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A New Species of Rights

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Review Essay

A New Species of Rights

RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS.
By Steven M. Wise.†
Cambridge, Mass.: Perseus Books, 2000. pp. xvi, 362. $25.00 hardcover.

Reviewed by Robert R.M. Verchick‡

> [W]hat freedom does any of us have to reimagine the terms of human [sic] association?[1]

INTRODUCTION

In the first week of Property I, my students and I encounter Pierson and Post, two nineteenth century sportsmen who covet the same fox in an "uninhabited wilderness" known today as Queens, New York.[2] One man (Post) pursues the animal to near exhaustion; his rival (Pierson) lies in wait, then shrewdly fells the fox near the chase's end.[3] The men's eventual dispute will involve the ownership of the dead creature's pelt, but before that, I focus my class's attention on the seconds before the kill.

"At that moment," I ask, "who owns the fox?"

"Post," will say one student.

"The landowner," will suggest another, unsure of who that could possibly be.

At last, showing either a blush or a smirk, someone will always say, "The fox?"

Then the giggles will start, and perhaps a groan, and then I will joke that I am looking not for the real answer, but the legal one.

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1. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1109 (1985).

2. Pierson v. Post, 3 Cai. R. 175, 180 (N.Y. Sup. Ct. 1805).

3. *Id.*

Steven Wise's book, *Rattling the Cage: Toward Legal Rights for Animals*, attempts to change that, if not immediately for woodland foxes, at least for the two animal species he argues are most like us, chimpanzees and bonobos.[4] In his book, Wise argues that chimpanzees, bonobos, and perhaps other species with similar levels of consciousness, should be considered "persons," not property, and thus afforded a basic set of individual rights that would protect them from the grim incarceration and physical abuse they now endure in research facilities across the United States.

Introducing his subject, Wise writes:

> For four thousand years, a thick and impenetrable legal wall has separated all human from all nonhuman animals. On one side, even the most trivial interests of a single species—ours—are jealously guarded. . . . On the other side of that wall lies the legal refuse of an entire kingdom, not just chimpanzees and bonobos but also gorillas, orangutans, and monkeys, dogs, elephants, and dolphins. They are "legal things." Their most basic and fundamental interests—their pains, their lives, their freedoms—are intentionally ignored (p. 4).

These are fighting words. And on the cusp of a new century, Wise has contributed an original and thoughtful work that marks what could become one of the groundbreaking civil rights battles of the next generation.

Although in the foreword, Jane Goodall calls *Rattling the Cage* "the animals' Magna Carta" (p. ix), the book is less political declaration and more legal exposition. It is, quite simply, a shrewd and witty three hundred page Brandeis Brief in support of primates' rights.[5] Unlike Peter Singer or many other animal advocates, Wise walks not in the footprints of Archbishop Langton,[6] Mahatma Gandhi, or Martin Luther King, Jr., but in those of civil rights lawyer Thurgood Marshall.

In the United States, millions of animals are routinely abused and killed without legal consequences. One hundred million pigs, cattle, and sheep are slaughtered;[7] twenty-five million animals—including dogs, cats, and primates—are subjects of experiments.[8] Against this broad band of exploitation, Wise focuses his interest on the plight of his current "clients," chimpanzees and bonobos. Noting these animals' state of consciousness

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4. Bonobos are sometimes referred to as "pygmy chimpanzees" but are considered a separate species (p. 5).

5. Such briefs, known for marshaling of evidence based on science and social science, were employed throughout the twentieth century as a means of attacking race-based and sex-based segregation. *See* Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 304-05 (2000).

6. Steven Langton, the archbishop of Canterbury, directed the campaign for civil liberties that resulted in King John's adoption of Magna Carta in 1215. ENCYCLOPÆDIA BRITTANICA, *Magna Carta, available at* http://www.britannica.com/bcom/eb/article/0/0,5716,51218+1+50003,00.html.

7. PETER SINGER, ANIMAL LIBERATION 95 (2d ed. 1990).

8. *Id.* at 220.

and their genetic similarity to human beings,[9] Wise surveys Anglo-American common law to find support for his argument that chimpanzees and bonobos deserve some basic package of "personhood" rights, including the right to have their interests represented in court.

Rattling the Cage is significant for two reasons. First, the book takes up the notion of rights-based animal protections, a minority view among animal advocates,[10] and shapes it into a nearly full-fledged legal argument, complete with case law, scientific evidence, and policy argument. Second, the book employs a powerful yet unlikely blend of critical legal analysis and "old fashioned" liberal rights discourse to make its point. In this way, *Rattling the Cage* closely resembles some feminist and critical race scholarship. Such a blended strategy could significantly broaden and strengthen the animal advocacy movement.

My essay evaluates Wise's use of critical and liberal tools in pursuing his "rights" thesis. Part I offers a brief primer in animal advocacy theories. Here, I distinguish between the "animal rights" movement and the more common "animal welfare" movement and explain Wise's preference for the former. Part II examines Wise's use of critical and rights-based strategies and applauds his adept maneuvering of both concepts. But like critical feminist and race theorists, Wise faces the dilemma that his deconstruction of Western legal theory may undermine the legitimacy of individual rights as well. In this part, I ultimately endorse Wise's hybrid approach, but offer words of caution learned from the rights movements of the last two centuries. In Part III, I argue that Wise's book significantly contributes to both the conceptual and political dimensions of the animal advocacy struggle.

I
RIGHTS AND WRONGS

Animal advocacy theory can be divided into two camps. The "animal welfare" camp[11] focuses on furthering the "interests" of human and nonhuman animals in the context of a human-dominated society.[12] Such advocacy often takes the shape of identifying and correcting societal wrongs that hinder the interests of humans and nonhumans, however those interests are defined. Animal welfarists justify their cause on utilitarian grounds, but they do not presuppose formal rights on the part of nonhuman animals.[13]

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9. According to Wise, biologist Vincent Sarich believes "humans and chimpanzees are as similar as 'two subspecies of gophers living on opposite sides of the Colorado River'" (pp. 2-3).

10. *See* GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 12-14 (1996).

11. *See id.* at 7.

12. *See id.* at 12-14.

13. *Id.*

The "animal rights" camp,[14] on the other hand, envisions a set of "personhood" rights which all humans and some nonhumans possess. While such rights may mean different things to different species, at a minimum they shield their holders from gross insults to the body, such as imprisonment, nontherapeutic injections, and, of course, murder.[15] While animal rights advocates may also seek the interests of animals for utilitarian reasons, their belief in a political right separates them from the "welfare" camp. Steven Wise is a proponent of animal rights and is probably a believer in animal welfare too, although his book does not address the welfare issue in detail.

We can further appreciate and distinguish between animal advocacy theories by assessing their approach to three issues, which I will refer to as equality, liberty, and individuality. I use "equality" in this context to refer to the uniformity of treatment required among nonhuman species, and between humans and nonhumans. I use "liberty" to describe the extent to which protection from human interference or harm is maintained. I use "individuality" to mean the degree to which a given theory values any randomly chosen individual of a species, as opposed to the collective species itself. I elaborate on the welfare and rights camps and assess them in terms of these criteria.

A. Animal Welfare

The animal welfare movement first gained national attention in the nineteenth century with the birth of the American Society for the Prevention of Cruelty Against Animals (ASPCA) and continues today in the form of many national and grassroots organizations.[16] Welfare advocates are utilitarian, judging conduct as right or wrong based on the consequences visited upon those affected.[17] Welfare advocates often present their views in ways that pursue the utility of both human and nonhuman animals.

1. Utility for Human Animals

When welfare activists seek to lead nonbelievers to an animal-friendly ethic, they most often invoke arguments designed to show that human society is harmed when nonhuman species are treated badly. Activists Jim Mason and Peter Singer, for instance, argue that the factory farms of today's agribusiness not only visit horrors upon chickens, cattle, and hogs,

14. *See id.* at 14.

15. *See* TOM REGAN, THE CASE FOR ANIMAL RIGHTS 382-83 (1983) (arguing against harming animals in scientific research).

16. *See* SINGER, *supra* note 7, at 217-18.

17. *See* FRANCIONE, *supra* note 10, at 12-14.

but also introduce toxic chemicals and pesticides into our food supply.[18] Others protesting the suffering of animals in feedlots argue that growing grain to feed animals to feed people is an inefficient use of resources, implying again a concern for human utility.[19] Even defenders of the Endangered Species Act, an astonishingly biocentric document,[20] often seek support for its goals by emphasizing the Act's benefits for humans. Among other arguments, they say the Act preserves important cultural symbols (the bald eagle), saves future natural medicines from destruction (taxol from the yew tree), and calls attention to endangered "indicator" species that may portend broader problems in an ecosystem necessary for human flourishing (declining salmon runs as an indicator of watershed damage).[21]

Equality, or uniform treatment, among nonhuman species is not theoretically necessary for utilitarianism, given that some species and their habitats provide us more benefits than others.[22] Similarly, liberty protections are not absolute. Cleaner cages for factory-farm chickens might be used if they would make for healthier eating. If not, they are unnecessary. As for the last criterion, human utility emphasizes individual welfare only rarely, usually where an animal of unique ability or notoriety is involved.[23]

2. *Utility for Nonhuman Animals*

When welfare advocates preach animal concerns to the choir, they are more likely to move beyond arguments of human utility, stressing instead the value of protecting nonhumans for their own sake.[24] This category includes most of the people we would think of as "animal rights activists"[25]—from biology students opposed to dissecting dead frogs for a grade to biologists opposed to scorching the eyes of live rabbits for

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18. JIM MASON & PETER SINGER, ANIMAL FACTORIES: WHAT AGRIBUSINESS IS DOING TO THE FAMILY FARM, THE ENVIRONMENT AND YOUR HEALTH 68-105 (1980) (reporting significant occurences of salmonella, carcenogenic chemicals, and illegal drugs in meats sold for human consumption).

19. *See* Robert H. Smith, *Livestock Production: The Unsustainable Environmental and Economic Effects of an Industry Out of Control*, 4 BUFF. ENVTL. L.J. 45, 72 (1996).

20. *See* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 659 (2d ed. 1998) (remarking that the Act's insistence on protecting species regardless of human cost or benefit "draws upon . . . quasi-religious principles emphasizing the sanctity of life").

21. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1187-88 (1996); PLATER ET AL., *supra* note 20, at 658-59. For a recent and thoughtful discussion of services provided by natural ecosystems, see generally NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 177 (Gretchen C. Daily ed., 1997).

22. *See* Douglas O. Linder, *"Are All Species Created Equal?" and Other Questions Shaping Wildlife Law*, 12 HARV. ENVTL. L. REV. 157 (1988).

23. Think Dolly, the first cloned sheep, or Keiko, the orca of *Free Willy* fame.

24. *See* FRANCIONE, *supra* note 10, at 12-14.

25. Although "rights" in this context refers loosely to "welfare" rather than political entitlement.

shampoo, from paint-spraying anti-fur activists in New York City to vegetarian bassist Paul McCartney.

Such advocates focus on identifying and maximizing animal interests, or what economists call "preferences." Because they assume any animal would prefer physical comfort to pain and emotional contentment to distress, welfarists spend much energy attempting to measure the degree to which animals are capable of experiencing pain[26] and of having emotional lives.[27] This focus often leads to a kind of empathetic response in which humans develop a closer relationship with the rest of the animal world based on their belief in shared experiences (familial love, loss of a loved one, fear of abandonment, and so on)[28] and, perhaps even a shared purpose (for instance, to live a rewarding life). These arguments emphasize themes of connection and community, sometimes enriched by aesthetic or spiritual ideas.

Once nonhuman and human preferences are identified, the next step is to maximize them. This process involves weighing the many interests at stake and reaching a balance that benefits the most individuals at the expense of the fewest. As with many balancing tests, the results are far from concrete, which may explain why animal welfarism claims so many adherents. Does welfarism require vegetarianism? Some say yes, reasoning that the needs of farm animals outweigh the eating preferences of humans. Others say no, reasoning that the human appetite for flesh can be counterbalanced simply by providing livestock with comfortable conditions until they are killed. As for animal experiments, even hard-liner Peter Singer would yield to experiments on primates if he thought enough lives would be saved as a result.[29]

When animal welfarism incorporates both human and nonhuman interests, it measures differently on our three-point scale. In terms of equality, welfarism casts a broad net. Virtually any animal that is capable of having rudimentary preferences ("no pain," "no death") qualifies to have its interests considered by society.[30] Liberty protection is soft and subject to

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26. *See, e.g.*, Marian Stamp Dawkins, *The Scientific Basis for Assessing Suffering in Animals*, *in* IN DEFENSE OF ANIMALS 27 (Peter Singer ed., 1985) (describing scientific methods of assessing suffering in nonhuman animals).

27. *See, e.g.*, JEFFREY MOUSSAIEFF MASSON & SUSAN MCCARTHY, WHEN ELEPHANTS WEEP: THE EMOTIONAL LIVES OF ANIMALS (1995) (examining scientific and anecdotal evidence on the emotional lives of nonhuman animals).

28. *Id.* at 67-72, 92-98 (presenting evidence of such emotions in nonhuman animals).

29. A strict nonspeciesist, Singer would under certain circumstances condone experiments on humans too. FRANCIONE, *supra* note 10, at 14.

30. Some welfare purists make no distinction between human and nonhuman interests and would, therefore, allocate the same weight to each when weighing aggregate benefit. *See id.* Most welfare activists, however, still favor human over animal interests when valued on the margin, which explains why some activists can countenance "humane" animal slaughter in order to satisfy the human "preference" for eating meat. *See* Harriet Schleizer, *Images of Death and Life: Food Animal*

partial or even complete sacrifice for the aggregate good. Individuality does not fare well under welfarism either. Because the welfarist sees all interests as fungible, that is, capable of being traded to compensate for others, strict welfarists necessarily see all interest holders, human or nonhuman, as fungible too.

B. Animal Rights

1. Thinking Outside the Cage

Steven Wise finds animals' salvation in a philosophy based on rights, not welfare. For thousands of years, Wise notes, human beings have classified animals as legal "things." As such, animals have been subject to almost any human need, want, or whim. Society's vague commitments to animal welfare are halfhearted at best, as ephemeral as charity at Christmastime. What is needed is a transformative shift in the way we see animals, a shift from "legal thinghood" to "legal personhood." Animals recognized as holding personhood rights would enjoy immunity "from serious infringements upon their bodily integrity and bodily liberty" (p. 267). They would also hold the right to have their interests represented in court, a guarantee that could protect their interests in times of future apathy. For Wise such rights are paramount. Without them, he says, borrowing Ralph Ellison's famous metaphor,[31] "one is invisible to civil law" (p. 4) and "one might as well be dead" (p. 4).

Rattling the Cage is not the first declaration of animal rights to find a broad audience. In 1983, Tom Regan's famous book *The Case for Animal Rights*[32] built the foundation upon which most rights-based arguments now rest. From the perspective of philosophical heft, Regan's book remains unrivalled, and Wise borrows generously from Regan's work. Regan's book, with its call for broad citizen action and its insistence on vegetarianism,[33] is also more radically ambitious than Wise's. But what Wise lacks, or intentionally avoids, on these counts, he makes up for with his steady focus on legal method and his superior narrative structure.

In the tradition of great lawyering, Wise backs his arguments with alternating appeals to the heart and mind. Thus, on page one we meet Jerom, to whom Wise's book is dedicated:

> Jerom died on February 13, 1996, ten days shy of his fourteenth birthday. The teenager was dull, bloated, depressed, sapped, anemic, and plagued by diarrhea. He had not played in fresh air for eleven years. As a thirty-month-old infant, he had been

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Production and the Vegetarian Option, *in* IN DEFENSE OF ANIMALS, *supra* note 26, at 69-70 (noting that some welfarists accept meat eating in an effort to appear "reasonable" to the broader public).

31. RALPH ELLISON, THE INVISIBLE MAN 3-4 (1947).

32. REGAN, *supra* note 15.

33. *See id.* at 330-98.

> intentionally infected with HIV virus SF2. At the age of four, he had been infected with another HIV strain, LAV-1. A month short of five, he was infected with yet a third strain, NDK. Throughout the Iran-Contra hearings, almost to the brink of the Gulf War, he sat in the small windowless, cinder-block Infectious Disease Building. Then he was moved a short distance to a large, windowless, gray concrete box, one of eleven bleak steel-and-concrete cells 9 feet by 11 feet by 8.5 feet. Throughout the war and into Bill Clinton's campaign for a second term as president, he languished in his cell. This was the Chimpanzee Infectious Disease Building.... minutes from the bustle of downtown Atlanta, Georgia (pp. 1-2).

Later, Wise introduces Lucy, a flirtatious chimp who could chat in American Sign Language (ASL), serve tea from the stove, and who, through a terrible chain of events, ended up in Gambia, where she was eventually shot and skinned (pp. 166, 239).

Wise is equally skilled in eliciting a sympathetic intellectual response. Eventually locating the seed of personhood rights in characteristics related to autonomy, Wise launches a fascinating discussion of the mental abilities of chimpanzees and bonobos, which, he argues, include the use of sign language, arithmetic, abstract spatial thinking, and a sometimes profound sense of self. This portion of the book, although lengthy, provides an excellent review of the quickly changing state of primate research. Wise also emphasizes primates' similarity with traditional, human rights holders, noting, for instance, that "[o]ur DNA and that of chimpanzees is more than 98.3 percent identical" (p. 132).[34]

While Wise muses about the impressive abilities of other animals, he shrewdly steers clear of ancillary questions. Do not ask who might petition the court next—gorillas, pigs, or elephants. For Wise, such issues can wait: there is no, and should be no, "enlightened" species list. Rather Wise recommends a standard based on scientific data and levels of animal consciousness that will evolve along with the rest of the common law. Determinations about a particular species and its members' accompanying rights are to be incremental, situation-based, and scientific.[35]

2. *A Contrast to Animal Welfare*

Already, one can see important distinctions between the animal rights and animal welfare theories. Most fundamentally, animal rights theory is nonutilitarian, or what philosophers call "deontological."[36] Rights, then, are

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34. When considering only the usable DNA material, the percentage jumps to 99.5 percent.

35. Wise purposely remains vague about the details of a "consciousness" standard, more for strategic reasons than anything else. What details he does introduce are examined in Part II.A.2.

36. Here I do not mean to suggest that animal welfarism could not also be based on a nonutilitarian, deontological principle. However, the main thrust of animal welfarism, as propounded

not a means to an end; they are morally justifiable in themselves. Distancing himself from utilitarian arguments, Wise never claims that animal rights will directly benefit humans in any significant way. Indeed, he all but invites a face-off between rights advocates and utilitarians by arguing that chimpanzees and bonobos should not be used in animal experiments even where such use is essential to treating human disease.

This difference generates additional distinctions between the rights and welfare which may be plotted on our three-point scale. Regarding equality, most rights advocates rely on a pecking order of animal cognition, suggesting the Orwellian line that while all animals are equal, some are more equal than others.[37] Regarding liberty, an individual's basic rights package would appear to be nonnegotiable and, therefore, not subject to significant compromise in the name of aggregate benefit. As for individuality, the liberal roots of rights theory insist that each rights holder be recognized as uniquely important and worthy of the same protection as anyone else similarly situated. Incidentally, all laws in the U.S. that protect nonhumans are animal welfare laws.[38] It could not be otherwise, since all nonhuman animals are considered potential or actual chattel. Even the fox that so confounded Pierson and Post was property before he was shot; according to Locke's philosophy, an animal in the commons was the shared resource of the People.[39]

II
TOOL-MAKING

Steven Wise's appeal for animal rights appears so fresh and potentially powerful because he employs a blend of critical theory and rights discourse to demolish and then reconstruct the moral and legal relationship between humans and nonhumans. In so doing, he manages to be both radical and conservative at the same time. In this Part, I examine the strengths and weaknesses of such a strategy.

A. Critical Tools

1. Unmaking All the Difference

Critical Legal Studies (CLS) theorists rely on the process of "deconstruction," by which they ask questions and draw comparisons

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by Peter Singer and his many followers, originates from a utilitarian perspective. *See* SINGER, *supra* note 7, at 5-9 (borrowing concepts from utilitarian theorists); REGAN, *supra note* 15, at 206 (describing Singer's position as utilitarian).

37. GEORGE ORWELL, ANIMAL FARM 133 (Signet 1996) (1946) ("ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS").

38. *See, e.g.*, Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 445 (D.C. Cir. 1998) (en banc) (noting that the Animal Welfare Act, the most significant federal animal treatment law, intends in large part to relieve public anxiety over animal mistreatment), *cert. denied,* 143 S. Ct. 1454 (1999).

39. *See* FRANCIONE, *supra* note 10, at 128.

designed to reveal the ideological biases that lie hidden beneath the fabric of supposedly neutral law.[40] For the critical scholar, such biases might include sexism, racism, the patterns of capitalism, or exploitative labor relationships, to name a few.[41] In her influential book, *Making All the Difference*,[42] Martha Minow demonstrates how outward differences among individuals—such as sex, race, or religious membership—are used to justify disparate legal treatment among them.[43] She argues that many notions of difference can be deconstructed to reveal hidden bias at the core.[44] Thus, an apparently neutral unemployment compensation rule that requires a Seventh-Day Adventist to choose between working on her Saturday Sabbath or forgoing state benefits may in reality rest on a cultural bias against minority faiths.[45] Minow challenges the reader to shake free of unstated biases and to develop a more neutral set of standards. This can be accomplished, she argues, by viewing law from the perspective of those outside the majority.[46]

In 1972, years before critical theory hit the law reviews, Christopher Stone suggested a similar argument in his famous appeal for judicial standing for "natural objects."[47] Stone wrote, "We are inclined to suppose the rightlessness of rightless 'things' to be a decree of Nature, not a legal convention acting in support of some status quo."[48] So went Stone's identification of the "hidden bias." Then Stone suggested a connection between an object's right to be represented in court and our ability to imagine an alternate perspective: "[U]ntil the rightless thing receives its rights, we cannot see it as anything but a *thing* for the use of 'us'—those who are holding rights at the time."[49] Wise employs both strategies, identifying hidden bias and imagining an outside perspective, throughout his analysis.

a. Identifying Hidden Bias

Steven Wise appears to know the Crit playbook by heart and deftly uses it to attack over two thousand years of philosophy and law, which have banished the nonhuman community into an anonymous and rightless

40. ROBERT L. HAYMAN, JR. & NANCY LEVIT, JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES 213 (1994).

41. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321 (1987).

42. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

43. *Id.* at 70-71.

44. *Id.* at 71.

45. *Id.* at 69.

46. *Id.* at 68.

47. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

48. *Id.* at 453.

49. *Id.* at 455.

hinterland. The backbone of this oppression is the ancient Greek idea of natural hierarchy, which Arthur Lovejoy called "The Great Chain of Being."[50] Wise writes:

> It worked like this: An infinite number of finely graded forms were arranged along the ladder. Creatures who were barely alive occupied the lowest rungs. Above them ranged the sentient beings, conscious, perhaps able to experience. Rational beings inhabited higher rungs, with the most rational human beings on the highest rungs that could be assigned to beings with physical bodies. Above them, looming incredibly high, dwelled an infinite number of spiritual and divine beings. The lower-rung dwellers were designed to serve the higher-rung dwellers, for they generated more heat, had souls made from better stuff, and were more perfect (p. 11).

Link by link, Wise insightfully (and good-naturedly) tests the mettle of the Chain, which Lovejoy described as "one of the half-dozen most potent and persistent presuppositions in Western thought" (p. 11). Along the way, Wise deconstructs the notion of natural hierarchy, the taxonomy of species, and, to a lesser extent, the definition of intelligence. On the subject of hierarchy, Wise dutifully calls Charles Darwin to the stand to make clear that science no longer considers nature a specially designed handmaid to human progress. Wise later solicits the aid of paleontologist Stephen Jay Gould who has sparked debate in the scientific community with his assertion that natural selection does not necessarily tend toward biological complexity or intelligence (p. 137).[51]

Wise next endangers the notion of species, a construct traditionally used to define the set of political rights holders.[52] Zoological classification is "not like sorting chess pieces" (p. 137). Pro-human bias and other subjective factors inevitably intrude. Chimpanzees, for instance, are more closely related to humans than they are to gorillas, but chimpanzees and gorillas are lumped into the same family (*Pongidae*), while human beings get their own (*Hominidae*). Assigning legal interests on the basis of species would seem even more dubious. "A species," Wise notes, "... is just a population of genetically similar individuals naturally able to interbreed,

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50. ARTHUR O. LOVEJOY, THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA (1960) (employing interdisciplinary approach to examine the idea of natural hierarchy in human history).

51. *See* Robert Wright, *The Accidental Creationist*, NEW YORKER, Dec. 13, 1999, at 56, 61; *see generally* STEPHEN JAY GOULD, WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY (1989) (describing his view that evolution tends toward no particular result or state). As we will see, Wise's assault on *biological* hierarchy is challenged by his simultaneous acceptance of a *cognitive* hierarchy. *See* discussion *infra* Part II.A.2.

52. *See* LLOYD L. WEINREB, OEDIPUS AT FENWAY PARK: WHAT RIGHTS ARE AND WHY THERE ARE ANY 110 (1994) (noting "a single, uniform rule that the category of [rights-bearing] persons is coextensive with the class of human beings"). Similarly, according to Michael Sandel, Karl Marx defined the highest solidarity in terms of the relationship "of man with his species-being." MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 342 (1996).

and no one suggests that it is the human ability to interbreed that justifies our legal personhood" (p. 241).

Wise also takes on orthodox views of cognition, another source of demarcation that conspires to keep animals in their place. If legal rights are to be associated with an individual's cognitive abilities, which are, in turn, associated with "autonomy," we must strive to develop a neutral idea of what cognition really is. Yet some researchers, according to Wise, make the anthropocentric mistake of assuming that whatever is most similar to human behavior must be associated with higher mental capacity. This is why chimpanzees like Lucy, who spoke in ASL, operated household appliances, and even fibbed to avoid trouble, seem so impressive to us. But we should not make the mistake of believing that using language or running the vacuum cleaner is a prerequisite for reasoning. Nor should one insist that the kind of self-reflection typical of Western societies is the touchstone for presence of mind.[53] As I argue later in this Essay,[54] Wise might have pushed his critique of consciousness further: he could have offered alternative standards for assessing cognition and could have pressed even harder against anthropocentric evaluation. Nonetheless, his analysis sets the gears of critical inquiry in motion.

Having revealed the concepts of natural hierarchy, taxonomy, and consciousness as being at least partially influenced by irrational bias, Wise leaves us to conclude that the only rationale society has left is an argument based on human utility. But, even supposing this critique is valid, I imagine you, the unpersuaded reader, answering, "the fact remains that animal exploitation is inescapable. Without it, civilization as we know it could not exist." It is at this point, if you will pardon the metaphor, that Wise sets the hook.

b. Imagining Outside Perspectives

Should you insist that animal outcasts will always be with us, Wise has a word to describe you, and it is not "selfish." It is "unimaginative." The history of the world, Wise argues, is the history of expanding and shifting perspectives, from the apostle Paul to Galileo to Darwin. Change requires a new way of seeing. "The beliefs of entire societies can alter," Wise writes with typical optimism. "Today, with the exception of slavers in Sudan, nearly everyone on earth believes that human slavery is wrong. But three hundred years ago that belief was rarely encountered. Three thousand years ago it did not exist" (p. 68).

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53. Wise explains that preadolescent children in some parts of Peru and Papua New Guinea appear by the standards of Western psychology to lack "theory of mind," although no one suggests this is actually the case (p. 234-35).

54. *See* discussion *infra* Part II.A.2.

Pulling the camera lens all the way back, Wise argues that society's current oppression of chimpanzees and bonobos is analogous to American slavery and the Holocaust, both examples of nations subordinating morality to heartless utility. If we fail to acknowledge that living beings have value beyond their utility, Wise explains, "we must face the fact that Adolph Eichmann, Adolph Hitler, and the killing doctors of Hadamar [a Nazi "euthanasia" center] . . . were correct" (p. 66). This is strong stuff, and Wise never backs away from this moral judgment. Yet if one buys the argument that the moral difference between chimpanzees and humans is more constructed than real, Wise's analogy is difficult to escape. Indeed, while discussing the *Dred Scott* opinion[55] with my first-year Property class last year, my students observed that virtually every argument invoked against the recognition of African-American citizenship, from jurisdictional concerns to cultural attitudes to natural law, had been replayed almost exactly against proponents of animal rights.

In addition to inviting us to assume the perspective of impartial historical observer, Wise occasionally zooms in to elicit empathy with the oppressed animals themselves. The book's opening description of Jerom, quoted earlier,[56] is a powerful example of this technique. We also encounter the narratives of Kama, a dolphin at Sea World; Kuni, a bonobo who captures and then carefully sets free a small starling; and Washoe, a female chimp who "cries" upon learning that her human caretaker has miscarried a baby.[57] But perhaps the most memorable and direct view into the mind of a nonhuman is relayed in Wise's chilling story of Booee, an ASL-using chimpanzee, who is sold to a medical laboratory and deliberately infected with Hepatitis C. Six years later, upon receiving a visit from a colleague of her former trainer, Booee signs the following message: "Key out" (p. 240).

2. *The Challenge for Critical Tools*

Wise impressively marshals his historical and scientific resources in deconstructing the Great Chain of Being and the chauvinism related to it. That he approaches this sometimes depressing topic with an engaging style and a good-natured wit will earn him extra points from nonspecialized readers, especially when compared to other writers in the field. But Wise's critical tour through science and history is not all smooth going. He hits at least two potholes.

First, while Wise skillfully deconstructs orthodoxy, he is ultimately unable to offer any new principle that is itself immune from bias. His analysis of animal consciousness illustrates the point. Wise argues that the reasoning capabilities of some animals may be underrated because human

55. Dredd Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

56. *See* discussion *supra* Part I.B.

57. Each animal, incidentally, is meticulously included by name in the book's index.

researchers have not found appropriate ways to test such capabilities and compare them accurately to those of humans. But this observation begs the question of why consciousness or comparisons to human ability are important at all. By associating political protection to beings with reasoning skills similar to humans, Wise privileges the same Greek notion of rationalism out of which the Great Chain was forged.

Might not the group migration patterns of Monarch butterflies or the inner workings of beehives suggest a collective, albeit unconventional, form of intelligence? And what of animals such as mice or rabbits, who languish in research labs, but who appear—how shall I say it?—rather dim?[58] Cass Sunstein makes exactly this point in his review of the book in the *New York Times*, when he suggests that Wise base animal protections on the capacity for suffering rather than intelligence.[59]

For Wise, these questions and Sunstein's critique miss the point. Wise has already chosen animal rights over animal welfare for his agenda, for reasons to be further examined below.[60] Although Wise does not acknowledge it, this choice also forces him to subordinate the radical mission of deconstruction, which would question the choice of intelligence as a benchmark, to the more traditional values of liberal rights, which endorse intelligence or reason as a benchmark. Having chosen to base his design on classical rights themes, the Greek ideal of reason is one he is fated to embrace. As a practical matter, this means Wise is willing to accept the possibility that his theory would sacrifice rabbits and mice in exchange for stronger and more individualized liberties for "brainier" species.

The second difficulty in Wise's analysis involves our ability to imagine outside perspectives. Human understanding of the animal perspective is essential to Wise because, as Martha Minow points out, such knowledge helps ferret out illegitimate bias,[61] and because human beings would inevitably be the ones defending the legal rights of animals in the judicial system. Empathy is not easy. Critical race theorist Richard Delgado today doubts whether humans are even reasonably capable of empathizing across racial and class lines.[62] Derrick Bell has expressed concern about civil rights lawyers' ability to pursue the individual interests of their clients rather than the abstract movement of which they are a part.[63] Such cultural

58. Wise, however, does note that rabbits display some impressive memory abilities that may go unnoticed by the average pet owner.

59. Cass R. Sunstein, *The Chimps' Day in Court*, N.Y. TIMES, Feb. 20, 2000, § 7, at 26.

60. *See* discussion *infra* Part II.B.2.

61. *See* MINOW, *supra* note 42, at 70-71.

62. RICHARD DELGADO, THE COMING RACE WAR?: AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE 12 (1996).

63. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471, 512-15 (1976).

misunderstandings arise despite the availability of centuries' worth of expressive art, music, and literature from around the world. How much harder it would be to climb into the consciousness of another species with whom we can barely communicate.

To be sure, some animal rights cases would be easy. Of course a bonobo would prefer his natural environment to a concrete cell. But what of an intellectually stimulated dolphin performing at Sea World? Or an elephant protected from poachers in a restrictive park? Or a chimpanzee born in captivity, dressed in a toddler's clothes, and taught ASL? Could we ever really know what such animals thought about their situations? Would we want to know?

B. Rights Tools

1. Mr. Kant Meets the Captain

Near the end of the eighteenth century, Immanuel Kant suggested that rights, though necessary, keep us apart.[64] Near the end of the twentieth century, the Captain & Tennille maintained that "[l]ove will keep us together."[65] The tension between the respect demanded by rights-based societies and the love required by civic community is a mainstay of jurisprudence, as well as song.[66] To simplify a bit, rights theory entails "an existential state of highly desirable and much valued freedom."[67] Freedom for the individual derives from the individual's protection, and to some degree, separation, from the meddling of others. On an informal level, we can call that protective layer "respect." On the formal level, we call it "rights." The protection from outside meddling leads to "autonomy" or "self-determination."[68]

In contrast, the early CLS movement imagined a more communitarian approach in which individuals long not for protection from one another, but for connection.[69] A strong concern for rights, in this view, does damage by drawing lines between groups that may share interests and by fostering a false sense of security among politically vulnerable classes.[70] Animal

64. *See* SANDEL, *supra* note 52, at 14-15 (arguing that "Kantian liberalism" makes it difficult to account for civic obligations and other moral and political ties that we commonly recognize).

65. THE CAPTAIN & TENNILLE, *Love Will Keep Us Together*, *on* CAPTAIN & TENNILLE'S GREATEST HITS (A&M Records 1977).

66. *See, e.g.*, Robin West, *Jurisprudence and Gender*, U. CHI. L. REV. 1, 2 (1988) (categorizing legal theories as adhering to either the "separation thesis" or the "connection thesis"); *see also* KRIS KRISTOPHERSON, *Me and Bobby McGee*, *on* ME AND BOBBY MCGEE (Monument Record Corp. 1971) (observing that "[f]reedom's just another word for nothin' left to lose").

67. West, *supra* note 66, at 5.

68. *Id.*

69. *See* Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1566-67 (1984).

70. *See* HAYMAN & LEVIT, *supra* note 40, at 214 (explaining that original critical legal scholars viewed rights as "state-sponsored bone-tossing" designed to "give an impression of fairness" and

welfarism resembles the early CLS movement in that it, too, distrusts rights rhetoric and strives for connection. For the welfarist, love more than respect motivates us to care about nonhuman interests.

In the welfare view, any being is entitled to love. But respect, and the rights it entails, must be deserved. What makes one deserving of rights-based respect? Wise fights mightily to show the answer cannot be as simple as whether one is biologically human. He turns to political philosophy, locating rights in a set of concepts he uses almost interchangeably: "consciousness," "cognition," and (Kant's favorite) "autonomy" (pp. 131, 236, 246). What seems most important here is one's ability to see oneself as *separate* from the surrounding environment (what Roberto Unger has called "consciousness")[71] and one's ability to use reason to make a choice (what Locke associated with "will").[72]

2. Some Advantages to Rights

Wise's exposition of the animal rights position suggests it has three important practical advantages. First, Wise believes that innate rights provide stronger protections against abuse than the traditional noblesse oblige of welfare theory. In his words, rights are "the least porous barrier against oppression and abuse that humans have ever devised" (p. 236). Reaching the same conclusion, critical race theorists famously declined to endorse CLS's "trashing" of rights in the late 1980s. As Patricia Williams explained:

> [R]ights are to law what conscious commitments are to the psyche. This country's worst historical moments have not been attributable to rights-*assertion*, but to a failure of rights-*commitment*. From this perspective, the problem with rights discourse is not that the discourse is itself constricting, but that it exists in a constricted referential universe. The body of private laws epitomized by contract, including slave contracts, for example, is problematic not only because it endows certain parties with rights, but because it denies the object of contract any rights at all.[73]

The worst thing about rights, then, is that there are not enough of them. Thus comes Wise's proposal to extend "personhood" rights to chimpanzees and bonobos.

While Wise diplomatically stops short of saying so, the evidence suggests that as a political strategy, animal welfarism has seriously

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maintain complacency); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 36 (1984).

71. ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 201 (1975).

72. Carlos A. Ball, *Autonomy, Justice, and Disability*, 47 U.C.L.A. L. REV. 599, 607-08 (2000) (describing Locke's view of equal freedom in the state of nature).

73. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 424 (1987).

disappointed. The movement's rallying call for "humane treatment" has proved hopelessly vague, allowing almost anyone who "cares" about relieving suffering to claim the mantle.[74] And despite some changes in consumer habits, human economic interests seldom yield to animal interests. "In a nutshell," writes fellow rights advocate Gary Francione, "things are worse for animals than they were one hundred years ago; the present strategy is simply not working."[75] Wise's rights strategy would address some of the vagueness in animal advocacy by insisting upon a set of minimum demands upon which all rights advocates should agree: that at least some animals, such as chimpanzees and bonobos, should no longer be viewed as "property"; that they lay claim to a minimum package of personhood rights; and that they have standing to have their legal interests represented in court.

Second, Wise suggests incorporating a common-sense flexibility into rights theory. It is too easy to deny a chimpanzee all personhood rights simply because he will never write *Middlemarch* or compose Beethoven's Ninth Symphony. Neither will your next door neighbor, nor will a newborn child, nor a senile grandparent, but everyone should be entitled to a "reasonable" level of rights. Under our current system, most adults enjoy the full panoply of rights, while newborns and the mentally infirm claim something less, usually the legal right to have their interests represented in a legal forum by proxy.[76] Wise recognizes the cognitive limitations of apes[77] and would gladly place them in this second category, leaving aside for now readers' fantasies of bonobos on the witness stand or hearsay from dolphins.[78] Here, Wise cleverly plays a card that is often associated with conservatives by arguing that rights and privileges should be recognized on the basis of one's individual rather than group status.

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74. *See* FRANCIONE, *supra* note 10, at 109.

75. *Id.* at 5.

76. The argument resembles Sojourner Truth's argument that enslaved blacks deserved, if not a full "quart" of rights, at least a "little half-measure full." *Sojourner Truth: Reminiscences by Frances D. Gage, in* 1 HISTORY OF WOMEN'S SUFFRAGE 1848-1861, at 115-17 (Elizabeth Cady Stanton et al., eds., reprint ed. 1985), quoted in KATHARINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 65, 66 (2d ed. 1998). The idea of rights on a sliding scale fits into the strategy of incremental activism (examined in the next paragraph), since one can argue for the "half-measure full" of rights, knowing that the ultimate goal is seizure of the full "quart."

77. Commenting on language as an indicator of cognition, Wise writes: "Okay. Chimpanzees and bonobos have been, are, and probably always will be really lousy, lousy language producers. At least compared to a human adult" (p. 221); *see also* PAUL R. EHRLICH, HUMAN NATURES: GENES, CULTURES, AND THE HUMAN PROSPECT 122 (2000) (describing the differences in cognative capacity between humans and other primates as "a difference in kind").

78. *But see* David McCord, *Can Apes Testify?*, EVIDENCE NEWSLETTER ASSOC. OF AM. LAW SCHOOLS, Fall 1999 (reporting on a project sponsored by the Animal Legal Defense Fund, in which lawyers hope to "present an ape to testify, via sigu language or a voice synthesizer, in support of a claim that apes have fundamental legal rights") *available at http://forensic-evidence.com/site/Biol_Evid/Ape_DNA.htr* (last visited Apr. 7, 2000).

Third, Wise emphasizes the incremental possibilities of rights-building. This is an important step. One of welfarists' strongest objections to rights theory is that it requires an "all or nothing" approach that is completely impractical.[79] Wise concedes that we will not obliterate property interests in all animals overnight. Perhaps we should not even want to. But the courts can work case by case, species by species, to determine when "thinghood" for animals clearly does not make sense. Here, Wise shows the pragmatism and timing of the seasoned civil rights litigator. A strategy of incrementalism enabled suffragists and modern feminists to free women from the pedestal that had become a cage, giving rise to the largest bloodless revolution in American history.[80] And Thurgood Marshall's incremental steps on the road to *Brown v. Board of Education*[81] are now legend.[82]

To musings about how far incrementalism might someday take us, one can almost hear Wise's courtroom response: "An interesting issue, your Honor, but the question of parrot autonomy is not presented in this case." As a matter of strategy, it is hard to fault such a treatment. Thurgood Marshall side-stepped similar minefields in the 1940s when some wondered if an integrated law school for adults could some day lead to integrated grade schools for children.

3. *The Challenge for Rights Tools*

One must not underestimate the power of legal rights in a democracy. Their existence transforms thinking in the courtroom and on the street. Thus, journalist Juan Williams argues that lawyer and jurist Thurgood Marshall, and not such prominent figures as Martin Luther King, Jr., or Malcolm X, had "the biggest impact on American race relations."[83] But rights tools have no magic powers. And they have disillusioned many a civil rights activist since the hey-day of mid-twentieth-century activism.[84] The struggles of critical race theorists and feminists point to a series of challenges presented by rights rhetoric that could easily threaten Wise's strategy if not anticipated and defused. I divide these challenges into what I call rivalries, rollbacks, and runaways.

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79. *See* FRANCIONE, *supra* note 10, at 147.

80. *See generally* ELEANOR FLEXNOR, CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES (1974).

81. 347 U.S. 483 (1954).

82. *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

83. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY, at xv (1998).

84. *See, e.g.*, DERRICK A. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

a. Rivalries

Rivalries occur when different groups of rights seekers turn from cooperative ventures and begin to compete against each other for what is perceived to be a finite amount of majority goodwill out of which rights can be negotiated. Sometimes rivalries follow from a leadership's conscious design; other times they occur in the form of insensitivity to another's plight. Thus, in the nineteenth century some suffragists invoked unfavorable stereotypes of black male voters, suggesting that the votes of mostly white women would balance the scale.[85] Similarly, in the 1970s the national women's rights organizations alienated lesbians and women of color in an effort to appeal to the "mainstream."[86] Richard Delgado notes sadly that during World War II, prominent African-American organizations for the most part remained silent on the subject of their government's internment of Japanese Americans.[87]

The seeds of similar rivalries have already been sown in the animal advocacy field. Rights advocate Gary Francione often seems engaged in a less-than-friendly competition with welfare advocate Peter Singer over the goals and motivations of animal advocacy. Wise, who is generally silent about welfarism in *Rattling the Cage*, rolls his eyes at least once, saying "No one but a professor or a deep ecologist thinks that a langnage using animal is not a bigger deal than island-building coral" (p. 237). We can expect further jabs between defenders of the spined and spineless. The line between needed distinctions and wasteful pettiness will always be thin. Let us hope we do not come to blows over whether my cat is more self-aware than your parrot. Finally, what of intraspecies rivalry? When chimpanzees are discovered (as they have been) battering the defenseless, waging war, or engaging in cannibalism,[88] do humans have the moral duty to intervene? What rules would govern the debate between humans on opposite sides of this question? These disputes may seem fanciful or even trivial, but they already determine where animal activists put their political, legal, and economic resources.

On the bright side, there is also precedent for groups opposed to oppression to creatively join forces and pursue stronger, broader coalitions for social justice. Abolitionist Frederick Douglass lent his support and presence to the suffragist rally at Seneca Falls.[89] Elizabeth Cady Stanton

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85. *See* Madelyn C. Squire, *Discovering Our Connections: Reflections on Race, Gender and the Other Tales of Difference*, 23 GOLDEN GATE U. L. REV. 795, 804 (1993).

86. PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 299, 307-09 (1984); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

87. Delgado, *supra* note 5, at 302.

88. *See* ERHLICH, *supra* note 77, at 210-11; JANE GOODALL, THROUGH A WINDOW: MY THIRTY YEARS WITH THE CHIMPANZEES OF GOMBE 108-09 (1990).

89. *See* FLEXNOR, *supra* note 80, at 76.

and Susan B. Anthony were both connected to the vegetarian movement before it became fashionable.[90] And feminism and race theory are both contributing strategies to the more recent environmental justice movement.[91] The trick for Wise and other animal advocates will be to find points of intersection among antioppression theories and to take advantage of concrete goals that are shared by diverse activist groups. Animal advocates must work for the day when, instead of being asked, "Why must you devote so much of your time to animals, in the midst of so much human suffering,"[92] they are asked, "What have you learned in your advocacy of animal rights that can be applied to other campaigns for social justice?"

b. Rollbacks

History teaches that once a legal right is won, the specter of political retrenchment is always near. Thus after the Supreme Court handed American Indians a victory for tribal sovereignty in *Worcester v. Georgia*,[93] neither the state of Georgia nor President Andrew Jackson would do anything to enforce it.[94] In the modern era, the promise of civil rights victories for people of color is quietly being rolled back through procedural limitations and unrealistic legal standards.[95] The phenomenon can be attributed to a dynamic Derrick Bell calls "interest convergence."[96] In this view, societies do not bestow rights on deserving members simply because "it is the right thing to do." They do so because the utilitarian interests of decisionmakers—such as placating guilt and impressing the international community—have suddenly "converged" with the interests of deserving members. When those utilitarian interests wane, so does the protection of rights.[97]

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90. SINGER, *supra* note 7, at 221.

91. *See generally* Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721 (1993) (race theory); Robert R.M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN'S L.J. 23 (1996) (feminism).

92. *See* GOODALL, *supra* note 88, at 250 (explaining that she is often asked if it would not be more appropriate for her to help "starving children, battered wives, [or] the homeless").

93. 31 U.S. (6 Pet.) 515, 561 (1832).

94. RONALD T. TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 86 (1993).

95. *See* Delgado, *supra* note 5, at 55; Charles R. Lawrence III, *supra* note 41.

96. *See generally* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

97. Syndicated columnist Jeffrey Hart echoes this thesis in his own discussion of *Rattling the Cage*. "After all," he writes, "human beings with that cerebral cortex are in control and write the laws and enforce them or fail to do so. Directly legislating decent treatment strikes me as more likely to succeed than granting animals abstract rights which, in any event, would have to be enforced by humans." Jeffrey Hart, *Animals Are Not Things; But Should Not Be Designated "Persons,"* WASH. TIMES, March 7, 2000, at A15. While I agree with Hart's description of the problem, I disagree with his preference for welfarism. If anything, vague commitments to "decent treatment" appear more vulnerable to political rollbacks than does rights theory.

For Wise, this means that rights theory is not nearly as bulletproof as he would like. In consequence, sustained liberty for chimpanzees and other species will depend on more than the legal reasoning of a handful of common law judges; it will also depend on activists' ability to harness public opinion to apply pressure on all parts of government to keep animal liberty alive.

c. Runaways

The term "runaways" describes, for me, arguments that are perceived to follow from a particular rights theory, but that are not directly intended or perhaps even condoned, by originators of the theory. Sometimes such extensions are made in good faith by other parties, sometimes not. In the 1970s, the privacy rights articulated on behalf of access to contraception were redirected to protect access to abortion,[98] an event applauded by most liberals. In the 1990s the equal rights rhetoric of twenty years ago has boomeranged in the form of conservative charges that women and now gays and lesbians are seeking "special rights," the antithesis of "equality under the law."[99] Rights, once asserted, take on a life of their own; thus the activist litigator tries to shape the discourse on rights early in an attempt to control their trajectory.

Without completely sweeping the animal rights terrain for errant explosives, I will call attention to at least one of Wise's arguments that may have implications for pro-choice feminists. In arguing for personhood rights on behalf of chimpanzees and bonobos, Wise at times focuses on the notions of "proportionality rights" and "potential autonomy" (pp. 86, 250). The first notion describes the sliding scale, discussed earlier, that protects the interests of infants and the mentally infirm. The second notion describes the idea that an individual is deserving of a degree of protection commensurate with her potential for autonomy.

Taken together, these concepts could be used to build a rights bridge not only to primates, but also to human fetuses. Indeed, Wise uses the example of courts allowing wrongful death claims on behalf of "nonviable fetuses" to buttress his position on animal rights. Later, he suggests that the establishment of legal personhood under the common law based on "potential for autonomy" would help establish a similar status for primates (p. 117). I do not wish to exaggerate the issue: the "rights" asserted on behalf of "nonviable fetuses," however derived, are not grounded in the Constitution and are, therefore, subordinate to abortion rights. In addition,

98. *See* Roe v. Wade, 410 U.S. 113 (1973).

99. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 626 (1996) (rejecting state's argument that amendment banning legal protection for gays and lesbians did no more than prohibit "special rights"); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 106 (1990) (characterizing a hiring preference for women as "radical social policy" that defies normal expectations and laws of probability).

Wise never goes beyond this example and never explicitly connects animal rights with any position on constitutional rights or the legality of abortion. Nonetheless, animal rights advocates must be watchful when navigating uncharted waters and should avoid unnecessary comparisons unless they intend the connections implied.[100]

III
"KEY OUT"

As is true of the civil rights and feminist movements, the animal liberation movement must simultaneously pursue political and conceptual missions.[101] The political mission addresses current power imbalances to relieve as much acute injustice as possible. The conceptual mission imagines a utopian society free of oppression, offering a lodestar for activists who, without a broader context, would not know where their cumulative acts were headed.[102]

In *Rattling the Cage*, Steven Wise offers skilled leadership in both missions. On the conceptual level, Wise shows both intellect and flair in attempting to deconstruct the ancient philosophical wall dividing human and nonhuman animals. His use of critical tools to abet a more conservative "rights" agenda raises a theoretical contradiction if taken far enough. But by clipping the wings of critical theory, Wise is able to preserve more concrete principles for action than does the animal welfare movement. Feminists and critical race theorists have set the precedent here by insisting on rights in the midst of their deconstructive projects. If this is what it takes for critical tools to achieve results in the real world, the strategy appears worth it.

Also on the conceptual level, Wise successfully articulates for a lay audience a persuasive and lucid case for protecting the interests of chimpanzees and bonobos within a framework of liberal rights. While it is true that much of the substantive philosophy behind animal rights theory has already been explored more completely by Tom Regan[103] and Gary Francione,[104] Wise brings a more hands-on legal perspective to the theory

100. To raise a second example of a potential runaway, Wise's emphasis on individual rather than group status as a basis for defining rights could offer ammunition to those opposed to affirmative action, which depends in part on the assumption that members of racial groups share certain characteristics, such as the experience of oppression.

101. *See, e.g.*, West, *supra* note 66, at 50 (arguing that practice and concept must be jointly pursued in feminist theory).

102. *See id.*

103. *See generally* REGAN, *supra* note 15 (presenting a philosophical case for animal rights).

104. *See generally* FRANCIONE, *supra* note 10 (examining animal rights, particularly in contrast to other pro-animal ideologies).

and employs a more open, conversational style that promises to attract and influence a broader audience.[105]

On the political front, Wise proposes and explains the "next move" for animal rights activists. This is a very significant accomplishment since the rights camp is often long on thought and short on action. Three points are particularly striking. First, Wise suggests a goal that is incremental, but still consistent with broader rights principles: liberate chimpanzees and bonobos from our common law property regime. Would such an act significantly change the way in which business, science, and medicine is practiced in the United States? Of course. But it is not a vision that is beyond contemporary imagination. Second, Wise supplies the latest scientific studies to build the most persuasive case for "autonomy" within the chimpanzee and bonobo species. Such evidence will prove crucial for lawyers hoping to change current practices through the common law. Third, in the tradition of Jane Goodall[106] and Dian Fossey,[107] Wise offers a narrative of primate experience that, however incomplete at this point, promises to launch deeper explorations into the possibility of transspecies empathy.

It is true that Wise does not answer the practical questions about how to keep rights from eroding or how to keep activists, particularly those in the rights and welfare camps, united over time. And Wise steadfastly refuses to offer any opinion on the possible rights of species other than chimpanzees and bonobos. Some readers may regard such omissions as disappointing or frustrating. *Rattling the Cage*, however, is but one lawyer's opening argument, not a philosophical meditation. Perhaps we need not comprehend the whole of justice to know, in one case, what justice is not. Having surveyed the vast chains of animal subjugation throughout the centuries, Wise should not be faulted for searching his surroundings and choosing only sharp stones. He uses what is available and with impressive skill.

105. In the words of Justice Livingston, "if men themselves change with the times, why should not laws also undergo an alteration?" Pierson v. Post, 3 Cai. R. 175, 181 (Livingston, J., dissenting).

106. GOODALL, *supra* note 88 (documenting Goodall's thirty years of studying and living among chimpanzees in Tanzania).

107. DIAN FOSSEY, GORILLAS IN THE MIST (1983) (documenting Fossey's 17 years of studying and living among gorillas in Africa's remote rainforests).