

# REMARKS

## THE EVOLVING LEGAL STATUS OF CHIMPANZEES

*On September 30, 2002, Harvard Law School hosted a legal symposium sponsored by the Chimpanzee Collaboratory's Legal Committee. The symposium featured speakers with expertise on chimpanzees, as well as legal scholars and lawyers who discussed the possibility of obtaining legal rights for chimpanzees and other great apes. This symposium sought to advance the argument that chimpanzees are entitled to some degree of legal status, and the speakers presented a range of views about how far such legal rights should extend. These remarks reflect the connection between the growing scientific understanding of chimpanzees and the advances in related legal doctrines.\**

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*President, Animal Legal Defense Fund*

Dominique Castro  
*Student, Harvard Law School*

Karla Wejberg  
*Student, Harvard Law School*

### SPEAKERS:

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\* *Animal Law* would like to thank Steve Ann Chambers for her assistance in the publication of this symposium. We also would like to thank all the participants for presenting such enlightening discussions. We are honored to have the opportunity to publish these remarks which are an edited version of the symposium in its entirety.

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*Professor of Psychology, Co-Director of  
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Jane Goodall  
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Cass R. Sunstein  
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*Assistant Clinical Professor at Tufts University School of Veterinary  
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*Museum of Comparative Zoology,  
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**Steve Ann Chambers:**

Good morning, and welcome to “The Evolving Legal Status of Chimpanzees.” My name is Steve Ann Chambers. I am the President of the Animal Legal Defense Fund and chair of the legal committee of The Chimpanzee Collaboratory.

On behalf of the Collaboratory, we’d like to extend our thanks to the Harvard Student Animal Legal Defense Fund, our co-presidents Karla Wejberg and Dominique Castro, Harvard Law School, and most especially to The Glaser Foundation, without which this day would not be possible.

This is truly an historic event. Here at this prestigious law school, with these brilliant, prominent minds—the most outstanding primatologists in the world and some of the most brilliant legal minds—exploring what the legal status of chimpanzees is, what it is not, and what it ought to be. We will explore how the law lags behind science and how we can effectively bring the law up into the twenty-first century, so that the interests of chimpanzees and other great apes can be adequately recognized and protected within our legal system.

**Dominique Castro:**

Dr. Jane Goodall is a world renowned primatologist and an advocate for animals and the environment. She earned her Ph.D. in ethology from Cambridge University after spending several years studying chimpanzees at the Gombe Stream Chimpanzee Reserve. She’s made several significant discoveries, including that chimpanzees make and use tools, hunt animals, and engage in warfare. Her work has become the foundation of future primatological research and has redefined the relationship between humans and animals. Founded in 1964, Dr. Goodall’s Gombe Stream Research Center is the longest, uninter-

rupted, wildlife study in existence. In 1977 she established the Jane Goodall Institute, which supports the Gombe work on chimpanzees, as well as education and conservation programs, such as the Congo Basin Project dedicated to ending the “bush meat” trade.

Among her many honors and awards, Dr. Goodall has received the National Geographic Society’s Hubbard Medal, the Medal of Tanzania, and most recently, the Secretary General has appointed her as his Messenger of Peace. She is one of only ten appointees in the world. Then, over the summer she trekked some twenty kilometers through the jungles of Congo with Dr. Mike Fay to raise awareness about the problems facing conservation in the forest.

It gives me great pleasure to bring to you Dr. Jane Goodall.

**Dr. Jane Goodall:**

{The doctor opens by making chimpanzee calls, and then she laughs.} The voice of the chimpanzee needs to be heard around the world—we need to speak out for these amazing chimpanzee relatives of ours. I have taken that sound into the United Nations, European Parliament, schools, civic centers—and just about everywhere in different countries of the world.

Chimpanzees are so like us. The chimpanzees (*Pan troglodytes*) and bonobos (*Pan panisous*) are our closest living relatives. As Roger Fouts will tell you, they can learn many signs of American Sign Language (ASL) and are able to comprehend the meaning of these signs. They can use ASL when they are communicating with each other, as well as with their teacher, but they haven’t developed a sophisticated spoken language for themselves. As far as we know, they’re not capable of teaching their young about objects or events that are not in the present, they’re not able to talk about things that happened in the distant past, and they’re not able to make plans for the distant future. Nor if one of them has an idea, can they sit around in a group and discuss that idea, so that it can change as a result of the accumulated wisdom of the group. So they are in an interesting position in the evolutionary chain, because although their brains are capable of comprehending so much, so far as we know, sophisticated spoken language is unique to humans. It has enabled us to move along an evolutionary pathway of explosive development of the brain, and that has enabled us to dominate other animals in the natural world. We only have to look around the world today to see the result of that domination. Animals in the wild are disappearing, individual after individual, species after species. Habitats are being destroyed. We’re polluting the air, the water, and the land. We are showing many examples of cruelty, warfare, and violence around the world. It’s a sad world we live in today.

There are people who say, “In a world where there is so much human suffering, why are you getting together groups of intelligent people to talk about the legal status of great apes? What about the lack of human rights in so many countries? Shouldn’t you be talking about

that?" I hope that as today progresses, you'll have an idea as to why it's important to think about the legal standing of the great apes. As I've said, chimpanzees are our closest living relatives. They are like us biologically. They differ from us in the structure of their DNA by only just over one percent. Their immune system is very similar to ours, which is why they're used in so many medical research experiments. Along with the other great apes, the anatomy of the brain and the nervous system are more like ours than those of any other living creature. Therefore, it shouldn't surprise us that there are so many sometimes amazing behavioral similarities as well.

In the wild the chimpanzees can live to be more than fifty years old. I think the longevity record in captivity is about sixty-five. They also have a long childhood, and during this long childhood, the young chimpanzee is able to learn the skills needed for life in the wild. We believe that the long childhood is important to the chimpanzee child, as for the human child, because there is so much to learn. The more sophisticated the brain of an animal, the more that learning in an individual life takes on an important role.

At Gombe the normal interval between live births is five to six years. When a new baby is born, the older child doesn't leave the family circle, but continues to travel around almost continually with the mother and young sibling for the next three or even four years. Even after that, bonds between family members continue into adulthood. I'll give a few examples in a minute.

Chimpanzees are capable of sophisticated cooperation. As you have heard, they may hunt, mostly other mammals, sometimes birds, and they may share the meat in response to begging gestures. They are capable of using many different kinds of objects as tools. It was a breakthrough observation when I first saw a chimpanzee at Gombe, not only using a piece of straw to fish for termites, but breaking off leafy twigs and stripping away the leaves, thus *fashioning* a tool in order to feed on termites. It was a breakthrough observation because at that time in 1960, it was thought that humans—and only humans—used and made tools. When I sent the information to Louis Leaky, my mentor who had struggled to get money for me to start that study, he made his now famous remark: "Ha! Now we must redefine man, redefine tool, or accept chimpanzees as humans!" Because humans had been defined, when I was at school, as "man the tool-maker."

Since that far-off time, we have found at Gombe that chimpanzees are using more than nine different objects for different purposes as tools. Incredibly, everywhere chimpanzees have been studied across Africa, they are using *different* kinds of objects as tools, in *different* contexts.

We talked about the importance of learning in childhood, and it has been shown in captive chimps that they are capable of learning, not only through trial and error, social facilitation, but also that they are capable of true imitation. These tool-using behaviors, in many cases, can often be described as culture, if we accept as a definition of

culture that it's a behavior passed from one generation to the next through observation, imitation, and practice. In other words, tool-using behaviors are not purely instinctive, although the ability to manipulate objects is instinctive.

Perhaps some of the most fascinating similarities between chimpanzees and ourselves is non-verbal communication—kissing, embracing, holding hands, patting on the back, swaggering, shaking the fist, pulling out hair, tickling, laughing—in all of these ways, they perform postures and gestures uncannily similar to many of ours. Not only that, they perform them in the same kind of context, and they clearly mean the same kind of thing. There is one moment at Gombe that was incredibly meaningful. Even now, forty years later, I still remember it as though it happened yesterday. During the very early months, the chimpanzees ran away from me. They had never seen a white ape before, and they are very conservative. One of them, David Graybeard, lost his fear before the others, and helped me to open a door into a magic world—the world of the wild chimpanzees. As the others were prepared to flee, David would sit there very calmly looking at me, and I think they gradually realized, “Well, she is not as dangerous as we used to think.” Well, on this one occasion about a year into the study, David had actually allowed me to follow him, as long as I didn't get too close. He disappeared as I was following him along a narrow trail into a thorny tangle of vine. It's easy for the sleek-coated chimpanzee to slide through the vegetation, but I got caught up by my hair and my clothes. It was very frustrating, and I was sure I had lost him. When I got through, there he was, sitting almost as though he'd been waiting for me—and maybe he was. Who's to say? So I sat near him, and lying on the ground was the red fruit of an oil nut palm, which chimpanzees love. I picked it up and I held it toward him. He turned his face away. I pushed my hand a little closer, he turned, looked directly into my eyes, and he took that nut. He dropped it, but at the same time he held my hand and gave that very gentle pressure, which is often how one chimpanzee will reassure another.

That moment was so magical because it was as though we had communicated with a language that predated human words; a language perhaps inherited by both chimpanzee and human from some ancient common ancestor millions of years ago. And that moment, which showed I truly had gained a wild chimpanzee's trust, laid on me a burden of responsibility; I never wanted that trust to be betrayed. I have tried to uphold that promise I made to David all those years ago.

Perhaps the similarity between humans and chimpanzees most important to this discussion is that, like us, they know emotions such as happiness, sadness, fear, and despair. We could run through a whole gamut of emotions, but it is not necessary to do so now. Everybody who has worked with chimpanzees in a reasonably normal setting, whether it is in the wild or in captivity, agrees that they show these emotions. Although it is difficult to prove, it is also impossible for me to prove that when you say you're happy, you feel like I feel when I am happy.

But if we watch our children, even before they can speak, we can tell from the way they behave if they are happy, sad, angry or depressed. And if you watch a chimpanzee child and a human child in similar context, they behave in similar ways.

There have been experiments where people brought up ape children with human children, and they understand each other quite well. Two of the human children actually thought of themselves as brothers and sisters of the young chimp with whom they shared their lives.

Like us, chimpanzees also have a dark side to their nature. It was shocking to me, when in the early seventies, we learned that sometimes as the males patrol the boundaries of their territory in groups of three or more, they may give chase and brutally attack individuals from a neighboring social group. They show hunting behavior. They climb a tree and stare out over what we may consider the hostile territory of a neighboring social group, and if they see a lone individual, usually a female, they will chase her, and the victim, if caught, will be subjected to an extremely brutal attack. Indeed, that individual may die of the injuries received.

It was perhaps one of the worst times for me at Gombe when our main study community divided into two, and the males of the larger northern group, once the boundary between them had been established, began systematically to move deep into the heart of the area which had now been claimed by the southern splinter group. One by one the southerners were attacked extremely brutally—individuals whom, previously, they had been grooming, playing, traveling, and feeding with. It was like a civil war. It lasted four years, and during those four years, the other individuals were annihilated (with the exception of adolescent females, who move between communities, preventing too much inbreeding). The victorious males and their females then took over this piece of territory that the “southerners” had claimed. Incidentally, it was the piece of territory that they had all shared before the split.

It was extremely painful to watch these events unfolding, and when I first began to talk about them, I was actually criticized by a number of colleagues who said, “But Jane, you shouldn’t report these anecdotes. People will get the feeling that, if we share a common ancestor, aggressive behavior is innate in our own species, and violence and war is inevitable.” Well, I don’t think many people can look around the world today and not believe that there are aggressive tendencies deeply imbedded in our nature. We have many examples of very deep aggression in certain leading politicians in the world today.

But, the point is, that with this sophisticated brain we have, we are capable of self-analyzing our feelings, and by and large we do not go around acting out our aggressive impulses. Our language says it all. “I could kill her,” or “I hate him.” We talk in a very violent way, but most people don’t go around attacking people who upset them. If they did, there would be mayhem in the streets. It would be like gang warfare all over the world. We don’t do that. We *can* control these aggress-

sive impulses. The most important thing to realize here is that there are also very strong precursors of compassion, love, and altruism in chimpanzees. I propose to illustrate this with a few stories.

Let's imagine for a minute that we're in the forest, and we're following two young chimps along a trail. It's dim and green in the forest, with little specks of sunlight coming down through the canopy. Leading us is an adolescent female, Pom. Following Pom is her little three-year-old brother, Prof, still a little unsteady on his feet. Their mother is behind them. As we walk along this trail, suddenly Pom stops. Her hair stands a little on end, which is a sign of arousal. She stares at something on the ground, makes the small sounds uttered by a startled chimpanzee, and rushes up a tree. Little brother—well, maybe he doesn't hear that sound. Maybe he doesn't know what it means. He continues along the trail. And the closer he gets to this spot on the ground the more agitated his sister becomes until every hair is bristling. She gets a huge grin of fear on her face, and she finally can't stand it any longer. She rushes down the tree. She gathers up her little brother and scoots back up the tree. And there, coiled up at the side of the trail, is a big poisonous snake.

The second story also illustrates the long-term, supportive, friendly bonds between members of a family. I should interject here that the father does not play a major role in raising children. Until recently, when we could do DNA profiling from fecal samples and from hair samples, we didn't know—although we sometimes guessed—which males had fathered which infants. Now we're finally beginning to do that. But when I talk about the family, for the most part I am referring to the bonds between mothers and their offspring, and between siblings. This is a story about a splendid young male, about twenty-three years old, who happens to be called Satan (but that's irrelevant to this story). He arrives at a big fruiting tree and rushes up with his hair bristling, while making his "oooh, oooh, oooh" happy food sounds. He spies a beautiful bunch of ripe red fruits, and he climbs to feed. The fact that there's already a lower ranking male feeding there is not important—"uhh, uhh"—he threatens the younger male away. The younger male screams. Now, what Satan didn't know was that the young male's older brother was higher up in the tree. Big brother comes down immediately, hearing the calls of his younger brother, and they both turn on Satan, attacking him. Now Satan screams. To my amazement, a very ancient female—her hair thin, her teeth worn to the gums—is feeding two trees away, high in the branches, and when she hears these screams, she comes swinging as fast as she can through the trees. She drops down onto these three huge males, each one of them about twice her size. She starts hitting the two brothers with her puny little fists. And it is Satan's ancient mother, Sprout. I think the two brothers were so surprised, they hit out at Sprout, and Satan was able to escape.

The third story is about an infant whose mother dies when he's three-and-a-quarter years old. He was a rather sickly infant and his

name is Mel. He was still suckling when his mother died in an epidemic of something like pneumonia. If Mel had an older brother or sister he would have been adopted, because that's how it goes, but he didn't. He followed different individuals, and they were all quite nice to him, but he didn't form a special bond and he became more and more depressed and it seemed he would die. We have had a number of youngsters older than that, five years or more, who have died seemingly of grief after losing their mothers. But to our amazement, an apparently completely unrelated adolescent male of twelve years old, Spindle, adopted little Mel—who had reached the age when it was possible to survive without milk. Solid foods had become quite important in his diet. And now that he'd been adopted by Spindle, Mel began to show signs of picking up a little. Spindle let Mel ride on his back, even clinging to his belly. He waited for Mel in travel. If Mel begged, "Hoo, hoo," for a share of food, Spindle would let him share. When Mel climbed up to the sleeping platform that Spindle made each night, Spindle would reach out and draw him close.

This was perhaps the most remarkable of all: When the big males are challenging each other for social dominance, they perform magnificent charging displays. With hair bristling, they hurtle across the ground, stamping and slapping, swaying vegetation, picking up and hurling rocks and branches. If an infant gets in the way, they may actually use that infant as a display prop by picking up, throwing, or dragging that infant. The mother's job is to make sure that the infant keeps away from socially aroused males, until he or she has learned how to behave. Spindle even took on *that* role despite the fact he was at the age when those big males were his heroes. The adolescent male, when he starts leaving his mother, follows the big males—watching them—learning how to behave in a group as a socially responsible male. Usually the adolescent male shows increased caution, because behavior that was tolerated by the big males when he was a juvenile, now suddenly is perhaps sensed as an up-and-coming challenge. Adolescent males are apt to become scapegoats, so they tend to keep out of the way during social excitement. But Spindle would risk everything, and go running in to rescue little Mel—and very often did get beaten up himself. There is no question that Spindle saved Mel's life.

Why would Spindle behave this way? As far as we know, there was not even the biological explanation that by saving Mel, Spindle was helping perpetrate his genes into the next generation, because there was no *close* relationship between Spindle and Mel. Well, here is a wild speculation: during the epidemic that claimed Mel's mother, Spindle also lost his own ancient mother. And, even though at twelve years old you don't need your mother, and are completely independent if you get injured, you tend to seek out your mother (if she's still alive) and spend peaceful time with her. Perhaps, just perhaps, losing his mother left an empty space in Spindle's life and this close contact with a dependant infant helped to fill it. If that's true, I can sympathize, because I lost my mother two-and-a-half years ago. And when you lose

someone who has been your best friend for sixty-five years, it does leave an empty space in your life. But we'll probably never know.

I hope these stories give some feeling of how like us chimpanzees are: they have a dark side as we do, but also can be loving and altruistic. I think it's true to say that the information learned from studies of chimpanzees and other great apes across Africa and in captivity, has really helped to blur the line once perceived as sharp between humans and the rest of the animal kingdom—a sharp line drawn by Western science and Western religion. A sharp line that was never recognized by the indigenous people around the world nor by Eastern religions. But certainly when I was growing up, that sharp line was thought to divide us from the rest of the animal kingdom. If we are prepared to admit that we are not the only beings with personalities, minds, and feelings, then we gain a new respect, not only for the chimpanzees, but for other amazing animals with whom we share this planet.

There has been a big change since 1960 when I began my study. When I first got to Cambridge University, I had no degree of any sort. Louis Leaky got me the money to start the Gombe chimp study from a wealthy American businessman. It took him a year to get enough money for six months, because it was a ridiculous idea; a young girl, straight from England, no degree, no training. Why would anybody give money for something like that? Eventually, Leighton Wilkie said, "All right Louis. Here's some money for six months." It was a shoestring operation. Then the British authorities from what was then Tanganyika put their feet down and said, "A girl? A girl from England, out in the bush? This is ridiculous. We can't give permission." But, in the end, they said "All right, but she must have a companion." So, who volunteered to come? My amazing mother, who had such an influence on my life right from the beginning, and who supported all my wild dreams. She didn't laugh at me when, at ten, I dreamed of going to Africa, living with animals, and writing books. She was sympathetic when I fell passionately in love with Tarzan and was jealous of Tarzan's wretched wife, Jane! She came with me for the first four months. Then came the breakthrough observation—David Graybeard using tools. It enabled Louis to go to National Geographic to get money to continue the research. And the rest is history.

At the end of the first year Louis Leaky said, "Jane, you have to get a degree. I won't always be around to get money for you, and you've got to stand on your own two feet. But we don't have time to mess about with a BA. You'll have to go straight for a Ph.D." I was really naïve. I had been to school, left at eighteen, messed about, earned the money to go to Africa, then left on a safari with Louis Leaky and Mary to look for fossil bones in Olduvai. I had learned what I could about chimps during the time it took Louis to get the money. But not much was known about chimps then.

And suddenly, I found myself going to Cambridge University in England, to pursue a Ph.D. A bit ridiculous, when you think about it! When I arrived, I was filled with excitement about all the amazing

things I had seen. I had gotten to know many of the chimps as individuals and it was like having cold water thrown in my face, because I was told, "You shouldn't have named the chimpanzees. That's very unscientific. You should have given them all numbers." That was the first shock. I was also told, "You can't describe the personalities of chimpanzees. Only humans have personalities." Even individual differences tended to be swept under the carpet in those days in ethological research. When I dared to talk about the chimpanzees having minds capable of rational thought (and it was so clear that they did), I was told "Only humans are capable of rational thought. Only humans have minds." Finally, the worst ethological sin was that I dared to talk about the chimpanzees having *emotions*.

This has all changed gradually since 1960. There are pockets of resistance but there now are many bright students in universities around the world studying mentation, not only in chimpanzees, but other animals as well. The students are studying emotions, trying to come to grips with how you collect rigid data on something like emotions, and even beginning to study personality differences. There is a major personality study going on in our ChimpanZoo program right now, involving many different zoos. So things are gradually changing. And once we blur the line that was once seen as being so sharp between humans and the rest of the animal kingdom, then we gain a new respect, not only for chimpanzees, but for other animals too.

What does the blurred line teach us? It teaches a little humility. We *are* a unique species—we're just not as different from the rest as we used to think. Each of these amazing species is also unique and has developed in its own way to adapt to its particular situation. The brain has adapted to cope with the kind of problems that crop up in that animal's daily life. It is so sad that chimpanzees and the other great apes, along with so many other extraordinary beings with whom we share the planet are disappearing because of us.

Yes, there have been species extinctions in the past, but this one that is being called the sixth great extinction, is due to us. It's due to our increasing populations around the world. It's due to the destruction of forest habitats in Africa, Asia, and South and Central America. It's due to hunting. For a long time, there was a heavy toll taken on chimpanzees and other great apes for the live animal trade—mothers were shot to take the babies for entertainment and for medical research. There is less of that now, although it still continues for different reasons.

Today, the worst threat to the chimpanzees and all the animals living in the last great forested areas of the world (and outside the forest too) is what's called the "bush meat trade." For hundreds and thousands of years, indigenous people have lived in harmony with the natural world, killing just those animals they need in order to survive. Let me describe what is going on in the Congo Basin, the last stronghold for chimpanzees, gorillas and bonobos in Africa. In the Congo Basin, the bush meat trade is threatening to exterminate the

great apes, as well as other animals, within fifteen to twenty years. The logging companies (sometimes the mining companies) have made roads deep into the heart of the last great rain forests of Africa. People settle along these roads. They set snares and cut down trees to grow a few crops. They take with them their diseases, which are a threat not only to the great apes, who are so like us they can catch all known human contagious diseases, but also to the indigenous pygmy people who live there. These roads, along with the logging trucks, provide a mechanism for the hunters to go deep into the forests where they camp for a few days and shoot everything that moves—everything that's larger than a small rodent, even birds and bats. This meat is cut up, smoked, then loaded onto trucks and taken into towns where the elite will pay more for it than they will for a piece of chicken or goat. This commercial exploitation is not sustainable.

The logging companies have huge camps deep in the forest and many people are now living at the edge of the forest who weren't there before. All these people want meat. And so, whereas the indigenous people were taking out just what they needed for themselves and their families, now suddenly they are feeding the logging camps (maybe two thousand people, the loggers and their families). That is not sustainable. When the logging camp moves, if the company is practicing sustainable, or so-called sustainable logging, there will be a forest left, but it will be a dead forest. There will be insects, small birds, and rodents. Not much help to the pygmy people, who will also have lost their culture.

These things are all going on at the same time. As chimpanzees, gorillas, bonobos, and elephants disappear, so too we lose their cultures. We've already lost the opportunity to learn about the full range of chimpanzee cultural flexibility. The Asiatic orangutans are threatened in the same way, along with other Asiatic animals. And the same thing is happening in South America.

We are not here to talk about conservation, but I think it is important to realize that our deliberations here—thinking about new ways in which we can help people to understand the significance of the great apes—will affect what goes on in Africa. It will affect the way that conservation programs are organized in Africa, as well as how we try to raise awareness in Africa and Asia about the problems.

I wonder if it would make a difference if the chimpanzees, gorillas, and bonobos could speak. If they could speak with words, not just signs. If we could bring a chimpanzee to stand here and say, in words, the things that they sign to Roger and Debbie, what difference would that make? We like to think, that if a chimpanzee could stand here and say to us, "Please let me out. Please give me the key to this cage," that our hearts would be melted. But, that isn't enough. Think of the days when slaves were used for menial tasks. Think of the slave labor in the past in the United States and other parts of the world. Slaves learned English. They were brought from Africa. They pleaded with us in our

language. It didn't make much difference, did it? It needed the law behind it before, gradually, we got freedom for the slaves.

Chimpanzees aren't only suffering in Africa. They are also suffering in captive situations around the world. It is still legal in the United States to buy our closest living relatives as pets. You can buy them on the Internet. You don't have to prove that you know how to treat them. Nobody tells you when you buy a young chimp that in six or seven years he or she will be stronger than you and no longer suitable to live in the house. They may look cute and sweet dressed up in frilly clothes—treated like a human baby, wearing diapers—but when they grow to be young adolescents they no longer want to be a human living in a house. They want to be chimpanzees. They want to climb trees. They don't like being disciplined. Chimpanzees can be very unpredictable. They can bite, and they can hurt people. However much people may have loved their little chimpanzee pets when they were small, those chimpanzees almost always have to be sent out of the house. Some people shut them up in small cages in their garage or something similar. Zoos don't want them, because these captive pets don't know how to behave like chimpanzees should.

Sometimes—often in the past—they ended up in medical research laboratories. Medical research is another tricky issue, a controversial one. If chimpanzees are so like us that the use of their living bodies might give doctors and scientists some clue as to the nature, prevention, or cure of diseases like AIDS and Ebola, shouldn't we use them?

We must face the question as to whether it is ethical to use chimpanzees in this way. I wish we had Ray Greek as part of this conference. Ray Greek is a doctor whose wife is a veterinarian. They have done extensive research on animal experimentation, not from the point of view of ethics of the animal rights movement, but from a consideration of human health. For anyone who is interested in this, I recommend their book, *Sacred Cows and Golden Geese*.<sup>1</sup> It is an extraordinary book, and they are working on a second one now. It is completely lacking in sentimentality, which gives the book its power and strength. It basically says that there *are* differences between humans and even our closest relatives, the chimpanzees. Chimpanzees can be infected with the HIV retro-virus, and it will stay alive in the blood. If you inject it into a baboon, it won't. But chimpanzees don't develop the full-blown symptoms of human AIDS. Gradually, chimpanzees have been phased out of AIDS research, at least in this country.

The Greeks look at different kinds of diseases and show how again and again, although animal research is perceived by people to have been crucial in finding different cures, in fact it was not crucial. In fact, most of the breakthroughs came as a result of epidemiology, clinical observation, and so forth. But now because of the law, there are requirements that new drugs must be tested on animals. And so we keep

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<sup>1</sup> Jean Swingle Greek & Ray Greek, *Sacred Cows and Golden Geese: The Human Cost of Experiments on Animals* (Continuum Publg. Group, 2000).

going in a vicious circle. Today there are alternatives to the use of live animals in so many situations. But until there is some kind of legal obligation for a new technique to be used, they will use the old method as long as it has been proven to be effective (which usually means cost effective). Until there's a law mandating the use of alternatives, people will continue to use animals, especially the pharmaceutical companies. That's the way they've always done it, and there's a huge body of people who've been trained in these techniques. If a pharmaceutical company uses a new technique and somebody sues, the company may be more liable than if something goes wrong with a drug tested on animals, because there has been a long history of the use of animals. This is true even though it's less effective for human health as well as economically inefficient. And so there are still chimpanzees in five-by-five-foot cages around the world, including this country. Fortunately, there are more and more people who are fighting to right the wrongs.

In Africa, we have sanctuaries for orphan chimps whose mothers have been shot for food. There is not much meat on baby chimps, so the hunter will often try to get a few extra dollars by selling them in the market. And because it is illegal to hunt and sell chimpanzees (I think in all their range countries in Africa) without a permit, you may persuade the government to confiscate these babies. Then they hand them over to whoever is able to care for them. There are sanctuaries, now, in many different African countries. I believe the Jane Goodall Institute's Sanctuary in Congo Brazzaville is the biggest. It now has one hundred and five orphan chimps, some of whom are now full grown. We can't put them back in the wild, because wild chimps would probably kill them. They might also get killed for wandering into villages—they've learned to trust people. They'd probably get hurt, and they might hurt someone else. Chimpanzees are hunters, and they have been known to kill human infants.

Therefore, we are responsible for these young chimps for the rest of their lives. I get a lot of criticism—we all do if we're involved with sanctuaries—from people who say, "Well, you should be trying to save the wild chimps and the habitat. You shouldn't waste money on a few individuals." But firstly, I believe that every individual matters, and is important. And secondly, when people come to visit the chimps in our sanctuary, the local people, any number of them, have said, "I will never eat chimpanzees again. I will never let chimpanzee meat come into my house. I will never go to a restaurant selling chimpanzee meat." So these orphan chimpanzees are acting as ambassadors.

In the United States and Europe, people are setting up sanctuaries for chimpanzees who have been released from the prisons of the medical research labs. There's the Fauna Foundation near Montreal in Canada, that is caring for over twenty chimpanzees that were originally in LEMSIP [Laboratory for Experimental Medicine and Surgery in Primates], the big biomedical research unit in New York State. More recently, Carol Noon has established a sanctuary in Florida. She is part of this Collaboratory, and would be here, but she is in New

Mexico where the infamous Coulston Foundation has finally been refused permission to continue to experiment on chimpanzees. Coulston's Lab had more violations of the Animal Welfare Act than any other laboratory, and now it has been closed down, and Carol has gone there to see what can be done.<sup>2</sup> She has been given the custody of more than 266 chimpanzees, and Roger may say a bit more about this. We need to help her, because before Coulston left he took away everything that could be moved—so this is a crisis situation. But at least the chimpanzees are away from Coulston. Many, many chimpanzees died during their time spent with the Coulston Foundation.

I am going to end with one last story. It's about a chimpanzee who was born in Africa, whose mother was shot when he was about one-and-a-half—that's how you catch baby chimps—and he was sent to North America, where he was in a medical research lab and was a subject for cancer research. He was one of the lucky ones. When he was about fifteen, he was released onto a man-made island at Lion Country Safari in Florida. He'd been named Old Man as an infant, because as an orphan chimpanzee, he looked so pathetic and huddled, and his face looked very old with misery. He lived on this island with three females. A young man, Marc Cusano, was employed to care for them. Marc was told when he took on the job, "Don't ever go near those chimps. They hate people. They're vicious. They're much stronger than you. They will try to kill you."

So Marc used to paddle a little boat across the moat and throw food onto the island. But as he watched, he became more and more fascinated by these chimpanzee beings. He saw how when he came with the food, before the chimpanzees take a single bite, they fling their arms around each other in real expressions of joy and happiness; they kiss one another, pat one another on the back, and then fall on the feast. Old Man had fathered a baby and Marc also watched how Old Man loved his infant. Old Man carried the infant around, protected him from real or imagined danger, and shared his food. And Marc thought: How he could really care for these amazing beings without establishing a relationship with them? He began going closer and closer. One day, he held out a banana and Old Man took it from his hand. Then came the day, sometime later, when Marc dared to set foot on the shore of the island. One day, he actually groomed Old Man, and Old Man groomed him back. One day they played. They became friends.

The females kept away, but did not interfere. After about six months, when Marc was on the island clearing up the food remains, he slipped and fell. He startled the infant, and the infant screamed. *Instantly*, the mother raced over! This protective response to real or imagined danger is just triggered in you—I've had a baby, and I know. She raced over and flung herself onto Marc, who, I suppose, she

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<sup>2</sup> In Defense of Animals, *Total Victory at Coulston* <<http://www.vivisectioninfo.org/Coulston/totalvictory/>> (accessed Feb. 2, 2003).

imagined had harmed her precious baby. She bit into his neck, and he felt the blood running down. And as he lay flat on the ground, the other two females came rushing over—this is typical chimp behavior—to join their friend. One bit his wrist, and one bit his leg. And as he was wondering how he could escape, he looked up and saw Old Man thundering towards them with his hair bristling and his lips bunched in a ferocious scowl. And Marc thought, “He thinks I hurt his precious baby,” and prepared to die.

But what happened? Old Man physically pulled those three females off Marc, and kept them away while Marc dragged himself to the boat and safety. I saw Marc when he came out of the hospital. He’d been really badly torn up. And he said, “You know Jane, there’s no question—Old Man saved my life.”

This, for me, is a symbolic story: if a chimpanzee—a chimpanzee who’s been abused by people—can reach out across this imaginary line dividing us from them, to help a human friend in a time of need, then surely we, with our greater capacity for understanding and compassion, can do the same.

And the chimpanzees need us now. They need animal rights activists. They need people concerned for animal welfare. And they need lawyers. We need to find a way to address some of the wrongs that we have perpetrated, and continue to perpetrate, on our closest living relatives, and we seek help from the legal community to create new legislation that will ensure that our closest living relatives are better protected in the future. Thank you.

### **Dominique Castro:**

Our next scheduled speaker is Dr. Roger Fouts. Dr. Fouts is a professor of Psychology at Central Washington University. He received his Ph.D. in Experimental Psychology from the University of Nevada. Since 1997 he has been part of Project Washoe, named for the first nonhuman animal to acquire a human language, American Sign Language for the Deaf. The project focuses on the use of sign language among chimpanzees living together in a social group. In 1981 he and Deborah Fouts founded the non-profit organization, Friends of Washoe, in order to improve the lives of chimpanzees in captivity and in the wild. In 1992 they founded The Chimpanzee and Human Communication Institute, an organization focused on humane research and public education regarding chimpanzee welfare. Dr. Fouts was influential in the US Fish & Wildlife Services decision to elevate the categorization of chimpanzees in Africa from Threatened to Endangered Species status. He has authored, or co-authored, more than 90 articles in scientific journals or books. His recent book, *Next Of Kin*,<sup>3</sup> received the Best 100 Books of 1997 award from both the *Los Angeles Times* and *Publishers Weekly*. Please join me in welcoming Dr. Roger Fouts.

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<sup>3</sup> Roger Fouts, *Next of Kin* (William Morrow & Co., 1997).

**Dr. Roger Fouts:**

Thank you. Thank you. I'd like to thank the Collaboratory, the Glaser Foundation, and Harvard Law School for providing this forum for a very important and timely topic. It's also nice to speak to people who are interested in law.

I am encouraged by the number of young law students in the audience today because our hope for change lies with you. With regard to youth, we should remember that Kepler was only 18 when he thought his three laws of planetary motion. Kepler's theories played an important role in the acceptance of Copernicus' heliocentric theory which in turn helped to change our egocentric view of Man's place in the universe—women weren't considered very important in those days. For the biological sciences our Copernicus was Darwin. We need a Kepler in the legal profession to take the biological reality of Darwin's continuity of the species and translate it into laws so that our legal system will no longer suffer its Cartesian delusions and will instead embrace the biological reality of continuity.

You heard from Jane, who is an old and dear friend. Her project was being a member of a community—she became a member of a chimpanzee community. She lived in the neighborhood. It's amazing how much a neighbor with binoculars can find out about you! She did a remarkable job of letting us know what the chimpanzee community was like—the individuals living within it, their interactions with each other, as well as interactions between communities. Sometimes the news was very exciting, sometimes depressing; finding similarities between us and chimpanzees, both good and bad.

Project Washoe has played a dramatic role in moving some members of our civilization away from their anthropocentric views of humans and to the realization that we are not superior to, but instead merely different to degree from our fellow animals. With Washoe's acquisition of American Sign Language she became the first nonhuman to acquire a human language and later pass it on to her adopted son Loulis. Regardless of the role Project Washoe has played in supporting the efforts to gain respect and legal protection for our fellow apes, it must be looked at carefully today. We must never use the ends to justify the means. As a participant in that project, I cannot effectively encourage others to stop the exploitation of chimpanzees without first addressing my own part in the exploitation. For this reason, I want to state right at the outset that Debbi and I would never again participate in or support a project such as this. Before change can effectively take place, we must not only recognize the necessity of moving in a new direction, but also recognize how the old direction was wrong and turn away from it. Only then can we begin to make headway toward realizing a new way of being in our shared world. Personally, such a change was one of the most difficult things I have ever done. I had to recognize that I was a part of a research project that, in the ignorance of the time, was party to a baby being taken from her mother and the

killing of her mother. In its ignorance, it was a project that condemned a young girl to a life where she could never fully reach the potential for which she was born, and would always be out of place, and would always be considered inferior. It was a project that took a young girl from her culture and family where she could have learned and given so much. It was a project that condemned her to a life in prison, even though she had never committed a crime. It is for these reasons that I have publicly stated before that I would never support or be a part of starting such a project again. It is for these reasons that I have publicly stated that the research project was morally wrong, even though it was done unwittingly during the ignorance of its time. It is for these reasons that I have publicly stated that it is wrong to breed such persons into captivity to serve human purposes. I had to come to grips with the reality that even though the originators of the project had the ignorance of their time to justify the project, today I do not have this convenience. I have to take responsibility for my actions and their actions given today's knowledge of wild chimpanzee culture and chimpanzee mental and emotional life. I have to accept the Darwinian fact that Washoe is a person by any reasonable definition, and that the community of chimpanzees from which she was stolen are a people. I have to accept the responsibility for unjustly imprisoning a relative of mine who has done nothing wrong. I have to accept the fact that I cannot undo the damage that has been done to her. I have to accept the fact that I cannot return her to her family, nor bring her mother back to life. Because of these things, I act. Because the four chimpanzees for whom I am responsible are marooned in this prison for life, I insist that their interests and well-being be our first priority. In their home, human arrogance of any sort is forbidden.

We know so much more about chimpanzees than we did thirty years ago. We know that the chimpanzee is the species closest to humans. They are biochemically and genetically closer to humans than they are to the gorilla. The chimpanzee's cultural behavior is extremely similar to those of humans as well. Free-living chimpanzees in the forest of Africa are similar to non-technological humans. They live and hunt in communities, they form strong social bonds with their friends and families, and they make tools. They display a tremendous amount of cultural diversity in regard to tool making, tool use, food preferences, and even show evidence of self-medication. The different communities of free-living chimpanzees have different gestural dialects in their communication. Perhaps the most important similarity to us is that they can suffer emotional and physical pain just as we do and often for the same reasons. By any reasonable definition they are a people, and the individuals are persons. Given this information, clearly it would be wrong to kill a mother to steal her chimpanzee baby; to bring that baby to a culture where she might be amusing and cute when she's young—as Jane pointed out with pets—but then she doesn't fit in when she gets older. She becomes seen as defective by the people of that culture. Perhaps she is seen as useful as a hairy test

tube and amusement in tutus, but other than that, not really worth it after she grows to be five or six.

The project did give us some information that we didn't have, so we learned things that we didn't yet know. It argued against "bad science," and we have a lot of bad science out there—we have many scientists who don't think straight. There are simple rules for science. For example, the absence of evidence is not evidence for absence. If you do a study and you fail to get results, the best you can do is withhold judgment. You must say, "I don't know." Sometimes academicians have a very difficult time saying, "I'm ignorant. I don't know." Instead they make bold statements; they look at evidence that isn't there and say things like, ". . . all normal humans acquire language, whereas acquisition of even its barest rudiments is quite beyond the capacities of an otherwise intelligent ape—a fact that was emphasized quite correctly, in Cartesian philosophy." A fellow by the name of Noam Chomsky said that.<sup>4</sup> His epigone, Stephen Pinker, continues in that vein.<sup>5</sup> Basically, what they do is pander to human arrogance in order to sell books, by telling us that we're special and that we're better than the rest. It appeals to us. That's an easy sell compared to Darwin. What does Darwin say? He says that indeed, you are unique, but so are chimpanzees. So are cockroaches. So are pigeons. So are pear trees. We're all unique. With Darwin we saw a major change from a world view that was vertical to one that's horizontal. You can't experience a greater change. I propose that the legal system today, even though the laws are beginning to move in proper directions, still adheres to a delusional vertical system. It has not embraced the reality, the empirical reality of the horizontal view of nature. After all, as Jane mentioned, we share over 98 percent of our DNA with chimpanzees.

Professor Richard Dawkins, who is at Oxford, has a wonderful example of our connection to chimpanzees. He expressed it in *The Great Ape Project*.<sup>6</sup> Imagine that you take your mother's hand, and she takes her mother's hand, and she in turn takes her mother's hand. You are standing here, and there is your ancestry, moving out the door—a line of mothers and daughters holding hands. Except for your mother, they are all your grandmothers. At the point where that line extends 150 to 155 miles, the grandmother who takes her daughter's hand will also be Washoe's grandmother, a chimpanzee's grandmother. That woman had to have two daughters, one your grandmother and one Washoe's grandmother. Now imagine that the daughter that is Washoe's grandmother has a daughter, who has a daughter, who has a daughter, and so on. When that line winds back in here, off the interstate and into

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<sup>4</sup> Noam Chomsky, *Language and Mind* (66 enlarged ed., Harcourt Brace Jovanovich 1972).

<sup>5</sup> Steven Pinker, *The Language Instinct: How the Mind Creates Language* (Harper Collins 1994).

<sup>6</sup> Paola Cavalieri, *The Great Ape Project: Equality Beyond Humanity* (Reissue ed., St. Martin's Press 1995).

this building, you are standing face-to-face with a chimpanzee. That is biological reality.

In a species like ours, there has never been a mother of one species and a daughter of another—it just doesn't happen that way. Some parents may choose to disagree with me on that while they are raising children, especially teenagers, but it's just not so. This gradual change is the reality. Yet, our laws reflect a discontinuity. They have man on top, then there's a gap—a difference in kind—and it comes from ancient Greeks. It's a pagan world view, but one that panders to arrogance, one that appeals to those in power. It's much more appealing to have someone say, "You are really exceptionally special," instead of somebody saying, "You're special, but so is everybody else."

Last night I was flipping the channels after a few meetings, looking for a little news—something that I feel obligated to do, but sort of dread. You never know what terrible thing is going to turn up on the news these days. It seems like we're slipping backwards. Jane mentioned that we can discuss things and learn from past experience. I don't see much evidence of that, at least not in the politics in this country. It is around, but it's not prevalent. So, I was flipping through the news, and they were interviewing a "skinhead," a person who once belonged to the Aryan Nation, but had left it. They asked him what got him involved, what motivated him to go out and beat up innocent people who weren't like him. He said, "When we would go out, we'd look for anybody that wasn't white—that wasn't one of us." The color didn't matter. As long as they were different, the skinheads would attack. Hate crimes. He said that what motivated him was the material the Aryan Nations gave him. He said, "They put me on a pedestal. They made me feel better than everybody else, and I wasn't going to be kicked, so we struck back."

In essence, I would argue that Aristotle and Plato have done that to our species. They've put us on a delusional pedestal where we can justify the exploitation of our fellow animals, of all "organic beings," to use Darwin's term. When he used the term "organic beings," he referred not only to apes and pigeons, but to pear trees as well. One fellow at a talk where I mentioned the genetic similarity in the grandmothers was very upset, because he was doing some very nasty biomedical research. I don't know if what he said is true or not, because I'm not in that field, but he said "I'll have you know that we share 50 percent of our DNA with algae." I said, "You've got it!, by George, you've got it!" Of course, he didn't get it. He didn't realize that the continuity extends beyond chimpanzees to all living things in the entire planet. It's our arrogance—our delusions of grandeur—that puts us outside of nature and allows this wanton exploitation and abuse of our fellow beings, our fellow organic beings.

Where did this come from? I believe it was Plato, when he said that man has a rational soul. His student—a rather anal-retentive obsessive-compulsive type—by the name of Aristotle, picked up that model. He was into having things orderly—I'm sure that if Aristotle

had a desk it would be quite neat and tidy. It wouldn't look at all like mine. He thought that everything had to have its place, so he put nature in its place. Of course, he put man on top because man had a rational soul, in addition to a brute soul. Plato and Aristotle felt that the best thing is to move away from the brute soul, the emotion soul; avoid the emotions and live in your mind. Leave your body behind. Don't let an otherwise rational logical mind get mucked up by emotions. From that, we get today's objective sciences. This dissociated the unitary being of both souls. We have emotions—those are real, just as we have rational thought—that is real. But, to pull them apart, you can create two monsters. The cold, objective, unfeeling, unthinking, rational mind is able to do horrendous things. In the 1970's there was an experiment that was done by such a mind, where they drove a piston into an un-anesthetized chimpanzee's skull in the name of science. Obviously, that science in its objectivism believed that it didn't matter—that it was for the good of science. Objectification is a problem without the emotions of subjectivism. What happens when we turn the forest in Africa, Washington State, or Oregon into dollars? That's objectifying them, killing them. It is taking living beings and turning them into something dead. Yet we do it over and over again, not only with chimpanzees, but with the planet. We try to objectify it. In any event, Aristotle categorized nature. He put man with the rational soul on top.

Discontinuity basically says that we have these defective brutes. You don't want them to vote, because all they have to rule them are their emotions and their instincts. Aristotle organized that. On top, he put the elephant. Number two, dolphins. You have to think like an ancient Greek male to understand this, a pagan, which is easy today. Unfortunately, most of the people in this room think that way, although there are probably fewer here than in most groups. When I teach I tell my classes, "Probably most of you believe that your world view was fashioned by a Judeo-Christian doctrine, because that was what founded this country. I tend to disagree. I would argue that you're all pagan Greeks in the way you see the world." Then I attempt to prove it by the end of the lecture. And, indeed, they are—they put man on top. But, half of them typically realize that this is not a good thing. The Greeks put the elephant right under man, which is handy for moving armies across the Alps. Number two on the list was the dolphin, which if you're having a sea war and your sailors are drowning, one of these happy mammals might push them to shore and save them. (You never hear about the sailors they take out the other way.) Finally, I ask my students to guess the third one on Aristotle's list. They ponder, "Let's see. What's important to man? Is it dogs? Cats? Horses?" I say that this critter does bear a similarity to all of those. They have been used as pets, beasts of burden, and so on. It turns out that number three is woman. Woman. If you have that world view, if an individual like a skinhead puts him and his type on top that justifies the exploitation of those who are not like him.

Aristotle was very explicit. He said that women are good for two things—children and cooking. Period. Later, the Catholic Church adopted Aristotle as their philosopher of record, which is something I'll never understand. Why would they adopt a pagan philosopher for a Christian religion? Of course when I've argued with Jesuits about that, they've responded that if Aristotle had lived after Christ, he would have been a Christian. I disagree. I think he would have stayed a pagan Greek.

When the Church adopted this philosophy, women were good for three things: children, cooking, and the Church, or kinder, kochen and kirche, as the good German husband would say. And what has happened to women? Do we have equal pay for equal time? What about women around the world? In the Church's model, the have-nots are exploited. It's justified because the one on top—in his delusion—thinks that he is so grand that using others to make his life better is justified. That same argument was used for the slaves. That same argument was used in the 1950s when we were infecting children, who were considered mentally retarded, with hepatitis.<sup>7</sup> That was justified. The notorious Tuskegee experiment<sup>8</sup>—the same justification. That model isn't real. That model is a delusion. That model panders to your arrogance.

The real model is a horizontal one, as proposed by Darwin. Yet, you might say that we are a different species. Look at me, I'm a human. Look at the differences in chimps. Yes, you are a different species. Yes, you are. Chimps are not humans. They have different characteristics. They have some characteristics that we have and they have some that we don't have. Additionally, we have some characteristics that they may not have, at least in manner of degree. Whether they are adaptable or not, I don't know.

As Jane pointed out, we seem to have an ability to really displace things in time. If you talk to clinical psychologists, they would say that the really authentic way to live life is to live in the here and now. Therefore, maybe chimpanzees are more authentic than we are, in terms of living in the here and now, and maybe that's why many of them don't have to pay the \$150 an hour to get their heads straight when they turn 30. The way they live and what they know works perfectly fine for chimpanzees. On their terms, they are great chimpanzees. One thing that Debbie and I noted when we first visited Gombe—in 1996, when Jane said that if we didn't come soon, there probably wouldn't be any wild, free-living chimpanzees—is that we are defective chimpanzees. Climbing up a hill and trying to stay with them, just in the simple behavior of locomotion, we did a crummy, crummy job—we kept getting lost. They were brilliant in the jungle.

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<sup>7</sup> See U.C. Santa Barbara Office of Research, *Human Subjects Training* <<http://hstraining.orda.ucsb.edu/training/willowbrook.htm>> (accessed Apr. 5, 2003).

<sup>8</sup> See PBS, *Online Newshour* <[http://www.pbs.org/newshour/bb/health/may97/tuskegee\\_5-16.html](http://www.pbs.org/newshour/bb/health/may97/tuskegee_5-16.html)> (accessed Apr. 5, 2003).

My experience with chimpanzees hasn't been at the community level, as much as at the family level. Washoe was a member of a family and we were a part of it. But, like Jane said, a chimp can be eight times as strong as we are, pound-for-pound, in the arms alone. Their arm strength is amazing. When Washoe had her baby teeth, her milk teeth, she was able to open canned goods. Not many human children can do that. An observant fellow once remarked, "When she gets her permanent teeth, she'll probably be able to open refrigerators." Perhaps. They're very strong and can do great damage, and like us, they can lose their tempers. However, when they lose their tempers, the ante goes up. It can become much more expensive.

Washoe was a younger sister to me. I got to know her as you would a family member, rather than a community member. She was dear to me. When I was hurt, she was concerned. She is still concerned. One time I broke my arm, and I didn't tell the chimps. It was one of those charming breaks right at the top of the humerus, which meant they didn't cast it. They just let it hang. You could hear the bones clicking when I moved or sneezed. I came into the building and when the chimps saw my arm they signed "hurt." Washoe signed "come hug," and gently touched me through the wire. Loulis, who was only about seven at the time and a very active little boy, calmly looked at me and just wanted to touch me, rather than asking me to chase and play. They show compassion. They express compassion. Washoe said "hug, love, I want to care for you." She's always shown compassion. But, she has also lied to me. She's played some dirty tricks. She took my watch one time and went to the top of the tree with it. I was begging for her to give back my watch. She stole it from me. While I was crying and begging, she started chewing on it. They have humor, too. When she was about five, I was playing a Go Game with her. By that time, she had been potty trained and knew how to use the chair, so she didn't have a diaper on. She was signing, "you go," and I was going. And then I heard her signing "funny." Funny is one of the signs that she makes with a noise. Instead of just touching her nose, she goes "snugh, snugh, snugh"—she'd snort. I heard her signing "funny, funny" and I looked around and didn't see anything funny, until I felt this warm, wet sensation running down my back. They have humor. Washoe does. It may be a gutter humor, but it's a humor. They care. They love. They emote. They think. They are different from us. They are a different species. But, so many people today, such as Steven Pinker, apparently don't know what a species is. They think it's a discontinuous thing.

Let's see what Darwin says. Darwin saw "species" as a term, to quote him, "arbitrarily given for the sake of convenience to a set of individuals closely resembling each other and that it does not essentially differ from the term variety, which is given to a less distinct and more fluctuating forms."<sup>9</sup> The term for "variety"—in comparison to

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<sup>9</sup> Charles Darwin, *The Origin of Species: By Means of Natural Selection* 40 (Prometheus Books, 1991) (originally published 1859).

mere individual differences—is also applied arbitrarily for the sake of convenience. It's a fuzzy distinction. It isn't a real thing. It's an arbitrary distinction given for the sake of convenience. However, members of our legal profession, scientists, and academicians—people who fancy themselves as great thinkers, like Steven Pinker and Noam Chomsky—treat it as if it is a black and white dichotomy. It's not true. It's not the way it worked. It could be that way if we were put on this planet by extra-terrestrials, but we weren't. We evolved. It is our hope that the legal situation for chimpanzees will evolve to embrace the biological realities, and abandon the Cartesian and Aristotelian delusions that are not in touch with reality. We have chimpanzees that have cultures, that make tools, that talk, albeit not vocally. Yes, speech is special, but that appeals to our arrogance—I do it this way, therefore, you should do it this way too. The early attempts to teach language to chimpanzees were just that. Rather than taking them on their terms for their worth, we tried to turn them into versions of us.

Allen and Beatrice Gardner started this project, and I want to quote them from 1989.

“Truly discontinuous all-or-none phenomena must be rare in nature. Historically, the great discontinuities have turned out to be conceptual barriers, rather than natural phenomena. They have been passed by and abandoned, rather than broken through in the course of scientific progress. The sign language studies in chimpanzees have neither sought nor discovered a means of breathing humanity into the soul of a beast. They have assumed, instead, that there is no discontinuity between verbal behavior and the rest of human behavior, or between human behavior and the rest of animal behavior. No barrier to be broken. No chasm to be bridged, only unknown territory to be explored.”<sup>10</sup>

What we have found by taking chimpanzees on their terms is that they are a sibling species. They are brothers and sisters. They are different, but so are our brothers and our sisters. Just like us, some are bad, some not so bad. Some are quite good. As I said, Washoe is very compassionate. You can hurt chimpanzees emotionally. You can hurt them physically. So what do we do to them, these living breathing relatives of ours? As Jane said, we still put them in 5' X 5' cages. We still turn them into entertainment by using cattle prods, beatings, and domination when they're young. Then, when they get too strong, the trainers dump them. Now they're talking about retiring them, but it is still quite common to put them into biomedical research.

Imagine punching a 2-year-old infant. On the news recently, Madelyne Toogood was arrested, because she was doing what trainers have done to infant chimpanzees for ages.<sup>11</sup> I've talked to trainers over

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<sup>10</sup> Alan Gardner et al., *Teaching Sign Language to Chimpanzees* xvii (St. U. of N.Y. Press 1989).

<sup>11</sup> See CBS News, CBSNEWS.com <<http://www.cbsnews.com/stories/2002/09/23/national/printable522895.shtml>> (accessed Apr. 5, 2003).

the years—in Oklahoma, they were quite free. Trainers would drop off an adult and pick up a baby at the institute that was run by Dr. Limmon. They said that if you want to train a chimp properly (this was not the way the Gardners did it, I assure you), you should hit them without warning—kick them, hurt them when you're just walking by. They said that you want to be completely unpredictable. You want to be like God and just strike without warning. That way the babies will never take their eyes off of you. So, when you're giving them instructions behind the camera, they will obey you. I remember one fellow in particular. I asked, "You've got chimps over in a tree and you tell them what to do, but how do you get them to obey you when you're not near them?" He pulled a slingshot out of his rear pocket and he had a hand full of marbles. He said, "With these." Ever been hit by a marble with a slingshot? It's not a pleasant experience. We do that in the name of entertainment. We do that to amuse ourselves. We do that so we can feel better about ourselves by taking away the dignity of chimpanzees and turning them into clowns.

Washoe is fortunate, but she is still caged. She is locked up in Ellensburg, Washington, facing life imprisonment. Like all captive chimpanzees, she never robbed a bank, she never stole a car. The best we can do for them is to make things better. As Jane pointed out, something that Debbie and I never thought we would see in our lifetime has occurred. The Coulston Foundation finally closed down.<sup>12</sup> Carol Noon stepped up to the breach. How many of us really make decisions like Carol Noon did? Face something to which you cannot say no? Coulston was willing to give up 266 chimpanzees and 62 monkeys. Think of the responsibility of your family of four multiplying several hundred times or more. Could you afford it? What would you do? She couldn't say no. She stepped into the breach. Now these chimpanzees have someone who cares—who puts their needs first. At the foundation, there were three large buildings. Once every three weeks, those chimpanzees would get a piece of fruit. One piece of fruit. They'd have to wait three more weeks for the next. Carol is changing them. They will have blankets to nest in, and slowly, with our help and diligence, we can find better homes for them.

We have a long way to go and not only in captivity. As Jane said, it's the species that's easy to objectify, so we have to think at an individual level. We must think not only of the individuals in small cages, but of the individual mother and daughter, free-living in the forest. The individuals whose forest is being destroyed. We've got to think of them all. It's up to you, and it's up to me. Most of all, it's up to the law to come to grips with empirical reality and abandon the pretentious and arrogant pandering of human delusions.

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<sup>12</sup> See International Primate Protection League, *Coulston Foundation Closed* <<http://www.ippl.org/01-03-23.html>> (accessed Apr. 5, 2003).

**Dominique Castro:**

Our next speaker is Mr. Steven Wise. Steven Wise received his law degree from Boston University School of Law. Since then, he has practiced animal protection law for two decades. He has taught Animal Law at Harvard Law School, John Marshall Law School, Vermont Law School, and Tufts University School of Veterinary Medicine, where he serves on the faculty of the Master of Science in Animals and Public Policy program. He served as President of the Animal Legal Defense Fund from 1984 to 1994. In 1995 he established the Center for the Expansion of Fundamental Rights, the only nonprofit tax-exempt organization in the world with the primary purpose of obtaining fundamental legal rights—such as bodily integrity and bodily liberty for nonhuman animals—beginning with chimpanzees and bonobos, through litigation and education. Please welcome, Mr. Steven Wise.

**Steven Wise:**

Good morning. I was writing furiously as Roger was telling me exactly what to tell those judges when we go into court. We continue to seek something like basic legal rights for nonhuman animals, certainly beginning with chimpanzees. I had to laugh, because the natural habitat for many of us lawyers is the courtroom. Strange things can go on there—different sorts of arguments. Dramatically different rules apply, and we often times share extraordinarily obscure conversations. We can spend quite a lot of time fighting about what a word means. I'm not making fun of Roger. It is, indeed, going to be very hard for us to go to judges and tell them that they have to stop pandering and that they have to get rid of their Cartesian realities and Aristotelian delusions. First of all, most judges will not know what we're talking about, and once they understand, they won't like it. Of course, that is why we're here, and that is the problem we face.

Last week, a reporter from a Seattle newspaper called me and said, "Critics are asking, 'Isn't the argument for legal rights for nonhuman animals just animal rights philosophy dressed up in legal argument?'" My answer was, "Well, yes." Philosophy, morals, and ethics all beat at the heart of what we do. They lie at the heart of human rights. It's very difficult to make a human rights argument—a civil rights argument at its core—without talking about fundamental philosophical ideas about what is right, what is wrong, what is good, and what is bad. Therefore, the legal argument for the rights of nonhuman animals does, indeed, intersect with the moral argument. Depending upon with whom you speak, the intersections are different, but animal rights necessarily intersect with human rights. The philosophy, the morals, and the ethical argument are what give the legal arguments their force.

My talk will be about "the" argument for the legal rights for chimpanzees. It's really "an" argument for the legal rights for chimpanzees. I notice I'm followed by such luminaries as Professor David Favre, Professor Cass Sunstein, and Professor Alan Dershowitz. I'm sure they're

not going to agree with everything that I say, and each will have his own ideas. Professor Tribe, who could not be here today, has his own ideas about the legal rights for nonhuman animals that he communicates persuasively and increasingly often. So, there are many arguments for the legal rights for nonhuman animals, and that is one of the signs of the success that those of us who have been working for 10 years, 20 years, or 30 years can show. More and more very smart people are beginning to think about these ideas, and are coming up with their own versions. Some are starting from scratch with their own ideas as to how we deal with the problem that Jane Goodall and Roger Fouts have set out so eloquently. We're letting 100 flowers bloom, but even if we didn't, they'd bloom anyway. That is a terrific thing!

What you're going to hear for the next 25 minutes is a summary of my arguments as to why chimpanzees should have basic legal rights. I begin this part by setting out some context. In the first book I wrote, *Rattling the Cage*, I argued why chimpanzees and bonobos should be entitled to basic legal rights.<sup>13</sup> In a recent book, *Drawing the Line*, I realized that we need more context, because one of the things that people immediately ask is, "where do you draw the line?"<sup>14</sup> Right now, there is a really clear line drawn. In fact, it is so well-drawn that I frequently talk about the line in terms of a gigantic, thick, high legal wall. Humans are on one side and all nonhumans are on the other side. It may not be particularly just or rational, but it is clear. Many people within the legal profession, including many judges, value clarity in and of itself. Those who value clarity will not like the arguments that I and others are making, because we are saying a line, a wall, is not in the right place. It shouldn't be there and we need to rethink fundamental issues about justice and rights. Who is entitled to justice? Who is entitled to rights? We're saying, "Let's take that wall down, and let's begin by bringing chimpanzees into the circle of rights bearers." One of the first questions that smart people will ask is, "Where do you draw the line?" They'll also throw in the words "slippery slope."

Indeed, where *do* you draw the line? If it is chimpanzees today, it must be fireflies tomorrow. That is the way evolution has worked; there is no discontinuity even between chimpanzees and fireflies. All of us are interconnected, because of the process of evolution that brought us here. We all are related to each other in basic fundamental ways that we're only just beginning to understand.

One problem that faces us today is the physical problem. We are surrounded by nonhuman animals. We do not see them sitting here at the Harvard Law School, but there are billions and billions. (I sound like Carl Sagan.) There are billions and billions of nonhuman animals everywhere, tens of billions, hundreds of billions, and we don't control them. They live their own lives. However, we dominate billions of them. For example, there are more than 10 billion nonhuman animals

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<sup>13</sup> Steven M. Wise, *Rattling the Cage* (Perseus Pblg. 2000).

<sup>14</sup> Steven M. Wise, *Drawing the Line* (Perseus Pblg. 2002).

that are killed every year in the United States alone for food, as part of the agricultural industry. That is a huge physical problem. Unfortunately, there are not that many chimpanzees in the world.

When people start talking about a slippery slope—where do you draw the line? They are concerned that once we break through that wall and cross the line between humans and every other species, where do we stop? They can see that there is enormous potential out there for treating nonhuman animals—all of the millions of species of nonhuman animals—in dramatically different ways than we do now. That could cause a change in the way that we view each other, them, and the way our society works.

An economic problem is closely intertwined with the physical problem. Many people, in the United States and around the world, make tremendous amounts of money exploiting nonhuman animals. That's why you'll find people who oppose granting basic legal rights to chimpanzees, who have never seen a chimpanzee, and who don't care about chimpanzees. They're looking down the road. First, it's chimpanzees, then it's dolphins, then it's cows, then it's chickens. They're saying, "I raise chickens. Let's not wait until we get to chickens. Let's start dealing with the people who want to give chimpanzees rights."

Next, there is the political problem and it's related to the economic problem. It is related to the physical problem. The political power in the United States, as in most places, is on the side of those who would exploit nonhuman animals, who would not want to give rights to chimpanzees or any other nonhuman animals for all the reasons I am setting out.

There is the religious problem that Roger and Jane both alluded to. Our legal system is a western legal system. We lawyers have no choice but to work within the legal system in which we find ourselves. It is a western legal system with western values and many of those values come from our western religious tradition. That tradition is not very helpful for nonhuman animals. The whole idea of dominion—that God made us superior to nonhuman animals—is deeply embedded in our religious and cultural ideas. Many of our religious ideas are deeply embedded in our law. It would be shocking if the concept of dominion was not embedded in our law, and indeed, it is.

There is the historical problem, which is an allusion to the great chain of being, the idea that the universe is a hierarchy and those on top rule over those on the bottom. Those who are on the bottom are seen as having been made for those above them. The idea that somehow nonhuman animals are made for human beings is deeply embedded in our culture. It is similar to the religious problem, although it can exist in countries that don't have a western religion.

Finally, there is the psychological problem. Jane, Roger, or others can explain the psychological problems regarding chimpanzees, but that doesn't mean that people will believe them. Many people think the universe was actually designed with humans on top and everyone else on the bottom. The fundamental values that are involved are often

quite impermeable to rational argument. This obstacle is well-illuminated by a quote that I bring from the slavery historian, David Brion Davis. He wrote in the *New York Times* a year ago last August, "Today, it is difficult to understand why slavery was accepted from pre-biblical times in virtually every culture and not seriously challenged until the late 1700s. But the institution was so basic that genuine antislavery attitudes required a profound shift in moral perception."<sup>15</sup> This meant fundamental religious and philosophic changes in views of human abilities, responsibilities, and rights. The same will occur for chimpanzee slavery.

William Miller, who is a political scientist, wrote about human slavery. He wrote that just before the American Civil War, "Thinkers, and statesmen, and leaders, and realistic politicians of all stripes believed that American slavery could not be ended, not by deliberate human action."<sup>16</sup> Those who supported slavery belligerently asserted that it could not be done. Those who deplored slavery sorrowfully granted that it could not be done. Those who had unsorted mixtures of opinions felt that it could not be done and did not want to hear about it. These are the same attitudes that permeate not just the legal profession and the judicial profession, but our culture, of which lawyers and judges are often an accurate reflection.

Now that we've looked at some of the context, let's look at the term "animal rights"—a term I hardly ever use—and we immediately see two problems. First there is the animal problem. Then there is the rights problem. Remember that there are one million species of nonhuman animals. To speak of animal rights, in some ways, doesn't make any sense at all. Animals are everywhere, butterflies, parakeets, chimpanzees, horses, and insects. The idea that they all should be entitled to the same kinds of legal protection, status, or rights makes no sense. The nonsensical parts contaminate the arguments for the parts that are legally and morally sound, such as the arguments for the basic rights of chimpanzees and other great apes.

We look at the idea of rights. There are an infinite number of rights. What rights could those of us who are trying to get legal rights for chimpanzees be talking about for chimpanzees? The rights we should be talking about—the ones that most of us are talking about—are the ones that protect the bodily integrity and personality of chimpanzees. These are like our most fundamental rights, those found in our state constitutions, in our Bill of Rights, and in the constitutions of other countries. The rights that I'm talking about—the same rights that other lawyers are talking about—are those legal rights that are the most fundamental, so-called negative rights. These rights are like a legal suit of armor that protects our bodies and our personalities

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<sup>15</sup> David Brion Davis, *Free at Last; The Enduring Legacy of the South's Civil War Victory* (N.Y. Times (Aug. 26, 2001)).

<sup>16</sup> William Miller, *Arguing About Slavery - The Great Battles in the United States Congress* 15 (Alfred A. Knopf 1996).

against those who would exploit them. We should look for these rights for chimpanzees in the same place that we look for them for human beings.

We don't agree where the most fundamental rights of human beings come from. Right after World War II, UNESCO<sup>17</sup> put together a group of philosophers, political scientists, and religious leaders to determine why human beings should have basic legal rights. They wanted to assist the people who were drafting the Universal Declaration for Human Rights. But they could not agree. They agreed that human beings should have basic legal rights, but could not agree on why. So they agreed to disagree. However, some sources are more likely than others. Natural law and natural rights are often cited by religious leaders, political leaders, lawyers, and law professors. It has its problems, everything has its problems, but when you try to figure out where our most fundamental rights come from, this is a likely source to apply these ideas. Where should the chimpanzees' most fundamental rights come from? The same place.

Liberty and equality are two of the most overwhelming, overarching values in our legal system. We should apply them in the search for legal rights for chimpanzees. Liberty is a non-comparative right—the kind of right you have because of how you are made, because of how you are put together. Equality is a comparative right—you are entitled because you resemble someone else who has those rights. There are many arguments for what non-comparative liberty rights exist. How might we look at chimpanzees and ourselves and recognize that this is how we are put together in a way that would entitle us to basic legal rights? I think of what I call “practical autonomy,” beings who can desire, (certainly chimpanzees can desire) act intentionally (they can clearly act intentionally), and have some sense of self. Their lives mean something to them; they have an idea that the life they are living is theirs. There should be no doubt that chimpanzees fulfill these criteria. Any being who has practical autonomy should be entitled to basic legal rights.

I want to make it clear that a realistic autonomy is not a necessary condition for rights. It is sufficient. There may be other sufficient grounds for the basic rights of chimpanzees, other nonhuman animals, and human beings, but if you have practical autonomy, that should suffice for basic legal rights.

In *Drawing the Line*, I set out four categories of nonhuman animals so that we could see how they relate to each other. How do chimpanzees fit with the rest of the animals? If we give rights to chimpanzees, does it necessarily mean that we have to give rights to fruit flies? The answer is no. Category one includes those nonhuman animals like chimpanzees, who are probably self conscious, have some (or perhaps even all) of the elements of the theory of mind—they can

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<sup>17</sup> See generally United Nations Educational, Scientific and Cultural Organization [UNESCO] (available at <<http://www.unesco.org>>).

know what others see or what others know—and they can understand symbols. They have the capacity for using a sophisticated language or a language-like communication system. They can lie, deceive, imitate, and solve complex problems. In *Drawing the Line*, I show how all four species of great apes are in category one, as well as dolphins.

Category four includes those nonhuman animals about whom we know a fair amount. We cannot see any potential in them for practical autonomy. But we must always consider the fact that nonhuman animals may have that potential, although we do not know it. We may not even have the capacity to understand them.

Irene Pepperberg, who works with an African grey parrot named Alex, makes a compelling argument that Alex is moving toward the great apes in his entitlement to basic legal rights. However, she says that bird brains and mammal brains are put together in very different ways. They may both be very sophisticated, but we have trouble understanding each other. She says the difference is analogous to the early Macintosh and PCs. They are wired in different ways. It's possible that a nonhuman animal, with whom we shared a common ancestor seven hundred million years ago, may have all the characteristics I'm talking about. We may not understand or identify with them. You always have to take that into consideration. On the other hand, they may simply not have those kind of abilities, and so they should not be entitled to rights. The animals of category four, either in the field or in laboratories, seem not to have the qualities that chimpanzees have, qualities that entitle them to basic legal rights under the practical autonomy argument. They do not have practical autonomy that we can see. Until further research or observation shows that they do have practical autonomy, they are not going to be entitled to rights.

Category three includes an enormous number of nonhuman animals. They are the ones about whom we know almost nothing. (In fact, we know almost nothing about most nonhuman animals.). Therefore, we can't make any rational determinations as to whether animals in this category should be entitled to basic legal rights or not.

Then there are the nonhuman animals in category two. In *Drawing the Line*, they range from Alex the African grey parrot and Echo the elephant, to honey bees. Honey bees are actually much smarter than I had ever imagined. I don't think they are entitled to rights, but they might be someday. As we move up the scale—I'm using a hierarchical scale because our law is hierarchical in the West—we move toward dogs, African elephants, African grey parrots. The arguments become stronger that they are entitled to basic legal rights. When you look at what an elephant knows or can do, or how an elephant or parrot is put together, it is hard not to be in awe. Why should we be able to do what we do to them?

At the top of that hierarchy, in category one, are dolphins and the great apes. The power of the arguments for basic liberty rights for great apes is illuminated by the incredible mental and cognitive abilities of chimpanzees, bonobos, orangutans and gorillas. In their light, it

is almost absurd to debate whether Washoe should be entitled to rights—whether Chantek the orangutan, Koko the gorilla, Kanzee the bonobo, and their cousins in the wild should have rights. They are so close to us that it is startling.

An equality right can be easily illuminated by looking at a child born at Mass General Hospital without a brain. She has all sorts of rights. Then look at the chimpanzee, Washoe. Washoe is a legal thing in our law. So, you have a child who is not sentient, who doesn't have a brain, but who is given numerous fundamental rights. You can't eat her, and you can't do biomedical research on her. Yet Washoe, Kanzee, Koko, Chantek, and the other great apes who are extraordinary beings, are seen as legal things—like this podium, just like a chair. Those of us in the legal profession, and judicial professionals, who think that equality is an important value, must find this dramatic inequity disturbing. They must be treated more equally. Thank you.

### **Dominique Castro:**

Our next speaker is David Favre. David Favre is a professor of law at Michigan State University Detroit College of Law, where he teaches courses in Animal Law, International Environmental Law, Wildlife Law, and Property. He has served as a delegate to the Eleventh Conference of the Parties of the Convention on International Trade of Endangered Species, where he represented the Animal Legal Defense Fund in Kenya. He also co-drafted a law for Malta concerning domestic implementation of the CITES Treaty.<sup>18</sup> He currently serves as chairperson for several animal and wildlife organizations and is on the board of directors of the Animal Legal Defense Fund, the Species Survival Network, and various other organizations. He is currently developing a website devoted to Animal Law. Please join me in welcoming David Favre.

### **David Favre:**

Good morning again. I am so pleased to be able to be here today. Steven Wise and I have interacted over the decades, and one of the last times we interacted was when the option came forward for teaching the first class of Animal Law here at Harvard; Steven Wise applied, I applied, and I believe one or two other people in this room applied. Steven got the job. The Harvard professorship is what kicked off one of the major focal points on animal issues in the United States—waking up the press to realize that there is an issue to deal with.

I am going to have to read my speech. I apologize for that, but this is a brand new idea, it is the first time I have presented it in public, and I only have a half hour to do it. So I need to keep myself focused.

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<sup>18</sup> *Convention on International Trade in Endangered Species of Wile Fauna and Flora* (Mar. 3, 1973), <<http://www.cites.org/eng/disc/text.shtml>>. See David Favre, *International Trade in Endangered Species: A guide to CITES* 217–25 (Martinus Nijhoff 1989) (containing comments on domestic implementation of CITES obligations).

The other thing I'd like to say generally is that my speech is not about "why." My speech is an attempt to create a "how." How are we going to do this? I think the other speakers this morning have given you a very strong dose of the "why," and I do not have anything I can add that they have not already said.

In my mind, chimpanzees are beings. They are beings with needs, desires, and predictable patterns of play and food gathering. They have social contact and structure. All of this can be gathered up under the term "interest." On the basis of science, many, including myself, believe that they are morally and ethically relevant. If we accept all of the positive things that science and ethics suggest to us about chimpanzees, the next questions are, "What is their status within the legal arena? What ought it to be?" It is imperative to turn to the legal system, because there are clearly humans who have no ethical concern for chimpanzees, and the only way to overcome their ignorance and lack of concern is by adopting laws that acknowledge and protect chimpanzees from abusive humans.

What is the present scope of debate for chimpanzees within the legal system? Steven Wise, this morning and through his two books, has suggested a comparative legal analysis by which primates could obtain certain legal rights within our legal system.<sup>19</sup> Other writers promoting legal rights for animals argue that a huge chasm exists between humans and all nonhuman animals that would be bridgeable only with the greatest effort—with a beach assault on the legal status quo.<sup>20</sup> On the south side of the river is the realm of humans within a legal community, and on the north side of the river is a community of things, of property—including animals—not within the legal community. The river, the barrier between them, is the property status of animals. These writers suggest that so long as animals are property they will be excluded from the legal community. Additionally, the legal community they see on the other side is not the one of today, but a different one—one in which all people are vegans and all commercial use of animals is gone. To move from where we are today to this legal community would indeed bridge a wide chasm. But perhaps they are looking in the wrong place. Perhaps the river can be crossed elsewhere. Perhaps it's not as difficult as they believe. I want to move upstream to find a shallower place to cross the river—not in some future legal community, but in the community of today.

I want to step back from the demands of sweeping legal change. What if we can make progress for chimpanzees without eliminating their property status? What if we can make the legal argument on their behalf without demanding to show that they are like humans?

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<sup>19</sup> See Steven M. Wise, *Rattling the Cage* (Perseus Publ. 2000); Steven M. Wise, *Drawing the Line*, (Perseus Publ. 2002).

<sup>20</sup> E.g. Gary Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 *Animal L.* 75, 100–01 (1997). Part of the confusion that plagues the modern animal protection movement is connected to the failure to realize that rights theory has at its core the rejection of the property status of animals.

Indeed, if we look at the legal community of today, we find that chimpanzees have already found a series of stepping stones into our legal community, and they are already quietly among us.

As a starting point, we need a conceptual lens with which to view our legal community. After some twenty-five years of pondering this issue, I think the sharpest vision is obtained by an "interest" analysis. This is not something I've created or need to describe in great detail for you. A comprehensive analysis was set out fifty years ago, by one of the most luminous deans of Harvard Law School, Roscoe Pound. His five-volume set on jurisprudence uses an interest analysis to explain the basic operations of the legal system.<sup>21</sup> He suggests that the law does not create interests, instead it "finds them pressing for recognition and security."<sup>22</sup> Within our legal context, what are these interests? Pound suggests that interest "may be defined, as a demand, or desire or expectation which human beings either individually or in groups seek to satisfy."<sup>23</sup> It is the reality of who we are, and when we try to become social beings and to organize ourselves, that we have interests. The law has been structured to deal with at least some of those interests.

If humans arrive upon the scene with interests attached to them like barnacles, then it is the role of the legal system to first decide which interests are important enough to allow access to judicial resources and second to resolve conflicts between qualifying and competing interests. For example, I may have a desire to shoot my neighbor if I see him beating my dog. I may also have a desire to walk out on my wife of twenty years. But my neighbor and my wife have conflicting interests with me, and the legal system has set up rules to resolve them. However, it would also be unfair to Dean Pound to suggest that he contemplated chimpanzees within the legal community. Within the informational context of his day, that case could not yet be made.

In my mind there are two critical points that serve as stepping stones that must be confronted before bringing chimpanzees across the river from the property status into the legal community. One is of science, and the other is of culture. First, it must be argued that chimpanzees have interests in the same way that humans have interests—interests that are recognizable and knowable by the legal system. Not necessarily the same interests as humans, but interests nevertheless. Second, conceptually, chimpanzees must be found within the community of beings about whom we have moral, and therefore, legal concerns.

The fact that chimpanzees have interests is simply a matter of the observations of science, and I can add nothing to what the prior speakers have said if they have not convinced you. For example, because of

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<sup>21</sup> Roscoe Pound, *Jurisprudence* (West 1959).

<sup>22</sup> *Id.* at 21.

<sup>23</sup> *Id.* at 16. The word "interests" is also a key phrase in the discussion of torts in the Restatement of Torts. The Restatement defines interests as, "to denote anything which is the object of human desire." *Restatement (Second) of Torts* § 1 (1965).

the work of the people in this room, we know a considerable amount about those interests, and an objective case can be made in a courtroom. The two books written by Steven Wise contain a number of examples of how science-based information can be brought into a courtroom.<sup>24</sup>

The second stepping stone across the river is to include chimpanzees as beings within our legal community. This issue is more complex—part science, part culture, and part psychological. Obviously the question is not “who is within the physical boundaries of the United States?” but rather “who is within our community that must be taken into account when community decisions are made?” We in the United States are not of one mind on this issue. Some animals, for some purposes, seem to be within our legal community, but other animals, in other contexts, are not within our legal community.

I feel comfortable asserting that chimpanzees, for some purposes, for some of their interests, are presently within our legal community. There are three primary areas we can look to for evidence of this state of affairs: criminal law, civil law, and regulatory law. The first beachhead for all animals on our shore of legal community was in the area of criminal law. Beginning after the Civil War, various states around the country adopted criminal laws to protect animals from unnecessary pain and suffering.<sup>25</sup> The existence of these laws clearly acknowledges the existence of an animal’s interest to be free from unnecessary pain and suffering. In the 1887 case of *Stephens v. Mississippi*, the court declared: “This statute is for the benefit of animals, as creatures capable of feeling and suffering, and it was indeed intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners.”<sup>26</sup> Today, under state cruelty laws in every state it is illegal to inflict unnecessary pain upon a chimpanzee, and anyone responsible for the care and custody of a chimpanzee has a legal duty to provide care for that chimpanzee. However, this is very simplistic, and there are a number of statutory exceptions to the criminal laws.

A second example of chimpanzee beings within the relevant legal community came with the adoption of the 1985 amendments to the Animal Welfare Act.<sup>27</sup> For the first time, the mental well-being, rather than the physical well-being, of chimpanzees was recognized and supported. The law requires that all holders of chimpanzees have “a physical environment adequate to promote the psychological well-being of

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<sup>24</sup> *E.g. supra* n. 19, at 131–58 (Wise gives significant detail about the cognitive ability and self awareness of dolphins).

<sup>25</sup> David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800s*, 1 Det. C.L. Rev. (1993).

<sup>26</sup> *Stephens v. State*, 3 S. 458, 458 (Miss. 1887) (citing Miss. Code Ann. § 2918 (1880)). For an example of another early case using similar language, see *Grise v. State*, 37 Ark. 456 (1881).

<sup>27</sup> *Animal Welfare Act*, 7 U.S.C.S. §§ 2131–2159 (2000).

primates.”<sup>28</sup> The United States Department of Agriculture [USDA] has developed regulations to deal with this issue,<sup>29</sup> a number of books have been written,<sup>30</sup> lawsuits have been filed,<sup>31</sup> and many conferences have been held over the past decade<sup>32</sup> to develop more fully how this legal obligation should be carried out.

A more recent example, in the civil law area, is from a whole different perspective. Under the Uniform Trust Code of the year 2000, which has been adopted in several states, another long-standing legal barrier has been lowered for animals.<sup>33</sup> Section 408 allows for the creation of trust for the benefit of animals.<sup>34</sup> Not just honorary trusts, which may or may not be enforceable, but trusts in which the animal is the beneficiary, for which the court can substitute trustees, and for which third parties can be appointed as enforcers to assure that the trustees have carried out their obligations. Thus a chimpanzee becomes a legally relevant being, one who has interests that must be protected. This has occurred in the most conservative of legal arenas—trusts and estates.

A fourth and final example of the legal presence of chimpanzees is most interesting and very recent. In 2000, Congress passed the Chimpanzee Sanctuary Act.<sup>35</sup> Underlying the passage of the act was a recognition by Congress that chimpanzees used in research are morally relevant beings, about whom we as a society have obligations. Thus Congress sought to provide some level of retirement for those chimpanzees who have been used for human benefit within the scientific community. Among its many provisions was the acknowledgment of a fundamental interest of chimpanzees—continued life. The law states that a chimpanzee within the sanctuary system shall not be “subjected to euthanasia, except as in the best interests of the chimpanzee involved.”<sup>36</sup> I think this is a powerful statement about the present interests of chimpanzees within our legal system.

These four examples support the position that the gap between humans and chimpanzees is not so great as others suggest. In particular, it should be noted that these points of legal recognition of the in-

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<sup>28</sup> *Id.* § 2143.

<sup>29</sup> 9 C.F.R. § 3.81 (2002).

<sup>30</sup> *E.g.*, Melinda A. Novak, *Through the Looking Glass: Issues of Psychological Well-Being in Captive Nonhuman Primates* (Am. Psych. Assn. 1991); Natl. Research Council, Committee on Well-Being of Nonhuman Primates, *The Psychological Well-Being of Nonhuman Primates* (Natl. Academy Press 1998).

<sup>31</sup> *E.g.*, *Animal Legal Defense Fund v. Espy*, 29 F.3d 720 (D.C. Cir. 1994); *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998).

<sup>32</sup> *E.g.*, Chimpanzee annual conference (transcripts of conference proceedings available at <<http://www.chimpanzee.org/merchandise.html>>); *First International Conference on Environmental Enrichment*, Portland, OR (July 1993).

<sup>33</sup> Uniform Trust Code § 408 (2000).

<sup>34</sup> *Id.*

<sup>35</sup> *Chimpanzee Health Improvement, Maintenance, and Protection Act*, 42 U.S.C. § 287a-3a (2000).

<sup>36</sup> *Id.*

terests of chimpanzees have occurred while the animals have the status of property. Property status is not a barrier to the recognition and protection of interests within our legal system. As the above examples suggest, our legislature has the authority to expand the presence of animal interests within our legal system, and my hope is that it will continue to do so. But more needs to be done. The presence of chimpanzee interests must be expanded, for they are still not receiving all the protection that they need. And while the legislative arena is always open, I want to suggest that there is another route available—that of common law state courts.

The traditional courts also have the capacity for the expansion of legal recognition of animal interests. In order to give form and substance to this avenue, today I want to urge for the adoption of a new tort: “intentional interference with the primary interest of a chimpanzee.” This tort would allow our civil courts to deal with and resolve conflicts between competing interests of humans and chimpanzees. Under this cause of action the plaintiff would need to prove four elements: 1) the existence of an interest; 2) the interest is of fundamental importance to the plaintiff; 3) the being’s interest has been interfered with or harmed by the actions or inactions of the defendant, and 4) the plaintiff must show that the weight and nature of the interest of the chimpanzee plaintiff substantially outweighs the weight and nature of the interest of the defendant. Before giving more detail regarding the elements of the tort, let me give you three examples, so that you’ll have a context in which to understand what I have in mind. They deal with a hypothetical chimpanzee: Jo Jo.

First hypothetical: Jo Jo lives in the Potsville Zoo. He is one of a group of ten chimpanzees on a three acre tract that is part of a six-million-dollar project the zoo built three years ago. Zoo visitors can see the chimpanzees from five different viewing positions. However, the chimpanzees have the ability to retreat out of view if they wish. There is a trained care giver on duty ten hours a day. The care giver has the following obligations: to observe the chimpanzees for medical needs, to feed them with creative gathering challenges, to assure that their individual interactions do not cause harm, to control humans, and generally, to assure the chimpanzees’ well-being. David Favre, an attorney, files a lawsuit on behalf of client Jo Jo, claiming that regardless of the cage size, Jo Jo is still not able to move about in as large an area as he would in nature, and that the confinement interferes with his fundamental interest in personal freedom. Under my tort, the court would not be able to rule for Jo Jo. Assuming that personal freedom may be a fundamental interest, the zoo has provided an environment that allows significant exercise of the interest of individual freedom of movement. Therefore, the plaintiff will not be able to show a substantial interference with a fundamental interest.

Second example: Jo Jo lives in the basement of the home of Mr. Big Jones, in a commercial five-by-five-by-seven-foot cage. Big Jones collects exotic animals, and he likes to show off Jo Jo to all his beer-

drinking friends by banging on the cage to get a reaction out of Jo Jo. After several months in residence, Jo Jo no longer reacts to cage rattling and has cut back on eating the table scraps that Big Jones feeds him. This comes to the attention of attorney David Favre, who brings an action for Jo Jo under this tort, seeking a guardianship for Jo Jo and an injunction requiring the transfer of Jo Jo to better facilities.

The first two elements are easily satisfied. The fundamental interests of Jo Jo are clearly at risk—no socialization, no physical exercise, no enrichment of the environment, lack of appropriate food, and actual psychological abuse. He is basically a living trophy for Big Jones. Therefore the court will move to the fourth element: does the interest of Jo Jo substantially outweigh the interest of Big Jones? The interests of the owner, Big Jones, are personal. He has a modest financial investment in the animal. He feels important as the center of attention within his community of human friends when Jo Jo is in the house. It makes him feel special, providing part of his self-identity. Big Jones' interests can be fulfilled in other ways and do not justify the interference with Jo Jo's fundamental interest. Jones' property interest in Jo Jo is not a defense. The court should be willing to enjoin the continued possession of Jo Jo by Big Jones. Because of the harm caused by Jones, the court could award damages or require title transfer from Jones to a third party without compensation.

Third example (in the middle of course, as I am a law professor): Consider Jo Jo, having lived for twenty years in an institutional lab at Big University, in a cage that meets the requirements of the Animal Welfare Act in physical dimensions. However, he never sees the natural light of the sun or feels the touch of another chimpanzee or a human unless the handlers have come to do a procedure on him. There is nothing for him to do. He has been part of three different scientific protocols over the past fifteen years. If attorney David Favre brings an action for violation of this tort and seeks the removal of Jo Jo from the environment, it should not be too difficult to show the intentional interference with his fundamental interests. The legal focus would quickly turn to element number four, and the court would have to determine whether Jo Jo's interest clearly outweighs the interest of the owner, Big University.

This is not an abstract argument about the use of animals in research. This will be about a particular chimpanzee at a particular university. Whereas in the past, researchers only had to justify their use of chimpanzees to themselves and did not have to give any weight to the interests of Jo Jo, now under the proposed tort, the university would have to make their case to a judge. Perhaps they could, perhaps they could not. I suspect most often they could not.

Now, let's go back to the tort and quickly touch upon some of the conceptual components. The premise of a tort is that a duty exists between defendant and plaintiff. I submit that this duty already exists and has been acknowledged within our legal system. Remember that the criminal laws adopted by every state impose both a duty of no

harm without justification and an affirmative duty of care. This proposed tort simply allows the recognition of that duty within the civil side of the legal system as well. There are those who might object to this new duty, as it does not impose a legal obligation on the chimpanzee. But we have many duties towards those without capacity to have reciprocal legal duties, for example, infants and insane persons.

The next point deals with the existence of the interest itself. The threshold question requires the court to be convinced that scientific information and not speculation support the claim of the existence of an interest. There should be a dual aspect of this inquiry. First, information about the species generally. Secondly, information about individuals before the court. The last thirty years have produced considerable information about chimpanzees—enough that a court should be comfortable understanding the nature of their interests. Obviously the test cannot be whether humans know everything about a species; we do not even know everything about ourselves. Sufficiency of the knowledge should be judged in the context of the specific interest that is at issue before the court. Satisfying the court as to the base of information is the burden of the plaintiff.

Now what about the fundamental nature of the interest, which is the second element? Only interests of fundamental importance to an animal should go before the court, not the trivial or the obscure. This is about both the reality of limited judicial resources and the political support that will be necessary to sustain a new tort. For the most part, these interests should also be the ones about which the most scientific information exists. This is not a bright line test; it will call upon the court to make a judgment call. The term “fundamental” should be considered in light of our knowledge about what is important to chimpanzees as a species and perhaps to a particular individual. Life is fundamental. Freedom from pain, activity space, reproductive opportunities, and social interactivity are all potentially fundamental. But again, both the individual and the species must be considered. A touchstone for what is fundamental already exists in the legal system in the form of the legislation discussed above.

Actions of the defendant are the third part of the test. It is axiomatic that the plaintiff must show that the defendant is the source of actions causing interference with the plaintiff's interests. This is fundamental to common-law tort actions, and the usual concepts and theories would apply in this circumstance as well.

Perhaps the most curious part of my test, and the most difficult, is the fourth part, the “substantially outweighs” element. The phrase “substantially outweighs” is in fact very important. If the balance of interests is close, then the human interests should prevail. As my proposed tort is a new approach and will require adjustments on the parts of many people, this power should be exercised only when the case is clear. To do otherwise will result in undermining the public's confidence in the right of the courts to address these novel issues. While the burden is on the plaintiff, the nature of the claim would normally re-

sult in the defendant providing information about the nature of the defendant's interest. Presumably the plaintiff would initially present a *prima facie* case that his interest would substantially outweigh the defendant's, then the burden would shift to the defendant to show that the plaintiff's interest does not outweigh his own.

The difficult issue the court will face is how to weigh disparate interests. Undoubtedly many issues of morality, money, fairness, and social policy will become intermixed. This difficulty is precisely why it is important to engage the court in the debate about chimpanzees. At the moment, this decision is usually made by the chimpanzee's owner. This can present significant conflicts of interest, as some owners give no weight to any interest of a chimpanzee.

I have not mentioned the word "standing." It is not expected that any chimpanzee has the capacity to call a lawyer and ask to initiate a lawsuit, but this is not a bar to creating a tort. Courts regularly adjudicate issues concerning beings who are incapacitated—children, the mentally incompetent, the insane, and the aged. It is beyond the scope of this speech to address who is best to represent the interests of chimpanzees before the courts. Our legal system has mechanisms such as guardianships, next friends, legal representatives, and social workers to deal with this issue. This procedural issue is not a bar to the adoption of the substantive law.

The tort remedy: what might we do, what would be available if we brought an action in this area? Against nonowners of chimpanzees, money damages will normally be sufficient. Against an owner, the remedies will also need to include equitable remedies such as injunctions, which may be necessary to stop certain actions and to improve conditions or remove a chimpanzee from unacceptable conditions. When money is awarded a trust could be used to hold the money for the benefit of the plaintiff chimpanzee.

Another difficult idea that must be dealt with, and I can just touch on it today, is intentionality. If the defendant is not a possessor, keeper, or owner of the plaintiff, then the plaintiff would have to show a knowing interference. (A second possible cause of action, of course, would be the negligent interference of a substantial interest, but that is for another day.). However, if a defendant is a possessor, owner, or keeper of a chimpanzee, then the law should conclusively presume that the person has knowledge of the fundamental interests of a chimpanzee. As a matter of public policy, no human should have the right to control or own an animal as complex as a chimpanzee without such knowledge, and it is therefore appropriate to charge them with the knowledge, whether or not they actually possess it.

Well, I have put before you a different approach. It does not satisfy many of the animal rights activists because it is not absolute, but I think that it is useful because it does what we do with human conflicts of interest—we allow for almost nothing to be absolute, and everything is balanced. To bring animals within this debate through the civil law system, you have to start with what some would consider a fairly low

threshold, but others might consider a high threshold. Recognizing a tort of substantial interference with a fundamental right is within the capacity of our courts to do fairly easily. Thank you so much.

**Steve Ann Chambers:**

This question is for Dr. Goodall and Dr. Fouts. You are both trend-setters in being advocate-scientists. Is there a trend of more scientists following your lead, such as Michael Soule, and conservation biologists, or are the professional costs and peer pressures still too great?

**Roger Fouts:**

In terms of scientists, I think advocacy is expanding, just as this symposium today is an example of a trend moving in a direction that all of us would like to see. You have the Psychologists for Ethical Treatment of Animals for example, which ten or fifteen years ago did not exist. However, where we see the major change is not so much in the old guard. There is a saying in science that scientific progress occurs one funeral at a time. So expecting someone like Noam Chomsky, (who has maintained his Cartesianism for forty years) to suddenly look at the data and say "I've been wrong," and jump up and down with excitement because he realizes that what he has been saying for forty years is incorrect, is very unlikely. The hope is in the students. It's in the eighteen, nineteen, and twenty-year-olds, and we see that more and more. The vast majority of students that come to study with us, both undergraduate and graduate, come because it's a humane facility where the chimpanzees' interests come first. I have a great deal of hope that once we older folks jump on the compost heap the new sprouts will bear much sweeter fruit than our generation has.

**Jane Goodall:**

Well I certainly agree with Roger that it's the up-and-coming generations that are our hope for the future. But I do think there's been change in establishment people as well. We've seen change, not great enough, but change in the medical research labs. We've certainly seen massive change in the way animals in zoos are maintained. I'm devoting a considerable part of my energies to our program for young people, Roots & Shoots. It is a symbolic name: roots make a firm foundation, and shoots seem tiny, but to reach the sun, they can break through brick walls. And if we see the brick walls as all the different problems that we humans have inflicted on this poor old planet, ranging from environmental to social, then this is a message of hope for youth. Hundreds and thousands of young people around the world *can* break through and make the world a better place.

We try to help children understand that all these problems are interrelated—we'll never have peace in the world until we can live in harmony with the environment. Each Roots & Shoots group tackles three different kinds of hands-on projects to make things better: for

their own human communities; for animals, including domestic animals; and for the environment we all share. The chimpanzee has this amazing ability to reach out across the nonexistent line that science tries to draw between humans and the rest of the animal kingdom. Then the chimp looks into our eyes, begging us to take him or her into our circle of compassion. That is the underpinning of the whole Roots & Shoots program. We now have more than four thousand active groups, from preschool to university, in seventy countries around the world.

**Steve Ann Chambers:**

This is for Steven Wise. Do you make an exception for an individual of a species not entitled to basic legal rights, when that individual exhibits extraordinary characteristics which would entitle it to its individual rights?

**Steven Wise:**

Whoever wrote that question, thank you, because what you did is catch something I glossed over, that goes to the essence of what I am talking about—that individuals of any species are entitled to legal rights. Chimpanzees don't have rights, humans don't have rights, only those who have the practical autonomy have rights. So if you are a practically autonomous human, you have these basic rights. If you are a chimpanzee with practical autonomy, if you are a mouse, or if you are a firefly with practical autonomy, you are entitled to basic legal rights. Your species is entirely irrelevant.

**Steve Ann Chambers:**

This is for Jane Goodall. What do you view as achievable solutions to the bush meat trade? Specifically, how can we challenge multi-national companies' exploitation of Central African rain forests?

**Jane Goodall:**

The bush meat trade is an incredibly complex problem. It's involving enormous amounts of money that are not part of the disclosed GNP of the country. And the solutions are really difficult. We believe that the best way of solving these problems is to form partnerships, and to work on a series of different aspects of the problem. For example, how do you find alternative sources of protein for the people who currently actually *need* the bush meat? The logging companies make the roads that enable the exploitation of animals, the killing for food to the point where it is not sustainable. Then all the people in the area who have been living sustainably in the forest for thousands of years will lose out as well, as more and more animals disappear. So we have to come up with alternative forms of protein and alternative forms of employment for the hunters. We cannot just say, "Let's stop all logging." We've already seen this morning that people are searching for ways to initiate

change. The best way is very often not to start with a sweeping total change, but to creep in step by step, as David Favre was suggesting. One can work with the logging companies, but many conservationists disapprove. However, WCS, working within the largest concession in Congo Brazzaville, has managed to reduce the illegal trade in bush meat by sixty percent over the past five or six years. That is a considerable difference. Another method is to work to enforce the laws against the hunting of animals illegally. Another is to work with organizations such as World Bank.

The good news—and I think one needs to share good news—is that the United States Department of State has taken the lead in developing the Congo Basin Initiative.<sup>37</sup> It has committed to thirty-six million dollars over the next four years. The European Union has come in with about the same amount.<sup>38</sup> And three of the big conservation groups have contributed funds—Conservation International, World Wildlife, and Wildlife Conservation Society. Most exciting of all, President Omar Bongo of Gabon has recently gazetted thirteen new huge forest parks.<sup>39</sup> Some of these were concessions for logging companies, not yet exploited, and those concessions have been withdrawn. Hopefully, part of the money from the State Department-led initiative will help President Bongo to enforce the laws within these newly created parks. On the whole, though, the bush meat trade is really, really complex. And I think many, many, many, many, many animals are going to vanish before we even begin to get a handle on it.

#### **Steve Ann Chambers:**

This is for David Favre. With respect to the fourth element needed for your proposed tort, don't you believe that courts will find that almost any economic or scientific purpose of humans outweighs the chimpanzees' interests?

#### **David Favre:**

No, I don't. I believe that courts are quite capable of balancing these things and that courts and judges are quite capable of being educated to believe that the chimpanzee interest has weight. Again, it is also a development. What was the judicial view of the value of a wetlands in 1950? They were swamps to be dug up and gotten rid of, but now you would expect a judge to have the attitude that a wetland is an important ecosystem deserving the protection that the various laws have given to it. So at the same time as I go forward with my proposal from the legal side, it's also an educational process of the judges to

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<sup>37</sup> United States Agency for Intl. Development, *Congo Basin Forest Partnership* <<http://www.usaid.gov/about/wssd/congo.html>> (accessed February 8, 2003).

<sup>38</sup> *Id.*

<sup>39</sup> *afrol News, Gabon Announces Creation of 13 National Parks*, 9 September 2002 <[http://www.afrol.com/News2002/gab006\\_13\\_new\\_parks.htm](http://www.afrol.com/News2002/gab006_13_new_parks.htm)> (accessed Apr. 12, 2003).

make them more attuned to and in touch with what the underlying philosophies are on this point.

**Steve Ann Chambers:**

This is for Roger Fouts. If the legal status of chimps is grounded in “negative rights,” then how does such status translate to habitat protection?

**Roger Fouts:**

I’m not sure that a legal person can help me with negative rights.

**Steven Wise:**

Do you mind if I answer that question? They don’t. You cannot enslave me. How that translates into a positive right to habitat protection for chimpanzees is hard, because it violates one of my fundamental tenets, which is “don’t ask for more for chimpanzees than you can get for humans.” How does a human negative right against bodily integrity violations translate into a right to a home or food? I think the answer is: it doesn’t, and that is a problem for chimpanzees. It’s a problem for human beings.

**Steve Ann Chambers:**

This is for Jane Goodall and Roger Fouts. Due to your understanding of the continuity with animals, are you vegans? And if not, why?

**Jane Goodall:**

Okay, I’ll start that one. I’m a vegetarian, but I do eat eggs and cheese and stuff like that. If I can, I make sure it’s free-range eggs and free-range cows and so on. Why aren’t I a vegan? Because a vegan’s diet is quite difficult. If you live somewhere and you can be surrounded by the right kinds of things, then you can be a vegan, and I probably would be. However, when you are three hundred days on the road, traveling all through places like China, Africa, and so forth, I think if I was a vegan I probably would have faded away by now, because I can’t carry the stuff with me. Also, it’s extremely embarrassing when you stay with people, because they don’t know what to give you. It’s another example of taking things step by step. We can move forward by becoming vegetarians and talking to people about why not eating meat is important, both from the ethical point of view for the animals but also for the long term good of the planet—not cutting down forests to grow grain, which is very wasteful. You know the theme of all these arguments. So it’s a step by step thing as far as I’m concerned.

**Roger Fouts:**

I don’t know if there is a technical name. We call ourselves ethical vegetarians, because we are somewhat forced into it. I guess from a Darwinian point of view, and embracing the empirical reality of na-

ture, life feeds on life. Darwin referred to, as I said in my talk, organic beings. Organic beings are not only chimpanzees and pigeons, but pear trees as well. So the continuity certainly extends beyond Animalia, it's the plants as well. The fact is that we have spent most of our time focusing on us, and we really don't know that much about plants. So to arbitrarily draw a line and say, well I'm going to start eating plants and not animals, seems to be just as arbitrary as the other lines. So what we try to do is to eat that which has not suffered cruelly, if you will. And by and large (maybe a botanist could tell me if this is true) I don't know a way in which a plant can be mistreated. Perhaps plants are smarter than we are in that respect, in that we can take a calf and put it in a box and that calf will stay alive, struggle and suffer greatly to produce veal at a farmer's whim. But I was in 4H when I grew up, and my project was carrots. Carrots taught me something—if you don't treat them right, you get nothing. Unless they had the right water, the right sun, and the right soil, they basically said, "I'm not going to suffer this," and they were gone.

By and large, we eat plants because they make it a little more difficult for us to be cruel. Chimpanzees aren't vegans either, they feed on life and life feeds on other life. Also in that realization is my hope that someday I will become a part of that chain as well. That my body and so on will go back into the chain, and whether a plant or a dog or a cat uses my energy to continue, that's fine. I think we have to be very, very careful with veganism. It can be almost a sort of imperialism, where people are trying to make a statement, and it is a worthwhile statement, but to me the statement should be broader—to embrace or to have a reverence for life.

One time in an argument with a philosopher, when I didn't think we should take computers that we no longer use and offer them to welfare, he called me a hydrocarbon chauvinist. So I don't care about the non-hydrocarbon-based things on this planet, but I think we should certainly have a reverence for the hydrocarbon things. We also should do simple things like giving thanks before you eat somebody, whether that be a plant or an animal. It is important to realize that the food is not ours and we do not have dominion. It is important to say grace, if you will, and realize that this food is not our right, but a gift, so we try to do that as well because it breeds humility.

**Steve Ann Chambers:**

Steven Wise. You have said that the great apes' similarity to humans entitles them to more humane treatment. Does this help or hinder lawyers who are fighting for better treatment of all animals, who are used for experiments, entertainment, and food?

**Steven Wise:**

I never said that. What I did say is that liberty and equality are two different ways of looking at the underpinnings of the entitlement

of rights. Equality is a comparative right. Someone is entitled to rights, because she's like someone else who has rights. In that case the similarity of a chimpanzee to a human being would be a ground for arguing that the chimpanzee should have rights, if the similarity is legally relevant.

But the other argument I make, the liberty right, the one in which I talked about practical autonomy, doesn't have anything to do with comparing ourselves to chimpanzees or chimpanzees to ourselves. It has to do with the way we are put together and has to do with the sorts of cognitive abilities that we value.

**Steve Ann Chambers:**

Professor Favre, doesn't the fourth element of your tort continue to promote the belief that nonhuman interests are subordinate to human interests? Then a follow up is, what if there were such a provision in determining interest based on gender or race? Wouldn't that have been unacceptable?

**David Favre:**

Not until about thirty years ago. My tort is built towards incrementalism. Yes, it still allows for differences between human beings and nonhuman beings. I have been thinking about this for twenty-five years, and I simply have no other mechanism to start the process of integrating animal interest into our legal system other than slowly. To say that all animals are equal to all humans just gridlocks the legal system. I don't see any other option. If somebody has another way to do it, I look forward to that proposal.

**Steve Ann Chambers:**

This is for Jane Goodall, but I think Roger could probably jump in, when he gets back. Has there been a fund created to assist Carol and her efforts to care for the 266 chimps that have been placed in her care?

**Roger Fouts:**

It happened quickly, and while it was in negotiation it had to be kept very quiet for fear that early publicity might stop the whole process. So there was a month and a half or so in negotiation—two months where people knew about it, but nothing was done. It is just becoming publicized now and some organizations have contributed. I understand that the Arcus Foundation is doing a dollar for dollar match for operating expenses, which is very generous considering that they basically supplied the initial funds to purchase the facility. I guess the way it worked was that the facility was purchased for \$3.7 million and then the chimpanzees were donated. I'm sure the Center for Captive Chimpanzee Care will put together a major fundraising where they can receive funds. So that is as much as I know.

**Steve Ann Chambers:**

We can check the status. We will put something on the Chimpanzee Collaboratory Website: [www.chimpcollaboratory.com](http://www.chimpcollaboratory.com).

**Roger Fouts:**

Any help is appreciated. Some of our students are doing a blanket drive. We found out last night that when Coulston turned over the facility, he not only took the keys, but also the toilet paper. He left literally nothing but the chimpanzees. So Carol is starting from scratch. She is going to supply enrichment, so they literally need everything. And money is of course a critical need because she will have to hire people.

**Jane Goodall:**

I think we should really thank the Arcus Foundation because they also provided the money to build the sanctuary for the chimpanzees whom Carol already has, who were originally from NASA—the Air Force chimps, as they are called. This is a very generous person, his name is Jon Striker. There is a name behind the foundation, and often those names are very important.

**Steve Ann Chambers:**

Here is a related question for all panelists. Please comment on your reaction to the release of the Coulston chimps and its implications for efforts to obtain legal rights for chimps.

**male speaker:**

When I heard the news, I was ecstatic on one side and a little sad on the other, because Coulston was such a bad guy that I really think he would have made a good defendant in these cases, and now he has removed himself from the arena. But this is a transfer; I am not sure it has much to do with the legal suit per se.

**Steven Wise:**

Isn't that odd that I've had the same feeling? That son of a gun! We are never going to be able to sue him now. On the other hand, there's going to be crescendos of publicity and it's going to roll and roll, and people are going to want to know why people think it's so important that this happened. I think it will be another factor that judges and lawyers and other people take into consideration when they are taking the measure of the value we place upon chimpanzees.

**Roger Fouts:**

We heard Jane mention the chimps that were freed from LEMSIP and given to Gloria Grow at the Fauna Foundation. If you go to her website, you should read the little biographies of what those individuals experienced, starting out as pets or in entertainment, going into

biomedical research, receiving two or three hundred liver punches, which required physical knockdowns (what we call knockdowns with capture) with guns and anesthesia over and over again. Some chimps were so desperate from these treatments that they literally bit off their thumbs in desperation. My hope is that those stories can get out there, and here we have a potential 266 stories to let people know what we are responsible for. Coulston operated perfectly legally, other than his fines within our system.

**Jane Goodall:**

If we look around the world today, we are shocked by the many violations of human rights. Look at the things that people do to each other. Look at the stories that hit the newspaper and television and it doesn't seem to be making that much difference. That's what's so frightening to me. I am thinking of child abuse that goes on, that is so horrific, and yet again and again courts send children back to families where they can repeatedly be tortured. I have a letter that I received two days ago from a young woman who is the first known (legally known) victim who was deliberately blinded by her mother with bleach. Six times she was put in front of a court, and six times the court said there wasn't sufficient evidence and there was collusion and she was sent back to her mother. So that's why I wonder, why will this be different?

**Steven Wise:**

Not only is our legal system not perfect, it's extraordinarily far from it. We have watched death penalty after death penalty be reversed with DNA evidence, and you would think that people would be paying attention to the death penalty cases. I feel like I'm giving a Law Day talk here now. It's the best that we have. It's hard to know what else to do. You need to get good judges. You need to have people who take it really seriously. This is what happens in a system in which people take little children seriously, and they take death penalty cases seriously. It explains why, in a legal culture in which nonhuman animals are not taken seriously, why they are just steamrolled every single day. So when chimpanzees have rights, we can't promise that they've entered nirvana. All they've done is begun to make some kind of a parity with us and the incredibly complicated, often unjust, legal world in which we all have to operate.

**Steve Ann Chambers:**

Thank You. This question is directed to Steven Wise and Jane Goodall. Under what circumstances would it be permissible to use chimpanzees in medical research? Is it always wrong? Morally wrong? If there were significant and clear benefits for finding cures to serious illnesses, would it then be permissible to us chimpanzees in research?

And do you believe that most medical research on animals is unnecessary?

**Steven Wise:**

Well, at least legally, and probably morally, the only time I believe one should be able to use a chimpanzee in research is a situation where one would also use a four-year-old human child. Not many.

**Jane Goodall:**

I think that, if one is realistic, it is terribly important that we realize it is not ethical ever, from the point of view of the chimpanzee, to use chimpanzees in invasive medical research. Maybe collecting urine is okay or something like that. But the problem is that until it is no longer legal to use chimpanzees, each of us has to ask this question to ourselves: suppose we have to face the situation where our child or our mother is dying, and we are told, okay, if we sacrifice a chimpanzee, this will give you back your mother or your child. How are we going to respond to that? These are the tough questions. You have to be prepared to face up to those really tough questions.

**Roger Fouts:**

I think one of our problems, or one of our delusions, is that in addition to our discontinuity from nature, we suffer from an irrational fear of death. It is like saying that I am only going to inhale and do everything I can possibly do to prevent exhaling. Or that we are going to stop the sun, so we only have sunshine and never night. One of the realities of nature are rhythms and the life cycle—and it is called a life cycle for a very good reason. You are born and you die. Even our days are cyclic. I'm not quite the same person I was when I first got up this morning. Nor will I be as mentally aware tonight as I am right now. Why are we afraid of death, when it is such a natural thing? Why do we have to take an endangered species to help an overpopulated species to become more overpopulated? One of our major problems today on this planet is that we have not used our rationality to control our own numbers, and it is causing tremendous suffering not only for fellow human beings, but for the whole planet, for goodness sake. So we should do this rationally rather than emotionally.

**Jane Goodall:**

But Roger, you're not facing up to that question. Suppose it was Josh (Roger's son), when he was six years old whose life could be saved by sacrificing a chimp? I just had a letter from the parents of a little boy of ten who had some kind of adult leukemia (which is becoming more and more common in children because of pollution), and his last wish was to see Jane. Well, I managed to get there two days before he died. His parents had been fighting for three years to try and save him. His little brother is hardly speaking anymore, he is so devastated. Sup-

pose she had agreed to a procedure that would save her son at the cost of a chimpanzee's life. Could any of us tell the mother that she was wrong?

We've got to change the law, so that people don't have to make decisions like that. I think that's what I meant to say. We shouldn't have to ever be forced to make such a decision, because we couldn't help choosing to save our child, no matter what the sacrifice, unless we are very abnormal children or parents. You know, I would take the life of *your* child to save my child. Never mind whether it's a chimpanzee or a pig or a dog. It's *my* child, and I know, being a mother, that I'd do almost anything for my child. There are two points here. One, we agree it is not ethical to use chimps, or dogs for that matter, and two, we should pay more attention to the Ray Greeks of the world, and really carefully assess what it is they are saying—that actually the use of animals has not often helped us. I want a new mindset. Instead of having people in the medical research arena saying, "Well, it's really sad. We do understand now that animals are sentient and sapient and we'll try to use as few as possible, and as low down the evolutionary tree as possible. But we'll always have to use some." I want a mindset that says, "We agree it's ethically wrong, so let's get together, with our amazing brains—and we have already created hundreds of alternatives to using *any* live animals—and stop using animals as quickly as we possibly can. That's how we should be thinking.

**Steven Wise:**

If I may say just one thing. The rights that I advocate—the sort of fundamental right, for instance, to bodily integrity, is intended to operate for chimpanzees the way that other fundamental rights operate for human beings. Just like someone could not take me or my children, or Jane, or anyone else, and do invasive research on them, because it might help them, they should not be able to do that to a chimpanzee either. And if I could put David on the spot, David—how would your tort work in that circumstance where, hypothetically, you might be able to do a procedure on a chimpanzee that might indeed advance human interests?

**David Favre:**

Well, I think that is a false premise. I don't know the fact pattern where you could say "doing x to x chimpanzee is going to produce a saved human life." The reality of how science works just does not allow that fact pattern to come up. But yes, you are suggesting an absolute right. I am suggesting the relative right of a balancing of interests. But I feel comfortable that in ninety-nine percent of the cases, we end up saving the chimpanzee.

**Steve Ann Chambers:**

This is for Steven Wise or David Favre. Steven Wise mentioned the opposition to animal-rights welfare from within the political arena. You have both proposed ideas toward changing the legal system. What would you suggest for changing the political system?

**David Favre:**

I thought about that, and as Steven was saying about the courts, I don't know of a better political system. I think we can make our system work better by trying to negate the consequences of money in the system. The corruption of our system is the amount of money corporations can put forward to move political processes. But a representative democracy is the best system that we can come up with at this point in time and we just have to work better within it.

**Steven Wise:**

One argument that flows through much of my writing is that the tools for granting basic rights to chimpanzees already exist in our common law system. It just takes the presentation of the scientific facts and the legal arguments to judges so they can begin to connect the dots.

**Steve Ann Chambers:**

This is for anyone. Would you agree that a tension exists between the consciousness-raising value of animal law, to which Jane Goodall refers, and the narrower, strictly legal arguments proposed by Steven Wise, David Favre, and others? If so, any thoughts on how to mitigate this tension?

**Steven Wise:**

Yes. No one pays attention to us when Jane is around. They don't want to hear our abstract legal arguments. They want to hear the great stories about the chimpanzees. So I am thinking of trying to send Jane to law school.

**Steve Ann Chambers:**

This is for anyone. How many chimpanzees are currently in captivity in the United States? What about the rest of the world? And is there a country where chimpanzees have a stronger chance of obtaining legal rights?

**Roger Fouts:**

Paul could probably answer that. The Great Ape Project has done a census, and I haven't read it thoroughly, but there are about three thousand chimpanzees in captivity in this country. I think there are

two or three hundred in Japan, and another four or five hundred in Europe. So probably about five thousand total.

**Steve Ann Chambers:**

Is there a country where chimpanzees have a stronger or better chance of obtaining legal rights?

**Roger Fouts:**

The Great Ape Project New Zealand did pass a law that gave them rights in the sense that you cannot experiment on them, you cannot torture them, and if you do research, it has to be for the individual's benefit. So New Zealand is ahead of us. England is another country that has some sort of legal protection for chimpanzees against experimentation.

**Jane Goodall:**

The sad truth is that the countries that are most likely to grant these rights to chimpanzees are the countries that are not exploiting them in that way in the first place.

**Roger Fouts:**

I think New Zealand has about thirty chimps.

**Jane Goodall:**

Yes, but none of them are in medical research. And England found it too expensive, so they moved their research outside. It is very easy for a country like New Zealand to pass a law like that because it is not making any difference. It just makes them look good.

**Steve Ann Chambers:**

This is for Steven Wise. Which method do you believe should be the focus of the animal rights movement—legislation or the courts? For instance, have any U.S. groups tried to model Britain and ban research on apes?

**Steven Wise:**

I think that both judicial and legislative efforts are ultimately going to be equally important, and they will feed upon each other. Probably the harder question is, "Where do you focus your resources on first? Which arena do you think we will likely have the first success?" I have spent the last fifteen years arguing that it will be in the common-law courts—in the state courts of the United States. I am sure there are people who will argue that it will be in the legislatures. The observation I have made is that the argument for the rights of chimpanzees is a matter of justice, and when you are making arguments from justice,

you make them before judges, who are in the business of dispensing justice. Legislators are in all kinds of businesses.

**Steve Ann Chambers:**

This question is for David Favre. Should individual animal interests be weighed against aggregate human interests? If so, is this fair to animals? If not can animal research ever be justified?

**David Favre:**

That is a very good question. You have gotten down to some of the hard points. For example, if we had a case of a particular chimpanzee against a particular university, that university, as the defendant, has the obligation to make the full defense that what they are doing is in the better interest. I assume that part of their argument could be a sense that they are doing things for science. But what I prefer about my approach is that you get away from this general "good for science, bad for species" debate, to which there is no answer. Instead the question becomes: "what is this facility using this animal for? What exactly are they proposing to do?" I think that we can win that debate quite often, because a lot of animals are not being used in particularly useful and sound scientific manners that are going to produce good information for the broader sense of science. So I want to get away from the "Should we use animals in research?" question and instead talk about a specific animal and a specific research experiment.

**Steve Ann Chambers:**

This question is for Dr. Goodall. What practical steps are there to educate the young people on the ground in Cameroon, Zaire, and so forth? The questioner is referring to the younger people in primary schools, for instance.

**Jane Goodall:**

The various NGOs [non-governmental organizations] on the ground are producing materials in French and some of the other languages. There is no unified approach, but with the money that's now available for the Congo Basin Initiative, we can hopefully get together and start to produce more materials and do more education. There is a lot of interest in Roots & Shoots in some of these countries, in Gabon and Congo Brazzaville for example. The thing I got out of being at the Johannesburg Earth Summit three weeks ago was that there was a sort of shrugging of the shoulders by the NGOs who were saying, "Well, we are never going to get real help from governments, from heads of states. So it is going to be up to us." We made some incredible partnerships there, which makes me feel very encouraged that we can produce better materials. But actually this bush meat problem is all over the world, not just in the Congo Basin. Everywhere people are hunting animals for food, including the United States.

**Steve Ann Chambers:**

This question is for Steven Wise. A colleague asked me about Steven Wise's legal argument, and I presented the argument for autonomy, liberty, and equality as well as I could. He suggested that it was more of a moral argument than a legal one, and I could not argue otherwise. How would you have responded had we been lucky enough to have you at our table?

**Steven Wise:**

Well, *Rattling the Cage* and *Drawing the Line* have approximately thirteen hundred footnotes apiece. Most are to either judicial cases or legal treatises. Unless everyone is talking about moral arguments, which is highly unlikely, then they and I are talking about legal arguments. As I said in my talk, there is and should be, (especially when you are talking about life and death) a strong overlap between moral and legal arguments. But it is easy to mistake them.

**Steve Ann Chambers:**

This question is for David Favre. Please explain the first element of the tort: what is the interest, and who is the plaintiff, a chimp or a person?

**David Favre:**

The plaintiff is the animal who has the interest, the chimpanzee, the particular being who has interest. The fact that the chimp needs an attorney to make this argument on their behalf is obvious, but the standing goes to the person who has the interest and therefore whose interest is being harmed. An interesting matter, it is going to require a little bit of thinking, because we as human beings all have basic understandings about each other and how we operate and what is important to each other. We discover fairly quickly what is important to other human beings, and do not actually lay this out in any great detail unless you get to really detailed human rights arguments about why we are letting this go forward. Why is it that one particular action is allowed and other actions are not allowed? When it comes to looking at animals of other species, then I do think we are going to have to pause and actually use science as a tool to lay out the argument: "Well this is important. Cats do this, but chimpanzees don't do that. What is important to a cat versus the chimpanzee?" Some things are perhaps the same, other things are not the same, and we are going to have to look at each individual species.

**Steve Ann Chambers:**

Thank you. We will squeeze in one last question, and this is for anyone. What about zoos, should they help serve as models of change? And if so, how?

**Steven Wise:**

Well, there are zoos, and then there are zoos. There are some that just should be dynamited. Then there are others where I think, if the zoo is run so that it looks an awful lot like a sanctuary, that zoo can serve as model for all sorts of things we approve of.

**Jane Goodall:**

I am constantly asked my opinion of zoos. We have a program at JGI [Jane Goodall Institute] called "ChimpanZoo." There are some twenty zoos around the world taking part in the program. It is partly to learn about chimps, but it is also to improve their conditions. I like animals to be free. I want them to be in the wild. I don't want them to be caged, not even in enclosures. On the other hand, we must consider what is really happening in the world. In Uganda's Budongo Forest, fifty percent of all adult chimps have lost a hand or a foot from being caught in a snare, and others have died lingering deaths from gangrene. The same is true in the Ivory Coast. Everywhere forests are being cut down, chimpanzee homes and homes of other animals are being destroyed, chimpanzees are being shot. Babies are being taken for entertainment—still going off to the rich Arab countries where the Sheiks like to have animal collections, like a stamp collection, and they all want a chimp.

Think of the bush meat trade, where *everything* is killed. Where babies are snatched and sold in the market beside the cut up bodies of their mothers. Think of medical research; think of beating chimps when training them for entertainment. And then look at a zoo where there is a very huge enclosure, and a decent social group. You can sit there in the evening and look at them: the male perhaps grooming a younger male or a group of females and the sun is warm on their backs and they have food. And it is an enlightened zoo that has got a lot of enrichment. It's a zoo that is raising money to help chimps in the wild, to help the bush meat problem. And then I think, "Well, if I were a chimp, where would I rather be?" Sometimes they would probably rather be in one of those good zoos. Like Steven Wise said, there are zoos and there are zoos.

There is one thing I forgot to say earlier. A key element in the bush meat trade is the women. In the cities, the markets are usually operated by women. The women are the ones who traditionally have been responsible for caring for their families and making sure that the children and their men have enough to eat. They know perfectly well that what's going on now is absolutely unsustainable. Women are beginning to form cooperatives, and we are trying to help them, and insist that the hunters be licensed. The women will only buy meat from hunters who are licensed, and they are going to try not to buy the endangered species. These may sell for a lot of money, but the women know that these animals are disappearing altogether. In the developing world, unless you get the support of the people, unless you care

about their well-being, you may as well throw conservation out the window, because it's got to be a win-win situation. And we have to do something about the growth of human population. Again it is women, and as women get empowered and better educated the family size drops.

**Steven Wise:**

Jane, speaking of women, I have something to say about women and the fight for animal rights in the courts. One hope I have is that there will be feminization of the legal profession, as there is already a tidal wave of feminization in the veterinary profession. Certainly in the United States. I have high hopes that as women begin to become judges, they will look upon the argument for the rights of animals in a way that's more favorable than men tend to have done, unfortunately.

**Karla Wejberg:**

Professional Dershowitz holds an LL.B. from Yale Law School.<sup>40</sup> He is a prolific writer whose latest book includes a chapter on animal rights.<sup>41</sup> Some of Professor Dershowitz's other major current publications include: *Letters To A Young Lawyer*,<sup>42</sup> *Supreme Injustice: How The High Court Hijacked Election 2000*,<sup>43</sup> *The Genesis Of Justice*,<sup>44</sup> *Just Revenge*,<sup>45</sup> *The Vanishing American Jew*,<sup>46</sup> and *Reasonable Doubts*.<sup>47</sup> Welcome Professor Dershowitz.

**Professor Dershowitz:**

First, I want to commend all of you who are involved in animal rights. I think it is a wonderfully important and insightful look into the soul of human beings and into issues that should be of great concern to all of us. Please keep up your important work. I might not agree with everything all of you say on every aspect of the subject, but it is clearly a very important issue that I think will have increasing importance in the years to come.

What I want to do is spend my short period of time exploring some of the jurisprudential underpinnings of animal rights. We take rights for granted. What are rights? After all, rights are trumps on prefer-

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<sup>40</sup> An LL.B. degree is now referred to as a J.D.

<sup>41</sup> Alan M. Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age* (Little Brown & Co. 2002).

<sup>42</sup> Alan M. Dershowitz, *Letters to a Young Lawyer* (Basic Books 2001).

<sup>43</sup> Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (Oxford U. Press 2001).

<sup>44</sup> Alan M. Dershowitz, *The Genesis of Justice: 10 Stories of Biblical Injustice That Led to the 10 Commandments and Modern Morality and Law* (Warner Books 2001).

<sup>45</sup> Alan M. Dershowitz, *Just Revenge* (Warner Books 2000).

<sup>46</sup> Alan M. Dershowitz, *The Vanishing American Jew: In Search of Jewish Identity for the Next Century* (Touchstone Books 1998).

<sup>47</sup> Alan M. Dershowitz, *Reasonable Doubts: The Criminal Justice System and the O. J. Simpson Case* (Touchstone Books 1997).

ences. We all have preferences. Preferences get incorporated into law, but if you declare something to be a right, it has a very special status, and it generally cannot be violated except for very compelling reasons. What makes something a right? At a very simple level, if you take a positive law approach to rights, it is easy. A right is something that the Constitution says is a right, or a right is something that a United States law says is a right—some written series of enforceable rules which hierarchically take preference over ordinary legislation or ordinary preferences.

Surely most of us think we have rights even if legislature and institutions do not recognize them. Surely the Jews of the Holocaust had rights not to be incinerated at Auschwitz even if there were no laws that protected them and afforded them any positive rights. Some people feel that in the United States a fetus has a right, even if the Constitution and the Supreme Court say only the mother has the right to choose. Deep down, most of us have a sense that there is some transcendent source of rights that goes beyond what our government gives us at any given point in time.

The question then arises: What are these sources? Where do rights come from? For some people, the answer to the question is very simple—God. From the Declaration of Independence we learn that God creates all men equally and endows us with certain inalienable rights. I would suspect that if you asked the vast majority of Americans today what the source of rights was, they would tell you the source of rights is God—divine rights, the Bible, the scriptures, or the interpretations of various divine rights. The Declaration of Independence talked about nature's "God," so another source of rights is natural law. It inheres in the nature of human beings or it inheres in the nature of interaction between human beings and others that there are rights. There must be rights!

Another argument follows. Think of a world in which there was not an external source of rights. What would it be like? It would simply be a world in which the majority would get its way or dictators would get their way, and there would be no source of challenging the status quo. Why did Jefferson have to invoke nature's "God?" Because he had no positive law, which would justify the American colonists taking the extralegal tack of separating from England, to which we were legally bound. So necessity is another source of rights. Without rights we could not survive in a world where governments have acted in arbitrary ways.

I want to explore with you what the source of animal rights might be. At the simplest level we have to ask the question, "Are animal rights, as you conceive of them, the rights of the animals themselves? Do they inhere in the animal, or are animal rights the rights of human beings not to have animals suffer?" Surely animals cannot have inherent rights vis-à-vis the world. If a little animal that is constantly eaten by lions had the right not to be eaten, you would have to ask yourself, "Does he have that right vis-à-vis the lion?" No. It is in the nature of

the jungle, the law of the jungle, that "Might Makes Right." One can say the natural law of the jungle is that the predatory lion will eat the less predatory animal on which it survives. You cannot really make the argument that animals have a right to 'live.' They may have a right to live vis-à-vis human beings, but they do not have a right to live, necessarily, in relation to other animals. If they did, then human beings, as the enforcers of rights, would be in a position where they would have to create protection for the smaller animals in the jungle against the larger animals in the jungle.

When I went on a photographic safari several years ago, we were told we could not go at night because we would use lights. The lights would protect the animals from their predators, and the people who ran these preserves did not want to interfere with nature. They did not see their role as protecting one animal from other animals. That is not in the nature of rights. Most of us would agree that, even if we come to the conclusion that animals have rights, such rights would not necessarily be in relation to other animals. They would be in relation to human beings. Therefore, there is a human-centered aspect to rights.

Animal rights are not alone in this regard. There are many rights that inhere in beings that do not participate in the democratic process of making rights. Forget about fetuses for a second. We would all agree that young children have rights, yet they are not part of the polity to vote. They do not participate in the decision. They are not part of the social contract, and it is hard to even place them in a Rawlsian world.<sup>48</sup> The source of the children's rights lies in their very humanity, and it is the adults, the ones who make the law, who have an obligation to make sure that we enforce those rights vis-à-vis those beings that are not capable of enforcing rights themselves. With children, of course, there is a unique situation, because the adults who make the law have a compelling interest in the rights being enforced in relation to their children.

I am not talking about the abusive situations, and even here we get complexities. For example, we are not talking about if a parent is caught on videotape beating a child, and she defended herself by saying, "Oh, I'm sorry. I did a terrible thing." I am talking about the situation where she defended herself by saying, "Wait a minute. That is my child. Family is the unit with rights! I did not do anything to damage the child lethally or even permanently. It is none of your business! Stay out of this issue. It is my decision how to bring up my child." In that situation, we would have a much more interesting conflict.

The question is: where do these rights come from? Do they belong to human beings or do they belong to the animals? The answer to many questions turns on that issue. If rights belong to the animals the way they would belong to a child, or the way they belong to a mentally re-

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<sup>48</sup> John Rawls, *A Theory of Justice* (Harvard U. Press 1971) Rawls contemplated a nether world in which human beings, veiled by ignorance of their status in the real world, had to decide basic principles of justice.

tarded human being who does not vote, but whom we protect, or the way rights belong to other sentient beings, it would be much harder for us as human beings to make cost/benefit tradeoffs. If the right belongs to that being, the right generally has to be respected unless one can show fairly compelling circumstances. We do not generally make tradeoffs between the rights of children and adults or between children.

There was an interesting case here in Massachusetts. The first case of a kidney transplant occurred at Massachusetts General Hospital and it involved identical twins, one of whom had failing kidneys and was going to die. The other, was of course willing, happy, and anxious to donate a kidney to save the life of the identical twin. The parents were also very anxious. The only problem was that a Massachusetts statute at the time said no parent could consent to any surgical procedure on a child unless it was in the best interest of that child. Massachusetts General Hospital refused to perform the surgery without court authorization because the doctors could not say it was in the best medical interest of the donor child to have a kidney removed. Statistically, the surgery put the child at a somewhat greater risk, so the court really had to think hard. Everybody knew how the case was going to come out, but the court had to decide how it would rationalize its decision to permit one child's interest to be traded off to protect the interest of another child.

Rights tradeoffs generally are not part of the process when there is no ability to consent, and the court came up with a rationale you might have expected. The court said it was in the best interest of the donor child because, if the child did not give the kidney, the potential donor child would not be able to live with himself. That is nonsense when you think about it. If the child had no choice, he would have been able to live with himself. The court was searching for a rationale that made some sense. The conclusion did make some sense and the court came to the right conclusion, but it did require a major conceptual change in rights law or attitudes towards rights. I think the same is true when we think through the issue of animal rights—whether they are animals' rights or human rights.

My own view is that I do not believe rights come from God. I am not smart enough to figure that out, and God has never spoken to me. I do not trust most of the people who claim that God has spoken to them and frankly, I do not like a lot of what he has said to many people. I can not, in a secular democracy, give much weight to divine rights. Divine rights, even on the issue of animal rights, are very complex. If one looks at the opening verses of the Bible, one of the first rules of the Bible is a very strong prohibition against eating of the flesh of a living animal.<sup>49</sup> It is indeed one of the Noahide laws, one of the laws applica-

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<sup>49</sup> Genesis 1:29-30.

ble to every human being in the Bible.<sup>50</sup> There are also ritual slaughter rules that prohibit cruelty in the killing of animals, although what did not seem cruel then may seem cruel now. However, the object was to prevent cruelty to animals. On the other hand, we see that animals were ordered to be killed if a human being had sex with an animal. Even if the animal was forced to do it for purposes of ritual purity the animal had to be killed. The concept of Diodon, killing animals who were involved in torturous activities, goes back to the Bible.

Sacrifice laws permit the sacrifice of animals, although the sacrifice has to be done in ways that are not supposed to be cruel. On the issue of divine law, there is a lot of ambivalence. The Bible is very clear when it says human beings were placed on the Earth to rule over animals and to eat of their flesh, and were permitted to take their hides and use them to protect themselves.<sup>51</sup> There is a clear hierarchy. The hierarchy is functionally defended by reference to the presence in human beings of a phenomenon that is not present in animals—a soul. People took souls so seriously in the nineteenth century that a doctor in Edinburgh actually conducted an experiment in which he weighed people just as they were dying and then weighed them in the seconds after their death. He actually came up with a precise weight of the average soul as it was leaving the body, based on these kinds of empirical research techniques. Most of us in this room, whether we believe in a soul or not, would not make rights depend on the presence of something as abstract a soul. All of us have met human beings who, if they have a soul, it is awfully hard to find. Yet we categorically say that all human beings have souls and therefore certain rights inhere in them. When it comes to divine law, there is no clear answer.

It is very hard to think about animal rights in the context of natural law to the extent that natural law derives from the rules of nature. The rules of nature clearly do not answer in terms of right or wrong. Nature is valueless. Nature does not have rights or wrongs. It has consequences. And the consequences of nature are more often injustice than justice. The consequences of nature are generally that the powerful outweigh the powerless. Darwinian rules are only biological rules. If one were to infer from Darwin how rights should operate, one would get to this despicable notion of social Darwinism, which makes the logical leap or engages in the naturalistic fallacy of what is, and what ought to be.

The role of law is to improve on what exists. The role of law and the role of rights is to elevate, to bring us up above the law of nature. My own preference is to say that rights grow out of human experience. I would put it even more dramatically and say that rights grow out of

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<sup>50</sup> Ahavat Israel, *Noahide Laws* <<http://www.ahavat-israel.com/ahavat/am/goyim.asp>> (accessed Mar. 19, 2003) (“Ever Min HaChay” is a prohibition on removing and eating a limb from a live animal. The Noahide Laws are referred to in the Old Testament. Also known as the “Seven Universal Laws,” they are applicable to every non-Jewish person.

<sup>51</sup> Genesis 1:26.

wrongs, that the history of rights in the world has been a history of wrongs, followed by a recognition that these were wrongs, followed by some inquiry as to how to best avoid the recurrence of those wrongs. The result is rights. We design rights to avoid falling into the Santayana trap of, "Those who cannot remember the past are condemned to repeat it."<sup>52</sup> We do not want to repeat the Crusades and the Inquisitions and the starvations and the Holocaust and the genocides of one form or another.

If you look at the history of rights, you will find, like evolution, they come in spurts. My dear friend Steve Gould's theory of evolution was always attacked as "evolution by jerks," meaning that the evolution followed long periods of quiet and then jerky, quick changes.<sup>53</sup> I think that is true of the history of rights too, over time. The history of rights, for example, developed after the massive violations of rights in the Second World War. We also saw the building of the United Nations and the Geneva Accords, and a whole range of other proliferations of rights. Rights come from wrongs. Rights grow out of experience. Rights are human inventions, not human discoveries, and that is a key distinction.

There are only three sources of human knowledge: invention, discovery and revelation. If we put aside revelation for a moment, there are certain things out there to be discovered, whether they be planets, continents, or rules of nature. Charles Darwin, Albert Einstein, and Issac Newton discovered rules. If they had not discovered those rules, someone else would have. The rules are true, and they exist. Human inventions are different. If Picasso and Beethoven had not lived, nobody would have written those symphonies or created those paintings. Some human inventions are so obvious that almost anybody would have come up with them, and some are a bit more complex. I think one must approach the issue of animal rights in the terms of human experiences and wrongs. There is no question that the history of the way in which human beings have treated animals is a history of pervasive wrong over many, many centuries. We ought to be learning certain lessons from our history of wrongs. Among those lessons are the following:

One, human beings lie on a continuum with animals. There is no sharp breaking point biologically or naturally. There is nothing that clearly marks the human being as superior to the chimpanzee or sentient animals. We all know there are human beings who by any criteria are endowed less fully than other animals. It is interesting how Jefferson saw this problem. When Jefferson was writing the Declaration of Independence, his own observations lead him to the conclusion that blacks were mentally inferior to whites. He wrote on that topic and

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<sup>52</sup> The Quotations Page, *George Santayana* <[http://www.quotationspage.com/quotes/George\\_Santayana/11](http://www.quotationspage.com/quotes/George_Santayana/11)> (accessed Apr. 5, 2003).

<sup>53</sup> Stephen Jay Gould, *The Structure of Evolutionary Theory* (Harvard U. Press 2002).

provided “data” to support it.<sup>54</sup> It would be similar to somebody today writing about the differences between human beings and chimpanzees. In Jefferson’s view there was a sharp distinction. According to Jefferson, blacks had never turned out a Euclid, nor could they. Blacks had never turned out a great poet, nor could they. There was a sharp dividing line between the black and the white, and the greatest proof he gave was that white slaves living in Roman times became poets and philosophers, but no black slave had ever become a poet or a philosopher.

For Jefferson, however, it did not follow that blacks should be treated in an inferior fashion. He said they were morally the equivalent of whites though not intellectually, and therefore, they should have been treated like children. The implication was that freeing a slave was the equivalent of abandoning a child, and it would have been unfair to free the slaves, except in a gradual way with their concerns being taken care of paternalistically. We learned from our experiences, of course, that Jefferson was wrong. It was nurture, not nature, which may have explained the absence of a black becoming a Newton, or perhaps we had not looked far enough or deep enough into African history to see whether or not there were any Newtons or any Euclids. Experience taught us that Jefferson was wrong, and experience taught us that slavery was wrong. I think experience will teach us that the way we treat animals today is wrong.

We should ask ourselves the question, “Well, if there are such rights, how do we draw lines?” There are two kinds of lines: lines about different kinds of animals, and lines that perhaps cross over into all animal species. Already we are drawing lines by focusing on chimpanzees over any other animal. Many people make distinctions between animals with human-like faces—when we can see their emotions and identify their pain—and animals without human-like faces. That is one line we will have to draw.

Another line will have to be a more functional and somewhat more controversial one. Even if animals have rights, or if they have rights in relation to human beings, there are certain kinds of rights that we are prepared to over-rule when they conflict with important rights of human beings. There is a distinction between research on animals for cosmetic purposes and research on animals for immediate life saving purposes. There also is an intermediate category of long term animal research that might conceivably add to knowledge and may save human lives in the long term, but without any assurances or guarantees. One would want to make a distinction between the gratuitous infliction of pain on animals and other activities that may produce ancillary pain but may have positive consequences.

One of the reasons I am adamantly against hunting, even when hunting is used to gather food, is because I want to create a sharp

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<sup>54</sup> Thomas Jefferson, *Notes on the State of Virginia* <<http://xroads.virginia.edu/~HYPER/JEFFERSON/toc.html>> (accessed Apr. 12, 2003).

distinction between the necessity and the joy. I do not ever want to see anybody get pleasure from the necessity of killing animals. I think if animals have to be killed, and if one can make the case for the killing of animals, it ought to be done in a way that does not produce joy for people who are engaged in it. People who enjoy an activity like hunting will find it easier to rationalize the need for the hunting. And if you have spoken to hunters, you will hear from them the great rationale, "Oh, we're helping with the overpopulation." The hunters believe it because they get great joy out of it. It is beneath serious moral argument to talk about the kinds of activities that cause pain to animals and produce no positive purpose, but simply produce joy. The heir to the throne of England today, I am sure you have heard, announced that he would leave England forever and take up a life of skiing if anyone were ever to abolish fox hunting. The idea that becomes a point of principle is that fox hunting is enjoyable.

My final argument is an empirical one, and I am not sure it is correct. I think it is right. It certainly is strong enough for me that I have brought up my own children in this way. I think it is empirically true that those people who gratuitously undervalue the life of any living being, but particularly the life of animals who can suffer and feel and remember, tend to be more likely to inflict pain on other human beings. Again, that is an empirical point, and there is counter-evidence to that. I am sure that the Nazi Gestapo treated their dogs better than they treated the Jews and the Gypsies. It may be true that Hitler was a vegetarian, and there are countervailing anecdotal arguments on the other side. Yet I can not help but believe that it is an empirical issue. It remains to be proved or disproved that a society that values the life of animals is going to value the life of human beings.

I worry a little bit about that argument because I hear it from my very religious pro-life, anti-choice friends who say that societies that value the life of fetuses also value human beings—and I know that is not the case in that situation. I know that there are many in the right to life movement who believe that life begins at conception and functionally ends at birth, and do not want to put lots of money into post natal care and the care of real human beings. We are seeing a lack of correlation between concern for the fetus and concern for human beings. It has to be in the realm of speculation, but I think it is speculation worth considering.

For me, the issue of animal rights has two components. One, a very strong emotional and liberty component, and two, a very interesting jurisprudential component. What I have tried to do is think about how to relate these two issues together.

**Question from audience:**

Can we look at this issue from a social justice point of view?

**Professor Dershowitz:**

That is an argument that cuts both ways. This country started out thinking only about white males, and then moved to concern for females, concern for blacks, and so forth. Is it not a natural extension to move toward concern for animals? Some would argue that it is easier to value every human being if we become specieists: if we say, "All human beings are special and holy, and every human being, but only human beings." I have heard this argument. Southerners argued during the segregationist period that if the government extended rights to black slaves, the next thing would be to extend them to gorillas. That argument was made, and I quoted it in my book *Shouting Fire*. That was a horrible argument we would reject out of hand today, but there is the fear of the slippery slope. There are those who would say that if you simply want to extend rights—and my friend Christopher Stone would extend it to trees—then extend rights to other, non-sentient forms of life.<sup>55</sup> I think it is important to draw lines. I would draw the line myself at animals that are capable of feeling pain, animals that are sentient, and animals that human beings can identify with based on the animals' feelings and suffering. In one sense, animal rights is part of the social justice movement, but how far does that movement go? Do we compromise some human gains if we move too far forward?

**Question from audience:**

Where should you make your arguments? In front of a judge or the legislature?

**Professor Dershowitz:**

What we are doing is taking a jurisprudential argument and turning it into a practical argument. First you have to try to build legislative support for this. Obviously the ideal situation is to have a right that we recognize because it grew out of wrongs, and try to build a constituency and persuade a majority to make that law positive law. Then you have something you can argue to the judge. In the absence of that, one has to use creative jurisprudential arguments of the kind we are talking about. When you live in a world of judicial restraint as we do today, making the argument in the first instance to the judge is not going to be the most persuasive or compelling place to make it. I would think starting at the legislative level might perhaps be more prudent.

**Question from audience:**

What would justify the killing of an animal?

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<sup>55</sup> Christopher D. Stone, *Should Trees Have Standing? And Other Essays on Law, Morals and the Environment* (Oceana Pub. 1996).

**Professor Dershowitz:**

I would start with the principle of necessity, and I think I would argue historically. If you look at, for example, the ancient sources, which are not wonderful in this regard, in early history, animals were killed for their food and their warmth. I would start to come up with a principle of necessity. You cannot justify the killing of any animal unless you can overcome a strong burden of demonstrating necessity. I think necessity is evaporating in parts of the world today. It is not necessary, for example, for us to eat meat in the United States. It simply is not. We do it as a question of preference. It is not necessary for us to kill animals for clothing anymore in the United States. It is in some parts of the world. I think that we will find, as the centuries roll on, that the need for animals in this regard will diminish considerably. That is why it is important to start this debate now. At the time that the need diminishes, will it increase for medical research purposes? As we become more sophisticated about medical research, perhaps we will need to use animals more. One question is: when do we have to use rats as distinguished from chimpanzees? To the extent people can argue that we have a cycle that we have built up, a medical research consortium that kills animals unnecessarily because when you do that more money rolls in, that kind of thing, coming up with a principled line is a hard one. The closest I could come would be the principle of necessity. What I like about the principle of necessity is it may be a diminishing principle. It may be something that diminishes over time, and that gives us a framework. One would not have wanted to say that about slavery. The principle of necessity in terms of slavery would be outrageous. The reason Jefferson opposed the expansion of the slave trade while South Carolina favored its expansion is because Jefferson had enough slaves, and Virginia had enough slaves. There was no necessity, and it kept the price of slaves up if there were fewer slaves. Whereas South Carolina did not have enough slaves, so they wanted more slaves to be brought in. I want to alert you to the danger of the principle of necessity and maybe you can have some more discussion about what that principle might be. What I hope I have done is stimulate a closer connection between the jurisprudential aspects of this issue and the practical aspect to this issue. Thank you very much, and keep up your great work.

**Karla Wejberg:**

Professor Cass Sunstein is a graduate of Harvard Law School and is currently the Karl N. Llewellyn Distinguished Service Professor of Jurisprudence at the University of Chicago Law School. He has recently written on the subject of animal standing.<sup>56</sup> Please welcome Professor Cass Sunstein.

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<sup>56</sup> Cass R. Sunstein, *Standing for Animals* 47 *UCLA Law Review* 1333 (2000).

**Cass Sunstein:**

I am going to identify the issues that separate reasonable people on the question of animal rights. Almost everyone shares a starting point: a belief that the law ought to protect against the infliction of suffering on animals, and the law ought to insure against cruelty and neglect. I do know that the most vocal critics of animal rights have committed themselves to the anti-cruelty laws. They believe that the law ought to protect against cruelty and neglect. I am going to explore people who are committed to protection against cruelty and neglect but are not committed to other things, and then explore the "other things" to which such people are not committed. I will attempt to figure out what issues are separating people.

I am going to get at this topic sideways by placing a spotlight on an analogy that has gotten a lot of attention today—the analogy between slavery and the current treatment of animals. Jeremy Bentham, founder of the modern law and economics movement, now a very respectable figure, but not in his time, wrote: "The day may come when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of the tormentor. A full-grown horse or dog is the odd comparison, and more rational, as well as a more conversable animal, than an infant of a day or a week or even a month old. But suppose the case were otherwise. What would it avail? The question is not, can they reason nor can they talk, but can they suffer?"<sup>57</sup>

John Stuart Mill is a somewhat more mainstream figure—less sectarian than Bentham—and the great founder of Utilitarianism. Mill also stressed the slavery analogy, responding to a critic of Utilitarianism. Mill's softer and less rigid version, response was, "It is to most persons in the slave states of America not a tolerable doctrine, that we may sacrifice any course of happiness of white men for the sake of a greater amount of happiness to black men. It would have been intolerable five centuries ago to most persons among the feudal nobility to hear it asserted that the greatest pleasure or pain of hundred serfs are not to give way to the smallest of noblemen."<sup>58</sup> According to the standard of Dr. Whewell, Mill's adversary, the slave masters and the nobles were right. The slave owners felt themselves bound by a tie of brotherhood to the white men and to the nobility, and felt no such tie to the Negroes and serfs. "And if a feeling on moral subjects," wrote Mill about animal rights, "is right because it is natural, their feeling was justifiable. Nothing is more natural to human beings, nor up to a certain point more universal, than to estimate the pleasures and pains

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<sup>57</sup> Jeremy Bentham, *The Principles of Morals and Legislation* 310–11 (Prometheus Books, 1988) (originally published 1781).

<sup>58</sup> William Whewell, *On Moral Philosophy* in John Stuart Mill & Jeremy Bentham, *Utilitarianism and Other Essays* 228, 252 (Alan Ryan ed., Penguin 1987).

of others as deserving of regard exactly in proportion to their likeness to ourselves.”<sup>59</sup> That was Mill’s use of the slavery analogy to echo Bentham’s concerns about current treatment of animals.

There are two issues both in Bentham’s argument and in Mill’s. One is an emphasis on unjustified suffering which was Bentham’s principal concern. His objection was that the failure to protect animals against abuse, neglect and harm was unjustified. Bentham said this in his Utilitarian assessment of the problem. Mill, for the most part, was echoing the stress on suffering. There is another point in the background, at least in Mill’s remarks, but not so much in Bentham’s, and that was an insult to the right of autonomy and self-determination that animals no less than human slaves faced. What Mill was objecting to was that animals were treated as objects for the control and use of others, and the use of animals as objects is what Mill thought had to cease.

I am going to urge that the analogy between the treatment of slaves and the treatment of animals is very close along the first dimension that Bentham emphasized—that of suffering. Less close, and more interesting and complicated, is along the second dimension, the subtext of Mill’s remarks—that of autonomy. I suggest that the analogy between slavery and current treatment of animals is tight and good with respect to suffering, and not tight but maybe good anyway with respect to the notion of autonomy. For those who think that the slavery analogy is weak and maybe even laughable or worse, their concern is that human autonomy is what the abolition movement was about. An idea of animal autonomy seems implausible to them. I am going to investigate the idea of animal autonomy.

The remainder of my remarks will be structured very simply. I will talk about the similarities between the practice of slavery and current treatment of animals. I will list them in a factual way, then try to identify the differences invoked by those that find the analogy preposterous or weak. Finally, I will outline from those two accounts, a primer about animal rights and the issues that separate reasonable people.

From the specifically legal standpoint, there are striking similarities between the actual law of slavery and the current law governing human treatment of animals. In both contexts, legal protections are given against harms inflicted on slaves or animals by third parties. In the elaborate law of slavery, if a slave was injured, there was legal protection given to the slave owner who was entitled to bring suit against the person who had violated the property right. The serious sanctions imposed on those who injured slaves were clearly designed to protect the owner of the slave against financial or emotional injury, and the same is true in the animal context.

Animals, for the most part, are protected in the same way. Injuries imposed on animals by third parties are redressed by owners for

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<sup>59</sup> *Id.*

financial and possibly other injury. In both cases there has been a growing recognition of the need to protect against murder, abuse, cruelty and the like. Before the abolition movement, with respect to slavery, there was a more modest movement, you might even call it the slave welfare movement. It saw as its goal the ban on torture, killing and cruelty. Even slave owners were placed under an obligation to treat slaves decently and humanely, and the law also imposed on them a duty of affirmative support—a kind that ordinary people face with respect to children. The same is true for animals. There are affirmative obligations of protection of animals enjoyed by animals against their owners. There are also negative prohibitions on their owners that are limited to cruelty and suffering.

The difficulty, and here is another similarity between the law of slavery and that governing the treatment of animals, is that the requirements of humane treatment are infrequently enforced either by public prosecutors who have the legal powers to enforce them. Also, there is no private right of action on the part of animals or their representatives in the case of cruelty or mistreatment. Similarly, there was no right of action on the part of slaves themselves against their owners in the case of cruelty or mistreatment. I hope the analogy is clear: it is as if we have the public law of criminal prosecution unaccompanied by the private law of tort, which provides for ordinary people a supplement to the limited resources and attention span of the prosecutor. If you are injured you do not need to rely on the district attorney, you can bring a private action. With respect to slaves and animals this is not the case. The infrequent enforcement is effectively insured by virtue of the fact that private enforcement is unavailable.

In both cases there is purchase and sale, which makes the analogy obvious along that dimension. That presents a panoply of legal similarities, so you could almost draw from the late law of slavery a set of legal prohibitions and requirements that map directly on to the existing law of animal welfare and protection on the state level. As with slaves, and so with animals, if those laws were taken quite seriously the world would be much different from what it is in fact.

These are legal similarities. Other similarities exist, well beyond the technical law. The most important of these is that slaves, like animals, face an odd kind of combination of circumstances where there are often affective ties, sometimes very close affective ties, between slaves and their owners, just as between animals and their owners. But that is accompanied by the fact that slaves, like perhaps most animals, were treated principally as instruments for the use and control of others. With respect to slaves the point need not be belabored, and many animals are so used also even if the animals are domestic. With respect to animals, of course, it is infinitely variable, the extent to which and the ways in which animals are used as instruments by third parties. We can just get a shorthand glance at such uses by first emphasizing scientific experiments, second, the use of animals for food—by far the most massive in terms of sheer volume—and third, the use

of animals for sport and entertainment. In these cases there also are parallels to slavery, especially with respect to sport and entertainment, although not with respect to food or scientific experimentation.

I think that Bentham was technically right on the mark in drawing an analogy with respect to the legal regimes that slaves face and the legal regimes that animals face. But why are there differences? Why is the analogy seen as unhelpful by so many? It is not right or adequate to say that animals are not human beings, because if we define animals in that sentence as nonhuman animals it is true by definition. The point is uninformative. The question is why the differences between human beings and other animals ought to make a difference for purposes of law. There are three, and only three, points that undermine the analogy.

The first has to do with cognitive capacities. There are three points here. The first is, if some of the comments made this morning were correct, the attempted response emphasizing animals' lack of capacity for reason is weak in its own terms. If Jane Goodall and Roger Fouts are correct, it is based on a myth about animals' capacities. A second point, which is really Bentham's point, is: suppose animals have weak or very limited cognitive capacities? Suppose you have a really stupid dog whose abilities to plan and to think are sharply limited. How and why, Bentham asked, does that make a difference? We could engage in a thought experiment—it is a little cheap but let us do it just for fun—in which people were cloned to have very little cognitive capacities, little or none, the capacities of a dog who is way below the norm. Would it be the case that it would be justified to reduce those cloned creatures to the status of slaves? Don't you agree that violates the moral intuitions of almost everyone?

The absence of cognitive capacities seems to have less force than it does at first. I do think that those who emphasize cognitive capacities are on to something, but not quite what they think they are on to. They suggest the absence of cognitive capacities defeats the analogy to slavery. I think what it suggests is that the rights that animals are entitled to have, in principle, are different from the rights that human beings are entitled to have. Or to phrase it a bit differently, the rights that animals are entitled to have depends on what kinds of animals they are. A chimpanzee ought not to have a right to vote, or to run for Congress, but it ought to have some rights to self-determination. Probably the rights of self-determination that a rat or a mouse would have would not be commensurate with the rights to self-determination that a chimpanzee or a horse would have. That is just to suggest that the attempted rebuttal, which is, I think, the most familiar one in public discussion, is, for three reasons, unconvincing. First, it is scientifically weak, second, it does not prove anything even if it is scientifically correct, and third, the most it suggests is that the rights that animals are entitled to is an outgrowth of the kinds of creatures they are.

The second attempt to defeat the analogy to slavery just stresses the wide range of good done by current practices on animals that treat

them as objects. Here the emphasis would be on scientific experimentation, which if it is done right is for the benefit of human beings and other animals too. And it might be emphasized that the use of animals for food and clothing, whether or not a necessity, is for human beings an affirmative good. We are in the world of utilitarian balancing, and as a University of Chicago person, I have to live in that world. This argument can not be ruled off-limits. It cannot be discounted. When we think about the sorts of rights to which human beings themselves are entitled, a degree of balancing is inevitable. Certainly that is true in the First Amendment context. Alan Dershowitz has controversially argued it is true with respect to the prohibition on torture, in the context of terrorism. And if a certain degree of balancing is inevitable, these affirmative human goods that come from current uses of animals can not be discounted as irrelevant. What is complicated is, with respect to slavery we did not engage in any such utilitarian balancing, and it was a bit of a trick to figure out exactly why we did not. It might be that even committed utilitarians believed that aggregate utility was best promoted by the complete prohibition, so that we did not need to engage in individual balancing for this particular "enslaving him or her" to make sense. We are, on balance, better off by a meta-decision not to allow the institution of slavery at all. If that argument is convincing, or if there is a non-utilitarian argument that is convincing for the prohibition on slavery, maybe that would carry over to the current practices with respect to animals as well. In short, I do not think the emphasis on the wide range of human goods that come from the enslavement of animals defeats the analogy, because a wide range of "white goods" come from the institution of slavery, and those were not seen as adequate.

This is the third and final attempt to distinguish current uses of animals from the institution of human slavery. What might drive the weakness of the analogy, if the analogy is weak, is that the ban on human slavery is about autonomy or choice, essentially, and not about suffering. Was the problem with slavery the denial of autonomy and choice to our fellow human beings, rather than the infliction of suffering on them? Note that Mill's passage ends with a quite intriguing set of suggestions. "We are perfectly willing to stake the whole question [that is the validity of utilitarianism,] on one issue. Granted that any practice causes more pain to animals than it gives pleasure to man, is that practice moral or immoral? And if, exactly in proportion as human beings raise their heads out of the slough of selfishness, they do not with one voice answer 'immoral,' let the morality of the principle of utility be forever condemned."<sup>60</sup>

That was a bit of an ornate sentence. Mill is urging that it must be that animal suffering, as a result of current practices, exceeds human pleasure, and as a result, the utilitarian principle is vindicated, and

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<sup>60</sup> John Stuart Mill & Jeremy Bentham, *Utilitarianism and Other Essays* (Alan Ryan ed., Penguin 1987).

the argument for the rights of animals is simultaneously vindicated. If the sentence was difficult, as I sense it was, it might not only be because it is ornate. It is because Mill did not think, in this passage at least, that the evil of slavery laid in the infliction of suffering but in the denial of the power of self-determination. With respect to animals, that is the issue on which I think much more work needs to be done, and where we might need to make some distinctions.

First consider domesticated animals: a dog, a cat, a horse. Ought they to have a freedom of choice or a power of self-determination? We ought not scoff at the idea. A human being who regularly overrode the choices of a dog, a cat, or a horse would be behaving cruelly and capriciously, and very possibly in violation of anti-cruelty law. The idea cannot be dismissed entirely. To the extent that domesticated animals' choices are overridden, it is often for their own self-protection, and animals who are domesticated are being trained or prohibited for the same reason children are. If the reason is a good one, it is to protect against harm to the animal or to third parties. If that is all that is being done here, there is no real denial of autonomy and no scoffing or contempt being cast on the idea of autonomy, even for domesticated animals. Beyond the domestic dog, cat or horse, the issues are quite different.

With respect to chimpanzees or elephants or lions, it is not exotic or odd to say there ought to be at least a presumptive right on their part to choose and to engage in the form of self-determination that they see best. That presumptive right might be overridden by their own interests or by the interests of third parties, but it is not an unrecognizable autonomy claim. Indeed, we might go so far as to say—and here I would disagree with Alan Dershowitz—that animals' freedom of choice might indeed impose on human beings an obligation of protection, to the extent that it is costless, against predations of other animals. If a domesticated animal or wild animal is about to be killed by a predator, and we can prevent the murder without cost, why not? Why ought we not say that the rights run against third parties that are animals, as well as third parties who are human? I have a fear that in some pockets of the animal rights movement there is a romanticization of natural processes, which often are in animals interests compared with human processes, but not always. Nature itself is often cruel, and if we can reduce the cruelty, by all means, we should.

I promised you a short primer on animal rights, and I think we are now in a position to deliver it in a few quick sentences. One thing that those interested in the prohibition of animal cruelty and suffering might do is simply ensure enforcement of existing rights, the rights that are on the books. That would be worth a lot for the animal welfare movement, very much like the slave welfare movement, which was worth a great deal. Here, all we are doing is building on widely shared moral intuitions that are already encoded in state and federal law to which, I suspect, many readers of *National Review* and *The Wall Street Journal*, as well as *The New York Times* and *The Boston Globe* are

committed. It would be a minimal animal rights position to ensure that the laws in the world mean what they say on the books. That is an area where lawyers, young ones or old ones, can do a great deal in a relatively short time.

The second, slightly less minimal, suggestion would be to say, with Mill and Bentham, that there ought to be more regulation of agriculture, which is to say food production, hunting, and entertainment, than currently exists. Regulation ought to go beyond current protection and be more stringent. That idea ought not to seem terribly exotic, because the European community—not so unfamiliar to American lawyers—already has moved a great deal in the direction of greater protection of animal well-being with respect to agriculture. American lawyers could do a great deal there. If those positions seem to some of you too minimal, we might go beyond them and ban certain practices on the theory that the only way to make a prohibition on unjustified suffering effective is through a ban. In entertainment, I personally have no problem with the use of animals if animals' well-being is protected, but it might be that the "if" clause can not be met, and some animals' well-being can not be protected in entertainment. If so, we have a good argument for a ban, and that might apply to many domains.

If we think that is insufficient, we might be more interested in animal autonomy and freedom of choice. I have suggested that animal autonomy and freedom of choice raises many complications where more work needs to be done. For those who believe that the idea of animal autonomy has a great deal of power, it might seem very important to eliminate the status of animals as property, as Steven Wise and others have argued. If what I have urged is correct, the stakes in the property versus non-property argument are a little lower than they seem. Creatures who qualify as property as a matter of law might not be right-less as a matter of law. If we ensured that laws on the books has meaning in the world, we would not eliminate the status of animals as property, but we would do a great deal to eliminate animal suffering and abuse. I do not suggest that the notion of property is correct. I do not believe it adequately captures human beings' reflective attitudes about their relationship towards animals, but I do believe that a great deal can be done short of taking on the notion of property wholesale.

There is one conception of the evil of slavery, which is suffering. There is another conception of the evil of slavery, which is a violation of autonomy. I have suggested that the analogy is fully correct and entirely persuasive along the first dimension—suffering. Along the autonomy dimension it is more difficult and more interesting. But the violations of autonomy that we observed are not irrelevant. The violations of autonomy might be justified when they are in the interest of the animal's own well-being. They are less likely to be justified when they are *not* in the interests of the animal's own well-being, unless there is a compelling justification for the intrusion. The Benthamite

question is whether what we do is giving animals good lives, and to the extent we do not, whether failure to do so can be convincingly justified. Thanks.

**Karla Wejberg:**

Our next and last speakers are Professor Paul Waldau and Professor Richard Wrangham. Professor Waldau is the Vice President of the Great Ape Project International<sup>61</sup> and one of the directors of the Great Ape Legal Project. He is currently an assistant clinical professor at Tufts University School of Veterinary Medicine where he is on the faculty of the Center for Animals and Public Policy. In the spring of 2002, Professor Waldau taught a course in animal law at Harvard Law School. Professor Waldau holds a Ph.D. in Ethics from Oxford University, a JD from UCLA and a Masters from Stanford University. He is the author of *A Specter of Speciesism: Buddhist and Christian Views of Animals*,<sup>62</sup> and many journal articles dealing with cultural, legal, philosophical and public policy issues affecting nonhuman animals.

Professor Wrangham is a professor at Harvard University's Department of Anthropology. His research interests include the conservation of chimpanzees and other apes, the evolutionary ecology of ape behavior and the integration of our understanding of ape and human behavioral evolution. Professor Wrangham holds a Ph.D. from Cambridge University. After majoring in zoology at Oxford University, Professor Wrangham studied chimpanzee behavioral ecology at Gombe with Dr. Jane Goodall, and in 1987 he initiated the Kibale Chimpanzee Project in Western Uganda, which combines research and conservation activities around the study of a community of fifty chimpanzees. He has directed the study since its inception and devotes several months every year to conducting field research. Welcome Professor Waldau and Professor Wrangham.

**Paul Waldau:**

Good afternoon. I am an "hors d'oeuvre" in that I am going to spend my time setting up Richard Wrangham's presentation. To do that, I am going to change the pace somewhat and ask you to use your imagination to cross some national boundaries into the international sphere. But first some primate social niceties—it is a privilege to be here at Harvard Law School again. I was able to teach the animal law course pioneered by Steven Wise here, which was an extraordinary experience, and it is a privilege to be back here for that reason alone. It also is a privilege to be sponsored by the Glaser Foundation, truly a leader in the area of moral concerns, that put together this Collaboratory. Working with the members of the Collaboratory has been a

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<sup>61</sup> See Great Ape Project International <<http://www.greatapeproject.org/>> (accessed Apr. 12, 2003).

<sup>62</sup> Paul Waldau, *The Specter of Speciesism: Buddhist and Christian Views of Animals* (Oxford U. Press 2001).

remarkable experience, as they are very talented and dedicated people. It is the wave of the future to work in coalitions and so the Collaboratory is an exciting venture. And lastly, I like Richard and it is a privilege to be his *hors d'oeuvre*, so to speak. From what others have said here today, you can see one of the focal points of the conference is that humans clearly have a very special ability to care about others and that drives conferences like this one. The ability to care about others reaches considerably beyond national boundaries. Think of the ways that humans do that—environmental ways and animal protection ways. In a few minutes I will refer to some key developments outside our borders, which help you see why the legal system needs to be in the debate to help people increase their awareness about the interests of chimpanzees: How do we recognize them? How do we protect them?

First I want to focus on a few “background features” inside our own legal system, outside our legal system and in other legal systems around the world. Using what has already been said today, think about how human individuals have reflected our remarkable capacity to care about others. There are lots of terms that embody this in our society and in the academy. For example, “ethics” is one word we use for this ability to care. But as most of you will know from the history of ethics, it is predominantly human-centered, or anthropocentric. “Justice” is also a term used for caring about others in the legal system. But as you have heard today, justice as a concept has historically been formulated in favor of humans and not in the service of nonhuman animals. In law, concern for others has often been problematic because the others have been primarily human. In many other areas in the academy, in philosophy for example, you have heard about Aristotle’s serious prejudices. John Rawls of Harvard wrote an interesting book on justice but it is extremely focused on humans even though five times in the book he refers to other animals.<sup>63</sup> In moral psychology, Lawrence Kohlberg, a monumental figure in that field at Harvard, also was very interested in justice but focused almost exclusively on humans.<sup>64</sup> Even in the field I study heavily—religion—there is some wonderful work on justice. There is a fabulous quote from Meister Eckhart, the medieval mystic, who said “the person who understands what I say about justice, understands everything I have to say.”<sup>65</sup> Unfortunately, religion has not often been in the service of other animals generally. Thus, I want to suggest to you that even though we often focus on terms like “justice,” it too often comes out in exclusively human-centered ways.

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<sup>63</sup> John Rawls, *Justice as Fairness: A Restatement* (Harvard U. Press 2001).

<sup>64</sup> Lawrence Kohlberg, *The Philosophy of Moral Development: Moral Stages and the Idea of Justice* (Harpers Collins 1984).

<sup>65</sup> Matthew Fox, *Creation Spirituality: Liberating Gifts for the Peoples of the Earth* 102 (Harper Collins 1991).

There is an important companion to the notion of justice which we need to focus on, and that is the compassion ability we have. You can see compassion in so many areas outside the law. Veterinary medicine, where I teach, is a wonderful area for that. In environmental awareness, our repair of ecosystems is an example. As David Favre explained today, the beachheads in our own legal system regarding protection for other animals often reflect that kind of compassion. For example, now we can leave resources in trust for other animals, and they will be enforced. Even our legal system, then, often reflects our native ability to have compassion for others including nonhuman animals, although it cannot be said too often that many of our formulations are highly, highly anthropocentric. Other words that reflect this remarkable ability would be "responsibility" and "care." For those of you who know feminist thinking, Carol Gilligan, a major figure here at Harvard, wrote a book, *In A Different Voice*,<sup>66</sup> where she challenged Kohlberg's major ideas about how it is that each of us develops as a moral being and focuses not on justice alone but also on compassion as a central ability. Gilligan focused on the fact that Kohlberg primarily studied males and came up with justice as his principal concept, whereas she focused on how women learn about moral development and connection to others, as the central feature of our moral abilities.

I suggest to you that in our legal system, although justice—not harming others—is incredibly important, there is a counterbalancing or companion notion or instinct we call compassion and responsibility: reaching out and connecting with others, who can clearly be nonhuman animals. In fact, if you do not have that compassion you will be hard pressed to come up with a full sense of justice because you will not have the ability to notice and take seriously the others who live around us and in our communities—if only because you will not have explored them carefully. And, sadly, this is what has happened in history. We have not looked at other animals very closely; therefore we think we only have to take care of humans. Thus, many justice concerns have been rather one-sided. When we step away from such general observations about our basic legal system, we see that it needs to be balanced not only with concerns for equality, fairness, and justice, but also with deep senses of compassion that help us reach out into the world. This helps us understand why a conference like this would teach us that we need to reach to others for our own health, but above all for other animals' protection as well.

So let me turn to the international scene. One of the reasons we might turn to the international scene when assessing the American system is that the United States is a rather reluctant player on the international scene. Most of you know that international treaties are not very often signed by our government, and conventions are ignored in a tragic way. We talk about international protections for chimpan-

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<sup>66</sup> Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard U. Press 1982).

zees, while in our country we have 3,000 of these remarkable individuals in captivity despite the fact that each is a true individual with a unique history. Later this year, The Great Ape Project will publish a census, which is the story of these individuals. This census will show how varied and tragic such captivity is in its overall sense. When you are from the United States you have very little voice when you go *outside* the United States because our practices regarding chimpanzee captivity are so insular—that is rather tragic. Yet note that in the lands outside our borders are some astonishingly rich developments which could be very, very encouraging. One development already has been alluded to today and that is the development in New Zealand, which was legislative in nature. Although it did not use the concept of rights for the animals, it clearly offered profoundly important protections for nonhuman great apes. New Zealand is a common law country and so has the capacity to develop what Steven Wise has so creatively developed: namely, common law developments which might allow judges to create protections for other animals' rights. To date, however, New Zealand has taken the more obvious legislative route.

Another common feature outside the United States is that courts in places like India talk about “rights” for elephants, and they do that quite seriously. In the Indian Constitution is an obligation for every citizen to honor nonhuman animals.<sup>67</sup> Even though that may be violated in the extreme at times, it is nonetheless in the Constitution. Think how radically different that is from our situation in the United States. Outside our borders are these interesting opportunities for how legal systems can work. Various state courts in the United States of course have used the word “rights” or its equivalent. They are not often major courts—indeed, one prominent case in American “animal law” comes from the probate court in Chittenden County, Vermont. Nonetheless, you see such things increasingly reported here in the United States. The road is steep, though, for those of us who wish to work in the United States alone. The fact that outside the United States we begin to see wonderful precedents illustrates the importance of basic human possibilities.

Consider this though—many laws outside the United States are, if you read them on their face, wonderful protections. A clearly significant problem, however, is that in the African range countries that have free-living nonhuman great apes, for example, there are good protections on the books, but they are honored in violation only. That is a tragic problem, and such an enforcement problem is one that we also have in our country. If enforcement is a problem inside our national boundaries, how much more so will it be across boundaries? Most of you know international law is a toothless tiger: the International Court of Justice in The Hague has a problem getting certain sovereign states, including our own, to pay attention. International law, as a

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<sup>67</sup> See Constitution of India <<http://alfa.nic.in/const/a1.html>> (accessed Apr. 5, 2003).

general body of law, is not a particularly effective tool. But there is one aspect in which international law operates in a wonderful way. It is a compass point. Richard Wrangham and Michelle Goldsmith, my colleague at Tufts, along with others in the Collaboratory have been working on The Great Ape World Heritage Species Project, which is an attempt to get United Nations-level protection for the four nonhuman great ape species.<sup>68</sup> This wonderful project shows that international law can be an extraordinary tool available to us.

Richard Wrangham will reveal that each of us today lives in a world quite different from the world into which we were born—there are far fewer nonhuman great apes, and far fewer animals in general. We will live in a vastly different world if we lose gorillas, bonobos, chimpanzees and orangutans. We *could* leave a world with those animals. We could leave a world without those animals. As you listen to Richard, ask yourself, “Do we really want to live in the world that we have impoverished in the ways that he will describe? Or do we want to implement this conference’s general theme, and change the world he is about to show us?” I suggest to you that one of these options is far, far richer than the other.

### **Richard Wrangham:**

In thanking the Glaser Foundation, one of the things I would like to do is to draw attention to the fact that, as a result of the Collaboratory here, they are promoting a synthesis between people concerned with the protection of individuals and those concerned with the conservation of species, and it is a rare synthesis. In the past there has tended to be a tremendous division between those groups, and a resentment between them. It seems to me, the wave of the future is represented by that synthesis. Jane Goodall, in her institute, has very much advanced it. There are a few other organizations that do, like the International Fund for Animal Welfare, and it seems to be really exciting.

Here is a male called Nsaba, from Tanzania. He represents chimpanzees in the wild. I want to emphasize the ties between what is decided about the U.S. legal system and what is going to be the future of the great apes of the world. I work in Uganda. In Uganda, every year, several juvenile chimpanzees are discovered in an illegal situation. Maybe somebody is trying to bring them across the border. Maybe someone is discovered with a chimpanzee in their backyard. There is an arrest, and the chimpanzee is brought into some legal facility, and generally given a life in a sanctuary. People in Uganda are shocked to discover that in America you are allowed to buy and sell chimpanzees. They regard it as extraordinary. The central point I want to make is that it is extremely difficult for us to go to the countries where the apes survive, trembling in many cases on the edge of extinction, and say to

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<sup>68</sup> See GAPNews, *Great Ape Project Backs Ape-Equality Efforts* <<http://www.greatapeproject.org/newsletters/gapnews/gn32702.html>> (accessed Apr. 5, 2003).

them, "Here's what you've got to do," and they say, "And what are you doing with your apes?" The problem of moral consistency is a very real one. There are those of us who are trying to work with people who in very difficult circumstances are organizing their own countries for the good of the apes, and I would argue for the good of many people in the rest of the world.

Let me just remind us who the apes are. We have four species, the orangutans in Asia, bonobos, gorillas and chimpanzees. All of them are communities of individuals. They have shocked us in the last few years by revealing, through their genetic material, their proximity of relationship to humans. The fact that they are closely related to us, on its own, is not particularly interesting, because you know that you have to have one closest relative. If we happened to be coelacanths, a species of fish that has no close relatives at all, then whoever is our closest relative would be a distant relative. Much more interesting is the significance of this relationship when combined with what we see about the structure of these species.

The question is, "What does it mean if it turns out that humans are in fact closer to chimpanzees than gorillas are?" Well, here is what it means. You take a DNA tree and you see that humans are tucked in between chimpanzees and bonobos and gorillas. The peculiar thing is that the gorillas, bonobos and chimpanzees all look just like each other. They are all big, black hairy things that walk on their knuckles and have big protruding faces. If you imagine a chimpanzee growing bigger and bigger it basically turns into a gorilla. They are all very similar. That means the species from which humans evolved must have been very much like one of those animals.

We can combine that with other information and play the following thought game. Imagine taking your grandmother to the University of Michigan football stadium. I taught at the University of Michigan for a few years so, on a Saturday afternoon, I know that you have an empty stadium that fills up in a couple of hours. You go there with your grandmother and you are the first two people to sit down, and then the thought game is, she has her grandmother sit next to her, and then she has her grandmother sit next to her. You are sitting, chatting passionately to your grandmother, because you really care about sports, and two hours later you feel a nudge in your back, and who is it? There is the person. It is someone very much in the gorilla, chimpanzee, bonobo mold, another big, black, hairy thing that walks on its knuckles and has got a protruding mouth, probably very much like a chimpanzee. We *are* a great ape.

We have heard a little bit about the cognitive ability of the great apes and the importance of cognitive capacity for two reasons. First, the logic of how we draw our boundaries and make our arguments in the law, and second, the way in which it leads to a sense of compassion, because once we understand the way chimpanzees and other apes think, we feel a very strong tie and want to do something about them. One of the stories I always come back to is with this individual,

Kakama, who is the only individual I have ever seen who made a small nest for another chimpanzee and then put that other chimpanzee, a younger infant, into it. What happened a few years later was amazing. His mother was pregnant and he was very bored, because she was slow, wanted to be alone and did not want to do anything. Kakama started playing with a log, and he started treating it increasingly like a baby. He carried it everywhere with him. It would sit next to him when he was feeding. As soon as he moved, he would carry the log with him. He would carry it in all sorts of positions on his back as he went around the place. Then came the time when, bored in a nest after playing with this log in much the same way that a mother plays with a baby, he made a little nest and put the log into the nest.

The thought that there are imaginative games like that going on in these minds is extremely striking to us. The frustration is that it is very difficult to assemble these sorts of anecdotes into a logical justification for saying, "There are minds in the forest." We have a strong feeling that it makes sense when Gary Larson imagines gorillas talking to each other, finding artwork in the forest that was done by a chimpanzee. We would like to be able to have a stronger empirical sense of this. We should not base any legal arguments on what we now know about the cognitive capacity of chimps, because we know their capacity is greater than we now know it to be. There are experiments just beginning to be done—very ingenious experiments by Brian Hare and his colleagues—that are showing for the first time one element of rationality.<sup>69</sup> That is, you can develop an experiment to show unambiguously that chimpanzees modify their strategies depending on what they know that another individual knows. Briefly, this is the first inkling of how we can systematically look at the cognitive capacities of apes in order to show their similarities to human. But time is too short. We can not wait for those results and then make our laws.

All of the apes need to live in forests, and the forest is going down extremely fast. There are three different estimates of the rate of the decline of the world area of forest, and it does not matter whether you take a constant loss argument, or the Friends of The Earth, or the World Resources Institute.<sup>70</sup> The essential element is all the same. We do not have very long at all, and whatever conservation strategies we have at the present are not working. We might as well be rearranging the chairs on the deck of the Titanic. There is no question that we are losing the great apes extremely fast. There are current estimates, and all the estimates are pretty darn weak regarding the numbers of the subspecies of the great apes.<sup>71</sup> Some of them are just in a few hundred,

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<sup>69</sup> Brian Hare et al., *Do chimpanzees know what other conspecifics know?* 61 *Animal Behaviour* 139–151 (2001).

<sup>70</sup> All three estimates indicate essentially a complete loss of tropical forest by the middle of the twenty-first century.

<sup>71</sup> *Great Apes and Humans: The Ethics of Coexistence* (Benjamin B. Beck et al. eds., Smithsonian Inst. Press 2001). Estimates range from 200 to less than 100,000 individuals, for the 11 subspecies of great apes.

less than the number of chimpanzees in this country. Some of them are a bit more, but not a single one could fill the University of Michigan football stadium on a Saturday afternoon.

The problem is not only that, in general, the forest is falling, but also that the isolated forest islands where great apes live are extremely vulnerable. In the most important ape country in the world, Democratic Republic of the Congo, and one of these national parks, Kahuzi-Biega National Park, has gorillas and chimpanzees. It has been home to around 8,000 gorillas belonging to one subspecies, and it has about ninety percent of that subspecies, and now about 7,000 of them are believed to have been killed. Ninety percent of them have gone in about a year and a half. Here is what happened. In that area, humans discovered the presence of numerous deposits of a mineral called coltan. This shows the way in which the apes are tied to the international economy, because coltan is tremendously important in cell phones. Suddenly, coltan became enormously expensive. Thousands of people moved in, illegally, to Kahuzi-Biega National Park. There was no way the local authorities, who were completely overwhelmed, could get rid of these people. In the first few weeks they were eating buffalo and elephants and gorillas, and several months later they were eating squirrels and mice, because they had killed all of the other animals. This mineral, which enabled people to have a "gold rush" type of experience, and enabled some very poor people to make a little bit of money quite quickly, was responsible for the loss of an immense proportion of one of the subspecies of gorillas.

The apes are vulnerable to all sorts of things. They are vulnerable to the continuing threats from logging, as Jane talked about. Pristine forest is being opened up with roads that ultimately threaten to take trees out, but also bring people in to set up camps that then become permanent, and these events lead to a change in the forest forever. It does not have to be that way, but it all too often tends to be that way. The apes are vulnerable to hunting. Jane described how the bush meat crisis is taking the lives of thousands of apes every year. The problem is partly the fact that the cynical logging owners do not bring in spaghetti to feed their workers. Instead they give bullets to local hunters, who normally can not afford bullets, and then say, "Please, will you go off and feed our workers?" The result is not merely that chimpanzees and other apes become part of a market for the local workers, but the market increases and suddenly their carcasses are found going off to market to satisfy the interest in eating meat in the middle-class towns as well.

The fact is that the battle is being lost, at the moment. If we take the twenty-one countries that contain chimpanzees, four of the countries have lost them. Maybe others have lost them also but we don't know because it is difficult to keep up with the rate of change. That suggests there are seventeen to go. In Southeast Asia the situation with orangutans is particularly hideous. I remember reading, about twenty years ago, that the rate of loss of forest suggested that orang-

utans would be extinct in the very early years of this century, and it seemed at that time impossible. I think now it does seem reasonable. It is entirely possible that orangutans could be extinct in the wild within another ten years. Things are going really badly very fast. The struggle is often militarized. People who are on the ground, at the research stations, trying to enforce the laws, may be pushed out of that area by people who are heavily armed, and who are acting, maybe illegally, on behalf of someone in government, or maybe with nothing to do with the government at all.

Obviously, it is extremely difficult for people in the range states, the states that are hosts to the great apes, to do very much about this. They have tremendous problems of their own. There are problems in implementing the laws, very often because the countries are unable to exert the law solidly over the whole territory. There are cultural values which are clearly in conflict. Only a few years ago at an environmental dinner in West Africa, bush meat was served to the delegates. As long as gorillas are thought of as an item that is culturally respectable, they will continue to be given by a man who is seeking a promotion from his boss. "Here is a hunk of gorilla meat. What finer present could I give you?" Some people say we should not try to change cultural values. We should not try to change the values that say it is great to give gorilla meat to someone, because it is a valued kind of meat. However, I think most people in this room would probably argue that this value should change. We got rid of cannibalism, and we got rid of slavery and it is time to get rid of eating a species that has a cognitive capacity that we already know to be as high as it is. Then there is the grinding poverty that affects these countries and makes it very difficult to see how we can simply ask them to do something to save a species, whether from our direct compassion or from our interest in having our close relatives stay with us on this Earth.

It is a world problem. There are many, many people throughout the whole world who are fascinated by apes, who find the apes very appealing, but do not have ways of doing much about it. At the moment there is no mechanism through which people who are concerned at an international level can easily work to help the great apes. There are many organizations, like the Jane Goodall Institute, and many conservation organizations that are doing something, but they are not working together in a systematic way, and that is why a number of us have for some time thought that it is time to try and internationalize and integrate the efforts in order to get an order-of-magnitude increase in the effort devoted to trying to save the great apes in the wild. The idea that many of us are working with is a specific one: to name the great apes as the world's first World Heritage Species in the aim of giving them global attention. The goal is to massively increase the resources available from all of those non-range countries that are interested, and to provide a global mechanism for conservation, such as an International Great Ape Commission.

Regardless of these details, the important thing is that the world needs help in order to be able to do this, and the United States is a hugely important country in this respect. Already it is a major donor. The United States has a Great Ape Conservation Act.<sup>72</sup> It has acted very well on behalf of great apes in many ways, but it does not have a consistently high policy with regard to the legal status of the great apes. Obviously there must be a suspicion that the lack of legal development is partly because the three thousand apes in this country have a lot to do with the biomedical industry—which is a very powerful industry—and one has to juggle complicated conflicts of interest with them. But the fact is, that when you go and you talk to people who are working with Jane Goodall Institute in Uganda or other local NGOs, and they are thinking about how to design strategies to perpetuate the apes in the future, and to work with the neighboring countries, they find it just deeply awkward to be faced with a country that is the most powerful in the world, and has many captive chimpanzees, but does not have the same high legal standards as their countries.

We need to use our understanding of great ape minds, both to get increased legal protection and to build compassion. There will continue to be a very important interaction between the laws in a country like this, and the ability of the rest of the world to provide the global support that will keep the populations and individuals alive in the forest. Thank you.

#### **QUESTION AND ANSWER SESSION:**

##### **Steve Ann Chambers:**

Paul Waldau: When will the chimp census report be available, and how will it be disseminated to the public?

##### **Paul Waldau:**

The publication of the chimp census will be in early 2003. The point of the census was to give the individual's history. Think of it this way—each of us has our own history, and that is quite a distinctive aspect about us. Chimps are like us in this regard—they have deep, distinctive personalities. The point of the census is not just to list them, but to give them a personal history and give people an ongoing chance to continue to report on them because that raises their profile and makes them true individuals.

##### **Steve Ann Chambers:**

David Favre, Professor Wrangham talked about chimpanzees not being considered private property in Uganda. Why not attack the legal status of chimpanzees as property in the U.S. before expending energy on your new tort?

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<sup>72</sup> *Great Ape Conservation Act*, 16 U.S.C. § 6301 (2000).

**David Favre:**

It is possible to think about the legal status with chimpanzees because there are such a limited number of them in the United States. It is not like taking on the issue of chickens. The economic interests involved are different too. I do not think that, because chimpanzees are not in the wild in the United States (and there is no way to think about them going back to the wild) that they are going to be in the United States in the future. I would like to shift the discussion from ownership to guardianship, with the understanding that the guardian has certain responsibilities and obligations toward the chimpanzees, and that there is somebody who is responsible. Who obtains that responsibility is, of course, an entirely different thing, and whether or not we want to move it away from research centers to somebody else. Given that chimpanzees represent money right now, it might be research centers. In the time of slavery, the thought of buying the slaves was one of the options considered, and it simply was financially not possible to do that. There is no reason the U.S. government could not simply buy all the chimpanzees that are not in the U.S. government and turn them over to an appropriate guardian. I have no difficulty with proceeding with that as a parallel effort, but I would tell you that, politically I do not see it happening. Maybe with a little bit more education it might happen, but I do not see the legal status as politically feasible in the immediate future.

**Steve Ann Chambers:**

Paul Waldau, how does the Bible, or Judeo-Christian system, view animals? How can one persuade people with Christian beliefs that animals are entitled to protection rights, since we believe we are more important?

**Paul Waldau:**

That is very easy. Read *The Specter of Speciesism*,<sup>73</sup> the book that I just published (laughter). Christianity, like Judaism, Islam, Buddhism and Hinduism, is an extraordinarily large phenomenon, and internally very diverse, and there are segments of the Christian tradition which are completely consistent with any kind of animal protection you would like to find. Of course, there are huge swaths of the Christian tradition, and many of the major institutions—some of which exist in Rome—that are really not quite sure if there are any nonhuman animals on the Earth at all yet, except those in factory farms, you might say. It is a sad thing that Christianity in its mainline interpretation has not been as helpful as it could have been, but it is clearly the case that one could be fully Christian and totally support this conference's most radical suggestions. The question, thus, is not

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<sup>73</sup> Paul Waldau, *The Specter of Speciesism: Buddhist and Christian Views of Animals* (Oxford U. Press 2001).

one that is easy to answer with a thumbnail sketch, for religion has both good and bad implications for protection of nonhuman animals. There are clearly extraordinary possibilities, and inside the American Academy of Religion, for example, today there is a major movement to try to get academics to speak realistically and also constructively regarding the promise religions have for helping with these kinds of themes.

**Steve Ann Chambers:**

This is for anyone who wishes to answer. Is there a difference, in your eyes, between an ape bred in captivity for medical research, and an ape taken from the wild for the same purpose?

**Jane Goodall:**

I can start it off. There is a very large difference, because the ape who was born in the wild comes to captivity after terrible trauma, having seen his mother killed, having gone through the fear of the journey, often being stuffed in a small sack. These are the ones that survive the journey. They bring a history with them. The ones born in captivity also have the trauma of being taken from their mothers, but they are taken from their mothers and they are then placed in the same kind of world into which they were born. But I think I know where this question is coming from, and it is the same question one often gets when thinking about intensive farming and meat eating, which is, "Well, surely it is alright to use these animals. They were bred for research." And I always go back again to the slave analogy that we have been talking about so much today—that slaves were born in slavery. Did that make them less human, and therefore more appropriate subjects to be used in slavery? The answer clearly is no.

**Roger Fouts:**

Just to add to that, there was a chimp I worked with in Oklahoma by the name of Thelma that was eventually sold to LEMSIP [Laboratory for Experimental Medicine and Surgery in Primates], and she was used as a breeder there. One of the things we do not see, or do not focus on, is the trauma to the mother as well when the baby is taken. She had so many babies taken. Imagine, this mother, she had so many babies taken for biomedical research that when she gave birth she would just hand the baby away. She had completely given up.

**Paul Waldau:**

One simple observation. I say this respectfully: if that question was asked about purpose-bred humans, would we have a difficult time answering that question? Even if the humans were not trained with language. You all know that if humans are not trained at a certain point in their life in language, they really become quite distorted relative to how we act and think. But would they be less than we are? I

doubt that is the case. It strikes me that there is an absolute equivalence between purpose-bred chimpanzees, and chimpanzees in the wild, at least on a moral basis.

**Steve Ann Chambers:**

This is for Paul Waldau and Richard Wrangham. Could you please explain more about the United Nations process? Can organizations and individuals assist?

**Richard Wrangham:**

The short answer is probably "No." The longer answer is that we are inventing the process as we go along. The crisis about how to internationalize and increase the efforts devoted to great ape conservation is provoking a number of different responses, at the moment. The World Heritage Species Project is one of them. At the moment, we have a non-profit organization based here in Boston, and we started to make contact with some countries around the world. The first two we approached were Uganda and the Congo, and the presidents of both of those countries have enthusiastically said they would like to help lead such an effort to develop a convention. I mentioned the fact that there are a number of initiatives going on, because it is not clear exactly what is, in the end, going to happen. We are, at the moment approaching UNESCO [United Nations Educational, Scientific and Cultural Organization] to think about how to develop a convention. A parallel effort is going on through UNEP [United Nations Environment Program], which is GRASP, the Great Ape Survival Project. This differs from the attempt to get a World Heritage Species status, and is a new instrument for integrating these conservation efforts by having people already on the ground visiting the countries and promoting the development of survival plans. It is "in the moment," with relatively few resources and relatively little effort at internationalizing. Who knows how these things might come together and combine and develop in the future. It is not easy at the moment to say what can be done. What can be done is that you can go to a website, [www.4greatapes.com](http://www.4greatapes.com), and find us. That way you will see addresses and telephone numbers to make contact as we are starting to develop the brochures and develop committees responsible for the work that needs to be done. Meanwhile, the legislative aspects are being organized by Steven Wise.

**Steven Wise:**

The Great Ape World Heritage Species Project, at least tentatively, is first trying to put together a proposed declaration for great apes. That would be a non-binding international document in which states would set out, would sign on, and agree to the principles that great apes are important, that great apes are a world heritage species, that all countries, whether range states or not, should share the load in protecting them. We are also beginning to develop a convention

which would have the force of law, and we hope that those countries would sign on for the declaration and then for the convention. I am sure it is going to take months and months and months before all of the dozens or hundreds or thousands of people and governments and NGOs who want input in those, (and all of them are needed in order to be able to attain what we are trying to see), before we have all signed on and begun to present something to the states themselves.

**Paul Waldau:**

Jane, I think you are the person here who probably travels the most around the world. What prospects do you see for the different environmental and conservation groups and the different animal protection groups around the world to work together to get Richard's idea a reality?

**Jane Goodall:**

The Earth Summit at Johannesburg led to a document with no teeth in it. It was an agreement made without consultation with most of the NGOs working on the ground. And so there was a very strong feeling among us, the NGOs—and there were 40,000 of us there—that if we wanted change, it was up to us. We felt, "Okay, we are not going to get political will behind most of the important agreements, so it really is up to us. It is up to the NGOs." We all networked, and we formed new partnerships. The Congo Basin Initiative, that I mentioned, was formed as a joint effort of the U.S. Department of State and the European Union. World Wildlife, Conservation International and the Wildlife Conservation Society contributed funding. The Jane Goodall Institute is involved and, I think, WSPA also. The plan is to work together to decide the best way these funds should be used in each of the Congo Basin countries—for priorities will differ from country to country. There is a movement towards increasing collaboration between conservation and protection groups. I think there is a growing realization that partnerships are critical—otherwise we shall lose everything.

**Steve Ann Chambers:**

The next question is to all participants. How do you see the significance of this conference in the larger context? Why here? Why now?

**Steven Wise:**

I have been practicing animal law for twenty-two years, and if I had thought a conference like this was going to happen at any time twenty-two years ago, I would have thought I had died and gone to heaven. Some of us have been working on it in a relatively solitary way, and there are people in this room whom I met twenty-two years ago who have been working to get the ideas we are talking about bubbling up from small groups. It requires everything from individuals

sitting in front of computers, if there were computers when we started, to the policy makers of the country and the world, to the lawyers of the country and the world, to the judges of the country and the world. It also requires many symposia, many books, and many classes to form a social justice movement, which is what I think this is. This is a social justice movement, and having a conference like this with such distinguished speakers in such a distinguished setting, is a major step forward.

**Steve Ann Chambers:**

It will be too late, if we do not act soon. We are very fortunate that enough people have been working hard enough for long enough, as Steven mentioned, that now we can hold this kind of conference, in this kind of beautiful setting, with these distinguished guests and speakers. That just goes to show how this is becoming more of a mainstream idea. People are catching on, becoming educated, and it really is time for change. The way to make effective, enforceable change is through the law, and that is why we need all the lawyers and law students who are going to be prominent lawyers and judges in the future to come forward and help.

**Paul Waldau:**

Steven Wise and I have had the really interesting experience of teaching the Animal Law class here at Harvard. We are different kinds of teachers, but both of us had very, very vibrant classes and really talented people like Karla Wejberg and Dominique Castro, two altogether talented people who are deeply interested in how our legal system can evolve on this conference's issues. That is really encouraging. At Tufts University, Michelle Goldsmith and I are colleagues at the Center for Animals and Public Policy. We get ten graduate students every year; these are remarkably committed students. It is interesting, though, that of our last forty graduate students, thirty-nine have been women. So there remain important imbalances out there, but we are surely getting highly talented people to work on legal and cultural protections for nonhuman animals. That bodes well for the future. Unfortunately, as Richard has pointed out, we have very little time. Overall, though, the future has some awesome prospects. The question is, how do we realize that as soon as we possibly can?

**Roger Fouts:**

I was just amazed with Cass Sunstein and Alan Dershowitz—to hear someone who I thought was very mainstream have an interest in this. I think that is a sign of the times, that all the work that you people have done, and I want to thank you. You have all visited us. We have all had long discussions for years and years, and to see it blossoming out and spreading out and really beginning to catch the interest of people that we were not sure would ever catch on.

Congratulations to the lawyers. I do not know if that is often said, but thank you.

**Steve Ann Chambers:**

This question is for Richard Wrangham and Paul Waldau. On a practical level, how can we change attitudes in the U.S. in time for the great apes World Heritage Species Project to save the wild apes? Must we sacrifice the captives in order to save the remaining wild apes? What are the consequences of ignoring the captives?

**Richard Wrangham:**

I think we need to have more symposiums like this that will lead to practical changes in the law. It seems to me that because of the work of people like Jane and Roger, in showing what is going on in the minds of apes, empirical appreciation bubbles through very quickly to the rest of the population. It makes people mad when they see that apes are treated badly, and so, on a practical level we do need to have people like Jane continue to lead the movement towards real effective change in this country. It is happening. The Great Ape Conservation Act has been passed, and the, I can not remember the name of the legislation for the sanctuaries has happened. This extraordinary event two weeks ago, with the Coulston Foundation handing over its chimps, was the result of the movement. It is continuing to happen. We all have to keep on pushing. There is no point in saying, "Great, that's done!" There is a long way to go.

**Paul Waldau:**

About the captive issue—that is a central issue. It is squarely in the middle of our cultural problem here, driven as it is by phrases like "humans or animals" when everyone here knows that humans are animals. We have artificially divided ourselves, unfortunately, from our fellow animals. Nonhuman apes are remarkable in captivity and they are remarkable in the wild. I think it is a tragedy that we continue to allow captivity. I once wrote a paper called "Zoos Imprison Us."<sup>74</sup> Three thousand captive chimps in the United States imprison our minds and they imprison us politically. They do not put us in a good position internationally to lobby for the important protections of natural habitat. I think the United States can contribute money. We are not on the moral high ground right now. We have tremendously creative thinkers, and that is important, but we need to work hand-in-hand with the rest of the world. I hope (and I know I will work for this) that the captives can somehow be included in the great ape World Heritage Species Project, but that may not be a fit because of political realities of getting backwards countries, like the United States, to sign such an

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<sup>74</sup> Paul Waldau, Lecture, *Zoos Imprison Us* (Tufts U. School of Veterinary Medicine Sept. 1999).

international agreement. That is a harsh thing to say, but it is something worth striving for. It will be creative if we get it done, and it is a very important thing to attempt.

**Jane Goodall:**

Whether or not the captive chimps are involved in the World Heritage Species does not mean we are turning our back on them. Movement to improve the lives of the captive chimps, to get them all released from medical research, not only in the United States, but other parts of the world will continue irrespective of the efforts of conservationists to save the forests and the wild chimps because both issues are important. The captive chimps can, in many ways, serve as ambassadors, because certainly in Africa most of the ordinary people do not get the chance to see chimps. Nor are the people continually bombarded with television shows, as is the case over here. When they come and see our orphans, and see them kissing, embracing and holding hands, and if, on occasion, they are allowed to hold an infant's hand, they never, ever get over it. They are changed for life.

**Steven Wise:**

There has been a growing response to these problems within the legal profession. There are now about twenty-five law schools in the United States that are offering some kind of an animal law class. There is now a class in Canada at McGill Law School. I spoke at the University of Vienna, two years ago, in Austria, at their animal law class. There is an animal law class in England. There is one in Holland. The Supreme Court of the state of Carrila in India moaned that they wanted animal rights law classes, "just like Harvard," they said. There is *Animal Law*, the law review that Lewis & Clark Law School has put together. There also is a Center for Animal Law at Lewis & Clark Law School. Cass Sunstein and Martha Nussbaum are editing a book by Oxford University Press, which I believe is going to be called *Animal Rights Law*,<sup>75</sup> a series of various essays, and it is beginning to coalesce within the legal community.

**Steve Ann Chambers:**

David Favre, do you have a case in mind for which you plan to use your new tort? If so, can you tell us about it?

**David Favre:**

If I did have a case, I would not tell you about it. Not until I filed the case. I have some hypotheticals in mind. As a typical plaintiff's attorney, I would want the worst possible facts on the other side, and the least possible justification. I would probably look for a roadside zoo

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<sup>75</sup> Cass Sunstein and Martha Nussbaum eds., *Animal Rights Law* (Oxford U. Press, forthcoming).

that had a chimpanzee or a primate in captivity where the benefits are almost *de minimis*, perhaps nonexistent, and the conditions are so bad that even a judge of moderately open mind would agree it was not an appropriate place for the animal. There are such things out there, so it is a matter of committing oneself to the filing of the lawsuit, while the other thing you have to do, of course, is perhaps pick the state. The tort is actually to be adopted by the supreme court of the particular state, and this is a state issue, not a Federal issue, so one would have to give some fair thought to what supreme court would be most open, at this point in time, to considering the tort as a possibility. Fifteen years ago, one would have assumed you would do it in California. That is not the case right now. We would have to take a close look at the best location to do it, and we will so do.

**Steve Ann Chambers:**

For David Favre or Steven Wise. How, if possible, can we insure others take cases to court that will make good law, not bad law, for the animals? Can we limit the movement of cases to the best ones?

**David Favre:**

The answer is "No." Anybody can file a lawsuit—that is an American tradition. The practicality of the situation does give some hope that the frivolous suit will not be filed. To bring this first lawsuit is probably a \$100,000 project, and it is not likely to be taken up by somebody who does not have resources. If you have that kind of resources, you tend to want to spend it well, and I think the first lawsuits will, in fact, represent considerable effort of legal resources and money to support the activities. There is no way to stop somebody filing a lawsuit, but I think pragmatically it probably is not going to happen.

**Steven Wise:**

I agree with David. The answer is "No." People have filed bad lawsuits. Luckily they have sunk, and no one pays attention to them. I think it is a \$500,000 lawsuit, myself. Just flying Dr. Goodall in from wherever she is to testify will cost \$10,000. The number of experts you would have to have if you want to do it right, the number of people who would be working on it would be great. It will be very complex. I have actively discouraged lawyers from filing these lawsuits, because there is little deep, bad law against us. All that is out there, in the cases, are single sentences saying, "Animals do not have rights." They cite back to another case that says, "Animals do not have rights," which cites back to another case, which cites back to Blackstone, which cites back to Roman law, and that is all. No court in the last several hundred years has bothered to explain why chimpanzees should not have rights. We do not want to give them the chance to come up with a cockamamie explanation. We would like to present them with powerful

facts that exist, and give them the opportunity, those first few times, to do the right thing.

**Steve Ann Chambers:**

Jane Goodall, what new is being done in the Guinean forests of West Africa to better protect chimpanzees and their habitat? Which of these West African countries seem most open to deal with problems concerning chimpanzees in their country?

**Jane Goodall:**

Well, I don't know very much about the West African forests. We have been more active in the Central African forests – the Congo Basin. This is the heartland of the last significant populations of chimpanzees, gorillas and bonobos. In Congo-Brazzaville, the Ndoki National Park was gazetted about six years ago. It was described as the last Eden, and it has been reasonably well protected. The Goulougo Triangle, the forest where I tramped my 20 kilometers, is an area that was more recently added on. It was amazing being in a forest that has never been logged, where even the pygmies never lived, because it has been protected by swamps. I loved to stand by the trees, hundreds of years old, that rise up hundreds of feet into the canopy. Standing by a tree like that, one that has been saved from the loggers, is as heartwarming as watching a group of chimpanzees who have never learned to fear man. They are curious, and gradually they climb lower and lower. There are in fact a number of forests that are being protected, but governments seldom have big budgets for conservation, corrupt officials seek extra money from logging companies, and laws are seldom enforced, even when they exist. Political instability creates its own problems for conservation. Richard described the destruction of forest and wildlife as a result of illegal mining activities for coltan in eastern Congo. Such illegal activities are almost impossible to prevent when a country is in the grip of civil war. We only hope that it will be possible to protect the new forest parks in Gabon. But it is better to have a park designated than to have no protection at all. Certainly much planning will be needed. It must be the government that tackles the issue. And the plans should be initiated and driven by passionate and dedicated Gabonese, not ex-patriots.

**Richard Wrangham:**

The events of this month have reminded us of how vulnerable the populations are because the Ivory Coast is the country that has the largest number of chimpanzees in west Africa, and let us hope that civil war, if that is the right term for it, dies away quickly. It could be the kind of place that leads to chaos. Sometimes military action is devastating for the apes. Sometimes it actually helps the apes, but it clearly shows how very vulnerable they are and how you cannot rely on

single countries. You have to think big. You have to think in terms of many countries together—as regional populations.

**Jane Goodall:**

People keep telling me there should be something like the UN peace keeping force that would be specifically for the environment. It is a great idea—they go in specifically to protect areas in times of war.

**Steve Ann Chambers:**

This is for all panelists. Do you see any way in which the proven language capabilities of apes, such as American Sign Language, could positively affect legal claims for personhood, for instance, the idea that the use of language is a phenomenon that constitutes the performance of a self?

**Roger Fouts:**

The Gardners claimed they were not breeding humanity into the beast. Chimpanzees are chimpanzees and they are fantastic chimpanzees. We know there is evidence of gestural dialects among free living communities of chimpanzees. We were not really teaching a dog to fly—language was a capacity apes had. I go with Jeremy Bentham, I think that the ability to suffer is much more important than language. This may sound odd, but it seems that by saying apes are special because they share more of our traits is to use the old notion that man is the measure of all things, which again comes from a hierarchy that says the more you are like me the more superior you are. We should take chimpanzees on their terms for being fantastic beings in and of themselves, and granted we touched on something with language, but we did not create anything. These were capacities that existed in the free living chimpanzees. To me it is arrogant to say, if they can jump through these hoops and if they have blond hair, then we will let them vote. Our characteristics should not be used as a measure to determine chimpanzees—they are perfectly fine.

**Jane Goodall:**

Roger, do you not think that because we are a species that has dominated this planet that the people we are trying to influence to make change are going to be extremely influenced by the very things you say they should not be? Maybe they should not be, but that is another matter. It always takes longer to change their attitude. So let us, for heavens sake, take the work you have done, that Washoe has done, and Koko and others, and use it. Let people know about it and try to influence as many people as we can. It is not so much arrogance, Roger. I think it goes back to my childhood dream of being able to talk to animals, and I think that the fact that animals can return comments to us in our language is immensely powerful and is a hugely important part of any argument that I would make to people. I just

think that you may say it is arrogance but for many people it is not: it is magic, it is pure magic.

**Steven Wise:**

It is hard to imagine the first trial in which lawyers claim that a chimpanzee has rights without having the language capabilities of chimpanzees be central. It is so stunning. Indeed I am bolstered that by the fact that every four or five months a manuscript is sent to me, a novel, and they all feature a trial in which a chimpanzee uses sign language. I have often thought about whether they could be sworn in as witnesses. I think they probably cannot, because they lie. But their language capabilities would be demonstrative evidence and if they lied it would be even better than if they told the truth. It is hard to imagine that the next Scopes trial involving a chimpanzee's rights claim is not going to centrally feature the apes' linguistic abilities.<sup>76</sup> As an aside, when I visited the African Grey parrot, Alex, and he was speaking words I understood, I was blown away. I do not understand American Sign Language, and I do not understand pigeon sign language. For me to see a nonhuman animal actually talking in a way I could understand without a translator, which I needed with Koko or Kanzee, was very powerful.

**Roger Fouts:**

Maybe it is a difference in perspective that this is all we have known for thirty-five years. Chimps talk—big deal this is what they do. What really, blows us away and it is still amazing, was our visit to Gombe, our visit to Kibale to see a community of chimpanzees and to see the structure of them, not influenced by us at all, but their own social structure. I think they have laws or rules or things going on in terms of that whole social fabric. Observing that was just completely amazing, and then to finally realize that this how they should be existing. Washoe, even though she has language and Dar talks to him, is really still considered a defective. They are still in prison and they have done nothing wrong. Their lives even with the language is really a deprivation situation compared to the apes that live free.

**Jane Goodall:**

There are other social animals that have incredibly complex lives: the elephants, and the lions, for example, but they can not stand up and answer questions which would be mind blowing to all the judges.

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<sup>76</sup> *Stokes v. State*, 278 S.W. 57 (Tenn. 1925) (commonly referred to as "The Monkey Trial," the lawsuit was brought to eliminate the teaching of Darwin's theory evolution in public classrooms).

**Paul Waldau:**

If a chimp can be pulled out of her context and has enough depth to grasp our language and use it in some way that we recognize it, using our language, then what are they doing with that depth in their own minds, undisturbed by us with each other over time in their families and communities? What they are doing with language on their own is what makes them astonishing to me. I do not really care if they can talk or not. It seems to me it is obvious when you encounter them that there is an extraordinary depth there. That is why language is exciting, because we intuitively recognize if apes do have language, what else are they doing?

**Steve Ann Chambers:**

Steven Wise, do rights depend on the animal similarity to humans? What about those who are very distant from us but may still or do feel pain?

**Steven Wise:**

The arguments I have been making for some years is that common law judges are not intellectual daredevils. Judges do not get paid to go diving into new areas of law. They are conservative members of a conservative profession. What David Favre and I and Cass Sunstein try to do is come up with ways in which we can convince common law judges to use the material they already have to change the judges a little bit here and there, to persuade them to fashion law that will protect chimpanzees and then other nonhuman animals. The more that chimpanzees or other nonhumans are similar to us, probably the easier it is for the judges and us to understand what extraordinary creatures they are, and to feel a kinship towards them. We tend to feel a kinship more toward those who we resemble rather than those who seem somewhat alien.

**Roger Fouts:**

I wanted to address something on a similar topic that you raised and Alan Dershowitz raised, that is, a slippery slope argument. One thing people fail to realize when they invoke that argument is that we are on a slippery slope of exploitation and we have been there. We have seen what that brings us in terms of whether it is slavery or women or infecting mentally retarded children with hepatitis. The slope we have not tried and the slope they are warning us against that we have no idea where it will take us, is the slope of compassion. That is the slope that we are arguing for, to extend that circle of compassion to other beings. I think Alan Dershowitz mentioned the issue of trees, and Jane just mentioned trees as well. What kind of world would this be if we show compassion for the plants as well? Maybe we should go beyond our hydrocarbon chauvinism and extend it to the rocks and the whole planet, for goodness sake. We have not tried the compassion ar-

gument. We know the other argument does not work and critics are afraid to leave it.

**Steven Wise:**

I have to respond on behalf of those of us who have actually been in courtrooms to try to convince judges to do things. It is really hard. I will say it again. It is really hard.

**Roger Fouts:**

Maybe if you were a little more sincere Steve, really.

**Steven Wise:**

You want the judges to take little steps, and you want to invoke values they already have and you want to point them to cases they respect and opinions they respect. You want to tweak it here and there, and (as long as we can keep this in this room), then what you really are trying to do is get them to make fundamental value changes that will expand that circle. But you do not make it that explicit.

**Steve Ann Chambers:**

David Favre, you touched on this but if you have anything else to say you can add it now. How would your new tort be created?

**David Favre:**

Common law torts are inherently the product of judicial rumination and decision making, so you could have the legislature create a new tort, that is one route. Otherwise a tort comes into being by the supreme court of the state declaring that it is now a tort. An example of torts that we are not quite sure we want in this society are the rights of fetuses. Some states' supreme courts have said that fetuses do have certain rights, and others have said they are not going to have rights. I will be an advocate for this tort and it will be published at some point. Then the determination on whether or not the tort can in fact come into being will be whether or not some group of people, plaintiff's attorneys, can convince a supreme court that this is the appropriate thing to do given our history of jurisprudence and given certain concepts. Although it sounds a little radical to start with, it really is not that different from other things they have done in the past.

**Steven Wise:**

David, the beauty of our common law system is that the judges make the law. Each state supreme court is filled with judges who make law. Much of the state's laws are made by judges. Judges, if you can convince them, may decide to extend the law a bit to see how it works because they know they made it. If they do not like it and it does not work out, they can unmake it. As opposed to trying to amend the constitution or even getting a state legislature to pass a statute. These are

harder things to unmake. Common law torts or common law actions are the easiest sort of lawmaking to reverse, so therefore, one argument is if it is a bad idea, the next time the case comes up you can reverse yourself. That has been done hundreds and hundreds of times.

**Steve Ann Chambers:**

Steven Wise, why do we need to look at rights and legal status hierarchically? Is it necessary to prove cognitive ability and practical autonomy? Do you think that another approach could be ecosystem-based rights?

**Steven Wise:**

I look at the law the way judges look at the law. I have my own feelings about it but I learned twenty-two years ago that judges do not care about what I feel the law ought to be. There are certain kinds of arguments judges value and respect, and so what we lawyers try to do is figure out how we can win. There are probably an infinite number of ways of going at this. But there is not an infinite number ways of going at this within the present judicial system. If the judicial system and the legal system changes, I am sure David and I will move over and make the kind of arguments the changes warrant. But the one we have is deeply imbedded, hundreds and hundreds of years. Only certain sorts of arguments have any reasonable chance of winning and we have been trying to figure out what those are.

**Steve Ann Chambers:**

I want to thank each of our speakers for grand presentations and for thoughtful, inspiring talks that have lead to some great ideas. This venue is incredible, where these great minds have come together and I hope that this kind of event will help move the law forward. The law is clearly deficient when it comes to chimpanzees and other great apes and other animals, for that matter, and it is time for people like us to step up and make those changes happen.

