Book Review

Animal Rights

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Rattling the Cage: Toward Legal Rights for Animals. By Steven M. Wise.* *Cambridge, Mass.: Perseus Books*, 2000. Pp. 362. $25.00.

The "animal rights" movement is gathering steam, and Steven Wise is one of the pistons. A lawyer whose practice is the protection of animals, he has now written a book in which he urges courts in the exercise of their common-law powers of legal rulemaking to confer legally enforceable rights on animals, beginning with chimpanzees and bonobos (the two most intelligent primate species).[1] Although Wise is well-informed about his subject—the biological as well as legal aspects—this is not an intellectually exciting book. I do not say this in criticism. Remember who Wise is: a practicing lawyer who wants to persuade the legal profession that courts should do much more to protect animals. Judicial innovation proceeds incrementally; as Holmes put it, the courts, in their legislative capacity, "are confined from molar to molecular motions."[2] Wise's practitioner's perspective is, as we shall see, both the strength and the weakness of the book.

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1. These are closely related species, and Wise discusses them more or less interchangeably. For the sake of brevity, I will generally refer only to chimpanzees, but what I say about them applies equally to bonobos.

2. S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

If Wise is to persuade his chosen audience, he must show how courts can proceed incrementally, building on existing cases and legal concepts, toward his goal of radically enhanced legal protection for animals. Recall the process by which, starting from the unpromising principle that "separate but equal" was constitutional, the Supreme Court outlawed official segregation. First, certain public facilities were held not to be equal; then segregation of law schools was invalidated as inherently unequal because of the importance of the contacts made in law school to a successful legal practice; then segregation of elementary schools was outlawed on the basis of social scientific evidence that this segregation, too, was inherently unequal; then the "separate but equal" principle itself, having been reduced to a husk, was quietly buried and the no-segregation principle of the education cases extended to all public facilities, including rest rooms and drinking fountains.

That is the process that Wise envisages for the animal-rights movement, although the end point is less clear. We have, Wise points out, a robust conception of human rights, and we apply it even to people who by reason of retardation or other mental disability cannot enforce their own rights but need a guardian to do it for them. The evolution of human-rights law has involved not only expanding the number of rights but also expanding the number of rights-holders, notably by adding women and blacks. (Much of Wise's book is about human rights, and about the methodology by which judges enlarge human rights in response to changed understandings.) We also have a long history of providing legal protections for animals that recognize their sentience, their emotional capacity, and their capacity to suffer pain; these protections have been growing too.

Wise wants to merge these legal streams by showing that the apes that are most like us genetically, namely the chimpanzees and the bonobos, are also very much like us in their mentation, which exceeds that of human infants and profoundly retarded people. He believes that they are enough like us to be in the direct path of rights expansion. So far as deserving to have rights is concerned, he finds no principled difference between the least mentally able people and the most mentally able animals, as the two groups overlap—or at least too little difference to justify interrupting, at the gateway to the animal kingdom, the expansive rights trend that he has discerned. The law's traditional dichotomy between humans and animals is a vestige of bad science and of a hierarchizing tendency that put men over animals just as it put free men over slaves. Wise does not say how many other animal species besides chimpanzees and bonobos he would like to see entitled, but he makes clear that he regards entitling those two species as a milestone, not as the end of the road.

That is the book in a nutshell, but there is, of course, much filling in of details, including interesting bits of history, such as that the Old Testament

method of punishing a domestic animal that killed a human being reflected a belief that such an act was insurrectional in character, like a slave revolt. Nevertheless, Wise's treatment of the history of animal law is not entirely satisfactory. He fails to note the inconsistency between the law's treating animals like slaves and what he takes to be the law's ignorance of the commonality between people and animals. After all, no one ever doubted that slaves had formidable mental capacities, whether or not equal to those of free men. To punish an ox or a rat as if it were a rebelling slave is to accord the animal a considerable dignity.[3] And to impose capital punishment on people who have sex with animals on the theory that such couplings may give birth to dangerous monsters is, in modern terminology, to assert that people and animals are one and the same species. When we remember that the Egyptians worshipped cats and that in Greek mythology Zeus often assumes an animal's form to have intercourse with women, it becomes plain that the ancients had a more complex view of animal "humanity" than Wise gives them credit for.[4]

He fails to ask why, beginning at the end of the eighteenth century, laws were enacted forbidding cruelty to animals. The laws were full of loopholes—essentially they just forbade sadistic, gratuitous, blatant cruelty—but they represented a dramatic change from the indifference of the common law to animals' welfare. One might have expected Wise to explore the social and intellectual developments that led to such a change—for example, the rise of an urban middle class disgusted by the casual cruelty of the lower class and disdainful of hunting as an aristocratic pursuit.[5] Both the lower class and the upper class in eighteenth-century England were primarily rural, and rural people are less sensitive to the shedding of blood than urbanites.

History is rather to one side of Wise's project and might be regarded indeed as little more than padding; it does no work in the book. What is important to his argument is that animals, or at least some species of them, have consciousness (he means consciousness of self—obviously animals are conscious in the sense that distinguishes being conscious from being unconscious), and he devotes a good deal of attention to that issue. Wise recites a scientist's speculation that when two gazelles are being chased by a lion, each "gazelle must realize that it was *she* who was being chased, as well as another gazelle who was not her, and . . . she must understand, however dimly, that dire consequences will flow for her if she, and not the

3. E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS (1906), *cited in* RICHARD SORABJI, ANIMAL MINDS AND HUMAN MORALS: THE ORIGINS OF THE WESTERN DEBATE 116 n.54 (1993).

4. Sorabji's book is an exhaustive examination of this question. SORABJI, *supra* note 3.

5. HILDA KEAN, ANIMAL RIGHTS: POLITICAL AND SOCIAL CHANGE IN BRITAIN SINCE 1800, at 67-69 (1998).

other gazelle, is caught."[6] Wise's own focus, however, is on primates. The longest chapter in the book, chapter ten, entitled "Chimpanzee and Bonobo Minds," summarizes the evidence bearing on chimpanzee cognition. While the chimpanzee's cortex is less than a quarter the size of a normal human being's, it still contains an enormous number of neurons, perhaps enough for consciousness, though no one knows for sure. Wise marshals considerable evidence to suggest that language is not indispensable to possessing some, however rudimentary, sense of self, of separateness from other things.[7] (It remains unclear, as he acknowledges, whether chimpanzees can be taught to use language.) Comparisons between chimpanzees and very small children suggest similar mentation. Like human beings, chimpanzees develop much greater cognitive abilities when they are raised in a stimulating social environment (either their native habitat or a deliberately "enculturating" laboratory environment) than when they live out their lives in a zoo, so we may tend to underestimate their intelligence.

Wise argues that a properly enculturated chimpanzee has the mental ability of a two- or even three-year-old child. One may doubt this, considering that children of those ages have substantial linguistic capabilities, but those capabilities may be separate from, though obviously immensely helpful to, the capacity to reason. Wise convincingly shows that chimpanzees have formidable mental abilities, including the ability to make mental representations, to make and use tools, to count and perform simple arithmetical operations, to deceive, and to empathize; that they are self-aware; and that they have culture, in the sense of know-how transmitted across generations.[8]

It seems more likely than not, assuming the accuracy of Wise's summary of the scientific evidence, that chimpanzees do have consciousness, or "minds," perhaps on the level of very small children or severely retarded adults. Having established this, Wise has only to remind us that small children and severely retarded adults have legal rights. To make the analogy even closer, he asks rhetorically whether, if a band of Neanderthals suddenly appeared in our midst, we would feel free to treat them with the same consideration that we treat, say, calves.[9] The answer is no. He ingeniously draws support from opponents of affirmative action, who argue that group membership, as distinct from one's individual qualities, is an illegitimate basis for claiming rights.[10] We should judge

6. STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 128 (2000) (citation omitted).

7. For a more elaborate version of the same argument, see ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES 11-51 (1999).

8. WISE, *supra* note 6, at 180-214.

9. *Id.* at 243.

10. *Id.* at 253-54.

persons, including Neanderthals—and apes—as individuals, rather than basing their legal status on the biological or other ascriptive group to which they happen to belong.

Wise is aware that too much emphasis on cognitive capacity as the basis for rights invites the question "So what about computers?" Some computer scientists and philosophers believe that computers will soon achieve consciousness. Wise brushes this possibility aside with the observation that chimpanzees and human beings have traveled a similar evolutionary path, and computers have not[11]—though one might have thought that, since computers are a product of the human mind, they may "think" along somewhat similar lines. Someday, perhaps soon, there will be computers that have as many "neurons" as chimpanzees, and the "neurons" will be "wired" similarly. Such computers may well be conscious. This will be a problem for Wise, for whom the essence of equality under law is that individuals with similar cognitive capacities should be treated alike regardless of their species. Nothing in his analysis would permit him to limit this principle to "natural" species—for what if a human being could be created in a laboratory from chemicals, without use of any genetic material? Surely Wise would agree that such a human being would have the same rights as any other human being; rights in his view are not based on genes.

From his principle of equality Wise deduces that chimpanzees should have the same constitutional rights and other legal rights that small children and severely retarded adults have: the rights to life, to bodily integrity, to subsistence, and to some kind of freedom (how much is unclear), but not the right to vote. He does not discuss whether they should have the right to reproduce. But he is emphatic that since we would not permit invasive or dangerous medical experimentation on small children or severely retarded adults, neither can we permit such experimentation on chimpanzees, no matter how great the benefits for human health.

The framework of Wise's analysis, as we have seen, is the history of extending rights to formerly excluded persons. Working within that conventional lawyerly framework, he seeks to convince his readers that chimpanzees have the essential attribute of persons, which he believes is the level of mentation that we call consciousness, but (to avoid a *reductio ad absurdum*) that computers do not have it. In short, anyone who has consciousness should have rights; chimpanzees are conscious; therefore, chimpanzees should have rights.

How convincing is the analysis, setting aside the minor criticisms that I have made thus far? It is the major premise that presents the immediate difficulty with this syllogistic approach to the question of animal rights.

11. *Id.* at 157.

Cognitive capacity is certainly *relevant* to rights; it is a precondition of some rights, such as the right to vote. But most people would not think it either a necessary or a sufficient condition of having legally enforceable rights, and Wise has not attempted to take on their arguments. Many people believe, for example, that a one-day-old human fetus, though it has no cognitive capacity, should have a right to life; and, after the first trimester, the Supreme Court permits the fetus to be accorded a qualified such right, though the cognitive capacity of a second- or even third-trimester fetus is very limited. And Wise is not distressed at the thought of destroying a "conscious" computer,[12] showing that even he does not take completely seriously the notion that rights follow cognitive capacity. Most people would think it distinctly odd to proportion animal rights to animal intelligence, as Wise wishes to do, implying that dolphins, parrots, and ravens are entitled to more legal protection than horses (or most monkeys), and perhaps that the laws forbidding cruelty to animals should be limited to the most intelligent animals, inviting the crack "They don't have syntax, so we can eat them."[13] And most of us would think it downright offensive to give greater rights to monkeys, let alone to computers, than to retarded people, upon a showing that the monkey or the computer has a greater cognitive capacity than a profoundly retarded human being, unless perhaps the human being has no brain function at all above the autonomic level, that is, is in a vegetative state. Cognition and rights-deservedness are not interwoven as tightly as Wise believes, though he is not, of course, the first to believe this.[14]

There is a related objection to his approach. Wise wants judges, in good common-law fashion, to move step by step, and for the first step simply to declare that chimpanzees have legal rights. But judges asked to step onto a new path of doctrinal growth want to have some idea of where the path leads, even if it would be unreasonable to insist that the destination be clearly seen. Wise gives them no idea. His repeated comparisons of animals to slaves and the animal-rights cause to the civil rights movement are misleading. When one speaks of freeing slaves and giving them the rights of other people, or giving women the same rights as men, it is pretty clear what is envisioned, although important details may be unclear. When the National Association for the Advancement of Colored People set forth on its campaign to persuade the Supreme Court to repudiate "separate but equal," it was pretty clear what the end point was: the elimination of official segregation by race. After that was achieved, other race-related

12. *See id.* at 268.

13. SORABJI, *supra* note 3, at 2.

14. *E.g.*, BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 80 (1980) ("The rights of the talking ape are more secure than those of the human vegetable."). *But cf.* WISE, *supra* note 6, at 262-63.

legal objectives came into view, but the proximate goal of the campaign was at least clear.

But what is meant by liberating animals and giving them the rights of human beings of the same cognitive capacity? Does an animal's right to life place a duty on human beings to protect animals from being killed by other animals? Is capacity to feel pain sufficient cognitive capacity to entitle an animal to at least the most elementary human rights? What kinds of habitats must we create and maintain for all the rights-bearing animals in the United States? Does human convenience have *any* weight in deciding what rights an animal has? Can common-law courts actually work out a satisfactory regime of animal rights without the aid of legislatures? When human rights and animal rights collide, do human rights have priority, and if so, why? And what is to be done when animal rights collide with each other, as they do with laws that by protecting wolves endanger sheep? Must entire species of animals be "segregated" from each other and from human beings, and, if so, what does "separate but equal" mean in this context? May we "discriminate" against animals, and if so, how much? Do species have "rights," or just individual animals, and if the latter, does this mean that according special legal protection for endangered species is a denial of equal protection? Is domestication a form of enslavement? Wise does not try to answer any of these questions. He is asking judges to set sail on an uncharted sea without a compass.

The underlying problem is the practitioner-oriented framework of Wise's discussion, with its heavy reliance on argument from analogy and on the syllogism described above. Analogy gives him his major premise, and the syllogism takes him from there to his conclusion. Chimpanzees are like human beings; therefore, so far as Wise is concerned,[15] giving animals rights is like giving black people the rights of whites. But chimpanzees are like human beings in some respects but not in others that may be equally or more relevant to the question of whether to give chimpanzees rights, and legal rights have been designed to serve the needs and interests of human beings having the usual human capacities and so make a poor fit with the needs and interests of animals.

Wise's book illustrates the severe limitations of legal reasoning. Because judges (and therefore the lawyers who argue to them) are reluctant for political and professional reasons to acknowledge that they are expanding or otherwise changing the law, rather than just applying it, departures from existing law are treated as applications of it guided by analogy or deduction. Wise either is playing this game, or has been fooled by it. He makes it seem that animal rights in the expansive form that he conceives them are nothing new—they just plug a hole unaccountably left

15. *See* WISE, *supra* note 6, at 123-24.

in the existing case law on rights. Animals just got overlooked, as blacks and women had once been overlooked. But correcting a logical error, removing an inconsistency—in short, tidying up doctrine—is not what would be involved in deciding that chimpanzees have the same rights as three-year-old human beings. What Wise's book really does, rather than supplying the reasons for change, is supply the rationalizations that courts persuaded on other grounds to change the law might use to conceal the novelty of their action. Judges are not easily fooled by a lawyer who argues for a change in the law on the basis that it is no change at all but is merely the recognition of a logical entailment of existing law. The value of such an argument lies in giving judges a professionally respectable ground for rationalizing the change, a ground that minimizes its novelty. But judges must have reasons for wanting to make the change, and this is where a lawyer's brief, of which Wise's book is an extension, tends to fall down.

Where might we go for the reasons for changing the law to entitle animals? I shall discuss two possible sources, which I call the "philosophical" and the "pragmatic." I use "pragmatic" in its normal lay sense rather than as the name of a philosophy. My view is that pragmatism is most usefully understood as the rejection of the foundationalist tradition of Western philosophy, which seeks to determine on the basis of first principles how (for example) we should treat animals.

The problem with foundationalist philosophizing is its incapacity to bring about agreement on first principles. To a utilitarian—that is, one who believes that our basic moral duty is to work to maximize happiness, or preference satisfaction, and thus to minimize pain—it seems axiomatic that people should be forbidden to mistreat those animals that have a sufficiently developed nervous system to be able to experience pain. The implications of pan-species utilitarianism, however, are unclear, if not grotesque. Placing animals on a plane of equality with human beings may make the life of a pig more valuable than the life of a severely retarded human being.[16] And should we perhaps undertake to shrink the human population to give more scope for happy-seeming animals, like bonobos? A world human population just large enough to support an enormous animal population might be the utilitarian optimum.

Such implications, which arise from the fact that nothing in utilitarianism establishes the boundaries of the community whose happiness is to be maximized, make utilitarianism an unpalatable philosophy without a good deal of ad hoc jiggery. It is unpalatable even if confined to the animal kingdom, for it seems to imply such things as that killing an animal (painlessly and without forewarning, of course) can be completely

16. *See* Dale Jamieson, *Singer and the Practical Ethics Movement*, *in* SINGER AND HIS CRITICS 1, 10 (Dale Jamieson ed., 1999).

compensated for by creating a new animal[17] to replace it and that carnivorous animals should be killed or sequestered to protect their prey.

At the other extreme from an animal-welfare standpoint is the view of Aquinas and other traditional Catholic thinkers that animals are entitled to no consideration, at least relative to human beings, because animals lack souls. There is no arguing with religious beliefs, and there is a secular argument for dichotomizing humans and animals, with or without reference to souls. It is that if we fail to maintain a bright line between animals and human beings, we may end up by treating human beings as badly as we treat animals, rather than treating animals as well as we treat (or aspire to treat) human beings. Equation is a reflexive relation. If chimpanzees equal human infants, human infants equal chimpanzees. Against this concern it can be argued that Darwinism shows that there is nothing special about human beings; we are an accident of nature's blind processes just like all the other animals, and so we have no "right" to put ourselves on a higher plane than the other animals. (This is the negative implication of Darwinism; the positive implication, which seems to me dubious, or at least arbitrary, is that Darwinism establishes our kinship with animals, and we should be kind to our kin.) But there may be a social value in a rhetoric of human specialty—think only of how the Nazis used Darwinian rhetoric to justify a "law of the jungle" conception of the relations between human groups. And the Nazis, as I discuss further below, believed passionately in animal rights.

A different approach to the issue of animal rights is from the direction of environmentalism. It is possible to have a religious or Romantic belief in the sacredness or transcendent value of nonhuman nature, of which nonhuman animals are a major component. This can produce a strange inversion of Wise's emphasis on cognition as the key to animal rights. Hitler's zoophilia, and Nazi environmentalism more generally,[18] were connected with a hostility to "cosmopolitan" intellect, that is, intellect not rooted in ethnic or other local particularities. The Nazis were constantly blurring the line between the human and animal kingdoms, as when they described Jews as vermin. The other side of this coin was the glorification of animals that had good Nazi virtues, predatory animals like the eagle (the Eagle's Nest was the name of Hitler's summer home in the Bavarian Alps), the tiger, and the panther (both of which gave their names to German tanks). Nietzsche's "blond beast," the opposite pole of degenerate modern man, was the lion. These are examples of how animal-rights thinking can assimilate people to animals and animals to people. A related point is that

17. *See id.*

18. LUC FERRY, THE NEW ECOLOGICAL ORDER 91-107 (Carol Volk trans., Univ. of Chi. Press 1995).

approaching animal rights from the direction of environmentalism—the valuing of nature—severs the link between animal rights and animal cognition. Nature is not valued by environmentalists for its mental attributes, and so the environmentalist is unlikely to want to give special protection to chimpanzees, dolphins, and other highly intelligent animals.

I do not mean to suggest that the animal-rights movement is tainted by Hitler's support for animal rights, any more than Hitler's enthusiasm for four-lane limited-access highways should be an embarrassment to our highway builders. I mean only to suggest that animal rights have no intrinsic political valence. They are as compatible with right-wing as with left-wing views.

It is possible, for that matter—here veering back toward utilitarianism—to have a purely sentimental attachment to animals: to like them, or some species at any rate, as much as, or more than, one likes the human species; or if not to "like" them, to sympathize with them sufficiently to feel their pain and to want to alleviate it. This "solves" the utilitarian problem of bounding the community, though not very satisfactorily, by linking animal happiness to the happiness of the human community.

Oddly, the sentimental attachment to animals is not well-correlated with genetic closeness, as is implicit in my noting that we can like some animals more than we like people. We are more closely related genetically to chimpanzees than to cats or dogs or falcons or leopards, but most of us like chimpanzees less than these other animals, which we find more glamorous or more beautiful. We might prefer, for example, to have medical experiments conducted on chimpanzees than on these other species, though the relative pain that experiments inflict on different species of animals would be a relevant factor to most of us. If chimpanzees' greater intelligence increases the suffering that they undergo as subjects of medical experiments, relative to less intelligent animals, the increment in suffering may trump our affection for certain "cuter" animals. To the extent that the happiness of certain animals is bound up with our own happiness, there is, as I have just noted, a utilitarian basis for animal rights (though "rights" is not the best term here) even if the only utility that a utilitarian is obligated to try to maximize is human utility.

I have but skimmed the surface of a complex philosophical debate,[19] and will assert dogmatically that the debate is inconclusive. It is

19. *E.g.*, MACINTYRE, *supra* note 7, at 11-51; JAMES RACHELS, CREATED FROM ANIMALS: THE MORAL IMPLICATIONS OF DARWINISM (1990); TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983); ROGER SCRUTON, ANIMAL RIGHTS AND WRONGS (3d ed., Metro Books 2000) (1996); PETER SINGER, ANIMAL LIBERATION (2d ed. 1990); SORABJI, *supra* note 3. *See generally* Ian Hacking, *Our Fellow Animals*, N.Y. REV. BOOKS, June 29, 2000, at 20 (reviewing J.M. COETZEE, THE LIVES OF ANIMALS (1999), and PETER SINGER, ETHICS INTO ACTION (1998)). Scruton's book is a well-written, well-argued, and ingenious attack on the "animal liberation" movement,

inconclusive because there is no metric that enables beliefs in utilitarianism, or Romanticism, or (normative) Darwinism, or other possible philosophical groundings of animal rights, to be commensurated and conflicts among them to be resolved. The significance of the philosophical debate lies rather in the *humancentric* concerns, such as the concern with leveling down people to animals, or people's love of nature or particular species, or an empathetic concern with suffering animals (feeling their pain as our pain), that the philosophical debate has flagged and that must figure in the pragmatic approach as well. By a "humancentric" approach, I mean one which assigns no *intrinsic* value to animal welfare, but seeks reasons strictly of human welfare for according or denying rights to animals. I seek not to defend such an approach, but only to explain it because it is the approach most likely to recommend itself to most people in wealthy, basically secular societies, such as that of the present-day United States.

The approach is pragmatic in bracketing basic value issues. It focuses on the consequences *for us* of recognizing animal rights. There are consequences both good ("benefits") and bad ("costs"—a word I am using broadly, without limitation to pecuniary costs). A further bit of taxonomy: The benefits and the costs of animal rights can be direct or indirect. A direct humancentric benefit of giving animals rights would be the increase in human happiness brought about by knowledge that the animals we like are being protected. An indirect benefit, though only if the welfare of the poor is weighted more heavily than that of the rich, would be the reduction in the price of food if people were vegetarians, which would avoid the considerable costs involved in having animals process grain into meat. These costs raise non-meat prices because, in effect, the animals are competing with people for the use of the land on which vegetables and grains are grown. A direct cost of animal rights would be the forgone benefits from medical experimentation, and an indirect cost would be the cost of enforcing animal rights.

These are merely illustrations. A systematic consideration of the benefits and costs of animal rights would require attention to many other factors, such as, on the benefits side, the (unproven) possibility that reducing violence toward animals may make human beings less violent to each other,[20] and, on the costs side, both the reciprocal concern that equating humans to animals will make us less considerate of human rights

but so strange (for example in its paean to fox-hunting, SCRUTON, *supra*, at 116-22) that it will turn most readers in favor of the movement. The other books that I have cited defend the movement with varying degrees of zeal that will turn some readers against the movement. Scruton, however, wins the prize for the best chapter title: "Duty and the Beast." SCRUTON, *supra*, ch. 8.

20. Are the Spanish, who watch bullfights in which the bull is killed, more violent toward each other than the Mexicans, who watch bullfights in which the bull is not killed, or than Americans, who do not watch bullfights at all? I do not think so.

(remember Hitler's zoophilia) and the concern that attention to animal rights may deflect our attention from human poverty, deprivation, and misery—including the human diseases that medical experimentation on animals may enable to be cured sooner than might otherwise be the case.

The rising interest in animal rights on the part of liberals such as Steven Wise may thus be another example (along with the homosexual-rights movement, environmentalism generally, and even affirmative action, which, at least when practiced by elite institutions, tends to benefit the upper tail of the distribution of whatever group is to be helped[21]) of a flight away from the traditional liberal concern with equality in the distribution of wealth, opportunity, and power.[22] It may be a continuation and intensification of the urban-rural conflict that gave rise to animal-protection legislation in England at the end of the eighteenth century. Farmers and hunters are an increasingly marginal segment of our population, and the theology of Thomas Aquinas has little hold over the minds of modern Americans, even Catholic ones. On the other hand, liberals may believe that there is a "trickle up" effect from animal rights: If animals deserve protection, *a fortiori* the weakest human beings do.

On the cost side, the practical impediments to defining and enforcing animal rights deserve particular emphasis. The earlier questions I raised about Wise's approach were concerned with those costs—for example, what exactly does "freedom" for animals (what Peter Singer in his influential book calls "animal liberation"[23]) entail and how do we decide through the case-by-case method of common-law rulemaking which species are to be endowed with what rights? The more one thinks about these questions, the less apt the vocabulary of "rights" seems. My guess is that, if pressed, Wise would admit that the only right of most, maybe all, species would be the right not to be gratuitously tortured, wounded, or killed—and as it happens, those were, at least nominally (an important qualification), the rights of Negro slaves in the antebellum South. And yet we think the essence of slavery is to be without rights. To be told now that slaves had rights is an example of how the movement for animal rights can depreciate human rights.

21. When Harvard, for example, bends its admission standards to increase the representation of blacks or Hispanics in its student body, the blacks or Hispanics who benefit are those least in need of a helping hand, as anyone who is just below Harvard's admission standard will be able to win admission to and do well at an excellent college without affirmative action, even if it is not quite Harvard. But recall how Wise uses opposition to affirmative action to reinforce the case for animal rights. WISE, *supra* note 6, at 253-54.

22. Except that Peter Singer derives both a duty to protect animals and a duty to redistribute income from utilitarian premises. Peter Berkowitz, *Other People's Mothers: The Utilitarian Horrors of Peter Singer*, NEW REPUBLIC, Jan. 10, 2000, at 27.

23. *See* SINGER, *supra* note 19.

Here is an illustration of the paradox of animal "liberation": The Animal Welfare Act provides comprehensive federal protection of wild animals.[24] In a case argued before my court involving the validity of a regulation issued under the Act requiring wild-animal dealers to have higher fences around their animal enclosures,[25] the government's lawyer conceded that the regulation could not be defended by reference to the interest in protecting people from the dangerous animals involved in the case, namely ligers and tigons (crosses between lions and tigers), because it was not part of the Act's purpose to protect people. But, he argued, since dangerous animals that escape from their enclosures and molest people are likely to be shot, the regulation was in fact an animal protection.[26] Maybe so, but it was protective custody, the antithesis of freedom, that the regulation decreed.

There is a sad poverty of imagination in an approach to animal protection that can think of it only on the model of the civil rights movement. It is a poverty that reflects the blinkered approach of the traditional lawyer, afraid to acknowledge novelty and therefore unable to think clearly about the reasons pro or con a departure from the legal status quo. It reflects also the extent to which liberal lawyers remain in thrall to the constitutional jurisprudence of the Warren Court and insensitive to the "liberating" potential of commodification. One way to protect animals is to make them property, because people tend to protect what they own.[27]

So Wise is another deer frozen in the headlights of *Brown v. Board of Education*. He has overlooked not only the possibilities of commodification, but also, and less excusably, an approach to the question of animal welfare that is more conservative, methodologically as well as politically, but possibly more efficacious, than rights-mongering. That is simply to extend, and more vigorously to enforce, laws designed to prevent gratuitous cruelty to animals. We should be able to agree without help from philosophers and constitutional theorists that gratuitous cruelty is bad. Condemnation is built into the word "gratuitous," and few of us are either so sadistic, or so indifferent to animal suffering, that we are unwilling to incur at least modest costs to prevent gratuitous cruelty to animals; and anyone who supposes that philosophers and constitutional theorists can persuade people to incur huge costs to protect the interests of strangers is surely deluded. Wise, following in the footsteps of Peter Singer and other animal liberationists, gives some vivid and disturbing examples of cruel treatment of chimpanzees, but I think he is mistaken to believe that the best way to prevent such cruelty is to treat chimpanzees like human beings. The

24. 7 U.S.C. §§ 2131-2159 (1994).
25. Hoctor v. U.S. Dep't of Agric., 82 F.3d 165 (7th Cir. 1996).
26. *Id.* at 168.
27. *See, e.g.*, *infra* notes 28-32 and accompanying text.

best way may be simply to forbid treating chimpanzees, or any other animals with whom we sympathize, cruelly. If that is all, in the end, that "animal rights" amounts to, we hardly need the vocabulary of rights, which is then just an impediment to clear thought as well as a provocation in some legal and philosophical quarters.

No doubt we should want to do more than merely avoid gratuitous cruelty to animals. One of the horrors in Wise's anecdotes about the treatment of chimpanzees is that the chimps in question had been befriended by humans and used for humans' profit as experimental animals, only to be abandoned to cruel treatment by other humans. Considerations of reliance and gratitude would move most people to share Wise's passionate condemnation of such conduct. More broadly, neglect and cruelty are linked; neglect can be cruel. But neither philosophical reflection nor a vocabulary of rights is likely to add anything to the sympathetic emotions that narratives of the mistreatment of animals are likely to engender in most of us.

I close with a recent judicial opinion by one of our ablest federal judges, Michael Boudin, in a heart-rending "animal rights" case.[28] The plaintiff had rescued an orphaned raccoon, whom she named Mia and raised as a pet. Mia lived in a cage attached to the plaintiff's home for seven years until she was seized and destroyed by the state in the episode that provoked the suit. A police officer noticed Mia in her cage and reported her to the local animal control officer, who discovered that the plaintiff did not have a permit for the animal, as required by state law. The police then forcibly seized Mia from her cage after a struggle with the plaintiff, carried her off, and had her killed and tested for rabies. Testing for rabies in a raccoon requires that the animal be killed, and a supposed epidemic of raccoon rabies had led the state (Rhode Island) to require the testing of raccoons to whom humans (in this case the plaintiff) had been exposed.[29] Mia tested negative, but of course it was too late for Mia.

The plaintiff claimed that the state had deprived her of property, namely Mia, without notice and an opportunity for a hearing and thus had violated the Due Process Clause of the Fourteenth Amendment. Property for these purposes depends on state law, and the court found, undoubtedly correctly, that Rhode Island does not recognize property rights in wild animals unless a permit has been granted,[30] and fear of rabies had deterred the authorities from granting permits for raccoons. To be owned is the antithesis of being a rights-holder. But if Rhode Island had a more generous conception of property in wild animals, the police might have been deterred

28. Bilida v. McCleod, 211 F.3d 166 (1st Cir. 2000).
29. *Id.* at 169.
30. *Id.* at 173-74.

from what appears to have been the high-handed, indeed arbitrary, treatment of Mia. As the court explained, it does not seem that the plaintiff had been "exposed" to Mia in the relevant statutory sense: There was no indication that the raccoon had bitten the plaintiff or that its saliva had otherwise entered the plaintiff's bloodstream.[31] And since Mia had been in a cage for seven years,[32] it was unlikely, to say the least, that she was infected with rabies. Moreover, from the standpoint of controlling the spread of rabies, there was no reason to worry about Mia infecting the plaintiff, since people do not spread rabies. Mia was dangerous, if at all, only to the plaintiff, who was happy to assume the risk. The refusal to allow her to keep Mia made no sense at all, but there was no constitutional issue because Mia was not the plaintiff's "property" within the meaning of the Due Process Clause of the Fourteenth Amendment.

This is just one example, and it does not prove that animals benefit less by having human-type "rights" and thus being "free" than by being "imprisoned" and by being "reduced" to "mere" property. I note in this connection that the average life span of an "alley cat" is only about two years, and that of a well-cared-for pet cat at least twelve years, but that is just another example, and against it may be placed the sad fate of the laboratory animal, who is the laboratory's property. The most aggressive implementations of animal-rights thinking would undoubtedly benefit animals more than commodification and a more determined program of enforcing existing laws against cruelty to animals. But those implementations are unlikely, so the modest alternatives are worth serious consideration. We may overlook this simple point, however much we love animals, if we listen too raptly to the siren song of "animal rights."

31. *Id.* at 169 n.2.
32. *Id.* at 169.