are equal, the rallying cry might soon become: “If the apes can do it, why can’t man?,” epitomizing the backwards mindset the GAP seeks to implement. Consider that various GAP advocates define themselves, human beings, as the inferior creature. As he climbed a hill in Africa, Dr. Roger Fouts¹⁸¹ remarked that he was a “defective chimpanzee.”¹⁸² It is a backwards mindset to define oneself as a “defective chimpanzee.” In arguing for the apes’ personhood, Steven Wise claimed that we, as human beings, may not have the capacity to understand the great ape.¹⁸³ It is a backwards mindset to infer that humans lack the capacity to understand the great ape. In discussing the great apes’ language, Douglas Adams opined that perhaps it is not that the great apes have yet to gain a language, but rather that we, human beings, have lost one.¹⁸⁴ It is a backwards mindset to assert that human beings’ capacity for language might in fact be inferior to that of a creature that has yet to utter a single sentence.

To grant the ape human rights without requiring the ape be bound by human law results in a reverse discrimination because granting rights without requiring accountability overturns the balance of equal-

¹⁸¹ Evolving Legal Status, *supra* note 2, at 15. Dr. Fouts, a professor of Psychology at Central Washington University, has been a part of “Project Washoe” since 1997, in which supporters attempted to teach a great ape, Washoe, sign language. *Id.*

¹⁸² *Id.* at 21.

¹⁸³ *Id.* at 30.

¹⁸⁴ Douglas Adams & Mark Carwardine, *Meeting a Gorilla*, in *THE GREAT APE PROJECT: EQUALITY BEYOND HUMANITY* 23 (Paola Cavalieri & Petter Singer, eds., 1996) (1993).

ity. There is no equality under the law where one actor is allowed to break the law free from accountability while the other actor does not enjoy that same freedom. Arguably, if man and animal are one and the same, then there is no reason to deny animals equality with man. However, if animals are not equals, then the issue of their protection cannot be solved simply by granting them greater rights.

B. *You Are Not Unique*

Are the advocates of the GAP simply seeking to protect and preserve animal life? The answer is a resounding, “No.” In the advocates’ own words, if the goal of the GAP was to protect and preserve the great apes species, then “the most important issues surrounding their protection would be wildlife preservation in countries with native populations of great apes and the local and international laws protecting endangered species.”¹⁸⁵ It is an undeniable fact that animals are legally protected and continue to experience increased legal protection. The AWA alone has experienced six different amendments, all which further restricted man’s behavior and granted greater rights to animals, particularly the great ape.¹⁸⁶

What then is the GAP actually seeking to accomplish? Given the practical implications of the GAP, the fundamental differences between man and animal, and the ape’s inability to be held accountable, why promote the GAP? The answer does not have to be sought or discovered. It is staring humanity in the face. Upon realizing that Jane Goodall had discovered a chimpanzee using a stick as a tool, Goodall’s mentor exclaimed, “Now we must redefine man, redefine tool or accept chimpanzees as human!”¹⁸⁷ Years later, Goodall remarked that once those who seek equal rights for great apes blurred the line between man and animal that was “once seen as so sharp,” man will realize he is not so different.¹⁸⁸ Man will finally realize that he is not unique.¹⁸⁹

The GAP presents a picture that tells only part of the story. Great apes do share certain similarities with man. They communicate non-verbally; they experience emotion; they are intelligent; and they express personality. However, these simple abilities are not what *define*

¹⁸⁵ Kolber, *supra* note 34, at 180.

¹⁸⁶ Adams & Larson, *supra* note 33.

¹⁸⁷ Evolving Legal Status, *supra* note 2, at 4.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

man. Certainly, man communicates, experiences emotion, is intelligent, and expresses personality. Yet, it is not these things alone that make man valuable. It is not these abilities alone that give man worth.

The GAP's argument must be understood. The GAP compares what is most basic about man and the ape and proclaims that man and ape are the same, differing only in degree, and thus, should be granted the same value.¹⁹⁰ The problem with this comparison is that in failing to honestly evaluate man and ape, the GAP is redefining humanity by diminishing the value of man while increasing the value of the ape, beyond its intrinsic characteristics and capabilities.

Consider a red, round, shiny tomato and a red, round, shiny ball. Both are red. Both are round. Both are shiny. If one heard this basic description of their similarities, one might infer that they are the same thing, or at least, the same type of thing. However, that inference would be completely wrong. A comparison of their basic similarities would not capture the uniqueness of either.

If one chooses, however, to go beyond the surface and evaluate the tomato and the ball honestly, one would be forced to admit, that while similar, these two objects are entirely different. While both the tomato and the ball might be useful, they each maintain entirely different values and uses. The tomato possesses life-giving and perhaps even life-saving abilities in its nutrients, sustenance, and in the water it contains. The ball, on the other hand, while useful for play, for work, or perhaps even for experiment, is useless for nutritional purposes and perhaps harmful if ingested. While the red, round, shiny ball is similar to the red, round, shiny tomato, they are not one and the same despite the basic similarities that they share. They do not possess the same value. The inherent differences between the two require us to treat the tomato and the ball differently. If a woman, on observing their basic similarities, alleged that the tomato and the ball were one and the same, she would be forced to disregard the inherent, unique character of each. In disregarding the unique character of the ball, the woman, by implication, authorizes herself to redefine what the ball is. What must naturally follow then, in redefining the ball, is the authority to assign the ball a new value.

This is what is at stake here. In comparing basic similarities and proclaiming it sameness, advocates of the GAP are in essence arguing to *redefine* man. In redefining man, as in redefining the ball, the GAP is re-assigning man's value.

¹⁹⁰ *Id.* at 2-10.

C. *The Connection: In Exalting Animal Life, We Will Desanctify Our Own*

In redefining what is human, we do not simply redefine what is valuable; we re-create the moral landscape. Under this new “community of equals,” a person is not valuable simply because he is human; rather, a *creature becomes* valuable solely because of its abilities; a *creature becomes* valuable because it meets the necessary criteria. What can “it” do? What can “it” not do? Once “it” no longer possesses the ability to perform or think or do in the same way, its “personhood” will become an afterthought. In equating ourselves to the ape, our humanity will be lost.

If man and the great ape are equal, we must understand there will be a radical paradigm shift regarding law, justice, and morality. Ironically, the GAP seeks to destroy the very thing it claims to impart. Without acknowledging human beings’ innate uniqueness, there is nothing to separate man from the animals. Human rights exist because human, moral beings stand for justice, morality, and the rule of law. If Dr. Fouts’s remark is true, if human beings are simply “defective chimpanzees,” then the idea of “human rights” becomes obsolete. Human beings are the *only* moral beings; and, unless we maintain that there are certain characteristics that set us apart simply because we are human, then human rights as we know them will cease to exist.¹⁹¹ In a world where a “person” is given value based on ability, there can be no real “human rights” because in the world of abilities, one’s value depends solely on what one possesses.¹⁹² If one’s abilities fluctuate, if they diminish or increase, so too will one’s value.¹⁹³

Moreover, by including both man and the ape in the same “community of equals,” the GAP has redefined what is valuable. Where apes are granted human rights because they possess certain skills, then, by implication, human beings who do not possess those same skills must be considered less valuable. It is the only logical conclusion, and in the wake, neither man nor animal will be safe. Why? Because their value will be granted based on what they can do. In the GAP’s world

¹⁹¹ Smith, *supra* note 151; see Wesley J. Smith, *The Triumph of Peter Singer’s Values: Animal Rights More Important than Human*, July 2008, <http://www.lifenews.com/bio2518.html>.

¹⁹² *Id*; See Wesley J. Smith, *Monkey Business: Spain Apes the Declaration of Independence*, WEEKLY STANDARD, July 28, 2008.

¹⁹³ Smith, *supra* note 151.

where value is defined by ability, the “community of equals” will be forced to earn its freedom.¹⁹⁴

CONCLUSION

In April of 2008, the U.S. House of Representatives introduced HR5852, the Great Ape Protection Act, a bill that would prohibit the conducting of invasive research on great apes, and “for other purposes.”¹⁹⁵ For those who believe that the United States will remain unaffected by Spain’s resolution, be forewarned. The rights of animals are increasing; the rights of humans are decreasing; and the world is steadily shifting in this direction.¹⁹⁶

It is not that proponents of the GAP have misplaced their priorities. It is that their priorities no longer include cultivating the dignity of the human being. Under the GAP, the world will grant the right to life to animals that will never function as members of society, while simultaneously *denying* the right to life to human beings. Under the GAP, the world will sacrifice those with inherent value because, according to the new standard imposed by the “community of equals,” “inferior” human beings are expendable. Under the GAP, the world that proclaimed the unique worth of man based on his intrinsic value will now confer that unique worth onto the ape simply because it possesses certain abilities. It was once said that “[t]he changing world compels certain things to disappear.”¹⁹⁷ That statement remains true—only the thing which is now dispensable has changed. In the world of the Great Ape Project, that which is now dispensable, is us.

Those who advocate granting fundamental human rights to great apes must not be dismissed. They must be heard; they must be evaluated; and, in the face of what they seek to implement, they must be answered. We cannot afford apathy. We cannot afford ignorance. We cannot afford fear. The stakes in this ideological battle are too great

¹⁹⁴ Smith, *supra* note 192.

¹⁹⁵ H.R. 5852, 110th Cong. (2008).

¹⁹⁶ *Practical Implications*, *supra* note 24. In the United States, apart from the argument for animals’ personhood, there is also a push to legally re-classify animals as “sentient property” (i.e. “feeling” property), and scholars argue that courts should determine the best interests of “sentient” property just as they determine the interests of young children and the mentally disabled. *Id.* Also, pet owners can sue for loss of love and affection and be awarded up to \$4000 dollars if a pet is wrongfully killed. *Id.*

¹⁹⁷ John Copeland Nagel, *Endangered Species Wannabees*, 29 SETON HALL L. REV. 235, 253 (1998).

and woe to us if we fail. If we are not careful, as one wise man so succinctly put it, we will soon wake up to realize that we are now “just another animal in the forest.”¹⁹⁸

¹⁹⁸ Smith, *supra* note 192.