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Saving Apes with the Laws of Men: Great Ape Protection in a Property-Based Animal Law System

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NOTE

SAVING APES WITH THE LAWS OF MEN: GREAT APE PROTECTION IN A PROPERTY-BASED ANIMAL LAW SYSTEM

By
Alexandra B. Rhodes*

This Note evaluates the methods advocates have taken toward furthering great ape protection in the United States (U.S.). Many animal advocates argue that abolishing animals' property status is essential to establishing effective protections; nonetheless, it will take time for our society to accept the concept of legal personhood for animals. Therefore, this Note suggests that for the time being, great ape protection should be framed in a human context, to protect animals within the existing, property-based animal law system. In general, this Note provides background on the property status of animals in the U.S., specifically analyzes the legal status of great apes domestically and abroad, and suggests how advocates may most efficiently work toward great ape protection today.

I. INTRODUCTION	192
II. BACKGROUND: ANIMALS IN THE CONTEXT OF U.S. LAW	194
A. <i>Animals Are Property</i>	195
B. <i>Animal Welfare v. Animal Rights: Abolitionists Challenge the Property-Based System</i>	198
III. THE CURRENT LEGAL STATUS OF GREAT APES IN THE U.S.	201
A. <i>Great Apes in the Endangered Species Act</i>	202
B. <i>Great Apes in the Animal Welfare Act</i>	203

* © Alexandra B. Rhodes 2013. Alexandra Rhodes is a 2014 J.D. candidate at the George Mason University School of Law. She is an Articles Editor for the *George Mason Law Review*, a vegetarian, and a passionate animal advocate. She would like to thank her whole family—especially her father, Michael, who provides an example every day of how to live a life with patient kindness. She would also like to thank Ralph Henry, adjunct professor at George Mason University School of Law, for his mentorship, and her close friend, Meagan Dziura, for her thoughts and encouragement throughout the writing process. She is especially happy to dedicate this article to the memory of the animals who touched her life—her dog, Toby, and her cats, Snowflake and Kalohe.

C. <i>Great Apes in State Law</i>	205
D. <i>The Resulting Life Experience for Great Apes</i>	206
E. <i>Recent Legislation to Strengthen Existing Laws</i>	208
IV. GREAT APE PROTECTION OUTSIDE THE U.S.	210
V. EFFECTIVELY STRENGTHENING GREAT APE PROTECTION WITHIN THE PROPERTY-BASED ANIMAL LAW SYSTEM	215
A. <i>American Society Is Averse to Legal Personhood Arguments</i>	215
B. <i>Advocates Effectively Litigate Animals' Interests within the Property-Based System</i>	218
C. <i>Advocates Can Effectively Protect Great Apes within the Property-Based System</i>	221
1. <i>The Split-Listing Petition Worked within Existing Legal Channels to Strengthen Chimpanzee Protections</i>	221
2. <i>The Great Ape Protection and Cost Savings Act Would Strengthen Great Ape Protection within the Existing System</i>	223
3. <i>Great Ape Protection within the Property-Based Animal Law System Requires a Dualistic Legal Approach</i>	225
VI. CONCLUSION	227

I. INTRODUCTION

In 1981, a volunteer at the Institute for Behavioral Research brought suit against the institute for guardianship of its experimental primates.¹ The primates, he alleged, lived in filthy conditions and were denied adequate food and water.² They suffered a lack of proper veterinary care, chewed their fingers, and further mutilated the limbs on which the institute experimented.³ In strong testament to the institute's cruelty, the chief experimenter kept a monkey's severed hand as a paperweight on his desk.⁴ The court, however, dismissed the volunteer's case for lack of standing;⁵ he did not allege sufficient suffering of his own, and so the primates' suffering would remain unevaluated.⁶

Disagreement exists over the best way to solve legal quandaries like these—the best way to close gaps in the law through which animals fall. In particular, the legal status of great apes is an increasingly divisive issue. Among animal activists, there are several theories regarding the best way to legally protect great apes. The Great Ape Pro-

¹ *Intl. Primate Protec. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 936 (4th Cir. 1986).

² *Id.* at 936.

³ Lauren Magnotti, Student Author, *Pawing Open the Courthouse Door: Why Animals' Interests Should Matter when Courts Grant Standing*, 80 St. John's L. Rev. 455, 468–69 (2006).

⁴ *Id.* at 469.

⁵ *Intl. Primate Protec. League*, 799 F.2d at 935.

⁶ *Id.* at 940.

ject (GAP) is a collective movement of philosophers, scientists, and legal scholars fighting for the rights of great apes.⁷ Their goal is to secure the right to life, the right to individual freedom, and the prohibition of torture for great apes.⁸ Protections like these are strong, but do not necessarily result in a call for abolishing animals' property status. Advocates such as Gary Francione push for just that, arguing that society cannot establish adequate protections for animals while they are considered property and not persons.⁹ The abolitionist approach¹⁰ is headstrong, fighting for a complete reform of the animal law system in the United States (U.S.)—essentially, for recognizing animals as legal persons and eliminating the need for public policy, moral, or conservation arguments.¹¹ Protecting a legal person does not require justification—life, liberty, and the pursuit of happiness are inherent rights.¹²

However, this Note analyzes another strategic movement for great ape protection. Rather than call for legal personhood, this movement instead argues for great ape protections in a human context.¹³ Advocates here make the case for great apes as objects of importance to legal persons, not as legal persons themselves. This movement works within the existing animal law system—a system that views animals as property—to efficiently advocate for great ape interests, and ultimately to protect apes from being exploited as property at all.¹⁴

Existing laws facilitate the systematic exploitation of great apes for human benefit in entertainment, medical research, and beyond. If successful, abolishing the property system and extending legal personhood to apes could yield effective protection, but in the time it would take for Americans to accept the personhood concept, apes will

⁷ Great Ape Project, *History*, <http://www.projeto-gap.org.br/en/history> [<http://perma.cc/0ibMX3S1RYK>] (accessed Nov. 16, 2013).

⁸ Great Ape Project, *World Declaration on Great Primates*, <http://www.projeto-gap.org.br/en/world-declaration-on-great-primates> [<http://perma.cc/0JH2mCA5A7A>] (accessed Nov. 16, 2013).

⁹ See Gary L. Francione, *Animal Rights: The Abolitionist Approach*, *About*, <http://www.abolitionistapproach.com/about> [<http://perma.cc/0SZ1E0aaEom>] (accessed Nov. 16, 2013) (“[A]ll sentient beings have one basic right: the right to not be treated as the property of others. . . . Our recognition of the one basic right means that we must abolish, and not merely regulate, institutionalized animal exploitation . . .”).

¹⁰ The term “abolitionist approach” is most famously associated with activist and philosopher Gary Francione, whose blog addresses the theories behind this idea. *See id.* (providing the “Six Principles of the Abolitionist Approach to Animal Rights”).

¹¹ *See infra* pt. III (discussing current federal and state great ape legal protections).

¹² *See e.g. Declaration of Independence* [¶ 2] (1776) (identifying these rights as “self-evident” and “unalienable”).

¹³ *See* Sue Russell, *Should Animals Be Considered People?*, *Pac. Stand.* (Dec. 20, 2011) (available at <http://www.psmag.com/legal-affairs/should-animals-be-considered-people-38481>) [<http://perma.cc/0dVkiwjXrzL>] (accessed Nov. 16, 2013) (identifying animal activists who advocate for incremental increases in rights).

¹⁴ Hanna Coate, *Animal Leg. & Historical Ctr.*, *Overview of the Legal Control of Apes*, http://www.animallaw.info/articles/great_apes/ovusgalegaloverview.htm [<http://perma.cc/0AQJMJPSX11>] (2011) (accessed Nov. 16, 2013).

continue to suffer. Though there is merit in personhood arguments, advocates can quickly achieve strong great ape protections today by using human-centric arguments that function within the existing animal law system.

Recent proposals, such as the Great Ape Protection and Cost Savings Act of 2011 (GAPCSA)¹⁵ and the split-listing petition to the U.S. Fish and Wildlife Service (FWS),¹⁶ attempt to fix the system by working within it. These proposals employ careful and conventional legal arguments that reflect human interests and economic realities.¹⁷ By putting a human face on the case for apes, the GAPCSA and the split-listing petition appeal to U.S. citizens in terms to which they can relate. Accordingly, these accessible proposals have a high likelihood of effecting real change for apes in the U.S. Even while working within the confines of a property-based system, these proposals can still distinguish great apes from other forms of property, placing apes in a specially protected status.

This Note proceeds in the following four parts. Part II provides an overview of U.S. animal law, demonstrating courts' willingness to accept animals as a special form of property. Part II also describes the "abolitionist" or "personhood" movement, which advocates extending personhood rights to animals and abolishing property status. Part III examines U.S. laws that specifically relate to great apes and introduces recent legal proposals to strengthen the protective value of these laws. Part IV then describes the efforts of other countries to protect great apes, and compares recent U.S. proposals to these foreign protections. Finally, within this context, Part V analyzes how advocates in the U.S. can most effectively promote animals' interests within the existing property-based system.

Ultimately, this Note concludes that reforming great ape protection within the U.S.'s existing property-based animal law system is both possible and effective. Without discounting the merits of legal personhood arguments, this Note suggests that today's advocates can indeed navigate the property-based system to efficiently achieve similar protections.

II. BACKGROUND: ANIMALS IN THE CONTEXT OF U.S. LAW

In the U.S., animals are considered property.¹⁸ However, over time, courts have been willing to recognize an animal's inherent value

¹⁵ Sen. 810, 112th Cong. (Apr. 13, 2011) (as introduced).

¹⁶ Anna Frostic, Humane Socy. of the U.S., *Petition before the Fish and Wildlife Service to Upgrade Captive Chimpanzees (Pan troglodytes) from Threatened to Endangered Status Pursuant to the Endangered Species Act of 1973, As Amended* (Mar. 16, 2010) (available at http://www.humanesociety.org/assets/pdfs/animals_laboratories/chimpanzee_research/fws_endangered_petition.pdf [<http://perma.cc/0xKyS8WkSEQ>] (accessed Nov. 16, 2013)).

¹⁷ See *infra* pt. III(E) (discussing the increased protections of the GAPCSA and the petition to end split-listing).

¹⁸ See *infra* pt. II(A) (discussing the legal status of animals as property).

despite its property status.¹⁹ U.S. courts accept that animals are a special form of property, provided the rationale relates back to the animal's relationship with a human.²⁰ Yet some activists feel that legislatures and courts have not gone far enough to protect animals.²¹ They argue that the only way to adequately protect animals is to abolish the property system altogether.²²

A. *Animals Are Property*

Animals' property status is the foundation of U.S. animal law; animals are property, defined by their specific usefulness to humans.²³ Even in the age-old adage "man's best friend," the dog still belongs to man; his relationship to a human defines him. An American animal is a pet or tool, a friend or food, but never considered an independent being with inherent rights. Animals are labeled and governed by how they benefit their human owners.²⁴ Accordingly, animals are owned, used, bought, traded, and even abandoned under the law as property.

Due to this property status, animals encounter one of their most pressing hurdles to obtaining legal protection: they have no standing in court.²⁵ To establish standing, a plaintiff must have suffered an injury that is traceable to some action by the defendant, and the injury must be one the court can redress.²⁶ Plaintiffs bringing suit on an animal's behalf must establish that they—not the animal—have suffered a redressable injury.²⁷

Sympathetic courts have addressed the standing obstacle by allowing parties to frame animal abuse as an injury to human plaintiffs.²⁸ For example, in *Humane Society of the U.S. (HSUS) v. U.S. Postal Service (USPS)*,²⁹ the court evaluated a suit against the Postal Service for distributing material promoting illegal cockfighting.³⁰ Distribution of the material could certainly have caused harm to the animals involved; promotion of illegal cockfighting directly injures the roosters. However, to evaluate standing, the court instead sought to

¹⁹ See *id.* (discussing cases that acknowledge the special relationship between human and animal as indicative of the animal's value).

²⁰ *Houseman v. Dare*, 966 A.2d 24, 29 (N.J. Super. App. Div. 2009).

²¹ See *infra* pt. II(B) (discussing animal activists' approaches to protecting animals).

²² For a detailed discussion of the difference between the animal rights and animal welfare movements, see Joseph Lubinski, Animal Leg. & Historical Ctr., *Introduction to Animal Rights*, <http://animallaw.info/articles/ddusjlubinski2002.htm> [<http://perma.cc/07MhXiXUuG3>] (2d ed., 2004) (accessed Nov. 16, 2013).

²³ Jessica Eisen, *Liberating Animal Law: Breaking Free from Human-Use Typologies*, 17 *Animal L.* 59, 60 (2010); Magnotti, *supra* n. 3, at 455.

²⁴ Eisen, *supra* n. 23, at 60.

²⁵ Magnotti, *supra* n. 3, at 455.

²⁶ *Id.* at 456.

²⁷ *Id.* at 457.

²⁸ *Id.*

²⁹ *Humane Socy. of the U.S. (HSUS) v. U.S. Postal Serv. (USPS)*, 609 F. Supp. 2d 85 (D.D.C. 2009).

³⁰ *Id.* at 89.

establish a redressable injury to the plaintiff, the Humane Society.³¹ The Humane Society contended that the Postal Service's decision to distribute this material promoted animal fights and likely increased the number of animals injured in such fights, thereby diminishing the Humane Society's limited resources to assist law enforcement with raids on illegal cockfighting.³² The court granted the plaintiff standing to sue over the injury to its limited resources.³³ Thus, the court evaluated the animal abuse by reference to the perceived harm caused to humans.³⁴

Apart from standing, animals face a myriad of other legal issues in the U.S. due to their property status. For example, divorce courts regularly deal with companion animals in the division of marital property.³⁵ State courts evaluate companion animals like any other piece of property and assign the animal a monetary value.³⁶ To determine the value of an animal, some courts have recognized that a pet is a special form of property, but only so far as the animal represents a special relationship or meaning to the possessing human. For instance, in *Houseman v. Dare*, the court noted that a companion animal represents a special relationship for which monetary compensation is inadequate.³⁷ Note that the emphasis is on the relationship between companion animal and possessing human, not on the life of the animal itself.

Courts also evaluate animals as property in police seizure disputes.³⁸ When an officer kills or injures an animal during the course of police duties, the animal's owner may invoke the Fourth Amendment's protection of property from unlawful government seizure.³⁹ The death or injury of a companion animal is thus an interference with the owner's possession; to litigate in the direct interest of the animal—under the law of murder, for example—would be inappropriate under the property-based animal law system. It is the owner's property in-

³¹ *Id.* at 90–91.

³² *Id.*

³³ *Id.* at 91–93.

³⁴ *Id.*; see also *Am. Socy. for the Prevention of Cruelty to Animals v. Ringling Bros.*, 317 F.3d 334, 336 (D.C. Cir. 2003) (acknowledging aesthetic injury sufficient to overturn a motion to dismiss when a trainer lost the ability to train and interact with circus elephants after witnessing their abuse).

³⁵ Tabby T. McLain, Animal Leg. & Historical Ctr., *Knick-Knack, Paddy-Whack, Give the Dog a Home?: Custody Determination of Companion Animals in Guardian Divorce* pt. I, <http://www.animallaw.info/articles/dduspetcustodyindivorce.htm> [<http://perma.cc/0njV5erTRxf>] (2009) (accessed Nov. 16, 2013).

³⁶ *Id.* at pt. II.

³⁷ *Houseman*, 966 A.2d at 29.

³⁸ Pamela L. Roudebush, Animal Leg. & Historical Ctr., *Detailed Discussion of Police Shooting Pets* pt. V, <http://www.animallaw.info/articles/dduspoliceshootingpets.htm> [<http://perma.cc/09E2EYBxqEm>] (2002) (accessed Nov. 16, 2013).

³⁹ See e.g. *Brown v. Muhlenberg Township*, 269 F.3d 205, 210 (3d Cir. 2001) (holding that an officer's shooting of the plaintiffs' dog constituted a seizure under the Fourth Amendment).

jury, not the animal's physical injury, that will receive attention in court.

A court may also make rulings involving animals as property in the realm of wills and trusts. Traditionally, courts invalidated arrangements bequeathing financial assets to pets.⁴⁰ Animals are property; one may not leave one form of property to another form of property—just as you may not leave your kitchen chairs to your table.⁴¹ Wills that left property to companion animals also may have violated the rule against perpetuities because the measuring life was not human.⁴² Thus, while an owner may think she has posthumously addressed the animal's interest in proper care, the animal's property status may often prevent the effectuation of such provisions. Gifts left to animals have come under scrutiny; in some instances, courts have found these gifts to be excessive, and thus reduced the amount gifted to an amount that is "reasonable."⁴³ However, in 1990, the revised Uniform Probate Code made pet trusts valid for those states electing to adopt it.⁴⁴ Thus, legislating an exception to the rule effectively settled the issue of pet trusts for most courts.

Will-stipulated euthanasia presents yet another quandary for U.S. animals. Some owners, rather than leaving their pet a trust, actually stipulate that the animal be euthanized upon the owner's death.⁴⁵ Such instances demonstrate the struggle between an animal's right to life and a human's right to property; on what basis should a court be allowed to interfere with a deceased owner's wishes? Historically, courts have been averse to enforcing will provisions that demand euthanasia.⁴⁶ To invalidate the provisions, a court will likely find the provision contrary to the owner's true intent regarding the property, focusing yet again on the human relationship with the animal.⁴⁷

These efforts to advocate for animal interests in divorce, probate, and illegal seizure cases demonstrate that Americans are willing to fight for the welfare of an animal within the existing property-based system. Recent case law in other situations also suggests U.S. courts

⁴⁰ See e.g. *In re Est. of Russell*, 444 P.2d 353, 363 (Cal. 1968) (holding that a dog may not be a beneficiary under a will).

⁴¹ See Suzette Daniels, Animal Leg. & Historical Ctr., *An Introduction to Pet in Wills and Pet Euthanasia* pt. II, <http://www.animallaw.info/articles/arusdanielssuzette2004.htm> [<http://perma.cc/0fx3HxLapJz>] (2004) (accessed Nov. 16, 2013) (noting pets were historically barred from being beneficiaries because they were classified as property).

⁴² Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 Santa Clara L. Rev. 617, 620 (2000).

⁴³ *Id.* at 633.

⁴⁴ Daniels, *supra* n. 41, at pt. II(E).

⁴⁵ See e.g. *In re Capers Est.*, 34 Pa. D. & C.2d 121, 122 (Orphans' Ct. 1964) ("I direct that any dog which I may own at the time of my death be destroyed in a humane manner . . .").

⁴⁶ Beyer, *supra* n. 42, at 661.

⁴⁷ See e.g. *In re Capers Est.*, 34 Pa. D. & C.2d at 126, 129, 141 (holding that the owner demanded humane euthanasia for her pets in fear of what she saw as inevitable suffering in her absence, and invalidating the provision as contrary to her true intent since better options existed).

are willing to accept that animals are distinct from other types of property.⁴⁸ Yet the trend mainly reflects a willingness to accept an animal's special relationship to humans, not an animal's intrinsic rights as an individual.

For example, beyond awarding plaintiffs an animal's fair market value for the intentional or reckless killing of a pet, courts have also awarded punitive damages for emotional distress.⁴⁹ In the landmark *State v. Nix*,⁵⁰ the court took a step further, ruling that a group of horses constituted separate, individual victims of a crime under the state's animal neglect statute.⁵¹ The trial court had previously concluded that "animals are not victims," so the defendant's neglect of a herd of horses was a singular offense; it could not constitute multiple, individual violations against each horse.⁵² But the appellate court decided that for the "purposes of the statute," animals are the intended beneficiaries—each horse in the herd could be considered a separate victim.⁵³ This case goes beyond recognizing a special relationship between humans and their animal property, and is perhaps the first to insinuate that an animal is capable of being a victim itself.⁵⁴ The holding, of course, is very narrow; the court stopped short of stating that an animal could be a victim outside the "purposes of the statute" in question.⁵⁵

B. *Animal Welfare v. Animal Rights: Abolitionists Challenge the Property-Based System*

While animal advocates have thus far been constrained to litigating within the property-based system, some have attempted to advance an interesting reform. The animal *welfare* movement generally acknowledges an animal's property status and aims to work within existing law.⁵⁶ However, an advocate for animal *rights* argues to revolu-

⁴⁸ See e.g. *Morgan v. Kroupa*, 702 A.2d 630, 633 (Vt. 1997) ("[M]odern courts have recognized that pets generally do not fit neatly within traditional property law principles. '[A] pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.'" (internal citation omitted)).

⁴⁹ See e.g. *Burgess v. Taylor*, 44 S.W.3d 806 (Ky. App. 2001) (upholding an award of \$125,000 in damages for intentional infliction of emotional distress against the boarders of a plaintiff's horses when those boarders sold her horses off to slaughter).

⁵⁰ *State v. Nix*, 283 P.3d 442 (Or. App. 2012).

⁵¹ *Id.* at 443.

⁵² *Id.* at 443–44.

⁵³ *Id.* at 449.

⁵⁴ *Id.* at 448–49.

⁵⁵ *Id.* at 449.

⁵⁶ For a detailed discussion of the differences between the animal rights and animal welfare movements, consult Lubinski, *supra* n. 22, at pt. IV(A)(1) ("Welfarists accept the legal status of other species as property," while "[o]n the other end of the protectionist spectrum are animal rights advocates. Rights advocates seek to first change the fundamental legal status of animals away from mere property towards something closer to personhood.").

tionize the current legal system entirely, by recognizing an animal's inherent rights as an individual.⁵⁷

Professor Gary Francione is one such advocate for the abolitionist approach.⁵⁸ There are many reasons, Professor Francione explains, that a society might exploit animals: killing animals for food is profitable and Americans have long justified the use of animals with cultural and religious arguments regarding human superiority.⁵⁹ Yet the real "culprit" facilitating animal exploitation is not economics or culture, but rather Western legal systems that view animals as property.⁶⁰ So long as an animal is property, a society cannot effectively establish an animal's rights; those rights will always be unfairly balanced against a human's legally superior property interest.⁶¹

Current U.S. law requires only "humane" treatment of animals and generally permits animal suffering so long as it is "necessary."⁶² However, animal rights advocates are working to shift the humane treatment paradigm by writing laws that reflect the inherent rights animals possess as sentient beings.⁶³

Rather than attacking animal abuse within the existing property-based system, the animal rights argument relies on the assumption that a society should litigate crimes against an animal just as that society would litigate crimes against a human victim. For example, People for the Ethical Treatment of Animals (PETA) recently filed suit against SeaWorld, alleging violations of the Thirteenth Amendment of the Constitution, which prohibits involuntary servitude.⁶⁴ Essentially, the suit claimed captive orcas at SeaWorld were slaves, held against their best interests.⁶⁵ The court quickly dismissed the case,⁶⁶ perhaps demonstrating how generally unresponsive U.S. courts are to the per-

⁵⁷ *Id.*

⁵⁸ See generally Francione, *supra* n. 9 (advocating an abolitionist approach to animal rights).

⁵⁹ Gary L. Francione, *Animals as Property*, 2 Animal L. i, i (1996).

⁶⁰ *Id.* at ii.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Sentience is an important concept in animal rights because it refers to a being's ability to experience life. A basic discussion of sentience might compare the concept to consciousness. See generally Colin Allen, *Animal Consciousness*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Winter 2011) (available at <http://plato.stanford.edu/archives/win2011/entries/consciousness-animal> [<http://perma.cc/0gUxbYDhXN2>] (accessed Nov. 16, 2013)) (explaining concepts of "animal consciousness"). Gary Francione argues that all sentient beings, human or nonhuman, have the right to be free of property status. See e.g. Francione, *supra* n. 9 ("The abolitionist approach to animal rights maintains that all sentient beings, humans or nonhumans, have one right: the basic right not to be treated as the property of others.")

⁶⁴ Compl., *Tilikum v. SeaWorld Parks & Ent., Inc.*, 2011 WL 5077854 (S.D. Cal. Oct. 25, 2011) (No. 11 Civ. 2476 JM WMC) [hereinafter *Tilikum* Compl.]; Joanna Zelman, Huffington Post, *PETA's SeaWorld Slavery Case Dismissed by Judge*, http://www.huffingtonpost.com/2012/02/09/peta-seaworld-slavery-_n_1265014.html [<http://perma.cc/0B2buwa2E1R>] (Feb. 9, 2012) (accessed Nov. 16, 2013).

⁶⁵ *Tilikum* Compl. at ¶¶ 1–2.

⁶⁶ Zelman, *supra* n. 64.

sonhood approach. In India, by contrast, the Ministry of Environments and Forests recently advised state governments to “ban dolphinariums and other commercial entertainment” involving captive dolphins.⁶⁷ A government statement on the issue noted that “research had clearly established cetaceans are highly intelligent and sensitive, and that dolphins ‘should be seen as “non-human persons” [with] their own specific rights.’”⁶⁸

Indeed, the argument for personhood is based in scientific research as much as it is in legal theory. Scientists and philosophers from across the world recently met in Canada to announce support for the Declaration of Rights for Cetaceans.⁶⁹ The Declaration is based on years of research, demonstrating that dolphins and other cetaceans have “complex brains and a human-like level of self-awareness.”⁷⁰ The Declaration of Rights for Cetaceans, agreed upon in May of 2010 in Finland, states that every cetacean has a right to life, to freedom of movement, and should not be subject to property status or cruel treatment.⁷¹ Adherence to the Declaration would end the practice of whaling and would prevent people from keeping dolphins or whales in captivity.⁷² On the island of Toshima, Japan, the government declared the dolphins inhabiting its shores to be citizens, fully protected while in its waters.⁷³ In a country where dolphin slaughter has been widely publicized,⁷⁴ this news is a refreshing and interesting look at how citizens internationally are trying to protect animals through the personhood model.

Just as the Declaration of Rights for Cetaceans calls for dolphin and whale personhood, some advocates argue to protect great apes as nonhuman persons. For example, the fictional brief for Evelyn Hart presents a theoretical litigation for the rights of a captive ape.⁷⁵ The

⁶⁷ Saroja Coelho, Deutsche Welle, *Dolphins Gain Unprecedented Protection in India*, <http://dw.de/p/18dQV> [<http://perma.cc/0R4U7o4rbeS>] (May 24, 2013) (accessed Nov. 16, 2013).

⁶⁸ *Id.*

⁶⁹ BBC News, *Dolphins Deserve Same Rights As Humans, Say Scientists*, <http://www.bbc.co.uk/news/world-17116882> [<http://perma.cc/0jxidTkyHR>] (Feb. 21, 2012) (accessed Nov. 16, 2013).

⁷⁰ *Id.*

⁷¹ The Helsinki Group, *Declaration of Rights for Cetaceans: Whales and Dolphins* (May 22, 2010) (available at http://www.cetaceanrights.org/pdf_bin/helsinki-group.pdf [<http://perma.cc/0yfsvs7g1Eu>] (accessed Nov. 16, 2013)).

⁷² BBC News, *supra* n. 69.

⁷³ Elsa Nature Conservancy, *Let's Protect the Dolphins of Toshima Island!*, <http://en.elsaenc.net/action/toshima-island/> [<http://perma.cc/0WJPH4WRGgH>] (Sept. 1, 2012) (accessed Nov. 16, 2013).

⁷⁴ See e.g. Justin McCurry, *Dolphin Slaughter Turns Sea Red as Japan Hunting Season Returns*, *The Guardian* (Sept. 14, 2009) (available at <http://www.guardian.co.uk/world/2009/sep/14/dolphin-slaughter-hunting-japan-taiji> [<http://perma.cc/0CBhTDY-uHxw>] (accessed Nov. 16, 2013)) (“Taiji’s annual cull of bottlenose dolphins and pilot whales continues despite growing international condemnation.”).

⁷⁵ Lee Hall & Anthony Jon Waters, *From Property to Person: The Case of Evelyn Hart*, 11 *Seton Hall Const. L.J.* 1 (2000).

article begins with a preface explaining the history and fluidity of the term “person” in the U.S.; corporations are now considered legal persons, while in recent history some humans were not.⁷⁶ The brief essentially argues that our scientific and moral understanding of the ape demands we extend protections to her as a “person” under the Fifth, Eighth, Thirteenth, and Fourteenth Amendments to the Constitution.⁷⁷ The model brief is a revolutionary attempt to explain the legal case for great ape personhood. Though theoretically interesting, the brief is, alas, simply a scholarly article.

Steven Wise, an active animal rights attorney, wants to make theoretical briefs like Evelyn’s a reality.⁷⁸ To that end, he founded the Center for the Expansion of Fundamental Rights and the Nonhuman Rights Project (NhRP).⁷⁹ Wise believes animals have the right to bodily liberty and integrity.⁸⁰ Concerned that too few activists have taken a jurisprudential approach to the fight for animal rights, Wise implemented a plan to establish common law legal rights for animals by bringing strategic suits in sympathetic jurisdictions.⁸¹ The Nonhuman Rights Project recently filed a habeas corpus petition on behalf of a captive ape named Kiko; the petition was denied, but Wise vowed to continue the groundbreaking effort to move forward with his affront against animal “thinghood.”⁸²

III. THE CURRENT LEGAL STATUS OF GREAT APES IN THE U.S.

Apes in the U.S. are indeed considered *things*. Like all animals in the U.S., apes are property.⁸³ Americans use apes as property in medical research facilities and zoos, and trade apes for private possession as pets.⁸⁴ One may also find apes in sanctuaries across the U.S.⁸⁵

⁷⁶ *Id.* at 1.

⁷⁷ *Id.* at 6.

⁷⁸ Russell, *supra* n. 13.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Transcr., *The Nonhuman Rights Project, Inc. v. Presti*, http://www.nonhumanrightsproject.org/wp-content/uploads/2013/12/Transcript_of_Oral_Argument-_Niagara_County_12-9-13.pdf [<http://perma.cc/S2ZB-2B77>] (N.Y. Dec. 9, 2013) (No. 151725) (Dec. 19, 2013) (accessed Dec. 30, 2013); see Kevin Conlon, CNN, *Chimpanzee Personhood Effort Fails First Legal Tests in New York*, <http://www.cnn.com/2013/12/09/us/new-york-chimps-personhood/> [<http://perma.cc/Y2HZ-GFX9>] (Dec. 10, 2013) (accessed Dec. 30, 2013) (“The group says it plans to file more lawsuits across the country on behalf of captive animals ‘who are scientifically proven to be self-aware and autonomous,’ such as elephants, dolphins, and whales.”).

⁸³ Coate, *Overview of the Legal Control of Apes*, *supra* n. 14.

⁸⁴ Symposium, *The Evolving Legal Status of Chimpanzees*, 9 Animal L. 1 (2003).

⁸⁵ The Chimpanzee Health Improvement Maintenance and Protection (CHIMP) Act dictates regulations for retiring and caring for chimpanzees “no longer needed” for federally funded medical research, and establishes a sanctuary for federal retired chimpanzees. 42 C.F.R. §§ 9.1–9.13 (2012).

Federal and state laws alike govern great apes, but the protections these laws afford often fail. Animal welfare and animal rights activists both recognize that there are flaws in the system; they simply disagree over the best way to fix these flaws. A careful understanding of existing great ape law is important in deciding how best to improve it.

A. *Great Apes in the Endangered Species Act*

Enacted in 1973, the Endangered Species Act (ESA) contains provisions that implement U.S. obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)⁸⁶ and regulates the treatment of apes once they enter the U.S.⁸⁷ The ESA identifies and protects animals that the U.S. Fish and Wildlife Service (FWS) deems “threatened” or “endangered.”⁸⁸ Because the FWS identifies most apes as “endangered,” they are theoretically afforded the highest level of protection.⁸⁹

The ESA generally states that it is illegal for any person to import, export, take, or conduct any interstate or foreign commercial transactions involving the transfer of ownership of endangered great apes.⁹⁰ For the purposes of this statute, the term “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct” with regard to an endangered animal.⁹¹ This statute makes it illegal not only to kill or maliciously injure an ape, but also to keep an ape in “inadequate, unsafe or unsanitary conditions.”⁹² In fact, it is illegal to even possess any animal that has been the victim of a “taking.”⁹³

While the ESA’s strong wording implies high-level protection for great apes in the U.S., there are fatal exceptions to the rules. For instance, if an ape was held in captivity for noncommercial use at the time the FWS listed it as endangered, then it is still legal to import or export that animal for any noncommercial purpose.⁹⁴ The “noncommercial purpose” limitation only protects the ape from being sold for profit—not from then being used in a for-profit manner (for instance,

⁸⁶ Convention on International Trade in Endangered Species of Wild Fauna and Flora (Mar. 3, 1973), 27 U.S.T. 1087 (available at <http://www.cites.org/eng/disc/E-Text.pdf> [<http://perma.cc/0599B6sR6Rr>] (accessed Nov. 16, 2013)) [hereinafter CITES].

⁸⁷ See generally 16 U.S.C. §§ 1531–1544 (2006) (outlining the regulations of the Endangered Species Act).

⁸⁸ Hanna Coate, *Overview of Great Apes under the Endangered Species Act*, Animal Leg. & Historical Ctr., http://www.animallaw.info/articles/great_apes/ovusgafdesa.htm [<http://perma.cc/04kWPHov5km>] (2011) (accessed Nov. 16, 2013).

⁸⁹ *Id.*

⁹⁰ 16 U.S.C. § 1538(a)(1).

⁹¹ *Id.* at § 1532(19).

⁹² Hanna Coate, Animal Leg. & Historical Ctr., *Detailed Discussion of Great Apes under the Endangered Species Act*, http://www.animallaw.info/articles/great_apes/ddusgafdesa.htm [<http://perma.cc/0VvrBwtiQrq>] (2011) (accessed Nov. 16, 2013).

⁹³ 16 U.S.C. § 1538(a)(1)(D).

⁹⁴ *Id.* at § 1538(b)(1).

in a roadside zoo or for television filming).⁹⁵ Other exceptions include the “captive-bred” exception, allowing one to take captive-bred endangered apes so long as it is for the “propagation of the species,” as determined by the FWS on a case-by-case basis.⁹⁶ The FWS may even issue an endangered species permit that allows the holder to “take” an endangered ape if it is incidental to an otherwise lawful act.⁹⁷

Aside from the ESA exceptions, some apes in the U.S. lacked protection because they were not even considered endangered. In November 1987, the Humane Society of the United States petitioned the FWS to change the classification of all chimpanzees from “threatened” to “endangered.”⁹⁸ Instead, to facilitate medical research, the FWS decided to classify only wild chimpanzees as endangered; captive chimpanzees remained merely “threatened,” leaving them still vulnerable in laboratories and the entertainment industry.⁹⁹ This is known as “split-listing”—the FWS split one population of chimpanzees from the rest, listing the same species under different statuses.¹⁰⁰ Chimpanzees are the only species the FWS treated in this manner.¹⁰¹ Split-listing excluded captive chimpanzees from the same high-level protection afforded to those in the wild. Because all U.S. chimpanzees are indeed captive, split-listing translated to a lack of protection for chimpanzees residing in the U.S.

The ESA exceptions are complex and can be overwhelming. The bottom line is that there were no restrictions on the use or possession of captive chimpanzees that were in the U.S. as of 1976, or were captive-bred in the U.S. thereafter.¹⁰² Thus, medical research facilities were free to treat chimpanzees in a way that the ESA otherwise prohibited. Part V(C)(1) of this Note discusses the current status of split-listing, and the most recent petition to end it.

B. *Great Apes in the Animal Welfare Act*

The ESA is not the only federal law governing the lives of great apes in the U.S.; Congress passed the Animal Welfare Act (AWA) in 1966.¹⁰³ The U.S. Department of Agriculture (USDA)’s Animal and Plant Health Inspection Service (APHIS) is responsible for administer-

⁹⁵ *Id.* at § 1532(2).

⁹⁶ *Id.* at § 1539(a)(1)(A).

⁹⁷ *Id.* at § 1539(a)(1)(B).

⁹⁸ 53 Fed. Reg. 9460, 9460 (proposed Mar. 23, 1988).

⁹⁹ Coate, *Overview of Great Apes under the ESA*, *supra* n. 88.

¹⁰⁰ *Id.*

¹⁰¹ Press Release, Humane Socy. of the U.S., *Statement on the U.S. Fish and Wildlife Service Finding on Chimpanzees* (Aug. 31, 2011) (available at http://www.humanesociety.org/news/press_releases/2011/08/statement_fws_chimpanzees_finding_esa_083111.html [<http://perma.cc/0nRzf1P32D>] (accessed Nov. 16, 2013)).

¹⁰² 50 C.F.R. § 17.40(c) (2012).

¹⁰³ 7 U.S.C. §§ 2131–2159 (2012).

ing the AWA standards and regulations.¹⁰⁴ The AWA regulates the care and handling of warm-blooded animals that are not used for food or other agricultural purposes (i.e., the AWA does not regulate the care and handling of farm animals).¹⁰⁵ Accordingly, the AWA regulates the use of great apes. With respect to nonhuman primates, the AWA requires research facilities to promote the “psychological well-being” of the primate and stipulates that they should “avoid or minimize discomfort, distress, and pain” to primates unless there is a scientifically justified reason.¹⁰⁶

The AWA is exactly what the name implies: an act for animal *welfare*—certainly not for animal *rights*. The Act is written in terms relevant to humans: to “protect the owners of animals from . . . theft” and to “assure the humane treatment of animals during transportation in commerce.”¹⁰⁷ The Act refers to humane treatment, but ultimately places “scientific necessity” above an animal’s interests.¹⁰⁸ And scientific necessity, of course, is determined by human needs.

Under the Act, the federal government may regulate the use of great apes in research facilities.¹⁰⁹ The 1985 amendments to the AWA mandate that research facilities provide for the psychological and environmental needs of captive apes.¹¹⁰ However, research facility guidelines are vague, simply stating that standards apply according to “generally accepted professional and husbandry practices” considered appropriate for each species.¹¹¹ Although the provisions provide minimum requirements for housing, sanitation, food, water, and shelter, they are certainly minimal. For instance, space regulations once required simply enough room for the ape to make “normal postural adjustments.”¹¹² Later revisions added calculation tables designed to ensure more exacting standards, but still left the apes enclosed in relatively small cages; a footnote to the provisions contemplated the need to address instances where the primate’s calculated cage size still prevented normal postural adjustment.¹¹³ Furthermore, the standards for psychological well-being are weak, at best. With veterinarian or administrative approval, facilities may lawfully restrain an ape for health reasons in a straightjacket or other device for over twelve hours a day, provided the ape is given at least one hour of free exercise.¹¹⁴

¹⁰⁴ USDA/APHIS, *Animal Care Factsheet* (Nov. 2012) (available at http://www.aphis.usda.gov/publications/animal_welfare/2012/animal_welfare_act_english.pdf [<http://perma.cc/0R8HWvGALmN>] (accessed Nov. 16, 2013)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ 7 U.S.C. § 2131.

¹⁰⁸ *Id.* at § 2143(a)(3)(D)(i).

¹⁰⁹ *Id.* at § 2143; 9 C.F.R. §§ 3.75–3.81 (2012).

¹¹⁰ Improved Standards for Laboratory Animals Act, Pub. L. No. 99-198, § 1752(2)(b), 99 Stat. 1645 (1985).

¹¹¹ 9 C.F.R. § 3.76.

¹¹² *Id.* at § 3.80(b)(1)(i).

¹¹³ *Id.* at § 3.80(b)(2) n. 3.

¹¹⁴ *Id.* at § 3.81(d).

Even then, if continuous restraint is required by the research proposal for which the primate is being held, the AWA excuses even the one hour of free exercise.¹¹⁵

Overall, the AWA provides some protection to great apes, but the protection is vague and generally minimal. Across the board, great apes require more substantial and nuanced federal legislation that holds up against the dangers they face.

C. *Great Apes in State Law*

The AWA regulates research facilities, but does not address keeping apes as pets or other private-use scenarios; these rules often come from state or local laws.¹¹⁶ While inhabitants of all states must abide by federal laws such as the ESA and the AWA, those looking to own great apes for any purpose must also look to state and local rules for guidance. States legislate in the form of both dangerous wild animal laws and anti-cruelty laws.

For example, Florida has both a dangerous wild animal law and an anti-cruelty statute applicable to great apes. The two laws serve different purposes. Florida classifies great apes as dangerous wild animals;¹¹⁷ therefore, Floridians may not own apes as pets and must have a permit to possess apes for any commercial purpose.¹¹⁸ The state designs dangerous wild animal laws to protect the interests of society as a whole rather than to protect the animal itself. In contrast, Florida's anti-cruelty law applies to "every living dumb creature" and prohibits cruelty, which is defined as any "act, omission, or neglect whereby unnecessary or unjustifiable pain" is caused to the animal, except for purposes of "medical science."¹¹⁹ The anti-cruelty statute regulates directly for the interests of the animal, but only so far as it does not interfere with any human interest.¹²⁰ Like federal laws governing great ape possession, Florida's state laws are primarily concerned with human interests.

Missouri statutes demonstrate how these state laws work together with federal laws. Like Florida, Missouri classifies nonhuman primates as "dangerous wild animals."¹²¹ Unless registered with local law enforcement, one may only keep a dangerous wild animal in a "zoological park, circus, scientific, or educational institution, research laboratory, veterinary hospital, or animal refuge."¹²² This statute indicates

¹¹⁵ *Id.*

¹¹⁶ Coate, *Overview of Great Apes under the ESA*, *supra* n. 88.

¹¹⁷ Fla. Admin. Code Ann. r. 68A-6.002 (2012); Fla. Fish & Wildlife Conserv. Commn., *Captive Wildlife Licenses and Permits*, <http://myfwc.com/license/captive-wildlife/#class1> [<http://perma.cc/06DQA3zBS4f>] (accessed Nov. 16, 2013) ("Class I wildlife are those that pose a significant danger to people.").

¹¹⁸ Fla. Admin. Code Ann. r. 68A-6.002.

¹¹⁹ Fla. Stat. Ann. § 828.02 (West 2012).

¹²⁰ *Id.*

¹²¹ Mo. Rev. Stat. Ann. § 578.023 (West 2011).

¹²² *Id.*

that so long as the owner registers the animal with local law enforcement, a Missourian is free to keep an ape as a pet. However, while Missouri does not explicitly prohibit the import, export, or possession of apes,¹²³ it is still illegal to import, export, or possess an endangered species under the ESA without an FWS permit.¹²⁴ Because the FWS does not issue permits to conduct those activities for pet ownership, a Missourian may not legally obtain an ape for private possession as a pet.¹²⁵ Here, federal and state laws work together to protect apes from being held in private homes.

Like Florida, Missouri has both a dangerous wild animal law as well as an anti-cruelty statute.¹²⁶ Missouri's anti-cruelty statute mandates adequate care and prohibits the intentional killing or injury of an animal.¹²⁷ Notably, however, the statute exempts "bona fide scientific experiments" from such regulations.¹²⁸ This exemption makes the statute comparable to other state and federal laws; great ape protection ends where human need begins.

State laws, like federal laws, legislate the use of great apes in terms of human interests. However, state law interaction with federal law can yield some protections for apes in the U.S. Undoubtedly though, existing state and federal laws leave some apes in dangerous and harmful situations.

D. *The Resulting Life Experience for Great Apes*

How do current state and federal laws affect great apes in daily life? How do the ESA, the AWA, and state law look in practice? Understanding the practical effect of existing law is essential to an accurate evaluation of recent efforts to improve it.

Apes are empathetic, complex, sensitive, and highly intelligent creatures. To illustrate, Dr. Frans de Waal wrote of a bonobo named Kuni who witnessed a bird hit the glass of her enclosure.¹²⁹ Kuni gently handled the stunned creature, comforting it.¹³⁰ When the bird failed to fly away, she enacted a plan.¹³¹ Kuni carried it as she climbed up the tallest tree in her enclosure and hung from the branches, bird in hand.¹³² Carefully, she unfolded the bird's wings, spreading them

¹²³ *Id.*

¹²⁴ See 16 U.S.C. § 1538 (prohibiting the importation, exportation, or possession of any endangered species listed under 16 U.S.C. § 1533).

¹²⁵ For a more detailed discussion of this specific example, see Hanna Coate, Animal Leg. & Historical Ctr., *Detailed Discussion of Missouri Great Ape Laws*, http://www.animallaw.info/articles/great_apes/ddusgamissouri.htm [<http://perma.cc/0wc3ahYWWGW>] (2011) (accessed Nov. 16, 2013).

¹²⁶ Mo. Rev. Stat. Ann. §§ 578.005–578.188.

¹²⁷ *Id.* at § 578.012.

¹²⁸ *Id.* at § 578.007.

¹²⁹ Frans de Waal, *Our Inner Ape: A Leading Primatologist Explains Why We Are Who We Are* 2 (Riverhead Bks. 2005).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

wide, and sent it gliding out of the enclosure like a toy airplane.¹³³ When it landed motionless, just short of freedom, Kuni kept watch over the bird all day until it finally took flight.¹³⁴ Kuni empathized with the bird on an impressively complex level; she knew not only that it needed help, but also that this animal was very different from her. The way Kuni tailored her assistance to the bird's needs demonstrates a profound sense of self and an understanding of the world around her.¹³⁵ Apes live as property at the mercy of their human owners, yet observations like these indicate that they can comprehend their captive situations.

In the U.S., great apes are generally held captive for either biomedical research or entertainment purposes.¹³⁶ Complex federal and state laws may or may not protect captive apes in these situations, depending upon their species, country of origin, and the use for which they are held.¹³⁷

In the entertainment industry, chimpanzees and other great apes are prevalent.¹³⁸ Since the FWS recognizes entertainment as a legitimate activity, the split-listing of chimpanzees under the ESA made captive chimpanzees in the entertainment industry especially vulnerable.¹³⁹ Held in captivity for the fleeting amusement of human audiences, these individuals go through intensive trainings that too often involve serious abuse.¹⁴⁰ Many trainers forego affectionate training methods to instead establish physical dominance over the animal.¹⁴¹ Severe beatings are not unheard of, with trainers striking chimpanzees repeatedly over the head with an iron bar to bully them into "abject submission."¹⁴² Undercover activists working at training facilities report instances of repeated, unprovoked beatings and the use of electric cattle prods to force chimpanzees to perform.¹⁴³ While some may argue that these are accounts of isolated incidents, this argument fails

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ De Waal, *supra* n. 129, at 2.

¹³⁶ See Press Release, Arcus Foundation, *Arcus Welcomes U.S. Agency Decision to Release Lab Chimps* (June 27, 2013) (available at http://www.arcusfoundation.org/conservation/newsroom/all_news/arcus_welcomes_us_agency_decision_to_release_lab_chimps [<http://perma.cc/02bD8E3EN3N>] (accessed Nov. 16, 2013)) ("Roughly 1,900 chimpanzees are held in captivity in the U.S. with 864 held in federal and private research laboratories; 286 used for entertainment or as breeders to fuel the private pet trade; 734 are in accredited zoos and sanctuaries.")

¹³⁷ See *supra* pt. III(A)–(C) (discussing the protection of great apes under the ESA and the AWA, and certain state laws).

¹³⁸ See Press Release, *supra* n. 136 (stating that "286 [chimpanzees are] used for entertainment or as breeders to fuel the private pet trade").

¹³⁹ Lorraine L. Fischer, Student Author, "No Animals Were Harmed . . .": *Protecting Chimpanzees from Cruelty behind the Curtain*, 27 *Hastings Commun. & Ent. L.J.* 405, 431 (2005).

¹⁴⁰ *Id.* at 412 n. 34.

¹⁴¹ *Id.* at 414.

¹⁴² *Id.*

¹⁴³ *Id.* at 415–16.

to acknowledge the sometimes fatal consequences of the abuse.¹⁴⁴ On one movie set, an orangutan's trainer beat him severely for "not paying attention."¹⁴⁵ The animal futilely tried to protect himself from the blows by hugging his body and curling into a ball; he ultimately died a month later of cardiac arrest.¹⁴⁶ Because so much of this abuse occurs behind closed doors, it often goes unnoticed and unregulated by state anti-cruelty statutes.

Many great apes in the U.S. live out their lives not in the entertainment industry, but in medical research. Though more highly regulated, research facilities are no less dangerous for apes. In 2011, a video went viral in which a group of chimpanzees, locked up for three decades and infected with HIV, saw the sun for the first time.¹⁴⁷ In the video, the chimpanzees hug each other, smiling and laughing as they leave their enclosure for the first time in thirty years.¹⁴⁸ In captivity, U.S. apes are routinely infected with disease, housed in tiny enclosures, and kept isolated from others for large portions of the day.¹⁴⁹ Apes that have endured experimentation often display signs of abnormal behavior by pulling out their own hair, biting themselves, and pacing.¹⁵⁰ Even after retiring from medical research, apes display symptoms of post-traumatic stress, suffering from violent screaming fits or self-mutilating behavior.¹⁵¹

Far from ideal, the difficult life experience of great apes in the U.S. is inconsistent with our scientific understanding of these vulnerable creatures and with the explicit conservation goals of U.S. laws such as the ESA.¹⁵² Mahatma Gandhi is often quoted as saying that the greatness of a nation can be judged by the way it treats animals.¹⁵³ Perhaps to that end, animal advocates have recently proposed legislation to afford great apes better treatment in the U.S.

E. Recent Legislation to Strengthen Existing Laws

Great apes in the entertainment industry, in medical research, and in private zoos face grave dangers. Recent legislation attempts to

¹⁴⁴ *Id.* at 416.

¹⁴⁵ Fischer, *supra* n. 139, at 416.

¹⁴⁶ *Id.* at 416 n. 49.

¹⁴⁷ Jeff Mackey, The PETA Files, *Chimpanzees in Sun for First Time in 30 Years*, <http://www.peta.org/b/thepetafiles/archive/2011/09/08/chimpanzees-see-sunlight.aspx> [<http://perma.cc/0VRvve1YidL>] (Sept. 8, 2011) (accessed Nov. 16, 2013).

¹⁴⁸ *Id.* at Video 0:12 to 0:32.

¹⁴⁹ Justin Goodman, The Hill, *Research on Chimpanzees Must End*, <http://thehill.com/opinion/op-ed/180037-research-on-chimpanzees-must-end> [<http://perma.cc/0CBMxLD1415>] (Sept. 7, 2011) (accessed Nov. 16, 2013).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See *infra* pt. V(C)(1) (discussing the petition to end the split-listing of chimpanzees).

¹⁵³ T. N. Khoshoo & John S. Moolakkattu, *Mahatma Gandhi and the Environment: Analyzing Gandhian Environmental Thought* 27 (rev. ed., Energy & Resources Inst. 2009).

strengthen protection against these dangers and to bolster existing laws such as the ESA and the AWA. The Great Ape Protection and Cost Savings Act of 2011 (GAPCSA) and the petition to end split-listing both work towards this end.

Unlike other species, the FWS split chimpanzees into two populations: captive and wild.¹⁵⁴ To facilitate medical testing, the FWS listed captive chimpanzees as “threatened”—permitting more invasive taking behavior.¹⁵⁵ Pursuant to Section 4 of the ESA,¹⁵⁶ the Humane Society of the United States (HSUS) petitioned the FWS to demand an end to split-listing of captive chimpanzees.¹⁵⁷ On September 1, 2011, the FWS granted a review of the threatened status, finding that the petition “present[ed] substantial scientific or commercial information indicating that listing all chimpanzees as endangered may be warranted.”¹⁵⁸

Unlike the petition, which sought to reform the interpretation of existing law, the GAPCSA proposes to establish entirely new law applicable to great apes. Although the GAPCSA applies to all great apes, not just chimpanzees, it only targets great apes being held for research.¹⁵⁹

The GAPCSA would prohibit any person or institution from conducting “invasive research” on great apes, breeding great apes for purposes of invasive research, and transporting great apes for invasive research.¹⁶⁰ The GAPCSA would retire all federally owned great apes used in medical research no later than three years after the enactment of the bill.¹⁶¹ Invasive research, as defined by the bill, refers to any research that may cause death, injury, pain, distress, fear, or trauma to a great ape.¹⁶² Invasive research also includes drug or substance exposure, any research involving physical mutilation or penetration, and any isolation or experimental manipulation that is otherwise detrimental to the health or psychological well-being of the animal.¹⁶³ The bill provides a penalty of up to \$10,000 for any violation of the Act, and counts each day in violation of the Act as a separate, punishable offense.¹⁶⁴ Introduced in the House of Representatives in 2011 by a

¹⁵⁴ See *supra* nn. 99–102 and accompanying text (discussing the split-listing of chimpanzees).

¹⁵⁵ See *supra* pt. III(A) (discussing great apes’ “threatened” status under the ESA).

¹⁵⁶ See 16 U.S.C. § 1533 (providing the listing petition process and guidelines to recommend changing the status of a species).

¹⁵⁷ HSUS, *Petition*, *supra* n. 16.

¹⁵⁸ 90-Day Finding on a Petition to List All Chimpanzees (*Pan troglodytes*) as Endangered, 76 Fed. Reg. 54423 (proposed Sept. 1, 2011).

¹⁵⁹ GAPCSA, Sen. 810, 112th Cong. (Apr. 13, 2011).

¹⁶⁰ *Id.* at § 4.

¹⁶¹ *Id.* at § 5.

¹⁶² *Id.* at § 3.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at § 6.

Republican—and former biomedical researcher—the bill had strong bipartisan support.¹⁶⁵

The bill showed substantial promise in 2012 sessions, yet Congress failed to enact it. The Senate Committee on Environment and Public Works held hearings on the bill, and recommended an amendment that “establishes a process for future considerations of invasive research [on apes] necessary to address a new, emerging, or reemerging threat.”¹⁶⁶ Ultimately, although the bill was indeed placed on the legislative calendar, a vote was never called before the end of the 2011–2012 session.¹⁶⁷

IV. GREAT APE PROTECTION OUTSIDE THE U.S.

Proposals like the split-listing petition or The Great Ape Protection and Cost Savings Act of 2011 (GAPCSA) are not unique to the U.S. In fact, great ape protection is an international trend in which the U.S. is lagging behind.

As introduced in 2008, the Great Ape Protection Act (originally, GAPA) stated, as part of its findings and purpose, that “Australia, Austria, Japan, the Netherlands, New Zealand, Sweden, and the United Kingdom have banned or severely limited experiments on great apes and several other countries and the European Union are considering similar bans as well.”¹⁶⁸ Other developed countries have largely surpassed the U.S. in recognizing rights for nonhuman primates. But as reintroduced in 2009, the bill made no reference to foreign legislation on animal welfare.¹⁶⁹ By 2011, the bill’s name had changed to include fiscally attractive “cost savings” language, and the findings and purpose section was refined to focus on the administrative burden of managing great apes for research.¹⁷⁰ It described the unnecessary nature of great ape testing and emphasized the costs to the federal government.¹⁷¹ While it retains some references to “moral” responsibilities, the bill has evolved to reflect the bottom-line concerns of U.S. legislative culture.¹⁷²

¹⁶⁵ GAPCSA, H.R. 1513, 112th Cong. (Apr. 13, 2011); Press Release, Humane Socy. of the U.S., *Federal Bill to End Invasive Research on Chimpanzees Introduced in Congress* (Apr. 13, 2011) (available at http://www.humanesociety.org/news/press_releases/2011/04/federal_bill_research_chimpanzees_introduced_041311.html [<http://perma.cc/0vAVTJxVmvsl>] (accessed Nov. 16, 2013)).

¹⁶⁶ Sen. Rpt. 112-242 at 2, 5 (Nov. 30, 2012).

¹⁶⁷ Lib. Cong., *THOMAS, S. 810*, <http://thomas.loc.gov>; *select* Bills, Resolutions, *select* Search Bill Summary & Status, *select* 112th Congress, *search* “Great Ape Protection and Cost Savings Act,” *select* S. 810, *select* All Information [<http://perma.cc/0SxoNG-gYvYd>] (accessed Nov. 16, 2013) (reporting the latest major action as “11/30/2012 Placed on Senate Legislative Calendar”).

¹⁶⁸ Great Ape Protection Act, H.R. 5852, 110th Cong. (Apr. 17, 2008).

¹⁶⁹ Great Ape Protection Act of 2009, H.R. 1326, 111th Cong. (Mar. 5, 2009).

¹⁷⁰ GAPCSA, Sen. 810, 112th Cong. at §§ 1–2.

¹⁷¹ *Id.* at § 2.

¹⁷² *Id.*

The 2008 GAPA finding was correct, though; many foreign countries are considering legislation to strengthen great ape protection. The European Commission (the executive body of the European Union (EU)) sets forth objectives for policy in EU member countries and proposes directives for the European Parliament to enact.¹⁷³ One such proposal, adopted in November of 2008, sought to revise the previous animal welfare directives to more strictly minimize the number of animals used in scientific research and “significantly improve the treatment” of those animals still subject to testing.¹⁷⁴ “Directive 86/609/EEC is the central legislative act of the European Community aiming at harmonising Member States’ rules protecting animals used for experimental and other scientific purposes. It was adopted in 1986 and has never been significantly changed.”¹⁷⁵

The November proposal sought to change this directive by requiring ethical evaluations of the necessity of any proposed animal research.¹⁷⁶ It would also require member states to “ensure the improvement of breeding, accommodation and care, and of methods used” in procedures to eliminate or reduce any possible pain, suffering, or distress to the animals.¹⁷⁷ This language is reminiscent of language in the U.S. Animal Welfare Act (AWA).¹⁷⁸

Furthermore, the proposal included a “ban on the use of great apes (chimpanzees, bonobos, gorillas and orangutans) in scientific procedures.”¹⁷⁹ However, it would still permit conducting research on great apes “for the conservation of the species itself,” and “if necessary in the case of a serious pandemic affecting the human population in Europe.”¹⁸⁰ These limitations on the proposed ban are also very similar to U.S. legislative language; compare, for instance, the foregoing provisions with language in the most recent GAPCSA proposals.¹⁸¹ Both suggest a broad ban on great ape research, but retain exceptions to comfort those concerned about medical emergencies or the necessity

¹⁷³ European Commn., *About the European Commission*, http://ec.europa.eu/about/index_en.htm [<http://perma.cc/0kqcfb7NxzE>] (updated July 11, 2013) (accessed Nov. 16, 2013).

¹⁷⁴ European Commn., *Animals Used for Scientific Purposes*, http://ec.europa.eu/environment/chemicals/lab_animals/proposal_en.htm [<http://perma.cc/0bBAkJBz9>] (updated Sept. 10, 2013) (accessed Nov. 16, 2013).

¹⁷⁵ Commn. of the European Communities, *Summary of the Impact Assessment 2* (Commn. Staff Working Paper Brussels SEC 2411/2, 2008) (available at http://ec.europa.eu/environment/chemicals/lab_animals/pdf/IA%20summary.pdf [<http://perma.cc/0SH2AanVQdV>] (accessed Nov. 16, 2013)) [hereinafter *Summary of Impact*].

¹⁷⁶ *Id.* at 3.

¹⁷⁷ *Animals Used for Scientific Purposes*, *supra* n. 174.

¹⁷⁸ See *supra* pt. III(B) (discussing the Animal Welfare Act’s requirement for research facilities to promote “psychological well-being” of primates and to avoid “discomfort, distress, or pain”).

¹⁷⁹ *Animals Used for Scientific Purposes*, *supra* n. 174.

¹⁸⁰ *Id.*

¹⁸¹ See GAPCSA, Sen. 810, 112th Cong. at § 2(g) (exempting medical care performed for the “well-being of the great ape”).

of research.¹⁸² Exceptions like these strengthen great ape protection proposals by conversely weakening opponents' arguments about scientific necessity and rendering those concerns increasingly irrelevant.

The Commission's report on the impact of the proposed directive identified four main areas of concern: economic, animal welfare, scientific, and public/societal.¹⁸³ The report's economic concern addressed the possible competitive disadvantages facing member countries with higher animal welfare standards.¹⁸⁴ These disadvantages, similar to those reflected in and expressed about GAPCSA proposals,¹⁸⁵ include higher prices for goods, regulations causing project variance and delay, difficult working conditions for researchers, challenges to horizontal mobility, and increased risk of activist criminality.¹⁸⁶ While U.S. legislators recognize animal welfare concerns and scientific problems, the Commissioner's report also, interestingly, highlights public/societal concerns that American legislators do not appear to address extensively. The Commissioner's report states, "Public/societal problems occur due to the increasing dissociation between weak legislation and strong public concern, evolving from changed ethical and societal values and increased public interest in the acceptability of animal testing."¹⁸⁷ In the U.S., by contrast, there is perhaps a stronger cultural subset that rejects arguments regarding ethical animal treatment; "public interest in the acceptability of testing" does not appear to be as strong a concern in the U.S. The European Commission not only responded to concerns about economics, animal welfare, and scientific problems—to which U.S. culture relates—but also responded to concerns about public reputation, and the need to update laws to reflect changing societal standards.

Specifically to great apes, the Commission's report evaluated two options to improve the existing directive: (1) a shift away from research using wild-caught primates, instead emphasizing the use of second-generation (or "purpose-bred"/"captive-bred") primates; and (2) a strict ban of research on great apes, with few exceptions.¹⁸⁸ The first option is irrelevant to current U.S. proposals; testing on U.S. primates is already largely conducted on second-generation, captive-bred animals. In fact, that is the very loophole that the split-listing petition addressed.¹⁸⁹ However, the second option evaluated is reminiscent of

¹⁸² See *Summary of Impact*, *supra* n. 175 (noting the importance of efficient and competitive research).

¹⁸³ *Id.* at 2.

¹⁸⁴ *Id.*

¹⁸⁵ See GAPCSA, H.R. 1513, 112th Cong. at § 2(a)(6) (stating that "maintaining great apes in laboratories costs the Federal Government more than caring for great apes in suitable sanctuaries").

¹⁸⁶ *Summary of Impact*, *supra* n. 175, at 2.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 4.

¹⁸⁹ See *supra* pt. III(E) (splitting chimpanzees into two populations—captive and wild—facilitates medical testing while avoiding a violation of the Endangered Species Act).

GAPCSA's prohibition on conducting invasive research on great apes.¹⁹⁰ After weighing the benefits and public costs, the European Commission concluded that both options were justified and worth endorsing.¹⁹¹

Accordingly, on September 22, 2010, the European Parliament promulgated a version of the recommended directive.¹⁹² Among other things, it states,

The use of great apes, as the closest species to human beings with the most advanced social and behavioural skills, should be permitted only for the purposes of research aimed at the preservation of those species and where action in relation to a life-threatening, debilitating condition endangering human beings is warranted, and no other species or alternative method would suffice in order to achieve the aims of the procedure. The Member State claiming such a need should provide information necessary for the Commission to take a decision.¹⁹³

The successfully adopted language—suggesting research on great apes only for the preservation of the species, or in emergency situations regarding human health crises—echoes language in the AWA¹⁹⁴ and recent versions of the GAPCSA.¹⁹⁵

By the adoption of Directive 2010/63/EU, many EU member countries were already well on their way to enacting great ape protections. In April of 2003, Sweden's Board of Agriculture and National Board for Laboratory Animals announced new regulations for animals in research.¹⁹⁶ One change exempted great apes and nine species of gibbon apes from use in experiments.¹⁹⁷ Sweden presently allows only non-invasive behavioral studies of those animals.¹⁹⁸ As such, Sweden's regulations on apes in laboratory testing are among the strongest European laws protecting apes.

In a controversial and much-publicized 2008 decision, Spain's lower house of parliament approved a resolution supporting the work of Great Ape Project efforts,¹⁹⁹ becoming the first national government to formally announce support for extending human-like rights to great

¹⁹⁰ See *supra* pt. III(E) (discussing prohibitions on invasive research on great apes).

¹⁹¹ *Summary of Impact*, *supra* n. 175, at 11.

¹⁹² Council Directive 2010/63/EU on the protection of animals used for scientific purposes, OJ L 276/33 (2010) (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:276:0033:0079:EN:PDF> [<http://perma.cc/0TXFTXemw9y>] (accessed Nov. 16, 2013)).

¹⁹³ *Id.* at 35.

¹⁹⁴ 7 U.S.C. § 2143(D).

¹⁹⁵ GAPCSA, H.R. 1513, 112th Cong. at § 4 (prohibiting invasive research).

¹⁹⁶ Press Release, Animal Rights Sweden, *Sweden Bans Experiments on Great Apes and Gibbons* (Apr. 10, 2003) (available at http://www.gibbons.de/main/news/0304sweden_ban.html [<http://perma.cc/0ZKDq9xNw8o>] (accessed Nov. 16, 2013)).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Lisa Abend, *In Spain, Human Rights for Apes*, TIME (July 18, 2008) (available at <http://www.time.com/time/world/article/0,8599,1824206,00.html> [<http://perma.cc/0BsUzhEFvhN>] (accessed Nov. 16, 2013)).

apes.²⁰⁰ Interestingly, around the same time, many Spanish citizens participated in the running of the bulls—which animal rights activists have long criticized as cruel and inhumane.²⁰¹ Why would Spain recognize such progressive rights for great apes, while ignoring the alleged abuse of bulls? Perhaps, like U.S. legislators, the Spanish government is sensitive to the economic impacts of animal law; bullfighting remains a profitable tourist attraction.²⁰² As Pedro Pozas, director of the Spanish branch of the Great Ape Project, stated, “[W]e have to separate our campaign against bullfighting from that of other animal rights because if we don’t, bullfighting will stop the whole thing. They’re too powerful.”²⁰³

In the United Kingdom (U.K.), the established ban on great ape research has faced challenges.²⁰⁴ Colin Blakemore, a professor at Oxford University and outspoken advocate of animal experimentation, says the U.K.’s ban on great ape research “makes no moral sense because it degrades the clear boundary between humans and animals.”²⁰⁵ While admitting there is no current necessity for research on great apes, he expresses concern regarding the implications of blurring “the moral boundaries.”²⁰⁶ Britain outlawed research on great apes (though not all primates) in 1998,²⁰⁷ and British law is unequivocally more protective of great apes than U.S. law. However, dissenting voices remain steadfast with concerns that extending rights to apes degrades human dignity. Views like Professor Blakemore’s exist in the U.S. too; some feel that protecting apes actually endangers humans.²⁰⁸ The British Union for the Abolition of Vivisection calls such arguments “backward-looking,” stating that “the [British] [g]overnment was absolutely right in 1998 to recognise that no great ape should ever be subjected to confinement in a laboratory.”²⁰⁹

Efforts to protect great apes have long been underway outside the EU as well. In 1999, New Zealand passed its Animal Welfare Act prohibiting “research, testing, or teaching involving the use of a non-human hominid” except under strictly limited circumstances of admin-

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Steve Connor, *Scientists ‘Should Be Allowed to Test on Apes’*, *The Independent* (June 3, 2006) (available at <http://www.independent.co.uk/news/science/scientists-should-be-allowed-to-test-on-apes-480902.html> [<http://perma.cc/0xmygsUhvjV>] (accessed Nov. 16, 2013)).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See *infra* nn. 222–223 and accompanying text (noting the argument that equating the rights of apes to the rights of humans will diminish the value of human rights).

²⁰⁹ Connor, *supra* n. 204.

istrative approval.²¹⁰ The Act only allows nonhuman hominid research when it is in the best interests of that species, making no exceptions for the interests of humans and thus preventing human interests from “trumping non-human ones.”²¹¹

V. EFFECTIVELY STRENGTHENING GREAT APE PROTECTION WITHIN THE PROPERTY-BASED ANIMAL LAW SYSTEM

U.S. advocates have much to learn from worldwide efforts to protect apes. Societal attitudes and cultural differences abound, but successful efforts seem to be similarly pragmatic. The majority of foreign efforts to protect apes did not include personhood rhetoric, animal rights arguments, or abolitionist language. This moderate approach is likely deliberate.²¹² For example, New Zealand’s Animal Welfare Act does not highlight the animal rights arguments that its Great Ape Project drafters likely support.²¹³ Rather, the Act was tailored to a society unfamiliar with the concept of granting rights to apes; to include personhood rhetoric would have been a strategic mishap, and possibly a step too far.²¹⁴ Just as Pedro Pazos separates great ape protection efforts from the efforts to end the profitable practice of bullfighting, so too should U.S. legislators proceed cautiously and insulate great ape protection in the U.S. from economic critique.²¹⁵

A. American Society Is Averse to Legal Personhood Arguments

The U.S. may be no more ready for the personhood movement than were New Zealand or the United Kingdom. Americans are a cautious people for whom change is best won slowly. Recall, for example, how explicitly the court dismissed personhood arguments in the recent suit against SeaWorld.²¹⁶ In an interview discussing the dismissal, Valparaiso Law professor Rebecca J. Huss noted that “most people involved in animal advocacy would say if there’s progress, it’s very slow.”²¹⁷ Activists have even compared the slow fight for animal rights to various civil rights efforts in U.S. history.²¹⁸ Despite the many mer-

²¹⁰ *Animal Welfare Act* 1999 (N.Z.), pt. 6 § 85 (available at <http://www.legislation.govt.nz/act/public/1999/0142/latest/DLM49664.html> [<http://perma.cc/0bg6zpN4toW>] (accessed Nov. 16, 2013)).

²¹¹ Rowan Taylor, *A Step at a Time: New Zealand’s Progress toward Hominid Rights*, 7 *Animal L.* 35, 35 (2001).

²¹² *Id.* at 41.

²¹³ *Id.* at 38.

²¹⁴ *Id.* at 41.

²¹⁵ See *supra* nn. 185–186 and accompanying text (discussing political sensitivities to the economic impacts of animal rights legislation).

²¹⁶ Zelman, *supra* n. 64.

²¹⁷ *Id.*

²¹⁸ Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in *Animal Rights: Current Debates and New Directions* 51, 51–52 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

its of extending legal personhood to animals, advocates still face an uphill battle against engrained societal norms.

The greatest obstacle to great ape rights is in the mindsets of men. We are comfortable protecting an ape's welfare as our property, but equating another animal to our level is apparently frightening, seen as a threat to our superiority. Great Ape Project officer Rowan Taylor aptly described this hesitance to promote the rights of great apes when he wrote,

Humans—like bonobos and chimpanzees—are tribal animals. . . . As the civil rights struggles against slavery, racial segregation and apartheid have shown . . . humans will sometimes go to great and even extreme lengths to keep other humans out of their moral and legal tribes. Non-human hominids suffer the additional handicap of being so like us that they invite comparison, while being just different enough to make the comparison unfavorable to them.²¹⁹

Some Americans are afraid that affording an ape the rights inherent to humans will somehow belittle those rights and make them less valuable.²²⁰ The fear is palpable in their rhetoric: “If man is simply a perfection of the ape, then our entire societal structure and its underlying foundation *must* be re-evaluated.”²²¹ To give great apes human rights thus becomes an alarm—a threat to our societal dominance.

Accordingly, for now, many advocates simply work within the existing property-based animal law system to effectively write great ape protections into law. When legislators and advocates avoid personhood rhetoric, and instead take an incremental approach to obtaining animal protections within the property-based system, they are not undermining the ambitious goals of animal rights activists.²²² These pragmatic advocates are simply cognizant of American social attitudes towards animals, taking calculated steps to respect the existing property-based system, thereby ensuring that their legislation does not fail for being too extreme.

Animal rights advocates may counter that working within the existing system simply perpetuates a deeper problem: encouraging the

²¹⁹ Taylor, *supra* n. 211, at 41.

²²⁰ See Antoinette Duck, Student Author, *Welcome to Primates' Paradise, Human Rights Not Allowed: Unravelling the Great Ape Project*, 7 Regent J. Intl. L. 165, 165 (2009) (“Some believe that man is intrinsically valuable . . . and thus possesses a value greater than that of the ape.”).

²²¹ *Id.* at 166 (emphasis in original).

²²² For commentary on this debate, see the discussion on Professor David Favre's views in Russell, *supra* n. 13. Though Favre thinks the law is essential to protecting animals, he avoids legal personhood rhetoric and advocates an incremental approach to obtaining protections and rights for animals. More radical activists criticize the incremental approach as “undermin[ing] the eventual goal of abolition by making the terms of [animal] bondage less onerous, and, therefore, making it less pressing that any action be taken.” *Id.* However, as Favre counters, these philosophers do not fully grasp the legal process: activists win legal rights as “a product of compromise and incremental change and smallness, as opposed to sudden insight and transformation of a legal system.” *Id.*

use of a property-based system only lessens the necessity to protect animals from harm because they are simply property. Taking that argument further, strengthening property-based protections for animals makes the need for a more meaningful status upgrade—from property to person—seem unnecessary because society sees these strengthened property-based protections as adequate.²²³

But perhaps, when done right, strengthened property-based protections are just as conducive to the welfare of American animals as the personhood approach. Challenging the property-based system elicits emotional reactions and can raise questions that distract from the individual animal's case. When PETA sued SeaWorld for enslaving whales, the innovative legal approach impressed advocates and garnered substantial media attention; unfortunately, the court still dismissed the case.²²⁴ Future personhood suits may be more successful; perhaps PETA paved the way for greater acceptance of such arguments. For example, though Steven Wise's recent habeas petition for a captive ape was denied, the impressive media attention may prove advantageous for appeal efforts.²²⁵

Suppose, however, that the court did agree to grant habeas corpus to the captive ape; what legal ramifications would that have? The magnitude of recognizing an animal's legal personhood at this point in U.S. social history might actually be distracting from otherwise uncontroversial issues in individual cases. If courts are truly unready to recognize legal personhood for animals, these suits could produce both fear from a threatened human population and also confusion within the judicial system. Several years ago, Professor Richard Epstein lamented that there "would be nothing left of human society if we treated animals" as people, asking, "Would even bacteria have rights?"²²⁶ It is precisely these hyperbolic, "slippery slope" arguments that—for now, at least—allow critiques of animal rights to build fear in substantial segments of the population.

Critics also capitalize on the questions of legal procedure that personhood raises. For instance, if animals are truly legal persons, then who may properly sue on their behalf? Is the answer a guardian, a

²²³ *Id.*

²²⁴ For an example of relatively negative media treatment on this topic, see *The Daily Show with Jon Stewart*, TV Broad., "SeaWorld of Pain" (Comedy Central Feb. 15, 2012) (available at <http://www.thedailyshow.com/watch/wed-february-15-2012/seaworld-of-pain> [<http://perma.cc/0w81BaCtcFv>] (accessed Nov. 16, 2013)) (mocking PETA for its lawsuit against SeaWorld).

²²⁵ Brandon Keim, *Judge Rules Chimps Can't Be Legal Persons, but Activists Vow to Fight On*, <http://www.wired.com/wiredscience/2013/12/chimpanzee-personhood-claims-denied/> [<http://perma.cc/L9T6-MYZP>] (Dec. 9, 2013) (accessed Dec. 30, 2013); see *supra* nn. 78–82 and accompanying text (discussing Steven Wise's strategy of establishing common law legal rights for animals).

²²⁶ William Glaberson, *Legal Pioneers Seek to Raise Lowly Status of Animals*, N.Y. Times (Aug. 18, 1999) (available at <http://www.nytimes.com/1999/08/18/us/legal-pioneers-seek-to-raise-lowly-status-of-animals.html> [<http://perma.cc/0izY2UEDKKL>] (accessed Nov. 16, 2013)).

court-appointed trustee, or simply any next friend? Currently, anyone who can establish standing may sue for an animal's protection.²²⁷ So if only the owner (guardian) may sue on an animal's behalf as a legal person, then that could actually limit the avenues for enforcing protection under the law. And perhaps legal personhood would expose animals to further danger by allowing plaintiffs to actually sue an animal, just as plaintiffs bring suit against corporations. While children, the mentally ill, and corporations are all legal persons, there are complicated laws regarding who may sue them and how. The difficulty of setting up such legal procedures fuels the argument against affording legal personhood to animals.

The concept of personhood raises questions that are worthy of the time and thought required to answer them. This Note does not aim to critique the moral or legal merits of personhood; rather, it simply means to illustrate the advantages of alternatively working within the system. Unraveling the answers to questions that personhood raises will take time, as will waiting for Americans to accept those answers. As long as respected legal scholars are vocally wary of personhood, and until activists can present a pragmatic counter to that brand of fear, strengthening protection within the existing property-based system remains a viable and important approach.

As detailed in Part II(A), courts are willing to recognize and protect animals as a special form of property, but mainly in terms of their unique relationship with humans.²²⁸ Even in the landmark case *State v. Nix*, which recognized that animals can be victims of a crime, the court was careful to emphasize that its interpretation of the word "victim" applied only to the context of that case and was specific to the statute in question.²²⁹ Ultimately, animal activists can capitalize on this incremental approach, and emphasize the special relationship humans have with animals, thus chipping away at loopholes that shelter abuse. Past animal advocates have litigated effectively within the property-based animal law system; and by understanding that basis, great ape advocates can as well.

B. Advocates Effectively Litigate Animals' Interests within the Property-Based System

Despite the cautious wording, pragmatic legislation that respects the property-based system can indeed provide adequate protection for U.S. animals and for great apes in particular. In the past, animal issues have been litigated both favorably and effectively within the prop-

²²⁷ See *supra* pt. II(A) (discussing the requirements of establishing standing).

²²⁸ E.g. *Houseman*, 966 A.2d at 29 (inferring the special value of the dog to the owner from her testimony about the dog's importance to her); *In re Capers Est.*, 34 Pa. D. & C.2d at 125–26, 129 (invalidating a provision in an owner's will requesting the humane destruction of her dogs upon her death because other options consistent with the owner's intent were available).

²²⁹ *Nix*, 283 P.3d at 449.

erty framework—a sympathetic court will find ways to protect animal interests without challenging the existing animal law system.²³⁰

As discussed, plaintiffs have found a way to establish constitutional standing in animal abuse cases despite initial adversity. Recall *Humane Society of the U.S. v. U.S. Postal Service*, where the court avoided dismissing an animal abuse case for lack of standing by framing the animal abuse in a human context.²³¹ This rationale may not sit well with some; after all, should a crime not be prosecuted for the victim's sake, even if that victim is an animal? And yet the judgment still advances animal interests by allowing a court to hear the case, regardless of the human-centric rationale. In *Humane Society of the U.S.*, the plaintiffs did not react to the standing challenge by attempting to change the constitutional requirements for standing; they avoided attacking the status quo.²³² Instead, they cleverly recognized the injury that animal abuse can inflict on human plaintiffs.²³³ These examples demonstrate how advocates effectively work within existing property-based animal law to quickly and efficiently advocate for animal interests. By litigating crimes against animals via the injury to a human victim, plaintiffs can still advocate for an animal's interests without the added confusion caused by affronts to the property-based system.

When courts evaluate pets as property to be divided in divorce proceedings, they likewise focus on human concerns. However, courts have recognized the special relationship humans have with their pets by advancing the interests of companion animals in divorce cases.²³⁴ Just as courts determine standing in a human context, advocates in divorce cases have effectively framed the animal's plight in human terms. Overburdened courts can be unreceptive to animal rights arguments.²³⁵ Courts are far more willing to recognize the special bond between human and pet than they are to consider the "best interests" of a pet as an individual.²³⁶

Fourth Amendment seizure cases are also a strong example of how animal interests are effectively litigated under property-based animal law. In seizure cases, courts have ruled that animals are property pro-

²³⁰ See *supra* pt. II(A) (providing examples of the courts' willingness to recognize and protect certain animals as special property due to their unique relationship with humans).

²³¹ *HSUS v. USPS*, 609 F. Supp. 2d at 90–92.

²³² *Id.*

²³³ *Id.*

²³⁴ See *e.g.* McLain, *supra* n. 35 (summarizing collective authority in divorce cases nationwide).

²³⁵ See *e.g.* *Bennett v. Bennett*, 655 So. 2d 109, 110–11 (Fla. 1st Dist. App. 1995) ("Our courts are overwhelmed with the supervision of custody, visitation, and support matters related to the protection of our children. We cannot undertake the same responsibility as to animals.").

²³⁶ Compare *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa App. 1984) ("A dog is personal property and . . . we do not have to determine the best interests of a pet.") with *Houseman*, 966 A.2d at 29 (recognizing the special relationship between pet and owner).

tected under the Fourth Amendment.²³⁷ Although such a ruling primarily enforces an owner's right to property, it also protects the animal's interests. Protecting animals as property under the Fourth Amendment discourages police from interfering with the owner's right to possession. Were plaintiffs to contend that their pet's life was more important than a police duty, the argument would likely gain little traction. However, by arguing that the police threatened their natural property rights, plaintiffs strike a chord with a larger audience. Property rights are a fundamental concern for American citizens, and protecting property rights is an inherent function of the U.S. government.²³⁸ Accordingly, constitutional property arguments are among the strongest legal tools animal advocates currently possess.

Courts also protect animals as property in probate cases involving wills and trusts. To avoid will-stipulated euthanasia, courts have framed the issue in terms of the human owner's true intent. Courts reasoned that behind the euthanasia stipulation stood a loving owner who feared for the pet's safety and wanted to prevent the animal from suffering neglect.²³⁹ Courts thus invalidated euthanasia provisions by citing the owner's true intent to simply have the animal properly cared for after the owner's passing.²⁴⁰ By framing the issue as a human concern—the need to carry out an owner's true intent with regard to property—advocates have effectively saved the lives of companion animals otherwise fated to die. Animal advocates in these cases did not rely on theories outside of existing property-based animal law, probably because time would not permit. Relying on personhood rhetoric in these cases could have resulted in delay and confusion, and possibly cost an animal's life.

Other advocates in will-stipulated euthanasia situations classify the animal as property, but argue that the destruction of such property is inefficient and against public policy.²⁴¹ By appealing to American ideals of economic efficiency, property preservation, and human intent regarding private property, will-stipulated euthanasia cases demonstrate the many ways to successfully advocate for an animal's interests within the property-based system.

²³⁷ See *supra* nn. 38–39 and accompanying text (discussing animals as property in police seizure disputes).

²³⁸ See U.S. Const. amend. V (“No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.”). John Locke, who wrote extensively on property rights, influenced the American desire to effectively guard property. See *e.g.* John Locke, *Two Treatises of Government* (Peter Laslett ed., student ed., Cambridge U. Press 1988) (defining political power as the right to make laws for the regulation and protection of property).

²³⁹ *E.g. In re Capers Est.*, 34 Pa. D. & C.2d at 125–26 (disregarding will's instruction to humanely destroy pets due to the decedent's deep interest in the humane care and treatment of her pets, and the fear they would not receive the same affection and kindness they had received during her lifetime).

²⁴⁰ *Id.*

²⁴¹ See *e.g. id.* at 135–38 (explaining that while one may dispose of property as one sees fit, that does not necessarily impart the power to destroy property).

Abolitionist advocates fairly seek to establish legal personhood for animals to eliminate the need to justify animal protection with public policy, property rights, or moral arguments.²⁴² However, animal advocates have nonetheless successfully used these public policy, property rights, and moral arguments to promote animal interests in the past. It follows logically that future attempts to lobby for animal protection within the property-based animal law system can likewise employ these arguments effectively.

C. Advocates Can Effectively Protect Great Apes within the Property-Based System

Despite property status, advocates successfully litigate animal interests in divorce proceedings, seizure disputes, and probate administration. But what does this mean specifically for great ape protection? Great apes face physical and psychological dangers in this country, yet great apes often slip through the cracks of animal law.²⁴³ Nevertheless, today's great ape advocates can continue to develop effective animal law using the same approach that has worked in the past—working within the existing system, flawed though it may be.

Both the Great Ape Protection and Cost Savings Act of 2011 (GAPCSA) and the petition to end chimpanzee split-listing put animal interests into human terms. Organizations fighting for these protections do not want to feed the critique that extending rights to apes is a slippery slope to personhood. At the same time, by working within the confines of property-based animal law, the current movement can, in a practical sense, afford protection to great apes which elevates the species above property status.

1. The Split-Listing Petition Worked within Existing Legal Channels to Strengthen Chimpanzee Protections

When the Humane Society of the United States (HSUS) petitioned the U.S. Fish and Wildlife Service (FWS) to stop split-listing chimpanzees under the Endangered Species Act (ESA), it chose to work within existing legal channels to create stronger chimpanzee protections.²⁴⁴ The FWS accepts petitions to evaluate the status of an animal species

²⁴² See e.g. Jeffrey S. Kerr et al., *A Slave by Any Other Name Is Still a Slave: The Tilikum Case and Application of the Thirteenth Amendment to Nonhuman Animals*, 19 Animal L. 221 (2013) (presenting an argument against public policy, property rights, and moral justifications denying nonhuman animals personhood).

²⁴³ E.g. Fischer, *supra* n. 139, at 422–32 (arguing that the law has failed to provide animals with adequate protection from cruelty under the Animal Welfare Act and the Endangered Species Act, and explaining that the split-listing of chimpanzees has prevented full ESA protection).

²⁴⁴ See *id.* at 430–31 (discussing the Humane Society's petition to have chimpanzee classification changed from "threatened" to "endangered" under the Endangered Species Act).

pursuant to Section 4(b)(3) of the ESA.²⁴⁵ While petitioning an administrative agency is not a unique or revolutionary mechanism in and of itself, the petition's success could still have a revolutionary effect, affording chimpanzees stronger protections than they have ever had in the U.S.

The petition did not propose to change the way U.S. laws view chimpanzees as property. Instead, it presented a legal and scientific argument to end split-listing in order to better effectuate the FWS's established legal goals.²⁴⁶ Congress enacted the ESA to conserve and protect vulnerable animals, a fact that the petition uses to attack split-listing as "antithetical to conserving the species" in question.²⁴⁷ The petition, therefore, focused on legal arguments that attack split-listing from the inside out. Rather than attempting to overhaul the ESA's structure, the petition simply demonstrated how the system could more effectively achieve its own goals.²⁴⁸ Split-listing results in the proliferation of privately-owned and exploited chimpanzees, causing public misconception about the prevalence of chimpanzees in the wild, and therefore interfering with legitimate conservation efforts.²⁴⁹ The petition also highlighted the dwindling wild chimpanzee populations, providing statistics on habitat loss and disease to demonstrate that the threat to wild chimpanzee populations has increased since the decision to split-list the species.²⁵⁰

If the FWS had denied the petition and decided to maintain split-listing, it would have therefore had to show that split-listing promotes the overall conservation of chimpanzees and is thus in accord with the principals of the ESA.²⁵¹ George Washington University's Animal Law Program submitted a comment to the FWS supporting the petition to end split-listing because split-listing is illegal according to established law: FWS treats captive chimpanzees differently than those in the wild, violating the "plain meaning of the Endangered Species Act."²⁵² The comment went on to state that treating captive chimpanzees differently is "arbitrary and capricious."²⁵³ These advocates framed the

²⁴⁵ See 76 Fed. Reg. 54423, 54423–25 (Sept. 1, 2011) (highlighting general agency procedure with regard to petitions under the Endangered Species Act, and outlining the history of the petition to list chimpanzees as endangered); HSUS, *Petition*, *supra* n. 16, at 4–5 (outlining the statutory and regulatory requirements under Section 4(b)(3)).

²⁴⁶ HSUS, *Petition*, *supra* n. 16, at 4–5, 20–124.

²⁴⁷ *Id.* at 20.

²⁴⁸ *Id.* at 20–27.

²⁴⁹ *Id.* at 69–71.

²⁵⁰ *Id.* at 94–105.

²⁵¹ Joan Schaffner et al., George Washington U. L. Sch., *Comment on Petition before the Fish and Wildlife Service to Upgrade Captive Chimpanzees (Pan troglodytes) from Threatened to Endangered Status Pursuant to the Endangered Species Act of 1973, As Amended* 23–24 (Oct. 31, 2011) (available at <http://www.law.gwu.edu/Academics/PublicInterest/AnimalLaw/Documents/GW%20Chimpanzee%20Comment%2010-31.pdf> [<http://perma.cc/0HLtkDqCsur>] (accessed Nov. 16, 2013)) [hereinafter *Comment on Petition*].

²⁵² *Id.* at 2.

²⁵³ *Id.* at 5–7.

petition not as demanding a change in the law, but as repairing an existing legal flaw. The petition did not challenge the animal law system; it simply insisted on conformity with existing law. This made the petition difficult to deny; opposing a request for legal conformity is much harder than opposing an overhaul of animal law's property-based regime. By making a practical and scientific case that split-listing is counterproductive to the ESA's own goals, the petition was well-suited to effect tangible change for American chimpanzees.

And indeed, the response has been promising—the FWS recently announced its proposal to classify all chimpanzees, including captive ones, as an endangered species.²⁵⁴ This proposal is still subject to public comment—and likely revision—before becoming final.²⁵⁵ But the victory for animal advocates is clear nonetheless.²⁵⁶

The petition's effectiveness is due in large part to its practical approach: it simply asked the FWS to classify chimpanzees in the same way it classifies other endangered species—without regard to captive status.²⁵⁷ Thus, the petition followed established legal procedures to promote the ESA's conservation efforts, appealing broadly to both moderates and more radical activists. The split-listing petition effectuated real change for great apes, in part because it simply followed the rules, rather than trying to change the legal game entirely. The legal overhaul that personhood rhetoric requires to bring about the same change would take time—time during which captive chimpanzees remain vulnerable to abuse.

The petition's success could ultimately place chimpanzees in a protected category, removed from the current dangers they face in the medical community and in the entertainment industry.²⁵⁸ The petition demonstrates a calculated step within the existing legal system to efficiently obtain protections for chimpanzees.

2. *The Great Ape Protection and Cost Savings Act Would Strengthen Great Ape Protection within the Existing System*

The proposed GAPCSA legislation would prohibit invasive research on great apes, but the language of the bill frames the necessity to end such research in a human context.²⁵⁹ By doing so, advocates of the GAPCSA give the bill a better chance of broad acceptance, which strengthens the likelihood of successfully writing meaningful protec-

²⁵⁴ 78 Fed. Reg. 35201, 35201 (June 12, 2013).

²⁵⁵ *Id.*

²⁵⁶ Neil Abramson et al., Animal Leg. Def. Fund Blog, *ALDF Lauds FWS Proposal to End "Split-Listing" of Chimpanzees*, <http://aldf.org/blog/aldf-lauds-fws-proposal-to-end-split-listing-of-chimpanzees/> [<http://perma.cc/0Kyv/LKsnKwW>] (June 12, 2013) (accessed Nov. 16, 2013).

²⁵⁷ *Comment on Petition*, *supra* n. 251, at 7–8.

²⁵⁸ *See supra* pt. III(D) (explaining the life experiences of great apes in the U.S. with specific examples from the medical and entertainment industries).

²⁵⁹ *See supra* pt. III(E) (explaining that the GAPCSA would punish human persons for their poor treatment of apes, rather than declare rights for the apes themselves).

tions for apes into U.S. law. The bill, by distinguishing between great apes and other animals, would recognize their special nature and eliminate the abuses their current property status allows. And yet, the bill would achieve these protections by working within the established property-based animal law system.

The GAPCSA uses conservative language that does not threaten human social dominance.²⁶⁰ The GAPCSA recognizes that great apes are “highly intelligent and social,” but also refers to them plainly as “animals.”²⁶¹ There are no personhood or abolitionist tones to the legislation. The bill acknowledges the National Research Council’s conclusion that there is a “moral responsibility” for the long-term care of chimpanzees in medical research.²⁶² Notably—yet perhaps unintentionally—this language reminds readers of their superiority to apes by encouraging the image of a benevolent master, an almost Biblical stewardship that inherently requires dominion.²⁶³

The GAPCSA’s title refers to the plan’s “cost savings,” which is indicative of the GAPCSA’s potential to broadly appeal to those who might otherwise be averse to animal welfare legislation.²⁶⁴ The bill asserts that ending invasive research on great apes is economically responsible and that “maintaining great apes in laboratories costs the Federal Government more than caring for great apes in suitable sanctuaries.”²⁶⁵ The importance of this fiscal point cannot be overstated: the economic argument makes the GAPCSA an attractive, socially acceptable piece of legislation that fits into the existing animal law environment by arguing in terms of human interests. Certainly, the GAPCSA would benefit great apes by protecting them from physical and psychological abuse in laboratories, but what U.S. legislators will care most about is that the GAPCSA would benefit the human population as well.

Finally, the GAPCSA contains a “contingency clause” that would permit the use of great ape research in emergency situations, such as an epidemic outbreak, requiring extreme measures.²⁶⁶ With medical necessity and administrative approval, the GAPCSA would allow invasive research on great apes.²⁶⁷ The clause makes GAPCSA even more appealing to skeptical legislators by placing human need above GAPCSA’s protections for great apes. And yet, requiring administrative approval in even emergency situations helps protect great apes from arbitrary use of the contingency clause.

²⁶⁰ GAPCSA, H.R. 1513, 112th Cong. at § 2(a)(3), (5).

²⁶¹ *Id.* at § 2(a)(3).

²⁶² *Id.* at § 2(a)(7)(A).

²⁶³ *See Genesis* 1:26–30 (King James) (In the Biblical Garden of Eden, God gives Adam and Eve dominion over the animal kingdom to care for and to use for their benefit.).

²⁶⁴ GAPCSA, H.R. 1513, 112th Cong. at § 1.

²⁶⁵ *Id.* at § 2(a)(6).

²⁶⁶ GAPCSA, Sen. 810, 112th Cong. at § 5.

²⁶⁷ *Id.*

The GAPCSA's success would help Americans join an international trend of affording great apes more extensive legal protections.²⁶⁸ Like foreign legislation prohibiting great ape research, the GAPCSA is a strong first step—though perhaps not the final destination—to perfecting great ape protection in U.S. law.²⁶⁹ Without the human-centric arguments that get a foot into the legislative door, the GAPCSA may have failed to take even that first step.

3. *Great Ape Protection within the Property-Based Animal Law System Requires a Dualistic Legal Approach*

Just as state and federal laws interact to more effectively protect animals,²⁷⁰ great ape protection within existing property-based animal law requires interaction between proposals on the federal level. While the desired effects of the GAPCSA and the split-listing petition may seem duplicative, layers of regulation ensure that no ape slips through the cracks. The split-listing petition and GAPCSA efforts would work together strategically, creating a dualistic approach designed to ensure stronger great ape protection. The goals of the petition and the GAPCSA overlap, but overall the proposals would work in tandem, complementing one another to better care for apes in the U.S.

The split-listing petition and the GAPCSA have common characteristics when it comes to medical research on chimpanzees. The GAPCSA would explicitly prohibit medical research on any great apes, including chimpanzees; and the split-listing petition aimed to reclassify captive chimpanzees to protect them from invasive research, among other things.²⁷¹ However, this overlap is important, because it would allow both efforts to work together, providing a “Plan B” to prevent litigants from exploiting a loophole in either effort.

For instance, though an end to split-listing would protect captive chimpanzees from invasive research, an institution could still theoretically apply for a special permit to “take” a chimpanzee via the FWS's captive-bred wildlife registration system.²⁷² Yet in that scenario, the FWS would be forced to deny the application because the GAPCSA forbids invasive research; there is no chance the “take” could be seen as a legitimate or necessary activity to permit. Simply re-categorizing cap-

²⁶⁸ See *supra* pt. IV (discussing how other nations such as Australia, Austria, Japan, the Netherlands, New Zealand, Sweden, and the United Kingdom have taken steps to curtail experimentation on great apes and that Spain has announced support for extending rights to great apes).

²⁶⁹ See *supra* pt. IV (detailing a Swedish law exempting great apes from use in experiments).

²⁷⁰ See *supra* pt. III(C) (explaining how Missouri laws interact with federal laws to provide great apes with further protection).

²⁷¹ The end of split-listing would protect chimpanzees from taking behavior as an endangered species under the ESA, and the GAPCSA would explicitly prohibit invasive medical research. H.R. 1513, 112th Cong. at § 4(a); see HSUS, *Petition, supra* n. 16, at 7–20 (explaining how the Takings Clause works, why chimpanzees are a “split-listed” species, and how that listing affects the species).

²⁷² 50 C.F.R. § 17.21(g)(2).

tive chimpanzees under the ESA is not enough; the GAPCSA would provide the FWS with strong guidelines by which to regulate permits that seek to circumvent the ESA's protection.

The split-listing petition would supplement the GAPCSA effort as well. The Act would provide great apes protection from medical research, but would not protect apes kept in captivity for other reasons.²⁷³ For instance, the GAPCSA would do nothing to bolster the protection of chimpanzees in the entertainment industry or in roadside zoos. Instead, the solution for these animals would come from a successful end to split-listing. An end to split-listing would make it illegal to keep chimpanzees in roadside zoos, to trade chimpanzees as private pets, or to keep chimpanzees captive in the entertainment industry. Ending split-listing would reach beyond the GAPCSA's prohibition on medical research to protect chimpanzees in other dangerous situations.

The proposals would work together in a third way as well. The split-listing petition applies only to chimpanzees. Therefore, the GAPCSA's success is important to protect non-chimpanzee great apes from invasive medical research. The only apes currently used for invasive medical research are chimpanzees.²⁷⁴ A successful split-listing petition would protect these chimpanzees from the dangers of research facilities. However, written in broader terms to include all great apes, the GAPCSA anticipatorily addresses any future testing issues. For example, in the face of the looming end to split-listing, medical researchers might simply begin testing on a new population of great apes; and yet all great apes—not just chimpanzees—experience physical and psychological suffering in medical research situations.²⁷⁵ Therefore, the GAPCSA foresees the potential for a medical research rush on bonobos or orangutans and would forestall the danger by banning invasive research on all great apes.

Together, the two proposals—the GAPCSA and the petition to end split-listing—would provide strong, effective protection for great apes within the property-based animal law system. By writing both proposals as pragmatic, targeted appeals to established legal procedures, the authors of this current movement increase the chance that such efforts will succeed. By legislating on multiple levels, these advocates ensure that the failure of either effort will not result in disaster, and that the success of both efforts will be even more valuable. While following established precedent, the proposals would work together to afford a previously unprecedented level of protection to great apes.

²⁷³ See GAPCSA, H.R. 1513, 112th Cong. at §§ 2, 4–5 (discussing apes only in the research context).

²⁷⁴ *Id.* at § 2(a)(1).

²⁷⁵ See generally David Cantor, *Items of Property*, in *The Great Ape Project* 280 (Paola Cavalieri & Peter Singer eds., St. Martin's Griffin 1993) (describing the experiences of chimpanzees, orangutans, and gorillas in the U.S.).

VI. CONCLUSION

Animal cruelty is frustrating to anyone who encounters it. To treat an animal cruelly seems medieval, and incompatible with first-world society. However, legal change is best won slowly, and the surest method of failure is through uncompromising rhetoric.

Animals in the U.S., including great apes, have always been considered property.²⁷⁶ This designation can interfere with advocates' ability to implement laws that adequately care for these intelligent, sensitive, and social beings.²⁷⁷ If an animal is property, then the human owner's property rights trump that animal's interests.²⁷⁸ Respected scholars such as Professor Francione argue that the only way to end great ape suffering in the U.S. is to extend human rights to great apes, to grant them standing in court, and to abolish their property status.²⁷⁹

Personhood arguments have seen success abroad, and are an innovative way to further the worthy cause of animal protection. However, it is still quite possible to legislate protection for great apes within the existing property-based animal law system.²⁸⁰ In fact, it is an efficient approach.²⁸¹ By appealing to the affinity for property rights in the U.S., advocates can frame animal issues in a human context that citizens and legislators will more passionately support.²⁸² By recognizing that crimes against an animal often infringe on a human right, advocates successfully litigate animals' interests within the property-based animal law system.²⁸³ Indeed, legislation that does not challenge the foundation of existing animal law has garnered effective results.²⁸⁴ When personhood arguments are seen as threatening to social values regarding human superiority, it takes away time and isolates allies that vulnerable animals cannot afford to lose.²⁸⁵ Long-term structural defects in the law aside, the most efficient way to protect great apes in the U.S. is to strengthen existing welfare laws and regulations.²⁸⁶

While advocates may disagree on the best way to combat animal cruelty, their ultimate goal remains the same. When it comes to great apes in the U.S., organizations on both ends of the spectrum hope to protect a vulnerable and valuable species. Whether working to abolish

²⁷⁶ Discussed *supra* pts. II(A), III.

²⁷⁷ See *supra* pt. II (highlighting problems with classifying animals as property).

²⁷⁸ Discussed *supra* pt. II

²⁷⁹ Discussed *supra* nn. 9–10, 58–61 and accompanying text.

²⁸⁰ Discussed *supra* pt. V.

²⁸¹ Discussed *supra* pt. V.

²⁸² See *supra* pt. V(B) (providing examples of areas of law framing animal issues in a human context).

²⁸³ Discussed *supra* pt. V(B).

²⁸⁴ Discussed *supra* pt. V(A).

²⁸⁵ See *supra* nn. 220–221 and accompanying text (describing the fear of many Americans that increasing rights for animals will diminish the rights of humans).

²⁸⁶ Discussed *supra* pt. V(C).

animals' property status, or to write stronger protections into existing law, animal advocates take up a noble task—speaking for those who cannot speak for themselves.