

# SYMPOSIUM

## ARE CHIMPANZEES ENTITLED TO FUNDAMENTAL LEGAL RIGHTS?\*

By

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### I. DR. JANE GOODALL

My mission is to try and give you at least some feeling for the nature of chimpanzees, how they really are, and how they have changed the way we think about ourselves.

Humans used to consider themselves a truly unique and separate species that stood apart from the rest of the animal kingdom, separated from others animals by an unbridgeable gulf. The chimpanzees help us to bridge that gulf, leading us to a new respect for them as well as for many of the other amazing nonhuman beings with whom we share this planet.

It all began thirty-six years ago when we began studying these chimpanzees in the Gombe National Park in Tanzania.<sup>1</sup> We began to see that chimpanzees are like half-human/half-ape creatures that stride along the shores of prehistoric lakes. One example is Faban. Faban walks in a wonderful upright posture because he fell victim to polio in the epidemic we had in the early years. He has lost the use of one arm, and to keep the limb from trailing on the ground, he has adopted this wonderful posture.

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<sup>1</sup> *E.g.*, JANE GOODALL, *MY FRIENDS THE WILD CHIMPANZEES* (1967); JANE GOODALL, *THROUGH A WINDOW: MY THIRTY YEARS WITH THE CHIMPANZEES OF GOMBE* (1990).

Despite his handicap, he can keep up with the others for long periods of time. Faban falling victim to polio points out the fact that chimps are genetically so like us, differing by only just over 1% in the structure of DNA, that they are susceptible to all known human contagious diseases with the apparent exception of cholera.

Early on I realized that each chimpanzee has his or her own personality, a fact that was not accepted by science at that time. I was heavily criticized for giving the chimpanzees names. But I could even see the difference between their faces.

Chimps live in a very definitely male-dominated society. The males are slightly bigger than the females and are much more aggressive. A typically aggressive posture is bristling hair, bunched lips, and a ferocious scowl. The male chimpanzees in the community usually number eight to ten. Sometimes they fight quite fiercely, particularly over social dominance and who is going to be number one in the hierarchy. Although they fight, the most effective performance male chimps use to rise in the hierarchy is by engaging in what we refer to as a charging display. Such displays includes hurtling across the ground with hairs bristled and dragging, swaying the vegetation. Males may also pick up or throw or drag large branches. They are basically trying to make themselves look bigger and more dangerous than they actually are and, in this way, they may intimidate rivals without resource to physical aggression which might result in their being damaged as well. We found that the males with the most imaginative, frequent, and spectacular displays are those who are likely to rise higher in the dominance hierarchy. Each one who has emerged as number one over the years has done so in his own special and unique way.

When I first "met" Mike in 1963, he was very low-ranking, probably about twenty-eight years of age, and no longer in his prime. He had lost some canines. But he was tremendously motivated to rise in the hierarchy and he was unusually intelligent. It was Mike who learned to use empty kerosene cans from my camp and incorporate these into his charging displays. He learned to keep up with three cans ahead of him, hitting and kicking them. Sometimes he would charge directly towards his superiors, who would then rush out of the way, climb a tree; or hide in the undergrowth. It was in a period of just four months that Mike rose, as far as we know, without a single fight, and took over the number one position. Having attained that position, he ruled for the next six years. Would he have done so without our cans? Every male had the same chance as Mike to use those cans. Moreover, every male used at least one can, at least once. But only Mike was able to capitalize on that chance experience and turn it to his own advantage.

Within a community, the chimpanzees settle most of their disputes by means of threatening postures and gestures. With a hierarchy, it is easy because everyone knows his or her place. The males are dominant over the females who have their own hierarchy. The dominant males often use a bipedal swagger; his message: get away from my food or I may have to hurt you. When chimps do hurt each other it is usually when the males of

one community attack those of another community, resulting in primitive form of warfare.

After a fight within a community, or a threatening behavior, the victim, even though sometimes very fearful, will very often approach the aggressor and adopt some kind of position of submission. In response to that, the aggressor will typically reach out with a reassuring gesture, a touch or a pat. They may hold hands, they may embrace one another, or they may kiss. This serves to restore social harmony after any kind of aggression, so that the relations between the community members are mostly relaxed and friendly.

If they are friendly when they greet, chimpanzees show many behaviors. A young female, for example, may bestow a kiss or other friendly "human" greeting upon an adult male who has arrived in her group. Or they may fling their arms around each other in response to a frightening sound across the valley. They derive reassurance and comfort from this friendly physical contact, which cannot be overemphasized.

I want to spend a little bit of time discussing the chimpanzee family. The father does not really play a role in this. Very often a sexy attractive female may be mated by all the males in her community. They may almost line up and mate with her one after the other. Very often we do not know which male is the father of which child. Sometimes a male takes a female away and keeps her throughout her period of estrous. Then when she has a baby eight months later we can be reasonably sure that he is the father. But very often, we do not know. He does not play any role within the family as such. All the males, as a group, protect the infants and the females within their own community from incursion by neighboring males.

One chimpanzee family became famous thanks to the National Geographic Society. The family consisted of old female Flo, who was the first mother I really knew back in 1961, with her little infant Flint, her daughter Fifi, and her son Figan. Figan went on to become the most powerful Alpha male in Gombe's history, reigning for ten years and rising to that position through a close friendly relationship with his elder brother with the paralyzed arm.

Figan was almost eleven when he began to leave his mother and travel with the adult males, learning from them what he needed to know to be an independent adult in this society. He was still spending a lot of time with his mother. Chimpanzees in the wild typically have their first baby when they are between ten and thirteen. Flo looked older than any other female we have seen before or since; she may well have been almost fifty years old.<sup>2</sup> Fifi's son, Flint, when eight and a half years old, should have been able to survive without her. But he was abnormally dependent on this old mother and it seemed that after her death he simply lost the will to live. He fell into a state of grief, and in this condition, with his immune response weakened, he fell sick and died within about a month of losing his mother.

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<sup>2</sup> They can live to be sixty in captivity.

Back to Fifi. The mother suckles her child for five or even six years; it's five or six years between live births at Gombe in the wild. There are good mothers and bad mothers in chimp society, just as in human society. We found that many females show maternal behavior that closely mirrors that of their own mothers. Fifi, like Flo, was protective, and playful and quite social; she spent quite a lot of time with other females. Freud often enjoyed a game with two other youngsters. But there were times when Fifi, like all mothers, was traveling about on her own. Then Freud had to amuse himself.

There is a great deal to do in the wild. Like acrobatics. There are many objects that serve chimpanzees as toys—like big rocks—and a lot that they can do with them. There are also baboons at Gombe. Freud had a particular play relationship with a young male, Hector. Hector once tried to enjoy a game with another baboon. Unfortunately, he has a tail, which of course a chimp doesn't have. So Freud gets his way by dragging Hector by the tail away from the other baboon to a session of rough and tumble play. It is extraordinary when you think that adult male chimps sometimes hunt, kill, and eat infant baboons. But then we play with cows and pigs sometimes and eat them as well. Young chimps learn just like human infants, by observing and imitating and then practicing what they have seen. Some of the social behavior, like grooming, which is so important in chimpanzee social life, is part of the inborn behavior pattern within which the young chimp actually comes into the world. Chimps will make grooming movements even if they have never seen another chimp. But they have to learn a lot about the context in which this is appropriate. And they don't do that unless they are growing up in some kind of natural social environment.

Young chimps have a tremendous curiosity about the behavior of others. This is how they learn about the feeding traditions of their particular community. These traditions may differ from one area to another, even if the same foods are present. They learn the tool-using behaviors of their community; chimps use more objects as tools than any other creature except ourselves. At Gombe, termite fishing is seen most often. By the time the chimps are about four years old, the young ones have learned how to manipulate these tools to fish for termites. In other parts of Africa where other chimps are being studied closely, we find completely different tool-using techniques, like a hammer and anvil technique for opening hard-shelled nuts that occurs in a lot of West Africa.

When Freud was almost five years old, little Frodo was born. Freud was absolutely fascinated by his little brother. As soon as Fifi would allow it, Freud would carry Frodo and they moved from one place to another through the forests. The two became great playmates and would spend a lot of time playing together. We realized how important it is to have an elder sibling in the family. And the child, instead of being forced to use his own resources, now has an elder brother who serves as sort of a built-in playmate and also a built-in role model. Frodo used to spend long hours watching carefully what Freud did and then usually imitated or tried to imitate what his brother was doing.

Fifi's family now numbers five. Freud is the eldest and, at about twenty-one years of age, is moving off into the forest. Frodo is five years younger—about fifteen. He carefully watches and waits to follow. These two males spent a lot of time away from Fifi traveling with the big males. Fanni is five years younger than Frodo. She is Fifi's eldest daughter. She's ten—an adolescent. Five years younger is daughter number two, Flossi, and four and a half years younger is little Faustino, the third son, now three years old. Fifi's first grandson was born while I was in America. I kept getting faxes that Fanni had a baby and that it was a male and what should we call him, we called him Fax. That is the family and part of this amazing community.

I just picked one family. If I had picked another family the stories would have been different because they have unique family histories, just as each community has its unique history. When you know chimps as well as I do, or any of us who have studied them in a reasonably natural situation, it is very heartbreaking to find out what is actually happening and how quickly the chimpanzees are disappearing. How they are hunted for food across much of Western and Central Africa. They are also hunted so that babies can be taken from their mothers and sold. Many are sold locally, in the streets, or in the markets, for anyone passing who takes pity on them, and wants to rescue them. Some of them end up with the dealers. It is not surprising that many of them die, because nobody understands that they need not only milk, but the same kind of affection and care as a human infant. Their emotional needs are similar. It is not surprising, because the structure of their brains and central nervous systems are so much like ours, more like ours than that of any other living creature. And what happens to them? They are sold as pets. Sometimes they are well cared-for. Very often they are exploited, used as substitute children. Or they will end up in a circus. People are beginning to realize that the training of circus chimps and other exotic animals very often involves great cruelty, like beating them over the head with an iron bar and deforming the feet by pushing the feet day after day into shoes—their feet are different from ours. Or they are used in entertainment, such as entertaining people at birthday parties. No life for our closest living relative. It is still legal in this country to buy and sell our closest living relatives, as once it was legal to buy and sell other humans from a different culture. They are used in the postcard trade. And the circus chimps, the pet chimps, the entertainment chimps, all outlive their usefulness when they get too big and dangerous. They are many times stronger than a human male. At that point they often end up in the medical research labs where they are used because they are so much like us that they can be infected with otherwise uniquely human diseases, diseases that you cannot give to a baboon, monkey, dog, or cat, but you can give to a chimpanzee.

There are some scientists who believe (or have believed) that chimpanzees can be useful in searching for cures and vaccines for things like HIV. I went to the Pelican Bay State Prison a couple of weeks ago to visit some inmates where I was reminded so vividly of having been in one of these chimpanzee medical research labs. The prisoners, because they are

human, have more space. These prisoners are there, we hope, because they have committed crimes; but these chimpanzees, living in five foot by five foot cages have committed no crime. They may be there because some people believe that they are benefitting us, but they certainly have not committed a crime. The conditions are like living in a nightmare world. These conditions are inappropriate, we should not be treating our closest living relatives in this way, and unless chimpanzees can be given at least some kind of fundamental rights within the legal system, nothing much will ever really change.

## II. STEVEN WISE

Those chimpanzees whose lives Dr. Goodall so vividly recreates should be eligible for such fundamental legal rights as bodily integrity and bodily liberty. As Professor Christopher Stone once observed, any proposal to confer legal rights upon the rightless "is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of 'us'—those who are holding rights at the time."<sup>3</sup>

Yet few judges, law professors, or practicing attorneys can listen to Dr. Goodall's stories of the families of Flo and Fifi and Frodo and Fax without mixed feelings. On the one hand we react, as humans must react, with initial interest and perhaps finally awe, to her compelling drama of full lives unfolding against the background of a mother's nourishing love, of competitors' jealousies, of sibling rivalries, of disputants restoring social harmony, of the affections of friends who have played together for endless hot and sunny days, of the triumphs of the weak but clever over the strong but overconfident, of the overcoming of physical and environmental adversities, of the inevitable capitulations to overwhelming strength, and of the fear, brutality, and sadness that are the inevitable consorts of civil war.

Yet, on the other hand, trained, and then submerged as we are in the canons and processes of law, we understand that Flo, Fifi, Frodo, and Fax are today considered mere legal things, precisely in the same way that the chairs in which we sit, the plates from which we eat, and even the food that we have eaten are considered mere things, possessed of no rights that humans are bound to respect, not even the most fundamental entitlements to bodily integrity or bodily liberty.

As has every other nonhuman animal, chimpanzees have, since they first became known to the West three hundred years ago, been considered mere things. Their "legal thinghood" has proven devastating to them, driving them to near extinction in the wild and reducing them to pitiful servitude in captivity. We have tolerated, encouraged, and sometimes purchased their captures and the destruction of their families across Central Africa. We have willfully ignored the brutal facts of their captures and

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<sup>3</sup> CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? TOWARDS NATURAL RIGHTS FOR LEGAL OBJECTS* 8 (1974).

the certainty that few would survive their intercontinental transport. We have, however, known full well that those who did survive were destined to live perhaps more than half a century in loneliness, pain, and fear behind thick metal bars in chilly sunless boxes of concrete or stainless steel, subject to our uncontained human whims—in all conditions to which civilized nations would not subject the most despicable human criminal. Yet, as Dr. Goodall observed, they have committed no crime.

For the entire four thousand years in which law has existed, a legal wall, thick, high, and seemingly unassailable, has separated humans from all other animals. It took much of this time for the idea of fundamental legal rights to develop even for human beings. Not until the last century was every human being finally cloaked with the legal personhood that signifies his or her eligibility for rights. That has changed. On one side of this legal wall, even the most trivial interests of our species are jealously guarded. We have assigned all of ourselves, but only ourselves, alone among the millions of species that comprise the animal kingdom, the exalted status of legal persons, entitled to all the rights, privileges, powers, and immunities of legal personhood. Most especially, we have assigned ourselves alone the fundamental legal rights to life, liberty, and bodily integrity, those rights that together form a protective perimeter around our bodies and our personalities without which we could scarcely flourish.

But on the other side of this wall lies the refuse of an entire kingdom, all the other animals, including chimpanzees. It is and has long been the common law rule that nonhuman animals are not eligible for legal rights simply because they are not human beings. This same broad legal rule applies as forcefully and as equally to gnats as it does to chimpanzees. But to any lawyer, judge, or law professor who has been exposed, even briefly, to some of the fruits of Dr. Goodall's thirty-five years of observing chimpanzees, the apparent overbreadth of this legal rule as applied to chimpanzees should naturally stimulate an inquiry into its justice. That must lead, in turn, to a tracing of its history, for every legal rule has its unique history and an understanding of this history is instrumental to what Justice Holmes called the "deliberate reconsideration" to which every legal rule should eventually be subjected.<sup>4</sup>

As Professor Alan Watson once concluded from his studies of comparative law, "to a truly astounding degree the law is rooted in the past."<sup>5</sup> The most common sources from which we quarry our private law especially are the legal rules of earlier times. But when we borrow past law, we borrow the past. Legal rules that may have made good sense within the context of what was then known and once valued may no longer make good sense. Raised by age to the status of self-evident truths, the rules may now perpetrate ancient injustices that may once have been less unjust because we knew no better. Like Theseus in the palace of the Minotaur, we must follow the thread of the legal thinghood of nonhuman

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<sup>4</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

<sup>5</sup> ALAN WATSON, *LEGAL TRANSPLANTS - AN APPROACH TO COMPARATIVE LAW* 95 (University of Georgia Press 2d ed., 1993) (1974).

animals, including chimpanzees, through the shadows of legal history. It will lead us to the most ancient legal systems known.

Ancient jurists declared that law itself had been created solely for human beings, the way ancient philosophers claimed that nonhuman animals had been themselves created solely for [the use of] human beings. The third century Roman jurist, Hermogenianus, said that “[a]ll law was established for men’s sake.”<sup>6</sup> And why should law have not been established, in his mind and in the minds of his fellow jurists, solely for the sake of men? Everything else was. This axiom was not confined to Rome. Justifying the massacre of guiltless nonhuman animals by a flood meant to punish an evil humanity, Rashi, the medieval Jewish scholar, explained that “since animals exist for the sake of man, their survival without man would be pointless.”<sup>7</sup> So it was that the ancient Greek, Roman, and Hebrew worlds fully embraced the idea that the universe had been divinely designed for a single end—the benefit of human beings. It was not just that humans were somehow different from every other animal. It was that this merely instrumental value of nonhuman animals was understood to be radically incommensurable with the inherent value of human beings.

But the world that spawned the legal thinghood of every nonhuman animal from the gnat to the chimpanzee, as it spawned the natural inferiority of women to men and of human slaves to human masters, is not our world. It is not the world. We now know that the universe in which they believed they were living was imaginary. This imaginary universe has since collapsed beneath a staggering weight of evidence provided by a process of which they knew nothing — science. As a result, my daughter, Roma, now entering the fourth grade, knows more truly how nature operates than did the authors of the Five Books of Moses or Aristotle. No one with even a rudimentary knowledge of modern biology and physics can accept the truth of the ancient cosmologies. Yet they continue to play a critical role in perpetuating the legal thinghood of nonhuman animals, for Hermogenianus’ teaching, that all law was made for men, implicit throughout the Old Testament and other ancient law, was incorporated by Justinian into his immensely influential sixth century *Institutes* and *Digest*. From there it was absorbed into the writings of the Glossators of Continental Europe, where it echoed throughout the works of the great common lawyers and judges of England—Bracton,<sup>8</sup> Britton,<sup>9</sup> Fleta,<sup>10</sup> Coke,<sup>11</sup> and Blackstone<sup>12</sup>—and was received nearly whole by their American de-

<sup>6</sup> Dig. 1.5.2 (Hermogenianus, Epitome of Law).

<sup>7</sup> Marilyn A. Katz, *Ox Slaughter and Goring Oxen: Homicide, Animal Sacrifice, and Judicial Process*, 4 YALE J.L. & HUMAN. 249, 274 (1992).

<sup>8</sup> BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND (Samuel E. Thorne trans., Cambridge, Massachusetts, Selden Society 1968).

<sup>9</sup> BRITTON (Francis Morgan Nichols trans., London, Macmillan & Co. 1865).

<sup>10</sup> FLETA (H.G. Richardson & G.O. Sayles eds. and trans., Cambridge, Massachusetts, Selden Society, 1955).

<sup>11</sup> The Case of the Swans, 77 Eng. Rep. 435 (K.B. 1595); EDWARD COKE, THE INSTITUTES AND THE LAWS OF ENGLAND (Hargrave and Butler eds., London, Printed for Clarke 1817).

<sup>12</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Bernard C. Gavit ed., 2d ed., Washington Law Book Co. 1941) (1892).



scendants—Kent,<sup>13</sup> Holmes,<sup>14</sup> and the supreme courts of every jurisdiction in the United States.<sup>15</sup> Today, the heart of this curious and imaginary physical world of the Ancients lies beating within the breasts of common law judges, animating the law that regulates the modern relationships between human and nonhuman animals, including chimpanzees. What Holmes said in the context of the law of master and servant applies. “The evidence of it is to be found,” he said “in every book which has been written for the last five hundred years . . . we still repeat the reasoning of the Roman lawyers, empty as it is, to the present day.”<sup>16</sup>

Upon encountering this legal wall in the Holmesian spirit of a “deliberate reconsideration” of ancient legal rules, one is initially awed by its thickness, its height, and its history of success, at all levels of law, in maintaining a legal apartheid between humans and every other species of animal. Unsurprisingly, as they draw from a common well, international law, constitutional law, statutory law, and the common law all treat nonhuman animals in nearly the same way. But an expert and thorough inspection of this wall will eventually yield up its more important, if less obvious, qualities.

As one might expect of a wall erected by the biblical Hebrews and ancient Romans, its mortar is badly cracking and its foundations have rotted. While it has some years left, it has reached a state of decay. Because its intellectual foundations are unprincipled and arbitrary, unfair and unjust, it is highly vulnerable, at least in the English-speaking countries, is to the unceasing tendency of the common law “to work itself pure,” if I may borrow Lord Mansfield’s phrase.<sup>17</sup> Common law judges have the duty, once injustice is brought to their attention, to place existing legal rules alongside those great overarching principals that have been universally accepted as integral to Western law and justice for hundreds of years—equality, liberty, and equity—and then to determine if, in light of changing facts and values, the ancient legal rules may now be found to be wanting.

Unlike the law of international treaties, national constitutions, and municipal statutes, the common law is developed by judges through their use of reasoned judgment. To be sure, the common law values consistency and certainty, so that persons may order their lives in harmony with rights and obligations that they know. But the common law also values reason, fairness, and flexibility. As judges make the common law, judges may unmake it if they later come to believe that they have erred. Legislators who disagree with the decisions of common law judges can try to overrule them. Judges, of course, know that they may unmake what they have made; they know that legislatures may revise their decisions for

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<sup>13</sup> JAMES KENT, COMMENTARIES ON AMERICAN LAW (WM. Hardcastle Brown ed., St. Paul, Minnesota, West Publishing Co. 1894).

<sup>14</sup> OLIVER WENDELL HOLMES, JR., THE COMMON LAW 18 (Boston, Little, Brown & Company 1938) (1881).

<sup>15</sup> Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 535-36 (1996).

<sup>16</sup> Holmes, *supra* note 4, at 18.

<sup>17</sup> *Omichund v. Barker*, 1 Atk. 21, 33 (K.B. 1744).

them. But the very fact that their own mistakes can be undone in relatively painless and swift ways encourages common law judges to be innovative and sensitive to those enduring arguments about what is reasonable, fair, right and just that shine through the light of a kaleidoscopic world of changing facts and morals and values.

As we have seen, the legal thinghood of nonhuman animals from the gnat to the chimpanzee is as ancient and as deeply woven into the fabric of our law as is any legal rule. But I suggest that this ancient legal rule, as applied to chimpanzees, so outright contradicts the overarching and, if I may, sacred principles of equality, liberty, equity, and justice that it can be affirmed only with the greatest of difficulties.

The writer, Edith Hamilton once reminded us of the plight of human slaves before the time of the Greek Stoics of the second century B.C.<sup>18</sup> And the words she chose to describe their plight described the effects of the legal rule that excludes all nonhuman animals, even chimpanzees, from eligibility for even the most fundamental legal rights.<sup>19</sup> "Everywhere," she said, "everywhere the way of life depended upon them. One cannot say that they were accepted as such, for there was no acceptance. Everyone used them; no one paid attention to them . . . what must be remembered is that the Greeks were the first who thought about slavery. To think about it was to condemn it."<sup>20</sup>

Yet recall that the abomination of human slavery was finally abolished in the West just in the last century. It continues in some countries to this day. The first thinking about the justice of the legal thinghood of nonhuman animals occurred just as slavery was flickering in the West. To date, it has resulted mostly in the enactment of pathetically inadequate anticruelty statutes. But as the scientific evidence of the true natures of such nonhuman animals as chimpanzees continues to mount, catalyzed by the work of Dr. Goodall, that thinking will be its undoing. For to think about the legal thinghood of such a creature as a chimpanzee will be finally, *finally*, to condemn it.

This process has commenced. At its deepest levels, modern law has begun slowly to disassemble the incommensurability between all human and all nonhuman animals both from the top down and the bottom up. The intrinsic value of human beings is now seen in law as commensurable with other values. This has been reflected, for examples, in the enactment of wrongful death statutes. These statutes were intended to alter the legal rule that the loss of human life, incommensurable as it was with anything else, could never be compensated by money. Meanwhile the lives of at least some nonhuman animals have begun to be infused with a degree of intrinsic and not merely instrumental value. The Preamble to the United Nations World Charter for Nature states that "every form of life is unique,

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<sup>18</sup> EDITH HAMILTON, *THE ECHO OF GREECE* (1957).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 23.

warranting respect regardless of its worth to man."<sup>21</sup> Respected international scholars have suggested that the legal right of individual whales to life may be becoming, after a century of development, a part of binding international law.<sup>22</sup> While interpreting our own Endangered Species Act, the United States Supreme Court was guided in a decision by the declaration of the Congress that endangered species were of "incalculable value."<sup>23</sup>

Such overarching values of Western law as equality and liberty strongly support the modification of the legal thinghood of chimpanzees. It is an axiom of Western justice that likes should be treated alike. To a large degree, this principle of equality is the marker by which the fairness and justice of any Western legal system is measured. Equality lies at the center of many of our constitutional liberties. This is because equality acts as a barrier to arbitrary classifications and arbitrariness is the antithesis of the reasoned judgment that Western law and justice demand. However, it is actual likeness and not false assumptions or beliefs about likeness that is the measure of equality. Dr. Goodall has briefly but compellingly demonstrated that Flo, Fifi, Frodo, and Fax are creatures whose natures and interests are actually like the natures and interests of human beings in ways relevant to what such fundamental legal rights as bodily integrity and bodily liberty protect. It is arbitrary and a breach at the fundamental principle of equality to deny them these rights merely because they are not human beings.

Similarly, after sad and terrible experiences with the destruction of liberty from Nazi Germany to Bosnia, the international community has firmly rejected the notion that fundamental human rights cannot be derived from such fundamental qualities of the human body and personality as our consciousness, our abilities to suffer, and our natural tendencies to live in families. Such interests as bodily integrity and bodily liberty must be protected by legal rights. Practices such as torture and slavery has been prohibited as international *jus cogens* norms that can never be waived or excused.

We have reached these kinds of crossroads before. The emergence of the discipline of child development as a social science led to changing views about the natures of childhood and children and spurred action toward the development of the fundamental legal rights of children. Better understandings of the nature of fetal development helped lead after World War II to the rapid recognition of the legal personhood of human fetuses in tort law. The emergence of scientific disciplines as ethology, genetics and cognitive psychology, all of which have been influenced by Dr. Goodall's work, have helped clarify that fundamental chimpanzee interests exist that

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<sup>21</sup> Harold W. Wood, Jr., *The United States World Charter for Nature: The Developing Nation's Initiative to Establish Protections for the Environment*, 12 *ECOLOGY L.Q.* 977, 992 (1985).

<sup>22</sup> Anthony D'Amato and Sudhar K. Choepa, *Whales: Their Emerging Right to Life*, 85 *AM. J. INTER. L.* 21 (1991).

<sup>23</sup> *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 (1978).

justify such fundamental legal rights as bodily integrity and bodily liberty in a legal system underpinned by the values of equality, liberty, and equity.

Of course, we can never know for certain that Flo and Fifi and Frodo and Fax experience inner worlds similar to our own. But anyone who has struggled with the protean nature of consciousness itself understands that we can never even know for sure that other humans are conscious. Thus, we are left, as Professor Martha Nussbaum has written, with "a choice only between a generous construction and a mean spirited construction."<sup>24</sup> The construction we choose will not only have a profound impact upon the lives and families of Flo and Fifi and Frodo and Fax, but upon our own lives and families, as it will help determine the value that we place upon our own fundamental principles of justice.

### III. DR. JANE GOODALL

One short story, a symbolic short story, to bring it back so that the chimpanzee can have the last word. It is the story of a chimp who was captured in Africa when he was about two years old. His mother was shot. He was sent over to a lab in the United States. He was one of one of the lucky ones. He was rescued from the lab and put on an island in a zoo very near here—Land Country Safari in West Palm Beach. His name was Old Man and he was put on an island with three females who had been in circuses and labs. A young man was hired, Mark Cusano, to look after this little group of chimps, as well as the others. He was told, "Don't go near those four. They hate people they're very dangerous. They'll kill you." For a while, he paddled in one of those little paddleboats to the island where he would throw food out for the chimps. But he began to watch them. He saw how joyous they were when he would appear with the food. They would embrace and kiss and hold hands. And then a baby was born, Old Man's baby. And he saw how gentle Old Man was. And he thought to himself, "How can I possibly care for these amazing creatures if I don't have some kind of relationship with them?" So every day he went a little closer and one day he held a banana out from the boat and Old Man took it from his hands. He said, "Jane, I know how you felt when David Graybeard first took a banana from you."

And the day came when he stepped onto the shore. And one day Old Man allowed him to groom him and then they began to play. So a friendship grew up. The females stayed back, but they didn't do anything. One day soon after this, he was cleaning the island. It was raining and muddy. He slipped and frightened the baby. The baby screamed. The mother rushed to defend her child, as mothers will, and leapt onto Mark and bit his neck. He felt the blood run down. The other two females came to help their friend. One bit his wrist. One bit his leg. He'd been attacked before but never like this. And then as he lay there on the ground with these females biting him, he looked up and he saw Old Man charging across the

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<sup>24</sup> MARTHA C. NUSSBAUM, *POETIC JUSTICE - THE LITERARY IMAGINATION AND PUBLIC LIFE* 38 (1996).

island with all his hair bristling and his lips bunched and he thought, "Well, my last hours has come. My last minute has come." But what happened, Old Man charged in and he physically pulled each of those females away and he kept them off Mark as he painfully dragged himself to the boat. When he came out of the hospital, some days later, I saw him. He said, "Jane, you know there's no question but that Old Man saved my life." This is a symbolic story for me, because if a chimpanzee who has been abused by people, mistreated by people, can reach out across this imaginary gap between his species and ours, to help a human friend in time of need, then surely we humans with our greater capacity for understanding and our greater capacity for compassion, can do the same for chimpanzees in their time of need.

